CJC CCM
Canadian Judicial Council
Conseil canadien de la magistrature

IN THE MATTER OF
Section 65 of the *Judges Act*, R.S., 1985, c. J-1, and of the Inquiry Committee convened by the Canadian Judicial Council to review the conduct of the Honourable Theodore Matlow of the Ontario Superior Court of Justice:

Report of the Canadian Judicial Council to the Minister of Justice

Pursuant to its mandate under the *Judges Act*, and after inquiring into the conduct of Justice Matlow, the Canadian Judicial Council hereby recommends to the Minister of Justice, pursuant to section 65 of the *Judges Act*, that the Honourable P. Theodore Matlow not be removed from office.

Council makes this recommendation on the basis of the attached majority reasons, after due consideration of reasons prepared by a minority of members.

Presented in Ottawa,
3 December 2008

CONCERNANT
l'article 65 de la *Loi sur les juges*, L.R., 1985, ch. J-1, et le Comité d'enquête constitué par le Conseil canadien de la magistrature pour examiner la conduite de l'honorable Theodore Matlow de la Cour supérieure de justice de l'Ontario :

Rapport du Conseil canadien de la magistrature au ministre de la justice

Conformément au mandat que lui confie la *Loi sur les juges*, et suite à une enquête menée au sujet de la conduite du juge Matlow, le Conseil canadien de la magistrature recommande par les présentes que l'honorable P. Theodore Matlow ne soit pas révoqué de ses fonctions.

Le Conseil présente cette recommandation pour les motifs majoritaires ci-joints, après avoir pris en considération les motifs préparés par une minorité de membres.

Présenté à Ottawa,
le 3 décembre 2008

List of Council Members who participated in the review of this matter

Liste des membres du Conseil qui ont participé à l'examen de ce dossier

- The Honourable / L'honorable Catherine A. Fraser
  (Meeting Chairperson / Présidente de la réunion)
- The Honourable / L'honorable Beverley Browne
- The Honourable / L'honorable Patrick D. Dohm
- The Honourable / L'honorable Ernest Drapeau
- The Honourable / L'honorable Lance S.G. Finch
- The Honourable / L'honorable J. Derek Green
- The Honourable / L'honorable Joseph P. Kennedy
- The Honourable / L'honorable John Klebuc
- The Honourable / L'honorable Robert D. Laing
- The Honourable / L'honorable J. Michael MacDonald
- The Honourable / L'honorable Jacqueline R. Matheson
- The Honourable / L'honorable Gerald Mercier
- The Honourable / L'honorable Marc M. Monnin
- The Honourable / L'honorable J.J. Michel Robert
- The Honourable / L'honorable Gerald Rip
- The Honourable / L'honorable Eugene P. Rossiter
- The Honourable / L'honorable David D. Smith
- The Honourable / L'honorable Deborah K. Smith
- The Honourable / L'honorable Allan H.J. Wachowich
- The Honourable / L'honorable André Wery
- The Honourable / L'honorable Neil C. Wittmann

MAJORITY REASONS OF THE CANADIAN JUDICIAL COUNCIL IN THE MATTER OF AN INQUIRY INTO THE CONDUCT OF THE HONOURABLE P. THEODORE MATLOW

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I. INTRODUCTION

[1] An inquiry committee ("Inquiry Committee") appointed pursuant to s. 63(3) of the *Judges Act* R.S., c. J-1, to conduct an investigation into the conduct of the Honourable P. Theodore Matlow ("Justice Matlow") of the Ontario Superior Court of Justice issued a report 28 May 2008 ("the Inquiry Committee Report"). The legislative framework, including the relevant bylaws and procedures of the Canadian Judicial Council ("CJC") are detailed below. The mandate of the CJC at this stage of the proceedings is to consider the Inquiry Committee Report and report its conclusions to the Minister of Justice for Canada. In that report, the CJC may, in exercising the jurisdiction conferred on it under s. 65(2) of the *Judges Act*, recommend that Justice Matlow be removed from office.

II. FACTUAL BACKGROUND

[2] Born 14 April 1940, Justice Matlow received his law degree from the University of Toronto in 1965 and his Master of Laws from Osgoode Hall Law School in 1979. He was called to the Ontario Bar in 1967 and practiced law in Toronto from 1968 until October, 1981 when he became a County Court Judge. He became a District Court Judge in 1985 and a Judge of the Ontario Court (General Division), now named the Superior Court of Justice, in 1990. In recent years, Justice Matlow has served extensively on the Divisional Court in Ontario presiding over appeals and applications for judicial review. In 2005, after 24 years as a full-time judge, Justice Matlow elected to become a supernumerary judge.

[3] Justice Matlow is a longtime resident and homeowner of a house situated on Thelma Avenue in the City of Toronto ("City"). Thelma Avenue is a short, one block long, dead-end, residential street that runs east only, off Spadina Road in an area of mid-town Toronto called Forest Hill Village. Justice Matlow's house is approximately 20 meters from a parking lot known as the Thelma Parking Lot located on the northeast corner of Spadina Road and Thelma Avenue. The Thelma Parking Lot is owned by the City and operated by the Toronto Parking Authority ("TPA").

[4] In October, 1999, the TPA and a Developer announced a proposed joint venture to build a development ("Thelma Road Project") on the lands occupied by the Thelma Parking Lot, including 10 residential townhouses (total 24,000 square feet) and a below grade parking facility. Justice Matlow attended a public meeting that local City Councillors had convened to explain the proposed development to the local community. At that time, Justice Matlow understood that the proposed development was to be in accordance with existing zoning and building bylaws. Because the lands on which the parking lot is situated were owned by the City, the authorization of City Council by way of resolution was required before any joint venture agreement could be executed.

[5] The joint venture was subsequently approved by a resolution of City Council in April 2000 following a report submitted by the TPA that included the comment that the proposed residential development was permitted under existing zoning. In the report attached to the Council resolution, the proposed development was described as a "10-unit housing project above a proposed underground parking garage" that was "permitted under the existing zoning."

[6] Negotiations relating to the Thelma Road Project amongst the City, the TPA and the Developer resulted in the signing of an Agreement by those parties dated 8 November 2001 ("Original Development Agreement"). The Original Development Agreement defined the "development" as meaning the proposed mixed use commercial/residential development of approximately 30,000 square feet and a parking facility to be constructed upon the lands.

[7] An Amending Agreement dated 8 April 2002 amongst the same parties was prepared but not signed. It re-defined "development" as meaning "the proposed mixed use commercial/residential of not greater than 50,000 square feet" and the parking facility.

[8] Justice Matlow attended a second public meeting in April 2002 and learned of the revised plans of the TPA and Developer to develop a single, six-storey, mixed commercial/residential building of up to 50,000 square feet on the Thelma Parking Lot site. That information resulted in

Justice Matlow, along with other residents of Forest Hill Village, forming an *ad hoc* neighbourhood group called The Friends of the Village ("Friends"). The purpose of the Friends was to oppose the six-storey, 50,000 square foot Thelma Road Project. Justice Matlow became one of the leaders of the Friends and was generally known as its president.

[9] In November, 2002, the City's Administration Committee declined to approve the six-storey, 50,000 square foot Thelma Road Project.

[10] Then, in late November, 2002, the Developer, the TPA and the City amended the Original Development Agreement. The amending agreement ("Revised Development Agreement") contained a new definition of development as meaning "the proposed mixed use commercial/residential development of approximately 30,000 square feet of gross floor area above grade not exceeding four (4) stories above grade and comprising primarily residential units with a retail component and the Parking Facility ... provided that any increase in the gross floor area or number of stories above grade shall require the TPA's prior written consent which may be withheld in TPA's sole and absolute discretion."

[11] In April 2003, the Developer applied to the City Planning Department to amend the applicable zoning by-law because the proposed development exceeded both the maximum permitted density and the maximum building height.

[12] In July, 2003, the Preliminary Report of the Director of Community Planning, South District, about the Developer's application was considered by the Mid-Town Community Council and referred back to the Director of Community Planning for a further report.

[13] Also, in July 2003, the Developer appealed to the Ontario Municipal Board ("OMB") from City Council's refusal or neglect to enact the proposed amendment to the applicable zoning by-law.

[14] In September 2003, the Friends sought and received two legal opinions as to whether the Original Development Agreement was authorized by City Council's April 2000 Resolution. Further, in September 2003, City Council adopted a resolution to appoint outside counsel to consider this issue.

[15] In October 2003, the OMB released a Notice of Hearing indicating that the Developer's appeal would be heard in January, 2004. The City notified the OMB in November, 2003 that it would be requesting an adjournment so it could consider the report of outside counsel.

[16] In December, 2003, Justice Matlow brought a motion seeking standing for himself only and also sought an adjournment of the OMB hearing until the legality of the Original Development Agreement had been determined. In his supporting affidavit, Justice Matlow identified himself as "a judge of the Superior Court of Justice."

[17] In December 2003, Ronald Lieberman and 23 other local residents commenced an application in the Ontario Superior Court of Justice seeking a determination of the validity of the Original Development Agreement and any and all other agreements. Although Justice Matlow knew Lieberman was bringing the litigation and was generally supportive of it, he was not a party to the litigation. In accordance with a protocol of the Superior Court of Justice, Justice Matlow emailed the Chief Justice of the Court, the Regional Senior Judge, and the judge responsible for scheduling lengthy applications disclosing his personal interest in the Lieberman litigation and suggesting that they might wish to assign a judge from another city to hear the application.

[18] The OMB's 12 January 2004 scheduled hearing was subsequently adjourned.

[19] As a result of outside counsel's legal opinion, City Council passed a resolution at the end of January, 2004 ratifying the Original Development Agreement between the City, the TPA and the Developer as amended to 28 January 2004.

[20] The OMB hearing did proceed but Justice Matlow withdrew from the OMB appeal proceedings. The OMB, in a decision dated 19 July 2004, approved the Thelma Road Project. The Lieberman application was dismissed without costs in August 2004.

[21] Throughout his involvement with the Friends, Justice Matlow personally engaged in challenging the legality of the Original Development Agreement as amended from time to time and engaged in email correspondence and direct meetings with elected officials, City Staff and City Administration and the Mid-Town Community Council. Justice Matlow also made public comments to the media regarding his reasons for opposing the Thelma Road Project and expressed his personal views on the legality of the Development Agreement and Revised Development Agreement which were reported in news articles.

[22] Details of his contacts included meeting with the City's Mayor in 2002, appearing in person before the City Administration Committee and contacting a City Councillor who was one of its members. In addition, in 2003, Justice Matlow appeared before the Mid-Town Community Council to object to the Thelma Road Project. He also met with the Auditor General of the City in August of 2003, and in September 2003, sent an email to the Auditor General stating that an opinion by a lawyer employed by the City Solicitor was "blatantly wrong and ridiculous." That email was sent under cover of his personal fax cover sheet headed "Justice Ted Matlow."

[23] In November 2003, Justice Matlow sent an email to the Attorney General of Ontario ("AG"), who was also his Member of Provincial Parliament, seeking his intervention in the Thelma Road Project. In that email, Justice Matlow referred to the City's actions as a "serious assault" on the neighbourhood. He stated that this arose out of a "secret agreement" made between the TPA and a developer and that City officials had disregarded the resolution passed by City Council and proceeded to make their own deal with the developer.

[24] In that same month, November, 2003, Justice Matlow wrote to the Mayor of the City on stationery headed "Justice Ted Matlow" providing his home address and telephone number and

seeking the intervention of the Mayor in the Thelma Road Project. In and around the time that the Mayor received this letter imploring the Mayor to "reverse a violation of law", the City solicitor, Anna Kinastowski ("City Solicitor"), reviewed the letter and was aware of Justice Matlow's position. She did not provide any information regarding Justice Matlow's involvement in the Thelma Road Project to anyone beyond her management team and did not issue any memorandum to City staff raising concerns about appearing before Justice Matlow or about Justice Matlow's sitting on cases involving the City.

[25] Justice Matlow also met with and corresponded with the City's outside legal counsel. In particular, Justice Matlow sent an email message to outside counsel in December 2003 in which he referred to "devious acts that have taken place."

[26] Between 2002 and 2005, Justice Matlow presided in five different cases as a single judge or as part of a three judge panel in the Divisional Court over matters in which the City was either a party or an intervener. None involved the Thelma Road Project nor any matter in which Justice Matlow had a personal interest. The City was successful in four of them. The City Solicitor would not necessarily have been aware that Justice Matlow presided over any of these matters.

[27] Nearby Thelma Avenue in Toronto is St. Clair Avenue, a busy multi-lane east-west thoroughfare which crosses Spadina Road approximately 0.5 kilometres south of Thelma Avenue. The St. Clair West street car line starts at Yonge Street, a major north-south street in central Toronto and runs west for several kilometers to Gunn Road. The St. Clair West Transit Improvement Project was a joint project between the City and the Toronto Transit Commission ("TTC") to reconstruct the existing streetcar tracks on St. Clair Avenue to build a dedicated right-of-way for streetcars.

[28] The St. Clair project was subject to a significant ongoing public and political controversy and its opposition included an entity called SOS-Save Our St. Clair Inc. ("SOS"), an incorporated community organization of residents and business operators who opposed the project. In August 2005, SOS applied to the Divisional Court (the "SOS Application") for a declaration that the

St. Clair project was in breach of s. 24 of the *Planning Act* because it was in conflict with the City's Official Plan. SOS also requested a declaration that the City and TTC had failed to complete the required environmental assessment.

[29] The SOS Application was scheduled to be heard Thursday, 6 October 2005 by a Divisional Court. On Friday, 30 September 2005, the Registrar of the Divisional Court sent an email to Justice Matlow, Madam Justice Susan Greer and Madam Justice Ellen MacDonald advising they had been scheduled to hear the application. These three justices had been assigned to sit in Sudbury the week beginning 3 October, but their schedule for later that next week had collapsed, leaving them with time to return to Toronto to hear other cases.

[30] Justice Matlow's evidence, not contradicted by any other evidence, was that he did not see this email until Monday, 3 October 2005. In fact, the other two judges on the panel also independently recalled that each had learned of their assignment to the SOS Application on either Monday, 3 October or Tuesday, 4 October 2005.

[31] In the preceding month, on 12 September 2005, Madam Justice Bellamy, sitting as the Commissioner of an Inquiry into the City's computer leasing contracts with MFP Financial Services ("MFP"), released her report ("Bellamy Report"). The Bellamy Report was critical of the governance and administration practices within the City, including the fact that contracts negotiated by City staff exceeded the authority granted by City Council. This was the same jurisdictional argument that had been made by the Friends in the context of the Thelma Road Project.

[32] On 13 September 2005, John Barber ("Barber"), the municipal affairs columnist for the *Globe and Mail* newspaper, who covered the MFP computer leasing inquiry for three years, wrote a column commenting on the Bellamy Report.

[33] Justice Matlow was provided with a copy of the Bellamy Report as were all other members of the Superior Court of Justice. Justice Matlow read the Bellamy Report shortly before 2 October

2005 and came to the opinion that Justice Bellamy's findings involved the same pattern of behaviour that he had encountered with the Thelma Road Project, namely that various City officials had exceeded their authority. Justice Matlow's evidence was that because of his reading of the Bellamy Report, he was prompted to send an email to Barber on Sunday, 2 October 2005 indicating that he had been until recently the President of the Friends and inviting Mr Barber to contact him about the Thelma Road Project. In that email, Justice Matlow specifically mentioned he was a Superior Court judge and then commented that he had written to Barber a year earlier about what Justice Matlow considered "evidence of misconduct" on the part of City officials.

[34] On Tuesday, 4 October 2005, Barber responded by email requesting relevant documents and Justice Matlow replied in turn that he was in Sudbury and would get a package to Barber upon his return. Justice Matlow then sent an email to Barber on the morning of 5 October 2005 and delivered an envelope of documents to the Globe and Mail mail room for Barber at that time. In that email, Justice Matlow referred to "more really awful and devious things", described the City's actions as a "...betrayal of our community...." and stated that they no longer considered the new mayor to be interested in uncovering "dishonesty" at City hall.

[35] The SOS Application was heard by the Divisional Court on 6 and 7 October 2005. Justice Matlow chaired the panel which included Madam Justice Greer and Madam Justice MacDonald. At the hearing, counsel for the City and the TTC requested a quick decision because construction of the right-of-way was ready to begin. On 7 October 2005, the City Solicitor attended a management team meeting at which the director of litigation advised that they had become aware on the previous evening that Justice Matlow was on the panel hearing the SOS Application and were concerned about Justice Matlow's sitting on the SOS Application because of the similarity between it and the Thelma Road Project.

[36] On 11 October 2005, the Divisional Court released its decision on the SOS Application stating that further detailed reasons would follow. It unanimously allowed the application, effectively stopping the proposed construction. The Divisional Court panel came to its decision to

allow the application independently of one another and at no time did Justice Matlow try to influence the decision of the other two panel members.

[37] On 19 October 2005, the City brought a motion requesting that Justice Matlow recuse himself from the SOS Application and that a new hearing be scheduled.

[38] On 20 October 2005, the *Globe and Mail* published a column by Barber.

[39] On 25 and 26 October 2005, a Divisional Court panel consisting of Justice Matlow, Madam Justice Greer and Madam Justice MacDonald heard the recusal motion and on 3 November 2005, allowed the motion for recusal, with Justice Matlow dissenting.

[40] Prior to the hearing of the SOS Application, Justice Matlow did not disclose to the other members of the Divisional Court panel details of his involvement in the Thelma Road Project or his dealing with Barber at the *Globe and Mail*.

III. THE COMPLAINT AND ALLEGATIONS

[41] On 30 January 2006, the City Solicitor, made a complaint to the CJC about Justice Matlow's conduct. Pursuant to the *Canadian Judicial Council Inquiries and Investigations By-laws*, SOR/2002-371 (the "*By-laws*") made under s. 61(3)(c) of the *Judges Act*, a panel constituted in accordance with the CJC's *Complaints Procedures* submitted a report to the CJC recommending that an inquiry committee be appointed. The CJC agreed with that recommendation by resolution dated 3 April 2007.

[42] In accordance with s. 63 of the *Judges Act*, the Inquiry Committee consisting of three members of the CJC as well as two lawyers appointed by the Minister of Justice of Canada was constituted. The particulars of judicial misconduct given to Justice Matlow by Independent Counsel (and later amended by the Inquiry Committee) were as follows:

35. ... [Y]ou 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.

IV. THE INQUIRY COMMITTEE PROCEEDINGS

[43] The hearing before the Inquiry Committee commenced 19 November 2007 and was then adjourned to a later date. A letter dated 4 December 2007 from counsel to the Inquiry Committee sent to Justice Matlow's counsel and Independent Counsel indicated additional allegations would include:

(i) Whether the conduct of Justice Matlow in taking the role he did in the Thelma Road Project controversy, and 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 his impartiality with respect to the City of Toronto and issues relating to the City of Toronto, that could come before the courts;

(ii) Given Justice Matlow's participation in the Thelma Road Project controversy, his failure to take steps to ensure that he did not sit on any matter involving the City of Toronto;

(iii) Whether Justice Matlow used the prestige of the office of judge to further his personal interests in the Thelma Road Project, and in particular in the solicitation of support from elected officials and members of the media; and

(iv) Having been assigned to sit on the SOS Application on September 30, 2005, Justice Matlow's entrance into communications on October 2, 2005 and subsequently, with Mr Barber of the Globe and Mail, on the subject of the Thelma Road Project, in the course of which allegations of impropriety by City of Toronto officials were made.

[44] The Inquiry Committee proceedings continued 8 - 10 January 2008 and 8 April 2008. An extensive Agreed Statement of Facts was submitted to the Inquiry Committee and the Inquiry Committee also heard oral evidence, received documentary evidence and heard and considered written and oral submissions of counsel.

[45] The conclusions and recommendations drawn by the Inquiry Committee in its Inquiry Committee Report at paragraphs [205] to [208] are as follows:

(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 5 October 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.

[46] Following issuance of the Inquiry Committee Report, Justice Matlow sought from the CJC an adjournment of its deliberations pending his filing a judicial review application in the Federal Court. The CJC declined to adjourn the proceedings but advised Justice Matlow he was free to renew his request in his written submissions to the CJC or at the public meeting held by the CJC to consider the Inquiry Committee Report (the "Public Meeting"). Justice Matlow then filed a judicial review application with the Federal Court seeking an order quashing and setting aside the Inquiry Committee Report. Justice Matlow did not apply to the Federal Court to stay the proceedings before the CJC. However, in his written submissions to the CJC, he asked that the CJC stay its deliberations. The CJC then invited full oral submissions on this issue at the public meeting.

V. LEGISLATIVE FRAMEWORK

[47] Sections 63-65 of the *Judges Act* state as follows:

> 63. (1) The Council shall, at the request of the Minister or the attorney general of a province, commence an inquiry as to whether a judge of a superior court should be removed from office for any of the reasons set out in paragraphs 65(2)(a) to (d).
>
> (2) The Council may investigate any complaint or allegation made in respect of a judge of a superior court.
>
> (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.
>
> (4) The Council or an Inquiry Committee in making an inquiry or investigation under this section shall be deemed to be a superior court and shall have
>
> (a) power to summon before it any person or witness and to require him or her to give evidence on oath, orally or in writing or on solemn affirmation if the person or witness is entitled to affirm in civil matters, and to produce such

documents and evidence as it deems requisite to the full investigation of the matter into which it is inquiring; and

(b) the same power to enforce the attendance of any person or witness and to compel the person or witness to give evidence as is vested in any superior court of the province in which the inquiry or investigation is being conducted.

(5) The Council may prohibit the publication of any information or documents placed before it in connection with, or arising out of, an inquiry or investigation under this section when it is of the opinion that the publication is not in the public interest.

(6) An inquiry or investigation under this section may be held in public or in private, unless the Minister requires that it be held in public.

64. A judge in respect of whom an inquiry or investigation under section 63 is to be made shall be given reasonable notice of the subject-matter of the inquiry or investigation and of the time and place of any hearing thereof and shall be afforded an opportunity, in person or by counsel, of being heard at the hearing, of cross-examining witnesses and of adducing evidence on his or her own behalf.

65. (1) After an inquiry or investigation under section 63 has been completed, the Council shall report its conclusions and submit the record of the inquiry or investigation to the Minister.

(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.

VI. THE PROCESS BEFORE THE CJC

[48] Having received the Inquiry Committee Report, the CJC's task is to make its own report and recommendation to the Minister of Justice of Canada.

[49] The Public Meeting was held on 21 July 2008 pursuant to the *By-laws* at which time the CJC heard from Justice Matlow, his counsel Paul Cavalluzzo, and Independent Counsel, Douglas Hunt, Q.C.

[50] Prior to the Public Meeting, extensive written briefs were received and reviewed by the CJC. The brief on behalf of Justice Matlow consisted of 110 pages and Independent Counsel's, 37 pages. This did not include the substantial exhibits and authorities submitted for review.

VII. THE NATURE OF THIS PROCESS

[51] Care must be taken to define the role of the CJC in considering the Inquiry Committee Report. By CJC, we mean the CJC as a whole, exclusive of any members unable to participate, for example the judicial members of the Inquiry Committee (who are specifically excluded from the deliberations under the *By-laws*).

[52] The CJC is not an appellate tribunal from the Inquiry Committee. The process contemplated is a seamless one in which an inquiry committee, charged with hearing evidence and finding facts and coming to its own conclusions, plays a critical role. An inquiry committee typically consists of three chief justices and two senior members of the Bar. Its composition, expertise and role together invite the CJC to carefully consider an inquiry committee's perspective as confirmed in its report. Further, the purpose of an inquiry committee is to investigate the complaint made, hear the relevant evidence, make the necessary fact findings and produce a report documenting the findings made and conclusions reached including whether or not a recommendation should be made

for removal from office, in accordance with s. 8 of the *By-laws*. The product of that exercise, the Inquiry Committee Report, is meant to assist and guide the CJC in its deliberations.

[53] The members of an inquiry committee are the ones who hear the evidence from the witnesses testifying before it, and therefore have the chance to observe those witnesses, determine what evidence to accept or reject and to evaluate the weight to be given to that evidence. Certain consequences flow from this. In particular, the CJC ought not to interfere with fact findings or inferences made by an inquiry committee without good reason. Therefore, it is incumbent upon the CJC, in its mandate under s. 65 of the *Judges Act*, to make clear where it departs from fact findings or inferences in the Inquiry Committee Report and the reasons for doing so.

[54] The existing statutory framework also contemplates that the CJC will consider the recommendations of an inquiry committee afresh, applying its own independent judgement to the facts. This includes the issue of what sanctions should be imposed where conduct so warrants. Accordingly, in fulfilling this obligation, the CJC does not employ, and is not constrained by, a standard of review equivalent to that of an appellate tribunal reviewing the decision of another body. This is made clear by s. 65(1) of the *Judges Act* which imposes on the CJC the obligation to report *its conclusions* following receipt of the report of an inquiry committee. That is reinforced by s. 65(2) which confers on the CJC the authority to decide, within the prescribed statutory limitations, whether, *in its opinion*, a judge has become incapacitated or disabled from the due execution of his or her office. To assist in this exercise, the CJC also has the power to hear additional submissions, as it did in this case from Justice Matlow speaking on his own behalf. It can also receive and consider new evidence.

[55] This responsibility on the CJC to make its own independent assessment and judgement is as it should be given the serious nature of the interests at stake. Those interests include both the need to preserve public confidence in the integrity of the judiciary and the need to ensure that judicial independence is not improperly compromised through the use of disciplinary proceedings. This approach is also mirrored in the procedure mandated by Canada's Constitution. A recommendation

by the CJC to the Minister to remove a judge from office must be brought before both Houses of Parliament. It is precisely because of the importance of the principles involved that a recommendation to the Governor General to remove a judge from office must come from both Houses of Parliament and not a committee of either House. Therefore, while the CJC should give serious consideration to the recommendations of an inquiry committee on the subject of sanction, the CJC is not bound to defer to those recommendations.

[56] With respect to another central point typically the focus of any inquiry committee, namely what constitutes judicial misconduct or a failure in the due execution of the office of judge or placing one's self in a position incompatible with the judicial office, these are issues that do not lend themselves to being definitively resolved by inquiry committees appointed on an *ad hoc* basis to consider individual complaints. Instead, given the need to ensure uniformity and therefore fair and equal treatment, it is the CJC, and not individual inquiry committees, that should bring its own independent judgement to bear and ultimately confirm the general principles as to the scope of sanctionable conduct. Therefore, in assessing whether challenged conduct should properly be characterized as sanctionable conduct, the conclusions of an inquiry committee constitute an important factor the CJC should consider. But on this point too, the CJC is not bound to defer to an inquiry committee's conclusions.

[57] The steps in this process form part of the protections essential in preserving judicial independence. This foundational principle of Canada's democracy protects the public by allowing individual judges to make decisions without fear or favour from anyone. In the end, judicial independence ensures judicial impartiality and both reinforce public trust and confidence in our judicial system. Preserving public trust and confidence is essential, for without them, another bedrock principle of our Parliamentary democracy – the rule of law – would be imperilled.

VIII. REQUEST TO STAY DELIBERATIONS

[58] At the outset of the Public Meeting, Justice Matlow renewed his request that the CJC stay its deliberations until his application for judicial review was finally determined by the Federal Court. After hearing oral submissions on this issue, the CJC reserved its decision and then proceeded to hear submissions from Justice Matlow, Justice Matlow's counsel and Independent Counsel on the merits of the case.

[59] By letter dated 30 July 2008, the CJC advised Justice Matlow and Independent Counsel that it had decided not to stay or defer its deliberations. Our reasons are as follows.

[60] A stay of proceeding is a discretionary relief granted in exceptional circumstances, where irreparable harm would otherwise occur, and where no other remedy is available or adequate. In *RJR-Macdonald* v. *Canada*, [1994] 1 SCR 311, the Supreme Court of Canada established a three part test for granting a stay of proceedings as interlocutory relief. A party seeking a stay must demonstrate: (1) that there exists a serious question to be tried; (2) that irreparable harm will result if the stay is not granted; and (3) that the balance of convenience favours granting such relief. With respect to the last part of the test, public interest is a factor to be considered in assessing whether to grant the requested relief.

[61] In support of his request, Justice Matlow argued that the test established in *RJR-Macdonald* v. *Canada, supra,* was met. He asserted that there was no question that his judicial review application raised serious and legitimate issues given the nature of the claimed errors of law and jurisdiction made by the Inquiry Committee.

[62] He also submitted that he would suffer irreparable harm if the CJC proceeded with its deliberations. More specifically, Justice Matlow submitted that any reliance by the CJC on a flawed or tainted report from the Inquiry Committee would necessarily render the ultimate decision of the CJC flawed as well. According to Justice Matlow, since any report by the CJC would be public, that

would cause him irreparable harm since the CJC would, in proceeding to consider this case on its merits, be doing so based on an erroneous report. Further, this harm could not be adequately addressed in monetary damages.

[63] Finally, on the third branch of the tripartite test, balance of convenience, Justice Matlow submitted that there would be no harm to either the CJC or the public in maintaining the *status quo* if the CJC's deliberations were deferred until such time as his judicial review application was finally determined in Federal Court since he has not been sitting as a judge since April 2007.

[64] Independent Counsel took the position that Justice Matlow's application for judicial review was premature and that to grant his request for deferment pending the application for judicial review would needlessly bifurcate, complicate and delay the the CJC's investigative process. In the alternative, Independent Counsel argued that Justice Matlow failed to establish that irreparable harm would result or that the balance of convenience favored granting the stay under the circumstances.

[65] As a general proposition, absent exceptional circumstances, compelling policy reasons exist for not undertaking judicial review of an interim decision of an administrative tribunal before the administrative process has been completed, even when issues of the tribunal's jurisdiction are raised: *Greater Moncton International Airport* v. *Public service Alliance of Canada*, 2008 FCA 68. Compelling policy reasons include: the risk of fragmentation of the process; the likelihood that such intervention will lead to additional costs and delays; and the concern that judicial review may become unnecessary in light of the ultimate decision in the matter. These same policy reasons apply with equal force when the stay application is made not to the Federal Court but rather, as here, to the administrative body itself, namely the CJC.

[66] Further, in considering whether to defer its own proceedings pending the outcome of proceedings before the Federal Court, the CJC is also entitled to take into account the reach of the procedure Parliament has statutorily prescribed and the nature of the alleged errors being challenged on judicial review.

[67] Both considerations weigh heavily against the CJC's deferring its proceedings. As noted, the *Judges Act* provides that it is the CJC which, following its consideration of the Inquiry Committee Report, ultimately provides its independent opinion as to whether a judge should be removed from office. More fundamentally, in its review of the Inquiry Committee Report, the CJC has the jurisdiction to cure errors of law, if any, and to reverse, correct or modify fact findings and inferences made by the Inquiry Committee where good reason exists to do so. Finally, even a public hearing before the CJC to consider the Inquiry Committee Report is not necessarily the final step in the review process. The CJC is entitled, should it so decide, to refer the matter back to the Inquiry Committee for further consideration. All this being so, the statutorily prescribed process under the *Judges Act* offers an appropriate basis on which Justice Matlow might challenge, before the CJC itself, the findings, conclusions and recommendations of the Inquiry Committee Report. Moreover, he did so.

[68] For these reasons, the CJC did not agree with Justice Matlow that irreparable harm would result from the CJC's considering this matter on its merits or that the balance of convenience weighed in favour of the CJC's staying its deliberations of the Inquiry Committee Report and dismissed Justice Matlow's stay application.

IX. POSITION OF JUSTICE MATLOW

[69] Justice Matlow contends that the Inquiry Committee denied him procedural fairness and natural justice and therefore, its conclusions and recommendations are invalid. He submits that the Inquiry Committee erred by:

(a) excluding relevant evidence from its investigation;

(b) failing to take into consideration relevant evidence, including uncontested evidence, that was before it;

(c) making findings of fact that are not supported by the evidence;

(d) investigating and making findings and recommendations with respect to matters of judicial discretion and judicial decision-making that are beyond its jurisdiction;

(e) expanding the scope of its investigation to investigate matters and to make findings and recommendations with respect to issues that were not part of either the original complaint or matters which were referred to the Inquiry Committee; and

(f) failing to address and consider evidence with respect to the ultimate issue in the investigation of whether public confidence has been undermined such that it renders Justice Matlow incapable of executing his judicial office.

[70] Further, Justice Matlow submits that the Inquiry Committee erred in failing to embark on an appropriate legal analysis of his constitutional rights under ss. 2(b) and (d) of the *Canadian Charter of Rights and Freedoms* ("*Charter*"), that is freedom of expression and freedom of association. He asserts that the well-established *Charter* analysis requires a broad interpretation as to whether his *Charter* rights were infringed and, if so, whether, under s. 1 of the *Charter*, such infringement constitutes a reasonable limit prescribed by law that can be demonstrably justified in a free and democratic society. Justice Matlow alleges that, by failing to engage in this analysis, the Inquiry Committee erred in law. In his view, the actions he took fell within the permissible limits of his guaranteed right to freedom of expression and freedom of association.

[71] Justice Matlow submits that these errors, coupled with a proper interpretation of the evidence before the Inquiry Committee and the new materials put before the CJC on 21 July 2008

including Justice Matlow's address to the CJC, ought to result in the CJC's concluding and recommending that Justice Matlow not be removed from the Bench.

[72] Finally, Justice Matlow submits that even if the CJC were to accept the Inquiry Committee Reports' conclusions and recommendations in their entirety or majority, the CJC should not recommend that Justice Matlow be removed from office on the basis that the test for removal has not been met on the facts of this case. In his view, the sanction recommended is disproportionate in all the circumstances.

[73] The various errors Justice Matlow alleges occurred can be grouped into four different categories:

> (a) *Charter* Issue – relating to alleged breaches of Justice Matlow's *Charter* rights.
>
> (b) Conflict Disclosure Issue – relating to Justice Matlow's assertion that the Inquiry Committee essentially elevated the document entitled *Ethical Principles for Judges* to a "code of conduct" mandating positive ethical obligations. This included finding that Justice Matlow had an ethical obligation to disclose a *potential* conflict of interest. In so doing, Justice Matlow asserts that the Inquiry Committee essentially usurped judicial discretion.
>
> (c) Report Deficiencies Issue – relating to complaints about the exclusion of alleged relevant evidence and the Inquiry Committee's treatment of other evidence including its failure to accept Justice Matlow's evidence that he did not find out that he would be sitting on the SOS Application until Monday, October 3rd, 2005.

(d) Sanction Issue – relating to the Inquiry Committee's decision to recommend removal from office.

X. POSITION OF INDEPENDENT COUNSEL

[74] An independent counsel's role before an inquiry committee is set forth in the *By-Law*s. Under s. 3(2) of the *By-Laws*, independent counsel's role is to present the case to the inquiry committee and to make submissions with respect to questions of procedure and law. In doing so, independent counsel is to act "impartially and in accordance with the public interest": s. 3(3) of the *By-Law*s. These same obligations continue once the CJC convenes a hearing to consider the report of an inquiry committee.

[75] With respect to Justice Matlow's claim that the Inquiry Committee erred in several respects, Independent Counsel disagrees. He takes the position that the Inquiry Committee did not commit any errors.

[76] First, in his view, the *Charter* Issue lacks merit. The test for judicial misconduct cannot be constrained by *Charter* considerations to the extent that asserted *Charter* rights conflict with the requirement of impartiality, integrity and independence of the judiciary.

[77] Second, on the Conflict Disclosure Issue, Independent Counsel concedes that the Inquiry Committee Report does distinguish between the CJC's jurisdiction in assessing conduct of judges as a matter of a judge's ethical duty as opposed to the exercise of judicial discretion in matters of legal principles. However, Independent Counsel contends that the two – conduct and discretion – are not mutually exclusive and that cases may arise where the exercise of judicial discretion may also engage ethical concerns. Independent Counsel relies on *Cosgrove v. Canadian Judicial Council* 2007 FCA 103; *Ruffo v. Conseil de la magistrature*, [1995] 4 SCR 267; *Re Therrien*, [2001] 2 SCR 3; *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 SCR 249; *Re Ruffo*, 2005 QCCA 1197.

[78] Third, with respect to the Report Deficiencies Issue, Independent Counsel asserts that even if relevant evidence has been excluded or not weighed in this case, it is open to the CJC to admit new evidence and take it into account or re-weigh it now or alternatively refer the matter back to the Inquiry Committee with specific directions under s. 12 of the *By-laws*. Independent Counsel also defends the manner in which the Inquiry Committee made certain disputed fact findings.

[79] Finally, on the Sanction Issue, Independent Counsel takes, in essence, a neutral position and does not seek Justice Matlow's removal from office nor recommend any particular sanction. Instead, he focuses on the factors that the CJC ought to consider in its deliberations.

XI. ANALYSIS

A. The *Charter* Issue

[80] The thrust of Justice Matlow's submission is that the Inquiry Committee failed to engage in a proper *Charter* analysis. He asserts that in keeping with Supreme Court of Canada decisions such as *R v. Oakes*, [1986] 1 SCR 103, the Inquiry Committee should have considered whether any limitations on his rights to freedom of expression and freedom of association meet the tests of s. 1 of the *Charter*. In other words, if Justice Matlow is constrained in exercising his rights to freedom of expression and freedom of association, are those constraints reasonable limits prescribed by law and demonstrably justified in a free and democratic society? Much of Justice Matlow's brief to the CJC condemns this failure to analyze and submits such analysis would have resulted in a different conclusion.

[81] We do not agree. As with many other *Charter* rights, freedom of expression and freedom of association are not absolute rights. Indeed, Justice Matlow expressly recognizes that "there is ... no doubt 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" (at para. 117

of Justice Matlow's Written Submissions). To suggest therefore that the Inquiry Committee "erred in law and exceeded its jurisdiction" by failing to conduct an appropriate legal analysis under s. 1 of the *Charter* is inconsistent with the recognition of those restrictions. The brief condemns the very conclusion it asserts.

[82] This is not a case where legislation is sought to be struck down as breaching s. 2(b) or s. 2(d) of the *Charter*. The interpretation of s. 65 of the *Judges Act* and the assessment of the propriety of Justice Matlow's conduct in context requires an interpretation consistent with *Charter* values, not a robotic *Charter* analysis. The ultimate issue is not in dispute. It is whether Justice Matlow's conduct incapacitates or disables him from the due execution of judicial office. Justice Matlow's position fails to take proper account of the implications of one of the unwritten principles of the Canadian Constitution, judicial independence: *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 SCR 3 at paragraphs [94] to [109]. Judicial independence exists to ensure that citizens can access independent, impartial courts. Preserving impartiality is therefore key to the judicial role. It follows that certain limits on a judge's freedom of expression and association are both reasonable and justified should a judge wish to continue in the judicial role.

[83] Consequently, a judge's freedom of expression may be subject to the scrutiny of a judicial council to ensure that public confidence in the judiciary is maintained. In this regard, we adopt the reasoning of the Supreme Court of Canada in *Moreau-Bérubé*, *supra*, at para. 59:

> While it cannot be stressed enough that judges must be free to speak in their judicial capacity, and must be perceived to speak freely, there will unavoidably be occasions where their actions will be called into question. This restraint on judicial independence finds justification within the purposes of the Council to protect the integrity of the judiciary as a whole.

[84] While this passage referred to a judge's comments on the Bench, the reasoning underlying it demonstrates why a judge's obligations as a member of the judiciary may also constrain

certain conduct off the Bench. Given the appeal process and the imperative need to ensure that judges are free to disclose the reasoning behind their decisions, inappropriate comments on the Bench will not typically require the intervention of a judicial council. As the Supreme Court pointed out in *Moreau-Bérubé*, *supra*, at para. 55:

> There have been very few occasions where the comments of a judge, made while acting in a judicial capacity, could not be adequately dealt with through the appeal process and have necessitated the intervention of a judicial council...

On the other hand, improper or inappropriate conduct off the Bench can only be effectively constrained through the intervention of a judicial council. This approach best ensures the protection of both the public interest and judicial independence.

[85] In short, the *Charter* cannot be proffered by a judge as a basis for relief from, or diminution in, his or her obligation to conduct themselves properly as members of the judiciary: *Ruffo v. Conseil de la magistrature* [1995] 4 SCR 267. There are limits to a judge's ability to comment publicly on contentious issues. Speech off the Bench that calls into question the impartiality of the judge risks being criticized as inconsistent with the judicial office. Just as the judiciary is entitled, based on separation of powers, to be free from improper interference by the executive and legislative branches of government, so too are the executive and legislative branches entitled to be free from improper interference by the judicial branch.

[86] This does not mean that all contentious expression is prohibited for members of the judiciary. Judges do not surrender their rights as citizens on appointment to the Bench. As with many legal issues, this is about line-drawing and context.

[87] The Inquiry Committee concluded that s. 2(b) and 2(d) of the *Charter* have no application to the matters under consideration here. However, we have determined that limited aspects of Justice Matlow's conduct and speech do fall within the permissible range of activities granted to

private citizens, including those who serve as judges, and do not constitute conduct deserving of sanction [See Part XI. B. 1. (b) below]. Equally though, to the extent that limitations exist on Justice Matlow's freedom of speech or association as a result of his judicial role, we agree with the Inquiry Committee that they are justified in a free and democratic society to ensure the integrity of the judicial system and thereby preserve public confidence and the rule of law. An individual judge cannot invoke s. 2(b) and 2(d) of the *Charter* in order to avoid the constitutional obligations inherent in holding judicial office.

B. The Conflict Disclosure Issue

[88] This issue involves two sub-issues. The first is whether the Inquiry Committee treated the CJC publication entitled *Ethical Principles for Judges* ("*Ethical Principles*") as a code of conduct rather than guidelines and thereby erred. The second is whether the Inquiry Committee erred in imposing an objective ethical standard on judicial decision-making in recusal matters and then concluding that judges are liable to disciplinary sanction for failing to meet it. This second issue in turn consists of three separate sub-issues: (1) apart from the SOS Application, whether Justice Matlow's sitting on other cases involving the City after he became involved in the Thelma Road Project constitutes sanctionable conduct; (2) whether Justice Matlow's failure to disclose to his other panel members and counsel on the SOS Application his involvement in the Thelma Road Project constitutes sanctionable conduct; and (3) whether Justice Matlow's failing to take steps to avoid sitting on the SOS Application constitutes sanctionable conduct.

[89] We will deal with each in turn.

1. Codes of Conduct, Ethical Principles and Guidelines

(a) What Role do the Ethical Guidelines Play in Evaluating a Judge's Conduct?

[90] The issue of the extent to which judicial conduct on and off the Bench should be guided by a written document is not a simple one. On the one hand, it is essential to the integrity of the judicial system that judges be free to act independently, to call cases as they see them and to explain their full reasoning for the conclusions reached without fear of condemnation or sanction for the views expressed. On the other, it is equally vital that public confidence in the administration of justice and in the judiciary be preserved.

[91] Before addressing this subject, a language problem warrants mention. There is no common understanding of what flows from the name given to written instruments dealing with judicial conduct. That is not surprising since the issue is not what a written document is called, whether a code of conduct or ethical principles or ethical guidelines, but rather what the written instrument says. In other words, the name chosen to describe the instrument, that is form, does not necessarily dictate the content of the written instrument, that is substance. Hence, one should be careful before drawing conclusions about what a particular written instrument is designed to do – and does – based on its name.

[92] Take for example codes of conduct. Codes of judicial conduct can create standards and rules which if departed from by members may automatically lead to disciplinary proceedings and sanctions. If a code focused on prohibited acts – calling one side about a case without notice to the other, or lending one's name to a commercial activity, or being a member of a club that discriminated against the admission of others on prohibited grounds, or accepting funds in excess of a certain amount in exchange for speaking at an event – then the breach of the code would be something that would be objectively verifiable with little room for reasonable people to disagree about the code's application.

[93] That is one approach to judicial conduct – setting forth specific terms and conditions that govern what to do in a particular instance. We refer to codes in this category as "proscriptive conduct codes." There are several difficulties with proscriptive conduct codes, not least of which is that they cannot address every eventuality which might occur. Accordingly, as with all generalized rules, they might, depending on the circumstances, be over-inclusive or under-inclusive.

[94] The proscriptive conduct code is not the approach adopted by the CJC in the *Ethical Principles* or by provincial courts that have also seen fit to adopt codes of judicial conduct. Instead, the approach in Canada has been to set forth general guidelines, whether called codes or ethical principles, to provide ethical guidance to judges. Indeed, when the CJC adopted the *Ethical Principles*, it specifically rejected the proscriptive conduct code approach in favour of an educational and aspirational one. Accordingly, the *Ethical Principles*, after commenting that its purpose is to provide ethical guidance for federally-appointed judges, states:

> The Statements, Principles and Commentaries are advisory in nature. Their goals are to assist judges with the difficult ethical and professional issues which confront them and to assist members of the public to better understand the judicial role. 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. (page 3)

[95] That said, the *Ethical Principles*, reflecting as they do many of the principles underlying various international instruments on the independence of the judiciary, serve as a useful touchstone of generally accepted ethical standards in the judicial community guiding judges in how they should act on and off the Bench. In *Ruffo v. Conseil de la magistrature* [1995] 4 SCR 267, Gonthier J made the point at para. 110 that a statutory code of ethics applicable to Quebec Provincial Court judges does not tell judges what to do in specific cases:

> 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 restraints.... [A]s an ethical standard, [the duty to act in

> a reserved manner] is more concerned with providing general guidance about conduct than with illustrating specifics and the types of conduct allowed. It is interesting to note in this regard the comments of Professor H. Patrick Glenn on the Code of Ethics adopted in 1987 by the Canadian Bar Association. They are of general application and particularly enlightening in this context: "It is in short, a Code which instructs in how to act, and not in what to do."

[96] Prior to the adoption of the *Ethical Principles* in 1988, the *Report of the Inquiry Committee Respecting Certain Judges of the Nova Scotia Court of Appeal (1990)*, (the "Marshall Report") had articulated the standard for a judge's removal from the Bench in the following manner (at page 27):

> ... 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 takes the following form:
>
> Is the conduct alleged so manifestly and profoundly destructive of the concept of 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?

[97] Should that standard be met, a recommendation for removal from office will follow.

[98] Also, when the *Ethical Principles* were adopted, the CJC had, and still has, a complaints procedure in place which allows for the investigation of complaints from the public, and for the provision of remedial comments and guidance to judges, where warranted, for cases that are not so egregious as to require the appointment of an inquiry committee to consider the judge's removal from office.

[99] In summary, conduct by a judge which jeopardizes the impartiality or integrity of a judge in the minds of right-thinking members of the public may properly be the subject of judicial conduct proceedings. As the *Ethical Principles* state at page 14, judges have an obligation due to their unique constitutional role in society to "conduct themselves in a way that will sustain and contribute to public respect and confidence in their integrity, impartiality, and good judgment." While the *Ethical Principles* are not absolutes and while a breach will not automatically lead to an expression of concern by the CJC, much less a recommendation for removal from the Bench, they do set out a general framework of values and considerations that will necessarily be relevant in evaluating allegations of improper conduct by a judge. Therefore, the fact that challenged conduct is inconsistent with or in breach of the *Ethical Principles* constitutes a weighty factor in determining whether a judge has met the objective standard of impartiality and integrity required of a judge and in determining whether the challenged conduct meets the objective standard for removal from the Bench.

[100] For these reasons, we have concluded that the Inquiry Committee was entitled to take the *Ethical Principles* into account in assessing whether the conduct complained of constituted sanctionable conduct.

[101] We now turn to the manner in which the Inquiry Committee applied the *Ethical Principles*. In its discussion of General Principles, the Inquiry Committee stated at para. [81]:

> 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.

[102] We agree with the Inquiry Committee that judicial conduct may, in a particular instance, lead not only to an appeal but to a finding of sanctionable conduct. However, it does not follow that

any time a decision made by a judge can be formulated as engaging a specific ethical duty, the decision is open to a finding of sanctionable conduct. This would potentially encompass almost every decision a judge made on or off the Bench. The principle as stated, to the effect that there can be no discretion whether or not to perform an ethical duty, does not allow for any exception for decisions made in good faith. (This issue is discussed further in Part XI. B. 2 (b) below.)

[103] It must be remembered that the *Ethical Principles* are not written as a proscriptive conduct code and it is not possible to apply them as such. They do not tell a judge what to do in a particular case. It remains a matter of judgement whether the facts in question engage the *Ethical Principle*s. For example, there is an ethical duty to treat all people who come before the courts fairly and equally. But every erroneous decision that might be rooted in, for example, a lack of understanding of when substantive equality should apply, and not simply formal equality, should not automatically lead to disciplinary proceedings. Much will depend on the context and the facts of each individual case. That is equally so where conduct off the Bench is concerned.

[104] In other instances in which we are unable to agree with the manner in which the Inquiry Committee has applied the *Ethical Principles* on given issues, we have expressed our reasons for doing so.

(b) Applying Charter and Ethical Principles to Certain Aspects of Inquiry Committee Report

[105] It is against this background relating to both the *Charter* and the *Ethical Principles* that we now turn to a consideration of certain findings and conclusions of the Inquiry Committee. The Inquiry Committee made nine (ix) specific findings and conclusions against Justice Matlow (as set forth in Part IV above). For convenience, we refer to these as "conclusions." These conclusions were characterized as either judicial misconduct or Justice Matlow placing himself in a position incompatible with the due execution of the office of judge or Justice Matlow failing in the due execution of the office of judge. This section addresses conclusions (i) to (v). Part XI. B. 2 (b)

below addresses conclusion (vi); Part XI. C. 2 addresses conclusion (vii) and (ix); Part XI. B. 2 (c) below addresses conclusion (viii).

[106] It is not disputed that Justice Matlow reviewed a generic opinion from the Advisory Committee on Judicial Ethics ("ACJE") entitled "Municipal Democracy" published in June, 1999. The ACJE is an independent body composed of judges; the committee provides advice to individual judges on ethical issues and makes its opinions available, in anonymous format, to all judges. Justice Matlow was aware of and considered this opinion before he invited a group of area residents to meet at his house in April, 2002 to organize opposition to the Thelma Road Project. The advisory opinion states as follows, in its entirety:

> 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.

[107] The first three conclusions of the Inquiry Committee Report, set out at para. [205] (i)(ii)(iii), deal with Justice Matlow's (1) organizing and leading community opposition to the Thelma Road Project; (2) meeting with and making representations to persons holding public office and advocating on behalf of the community group he was leading during opposition to the

Thelma Road Project; and (3) deliberately promoting news media focus on the City's decision. The Inquiry Committee found that, in all three instances, Justice Matlow placed himself "in a position incompatible with the due execution of the office of judge."

[108] We do not find that standing alone or taken together, Justice Matlow's conduct in relation to his opposition to the Thelma Road Project, as articulated in these first three conclusions, constitutes judicial misconduct or placed Justice Matlow in a position incompatible with the due execution of the office of a judge. In reaching this conclusion, though, we agree that some of these activities were carried out in a way that did place Justice Matlow in a position incompatible with the due execution of the office of judge, for example by identifying himself as "Justice Ted Matlow" in making representations to officials and media representatives. That aspect of his conduct is properly addressed in the discussion below concerning conclusions (iv) and (v).

[109] With respect to conclusion (i) – Justice Matlow's having organized and led community opposition to the Thelma Road Project – we do not agree with the overly broad conclusion on this issue. The mere fact that a judge, in the defence of his or her home, objects in his or her capacity as a private citizen or homeowner to proposed municipal actions directly affecting that home and that could compromise its value or enjoyment or access to it does not mean that the judge has automatically placed himself or herself in a position incompatible with the due execution of the office of judge.

[110] In their role as private citizens, judges are not obliged to defer to all municipal actions simply because they also happen to be judges. The municipal level of government is the one that most directly affects citizens in their daily lives. As with other citizens, judges may find themselves, in their private capacity, objecting to or expressing concerns about a range of municipal actions. The degree of controversy should not be the basis for deciding whether a judge has a right as a private citizen to object to municipal actions. In fact, those actions that turn out to be the most controversial may be the ones that have the most potential to compromise the judge's interests as a private citizen.

[111] In expressing legitimate concerns as a taxpayer and citizen, a judge is not compelled to speak only through neighbours or legal counsel. Requiring a judge to do so would also elevate every issue, no matter how minor, to one necessitating the intervention of legal counsel were it to be pursued by the judge as a private citizen. More generally, it could also potentially profoundly and negatively impact on a judge and his or her family in a way that other citizens would not reasonably expect of a judge.

[112] In conclusion (ii), the Inquiry Committee found that by meeting with and making representations to a number of public officials about the Thelma Road Project, Justice Matlow had placed himself in a position incompatible with the due execution of the office of judge. We also find this conclusion to be overly broad. It is not necessarily inimical to the judicial office that a judge meet, in his capacity as a private citizen, with municipal officials in an effort to raise legitimate concerns. Here, legal counsel retained by the Friends and the City both had concerns about whether the proposed revisions to the Thelma Road Project were in conformance with City approvals. City Council later decided it was necessary to ratify the disputed Development Agreement. Accordingly, the fact that a judge, as a private citizen, opposes a project that is not, or arguably is not, in accordance with decisions made by a municipal council and meets with a public official to express those concerns does not by itself place the judge in a position incompatible with the due execution of his or her office.

[113] As for conclusion (iii), that is deliberately promoting news coverage, we cannot agree that these actions taken by a judge in his or her private capacity necessarily compromise the person's role as a judge. Promoting public scrutiny and accountability through a vigilant media is an integral part of a Parliamentary democracy. Consequently, to suggest that inviting media scrutiny of a municipal decision challenged by a judge in his or her role as a private citizen means that he or she has necessarily placed himself or herself in a position incompatible with the due execution of the judicial office is an unduly general proposition that admits of no exceptions or refinements irrespective of the circumstances.

[114] It was not Justice Matlow's opposition, as a private citizen, to the Thelma Road Project or his leadership of that opposition or his meeting with public officials about that opposition or even seeking news media coverage about the issue that is problematic. Instead, it is the way in which Justice Matlow carried out those activities that has raised entirely legitimate concerns about his conduct.

[115] We begin by adding one important caveat to our observations regarding conclusions (i) to (iii) inclusive. It is wholly inappropriate for a judge to act as a legal advisor for a group of individuals or to publicly offer legal advice, even where the judge has a legitimate personal interest in its outcome. Here, Justice Matlow did both repeatedly over a lengthy period and in doing so, he placed himself in a position incompatible with the due execution of the office of judge. He was wrong to do so.

[116] We now turn to conclusion (iv). The Inquiry Committee found that by using intemperate language in circumstances where the listener would know that he was a judge, Justice Matlow placed himself in a position incompatible with the due execution of the office of judge. We agree with this conclusion. The record is replete with his quotes from newspaper articles and letters amply demonstrating the repeated use of intemperate language which was inappropriate and negatively affects the perception of impartiality in the judicial role. Justice Matlow's references to "absurd proposal", "stupidity", "political intrigue" and "perhaps dishonesty" are a few examples of his intemperate and inappropriate language. To this, we would add his accusation that municipal officials were trying "to whitewash everything"; his reference to "devious acts that have taken place"; and his description of the actions of City Council as "a betrayal and a whitewash." Particularly egregious were his comments about a solicitor on the City staff.

[117] Given the evidence here, we go further. It is one thing to oppose a decision; it is another to use the prestige of a judicial office to gain access to public officials or to add legitimacy to the criticisms expressed. It is apparent from this record that Justice Matlow chose on several occasions to make his position as a superior court judge known to those with whom he was communicating.

In this regard, the Inquiry Committee found at para. [155], and we accept, that "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 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." It is also clear on this record that when Justice Matlow made it known that he was a superior court judge, this was done deliberately on more than one occasion to add legitimacy to the position he was taking. For example, in his dealings with Barber, Justice Matlow acknowledged that he told Barber in his written email to him that Justice Matlow was a "Superior Court Judge." Asked to explain why, he stated (Transcript of 9 January 2008, page 218):

> 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.

[118] And when asked to explain why he would choose to use notepaper headed "Justice Ted Matlow", which he asserted was private notepaper, Justice Matlow said (Transcript of 9 January 2008, page 273):

> That is my title; it is part of who I am. It is part of my identity.

[119] Yet other evidence reveals that decisions to disclose his status as a judge were deliberate as reflected in the following questions and answers (Transcript of 9 January 2008, pages 290-291):

> 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.

[120] In our view, Justice Matlow's use of the title "Justice" in his dealings with third parties on the Thelma Road Project was inappropriate and adversely impacted the public perceptions of his impartiality particularly in light of the highly political and controversial nature of the dispute. To take another example, in his 19 August 2002 email to Barber, Justice Matlow 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.

[121] Thus, we agree with conclusion (iv) of the Inquiry Committee that by using intemperate language, in circumstances where all to whom the language was directed would know that he was a judge, Justice Matlow placed himself in a position incompatible with the due execution of the office of judge. We also find that by deliberately using his judicial title and with it the prestige of judicial office for the intended purpose of enhancing his credibility and legitimacy to advance his private interests, Justice Matlow placed himself in a position incompatible with the due execution of the office of judge. Both are clearly outside the bounds of acceptable behaviour for a judge and we strongly condemn Justice Matlow's actions in this regard.

[122] Similarly, with respect to conclusion (v), we agree with the Inquiry Committee Report that Justice Matlow made totally inappropriate comments as to the legal duties of an Attorney General in his correspondence with the AG to further his and his neighbours' personal interests and in doing so, thereby misconducted himself in office. Justice Matlow's 6 November 2003 email to the AG requests that the AG "intervene to require that the City comply with the rule of law", implying therefore that the City had not done so and then effectively asserting that the AG had a duty to act stating that "it is incumbent on [the Attorney General] to do so in these circumstances." For Justice Matlow to tell the AG what his duties were in circumstances in which the AG would likely know that Justice Matlow was a superior court judge constitutes an impropriety on Justice Matlow's part amounting to judicial misconduct.

[123] In summary, while judges who have personal interests, such as home ownership, that can be affected by government action have the right, in their private capacity, to contest, as do other

Canadians, decisions that affect those interests as do other Canadians, there are limits as to what a judge might do. A judge is not entitled to use the prestige of judicial office to advance his or her private interests. Nor should a judge use intemperate language where others would likely know, or could be expected to know, that he or she was a judge. And under no circumstances is a judge entitled to act as a legal advisor for individuals opposing government action.

2. Recusal Decision-Making

(a) General Principles

[124] In the *Ethical Principles* chapter on Impartiality, Commentary A.1 states:

> . . . The Statement and Principles do not and are not intended to deal with the law relating to judicial disqualification or recusation.

[125] The CJC's *Report to the Minister of Justice concerning Mr. Justice Jean-Guy Boilard of the Superior Court of Quebec (2003)*, ("Boilard Report"), states:

> In the view of the Council, the decision by 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.
>
> 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.

[126] To the same effect is a 2004 Opinion of the ACJE (Opinion 2004-14), which stressed that a recusal decision is not a matter of judicial conduct or, at least, would not be, absent bad faith or abuse of office:

> 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.

(b) Sitting on Cases Involving the City Other than the SOS Application

[127] The Inquiry Committee accepted that Justice Matlow did not believe that a reasonable, fair-minded and informed person would have a reasoned suspicion he was in conflict in his continuing to hear cases involving the City: para. [170] of the Inquiry Committee Report. In other words, the Inquiry Committee effectively found that Justice Matlow honestly believed that he was not in a position of conflict in continuing to hear cases involving the City.

[128] However, the Inquiry Committee then went on to conclude that Justice Matlow nevertheless breached an ethical standard because he did not have the "objectivity expected of a judge" which if he had, would have made it impossible for him to conclude as he did: paras. [171] - [172]. Based on this formulation of the standard, the Committee found that Justice Matlow had a "clear duty" to disqualify himself from any case involving the City after becoming involved in the Thelma Road Project and accordingly that he had failed in the due execution of his office: paras. [172] - [173]. This is identified as finding (vi) in the Inquiry Committee Report: see para. [205] (vi).

[129] We are unable to agree with the Inquiry Committee's reasoning or its conclusion on this issue. First, it is not consistent with jurisprudential principles. It is true that a judicial decision may, depending on the circumstances, lead to both an appeal and disciplinary proceedings. A discretionary judicial decision is not immune from review for judicial misconduct simply because an appeal right exists. This very point was made by Arbour J. in *Moreau-Bérubé v. New Brunswick (Judicial Council)*, *supra*, at para. 58:

> In some cases, however, the actions and expressions of an individual judge trigger concerns about the integrity of the judicial function itself. When a disciplinary process is launched to look at the conduct of an individual judge, it is alleged that an abuse of judicial independence by a judge has threatened the integrity of the judiciary as a whole. The harm alleged is not curable by the appeal process.

[130] Justice Matlow argues that unless a judge has been guilty of bad faith or abuse of office, the judge cannot be disciplined for a discretionary judicial decision nor for any of the circumstances leading up to it. However, this formulation of the principle, adopted by the CJC in the Boilard Report, should not be taken to be an exhaustive or definitive catalogue of the circumstances under which a discretionary decision might give rise to a judicial conduct review. Still less was it intended that the identified categories be given a narrow interpretation. For example, if a judge were to make a discretionary decision while impaired by alcohol or alternatively, for an improper ulterior motive, the decisions, in both instances, could properly be the subject of separate disciplinary proceedings, notwithstanding the merits of the decisions, and notwithstanding the existence of an appeal right.

[131] Accordingly, a more comprehensive and appropriate formulation of the principle may be this. A discretionary judicial decision may warrant a finding of sanctionable conduct if the judge's conduct in any part of the proceedings up to and including the decision involves abuse of office, bad faith or analogous conduct. For this purpose, abuse of office can arise through a variety of circumstances, including abuse of judicial independence. And bad faith includes making decisions for an improper ulterior motive.

[132] What must be stressed though is that the Inquiry Committee's fact findings and the evidentiary record here confirm that in making the decisions that he did to sit on cases involving the City, Justice Matlow acted in good faith throughout. He honestly believed he did not have to recuse himself from all cases involving the City. He may have been wrong in law although that is arguably debatable on this point insofar as the cases other than the SOS Application are concerned. But throughout these proceedings, no one questioned Justice Matlow's honestly held subjective belief that what he was doing was reasonable and appropriate in the circumstances even from the

perspective of an objective observer. Indeed, the Inquiry Committee accepted that this was so and, as noted above, made a conclusive finding to that effect at para. [170].

[133] Second, it is an error in principle to impose a purely objective ethical standard on a discretionary judicial decision (whether to recuse oneself) and then treat that failure to meet that standard as indicative of or equal to judicial misconduct. Even the *Ethical Principles* do not go this far. They state, in Commentary E.8 on "Conflicts of Interest" in Chapter 6 regarding "Impartiality," that a judge should disqualify him or herself "if aware of any interest or relationship which, to a reasonable, fair minded and informed person would give rise to a reasoned suspicion of lack of impartiality." The question is what did the judge conclude after assessing this issue from an objective perspective. The Inquiry Committee decided at para. [171] that this test would be difficult to apply because 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." Instead, the Inquiry Committee imposed a purely objective test of what a judge would decide "acting with the objectivity expected of a judge." It then went on to find that had Justice Matlow applied that reasonable objectivity, he would have recused himself.

[134] The problem with this approach is that it ignores the fact that a judge might well honestly conclude, even after applying an objective test, that he or she was not required to recuse. In fact, the Inquiry Committee had already found at para 170 that from Justice Matlow's 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." Were the Inquiry Committee's theory correct, every case in which a judge erred in the exercise of their decision-making by failing to meet an objective standard of what others would have done in the same circumstances would potentially leave the judge open to a finding of judicial misconduct.

[135] Therefore, the Inquiry Committee erred in importing a purely objective standard into the question of whether Justice Matlow ought to have recused himself in the other cases involving the City. His failure to recuse himself on cases other than the SOS Application may be questionable

judgement or even, depending on the circumstances, very poor judgement but given the facts here, absent bad faith, abuse of office or analogous conduct, it is not sanctionable conduct.

[136] Third, the Inquiry Committee did not consider the facts relating to each of the cases involving the City other than the SOS Application. A discretionary decision, including a recusal decision, is just that, a decision subject to the exercise of judicial discretion. The reason for making certain decisions subject to a judge's discretion is that the decision in question cannot be formulated as an absolute rule. In many cases, the answer to the question before the judge is "It depends." And what it depends on are the facts of the individual case. An inquiry into when apprehension of bias may be found to exist is highly fact specific. As pointed out in *Weweykum Indian Band* v. *Canada*, [2003] 2 SCR 259 by McLachlin CJC at para. 77:

> "[T]his is a corner of the law in which the context, and the particular circumstances, are of supreme importance." As a result, it cannot be addressed through peremptory rules, and contrary to what was submitted during oral argument, there are no "textbook" instances. Whether the facts, as established, point to financial or personal interest of the decision-maker; present or past link with a party, counsel or judge; earlier participation or knowledge of the litigation; or expression of views and activities, they must be addressed carefully in light of the entire context. There are no shortcuts.

[137] Other than the SOS Application, this analysis was never conducted with respect to the cases involving the City on which Justice Matlow sat. Consequently, a sweeping assertion that Justice Matlow ought not to have sat in any of the cases involving the City following his involvement with the Thelma Road Project cannot be sustained on this record.

[138] Fourth, the Inquiry Committee erred in imposing a duty to disclose a possible conflict to his panel members on the basis that a reasonable, fair minded and informed person would have a "reasoned suspicion" of conflict. The *Ethical Principles* do not set out when a judge should or should not recuse himself nor do they set out a duty to disclose possible conflicts of interest based on a "reasoned suspicion" test. Further, the law on whether a duty to disclose possible conflicts of interests is not settled and we are concerned about the implications that would necessarily follow

from imposing on judges an unqualified obligation to disclose possible conflicts of interest based on a "reasoned suspicion" test.

[139] Here, Justice Matlow sat on a number of other cases in which the City was a party. Since we are not aware of the factual circumstances, there is considerable room for debate as to whether Justice Matlow was required even as a matter of law to recuse himself from those other cases. Indeed, it is noteworthy that at no time did the City ever object to his sitting on any of those other cases.

[140] For these reasons, we find ourselves unable to agree with conclusion (vi) that Justice Matlow failed in the due execution of his office by failing to take steps to avoid sitting on any matter in which the City was a party or in respect of which the City solicitor or her staff were involved. Given the circumstances of this case and the Inquiry Committee's express finding that Justice Matlow did not believe that a reasonable, fair-minded and informed person would have a reasoned suspicion he was in conflict in his continuing to hear cases involving the City, those decisions cannot form the basis for a finding that Justice Matlow has failed in the due execution of the office of judge.

(c) The SOS Application

[141] The Inquiry Committee concluded that it did not have the jurisdiction to consider whether Justice Matlow ought to have sat on the SOS Application. Nevertheless, after conceding this, it then went on to consider Justice Matlow's conduct in failing to take steps to avoid sitting on the SOS Application and in failing to disclose to his other panel members the extent of his prior involvement with the Thelma Road Project. The Inquiry Committee concluded that the reasons it expressed for finding that Justice Matlow had a clear duty to avoid sitting on <u>any</u> matter involving the City applied with equal force to this situation as well: para. [184].

[142] For most of the reasons already discussed above, we do not agree with the reasoning or conclusion of the Inquiry Committee on this issue. The Inquiry Committee concluded that Justice

Matlow subjectively believed that a reasonable, fair-minded and informed person would not have a reasoned suspicion he was in a position of conflict in hearing cases involving the City. That necessarily includes the SOS Application. Certainly, the Inquiry Committee did not make any finding of bad faith, abuse of office or analogous conduct against Justice Matlow with respect to his decision to hear the SOS Application. Hence, the decision Justice Matlow made in good faith is not sanctionable conduct in these circumstances.

[143] The Inquiry Committee also found that Justice Matlow's failure to disclose his prior involvement in the Thelma Road Project to his other panel members was judicial misconduct. However, again, the Inquiry Committee used a purely objective standard of what a judge in a similar position ought to have done despite having found – in effect – that Justice Matlow acted in good faith in making the decision he did. While we are bound to say that Justice Matlow's failure to disclose to his other panel members or counsel his involvement in the Thelma Road Project demonstrates seriously flawed judgement, in light of the fact findings made, it is not sanctionable conduct.

[144] For these reasons, we do not agree with conclusion (viii) that Justice Matlow failed in the due execution of his office by failing to disclose to his fellow panel members his prior involvement in the Thelma Road Project and failing to take steps to ensure he did not sit on the SOS Application.

[145] The remaining part of conclusion (viii), where the Inquiry Committee found that by taking steps immediately prior to his scheduled sitting on the SOS Application to promote renewed media attention in the Thelma Road Project, Justice Matlow failed in the due execution of his office is duplicitous. The issue of promoting renewed media attention in the Thelma Road Project controversy is dealt with in conclusion (vii) discussed in Part XI. C. 2 below.

C. The Report Deficiencies Issue

1. Exclusion of or Failure to Weigh Relevant Evidence

[146] Paragraphs 32 and 33 of the Inquiry Committee Report state:

> [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.

[147] Justice Matlow contends that the letters provided evidence of Justice Matlow's character, that they were accepted and admitted into the record with the consent of Independent Counsel and that they did not address the specifics of the allegations of misconduct but rather provided general information about Justice Matlow's character and integrity. We have reviewed the letters and this is an accurate description of them. They are from fellow justices in the Superior Court of Justice for Ontario and also prominent legal counsel in Toronto.

[148] Justice Matlow submits that character evidence is relevant to the assessment of his integrity and credibility and also constitutes mitigating factors with respect to the appropriate penalty. Therefore, it should have been considered by the Inquiry Committee.

[149] The reasons of the Inquiry Committee indicate that it viewed this evidence as partisan and, in any event, as representative of a small segment of the public only. We do not disagree with this assessment. But we also find the evidence to be relevant. Positing the opposite question, what if there were a deluge of letters from the local community, including Justice Matlow's peers and lawyers, to the effect that he was unfit to hold office? Would that be relevant as part of our deliberations? We think it may properly be. So too, are the support letters which have been accepted as evidence.

[150] Character is certainly relevant to the assessment of a judge's attributes. The letters deal with various aspects of Justice Matlow's character, that is his integrity, honesty, conscientious work ethic, and commitment. While these letters are not relevant to whether the conduct complained of occurred, they may be relevant to why the acts occurred, the context of the acts, and whether the acts were committed without malice and without bad faith. Character is also highly relevant to the issue of what recommendations should flow from a finding of judicial misconduct. While the weight to be given to this evidence is admittedly for the inquiry committee, and while an inquiry committee may elect to give it little weight, still it is an error in principle to simply ignore this kind of evidence for all purposes. In particular, the evidence is relevant to the sanction phase of the proceedings and ought to have been considered in that context. It was not.

2. Findings of Fact Contrary to Uncontradicted Evidence

[151] This takes us to a highly problematic aspect of the Inquiry Committee Report. Justice Matlow challenges the Inquiry Committee's failure to accept his uncontradicted evidence that he did not know that he would be sitting on the SOS Application until Monday, 3 October 2005, the day after he had renewed his contact with Barber about the Thelma Road Project by email. Justice Matlow also challenges the Inquiry Committee's rejection of his uncontradicted evidence that he contacted Barber at the Globe and Mail by email on 2 October 2005 because he had just read the Bellamy Report and had concerns that similar activity documented in the Bellamy Report existed within the City's bureaucracy in relation to the Thelma Road Project.

[152] In addressing this issue, we caution ourselves that it is inappropriate to speculate about what fact findings the Inquiry Committee might have made had further questions been asked of witnesses. It is equally inappropriate to upgrade the Inquiry Committee's fact findings by making negative inferences that the Inquiry Committee declined to make.

(a) Findings Relating to When Justice Matlow First Learned About the SOS Application

[153] On the question of when Justice Matlow first learned he would be sitting on the SOS Application, his evidence that he did not find out until Monday, 3 October 2005 at the earliest was not accepted by the Inquiry Committee. The Inquiry Committee attempted to sort out the timing of events by calling evidence from Court officials who had sent emails asking whether the panel would hear the SOS Application once it concluded its sitting in Sudbury. The Inquiry Committee Report concluded at para. [77]:

> The memory failure of [court officials] ... 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.

[154] Justice Matlow's evidence on timing was consistent with the evidence of both of his other panel members on the Divisional Court panel, as reflected in para. 62 of the Agreed Statement of Facts:

> 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.

[155] While this independent evidence supports Justice Matlow's evidence on this critical issue, and while the Inquiry Committee offered no reasons for not finding that it did so, we decline

to disturb the Inquiry Committee's findings on this point. It is the Inquiry Committee that heard Justice Matlow's evidence and observed him giving it, both under direct and cross-examination. We had no such opportunity. Although Justice Matlow did address us at the Public Meeting, it was not on this issue nor on the question of his motivation for renewing the contact with Barber.

[156] Having said this, however, it is vital to emphasize that implicit in this finding of the Inquiry Committee is the fact that it could not, on the evidence before it, state with confidence *one way or the other* when Justice Matlow first learned that he would be sitting on the SOS Application. In other words, the Inquiry Committee declined to find the converse as well, that is that Justice Matlow knew he would be sitting on the SOS Application when he renewed contact with Barber on 2 October. Indeed, had the Inquiry Committee found that Justice Matlow knew he would be sitting on the SOS Application when he renewed contact with Barber on Sunday 2 October, this could not be sustained on this evidentiary record given the fact that Justice Matlow's uncontradicted evidence on this point was consistent with the independent recollection of his two other panel members.

(b) Coincidence of the Barber Contact with the SOS Application

[157] How then did the Inquiry Committee deal with the question of the coincidence of the Barber contact with Justice Matlow's hearing of the SOS Application? With respect to what motivated Justice Matlow's renewed contact with Barber, the Inquiry Committee began its analysis by noting that it had, earlier in its reasons, been unable to "make a finding of fact that reflects the position expressed by Justice Matlow": para. [189]. The problem though is that, after having found earlier in its decision that it could not make a finding on this issue either in support of, or against, Justice Matlow, the Inquiry Committee then went on to state later (at para. [190] of the Inquiry Committee Report):

> However, clear and cogent evidence established 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*.

[158] The first finding that Justice Matlow initiated the reopening of the Thelma Project-related dispute knowing he was, or was likely to be, sitting on the SOS Application is inconsistent with the Inquiry Committee's earlier conclusions on this issue. And as noted, Justice Matlow's evidence that he only learned he would be sitting on the SOS Application on Monday, 3 October, 2005 at the earliest is consistent with the evidence of two other members of the panel, Justices Greer and MacDonald, as to when they too first learned that they would be sitting on the SOS Application.

[159] The second finding goes to the issue of Justice Matlow's decision that he could sit on the SOS Application. That issue has already been canvassed in detail. Absent a finding of abuse of office or bad faith or analogous conduct, which the Inquiry Committee did not make, Justice Matlow's decision to sit on the SOS Application when he had renewed contact with Barber about the Thelma Road Project cannot, for the reasons given, be characterized as sanctionable conduct.

[160] Nevertheless, we accept the Inquiry Committee's finding that when Justice Matlow sent his follow-up email and materials to Barber on 4 and 5 October, Justice Matlow knew he would then be sitting on the SOS Application. However, again for the reasons given, we do not agree with the Inquiry Committee's conclusion at paragraphs [193] - [194] that by sitting on the SOS Application, knowing he had renewed his allegations of misconduct about the Thelma Parking Project, 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 his office. Justice Matlow's failure to recuse himself demonstrates seriously flawed judgement but, given the fact findings the Inquiry Committee made, we cannot say that this constitutes sanctionable conduct.

[161] Was it judicial misconduct for Justice Matlow to have resurrected the Thelma Road Project controversy? The Inquiry Committee appears to have found Justice Matlow's conduct in reviving the controversy to be so at least insofar as conclusion (vii) is concerned. We do not share

the Inquiry Committee's view that reviving this issue was by itself inappropriate. We do agree though that it was inappropriate to continue pursuing it by emailing and delivering documents relating to that controversy to Barber on 4 and 5 October 2005 when Justice Matlow knew, as he did by 4 October, that he would be sitting on a case on 6 October involving a disputed municipal government planning matter where the City was centrally interested and which involved a dispute between the City and a community group similar in nature to that in which Justice Matlow was personally interested.

[162] Accordingly, subject to the limitations set forth above, we accept the Inquiry Committee's determinations as set forth in the latter part of conclusion (vii). That is, by sending further emails to Barber on 4 and 5 October 2005 and delivering documents relating to the Thelma Road Project to Barber on 5 October 2005 when Justice Matlow knew, within days he would 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.

[163] Conclusion (ix), which deals with Justice Matlow's pursuing allegations of municipal misconduct with Barber on 4 and 5 October knowing he would be sitting as a judge and then sitting on the SOS Application, is repetitive of conclusions (vii) and (viii) and hence duplicitous. It is unnecessary for us to consider it further since we have dealt exhaustively with both conclusions (vii) and (viii).

D. The Sanction Issue: Should the CJC Recommend Removal From the Bench?

1. Applicable Considerations

[164] We adopt the Inquiry Committee's statement of the test for removal from the Bench, particularly at paras. [111] - [113]. Quoting from para. 35 of the *Report of the Inquiry Committee*

concerning Mr. Justice Bernard Flynn of the Superior Court of Quebec (2003) (the "Flynn Inquiry Report"), the test proposed and adopted there, and by the Inquiry Committee here, is as follows:

> 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?

[165] The Inquiry Committee Report, at para. 112, goes on to cite para. 147 of *Re Therrien, supra*, where in considering the removal of a Provincial Court Judge from office the Supreme Court of Canada stated:

> 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).

[166] The Inquiry Committee, at para. [113] of its Report, correctly characterized its task as two-fold: first, determine whether Justice Matlow's conduct falls within any one of paragraphs (b) through (d) of s. 65(2) of the *Judges Act*; and second, if so, apply the test for removal set forth above. An important aspect of the test not specifically articulated is its prospective nature. Implicit in the test for removal is the concept that public confidence in the judge would be sufficiently undermined to render him or her incapable of executing judicial office in the future in light of his or her conduct to date.

2. Justice Matlow's Conduct and the Appropriate Sanction

(a) The Inquiry Committee's Recommendation

[167] As noted above, the Inquiry Committee outlined a number of actions on Justice Matlow's part that resulted in his either being guilty of judicial misconduct, or failing in the due execution of the office of judge or placing himself in a position incompatible with the due execution of the office of judge. At para. [206], the Inquiry Committee also observed that some of their nine conclusions in para. [205] "standing alone" would not necessarily constitute conduct that is so manifestly and totally contrary to the impartiality, integrity and independent of the judiciary that the confidence of individuals appearing before the judge or of the public in its justice system would be undermined, thereby rendering Justice Matlow incapable of executing his judicial office. But the Inquiry Committee added at para. [206] that "taken together there can be no doubt that such is the impact."

[168] In addition, the Inquiry Committee specifically found at para. [206], and this was clearly a factor influencing its ultimate recommendation, that "notwithstanding intervening events, there has been no significant change in Justice Matlow's views as to the propriety of this conduct in respect of which the complaint was filed." In this regard, the Inquiry Committee relied on a number of Justice Matlow's comments attempting to rationalize and justify his actions. The Inquiry Committee characterized these comments as also demonstrating conduct "that is destructive of the concept of the impartiality, integrity and independence of the judicial role." Included amongst them are the following excerpts from Justice Matlow's cross-examination (Transcript of 9 January 2008, pages 275-276):

> I knew I was about to do something that likely most other judges would not do. But I thought that 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.
>
> I was entitled to do things that fulfilled my concept of my role as a judge, within the confines that I had to accept.

[169] The Inquiry Committee also found that Justice Matlow's expressions of regret before it were limited. In particular, the Inquiry Committee found at para. [202] of the Inquiry Committee Report that Justice Matlow's view of his errors of judgement extended to two things only: delivering documents to Barber and failing to disclose what he had done to his two judicial colleagues on the SOS Application. The Inquiry Committee also determined at para. [203] that Justice Matlow's response when asked whether he regretted any negative impact on the public's view of the administration of justice was "equivocal and he indicated that 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."

[170] After repeating its nine conclusions about Justice Matlow's conduct noted above, the Inquiry Committee then went on to outline at para. [207] the four other factors it had taken into account (set out in para. [45] above). The Inquiry Committee concluded that it was led unavoidably to the conclusion that Justice Matlow's conduct was so manifestly and totally contrary to the impartiality, integrity and independence of the judiciary that the confidence of individuals appearing before him or of the public in its justice system had been undermined rendering Justice Matlow incapable of performing the duties of his judicial office. As a result, it expressed the view that a recommendation for Justice Matlow's removal from office is warranted.

(b) Decisions in Other Judicial Conduct Cases

[171] Were the conduct of a judge sufficiently egregious that public confidence in the judiciary could not be sustained, we would have no hesitation in recommending the judge's removal from the Bench.

[172] The CJC has previously done so. This occurred in the matter of Justice Bienvenue: Report of the Inquiry Committee concerning *Mr. Justice Jean Bienvenue of the Superior Court of Quebec in R. v. Théberge (1996)*. In that case, an inquiry committee was constituted as a result of a request to the CJC from the Québec AG and the Federal Minister of Justice to inquire into the

remarks and conduct of Bienvenue in the course of the trial in *R. v. Théberge*. In its report, the inquiry committee followed the analysis developed by Gonthier J in *Ruffo v. Conseil de la magistrature*, [1995] 4 SCR 267 and assessed the impact on public confidence from the objective standpoint of what an informed person, viewing the matter realistically and practically – and having thought the matter through – would conclude. Incidents in question included the judge's meeting with the jury after the verdict and expressing disapproval of the jury's verdict and inappropriate sexist remarks about women. The majority of the Inquiry Committee recommended that Bienvenue be removed from office. The CJC accepted the majority report and recommended to the Minister removal from office. Bienvenue resigned.

[173] In the Flynn Inquiry Report, the inquiry committee appointed as a result of a request from the Québec AG to inquire into Justice Flynn's conduct with respect to statements made by him and reported in the newspaper *Le Devoir* relating to a property transaction involving his wife, concluded that Flynn should have refrained from making comments to the media. Characterizing the statements as inappropriate and unacceptable, it also noted that Flynn had spoken out on matters of a controversial nature which were likely to come before the Superior Court of which he was a member. It concluded that in making the statements he did that Flynn had failed in the due execution of his office given the duty to act in a reserved manner. However, given Flynn's irreproachable career, the isolated nature of the incident complained of, the unlikelihood of a similar incident re-occurring and the judge's acknowledgment of having made a mistake in speaking to the journalist, the inquiry committee concluded that Flynn was not disabled from the due execution of his office and there was no recommendation that he be removed from office. The CJC, in its report to the Minister, agreed with the inquiry committee's conclusion.

[174] Regarding Justice Boilard, an Inquiry was held as a result of a request from the Québec AG to inquire into Boilard's conduct in recusing himself from the continuation of a long trial. In the Boilard Report, the CJC concluded that in recusing himself from the case, Justice Bollard had not failed in the due execution of his office and should not be removed.

[175] At the provincial level, Judge Moreau-Bérubé, of the New Brunswick Provincial Court, made derogatory comments about residents of the Acadian Peninsula while presiding over a sentencing hearing. She later apologized for the statements. Complaints were filed with the New Brunswick Judicial Council alleging misconduct and an inability on the part of the judge to continue to perform her duties as a provincial judge. An inquiry panel concluded that Moreau-Bérubé's comments did constitute misconduct, but that she was still able to perform her duties as a judge. Despite the inquiry panel's findings, the Judicial Council concluded that the judge's remarks created a reasonable apprehension of bias and a loss of public trust and recommended she be removed from office. The Supreme Court of Canada upheld the Judicial Council's decision on the basis that the comments made created an apprehension of bias: *Moreau-Bérubé*, *supra*.

(c) Application of Test for Removal from the Bench to Justice Matlow's Conduct

[176] It is clear that the Inquiry Committee's finding that a recommendation for Justice Matlow's removal from the Bench is warranted is linked both to its nine conclusions and the four factors outlined above. With respect to its conclusions, we have explained why we do not share certain of these conclusions. In particular, we have found that conclusion (vi), dealing with Justice Matlow's sitting on matters involving the City other than the SOS Application and (viii) dealing with Justice Matlow's sitting on the SOS Application do not constitute sanctionable conduct. We have also found that conclusions (i) to (iii) are overly broad and that each does not support a finding of judicial misconduct. We have also found that conclusion (ix) is duplicitous and subsumed in other conclusions, including conclusion (viii) which cannot form the basis for disciplinary proceedings. We agree fully with conclusion (iv) and indeed have bolstered and broadened that conclusion. We have also found that Justice Matlow improperly acted as legal advisor and thereby failed in the due execution of the office of judge. We are also in agreement with conclusion (v) and part of conclusion (vii).

[177] From this brief summary, it will be evident that certain matters which the Inquiry Committee put on the scale in evaluating the seriousness of the conduct complained of ought not to have been characterized as sanctionable conduct.

[178] Moreover, we have explained why it is appropriate to place on the sanction scale the character evidence letters Justice Matlow submitted to the Inquiry Committee. These letters speak to public support and confidence in Justice Matlow albeit from a certain part of the local community only.

[179] Finally, unlike the Inquiry Committee, we have the benefit of Justice Matlow's oral statement to the CJC at the Public Meeting. In that statement, Justice Matlow reiterated that his contact with John Barber in October 2005, was "an error in judgment ..." He acknowledged that "he made many errors and engaged in various forms of inappropriate conduct." He apologized without reservation for errors of judgement and inappropriate conduct. Justice Matlow also concluded (Transcript of 21 July 2008, page 12):

> The Inquiry Committee expressed concern that I would repeat the conduct that led them to recommend that I be removed from the bench.
>
> In response to that concern, I promise you today, in the most binding way that I can conceive, that if I am permitted to remain in office as a judge, I will never repeat conduct similar, in any way, to the conduct that might be found offensive by you. I will, without exception, conform to your views.
>
> If you grant me this opportunity, I promise you that I will never give you reason to regret your decision.

[180] We are satisfied that in making these comments, and offering the acknowledgment of errors of judgement that he did that Justice Matlow was – and is – sincere about his expressions of regret and we are also satisfied that those expressions of regret before us extended beyond those acknowledged to the Inquiry Committee.

[181] We have carefully considered the articulated test for removal from the Bench, the findings of the Inquiry Committee Report as modified by these Reasons, the evidence tendered by way of letters of support to the Inquiry Committee, Justice Matlow's address to the CJC at the Public Meeting and the extent of his expressions of regret contained therein, previous decisions of the CJC and other judicial councils and the relevant jurisprudence.

[182] In doing so, it is important to place Justice Matlow's conduct in the context of his judicial career. Justice Matlow has served on the Bench for 27 years. During that time, apart from this case, there is no evidence before us of any improper or inappropriate behaviour on his part on or off the Bench.

[183] Further, unlike the fact situations in both *Bienvenue* and *Moreau-Bérubé*, Justice Matlow's misconduct did not occur in the performance of his judicial duties. Bienvenue's actions and attitudes demonstrated a lack of impartiality in the performance of his judicial function that had implications going forward. In the case of Moreau-Bérubé, the bias demonstrated in her remarks would remain forever in the minds of Acadian residents. In both cases, they had incapacitated themselves from ever being perceived as impartial in the future. Without in any way excusing Justice Matlow's conduct, it related to actions off the Bench in pursuit of his private interests. Given the evidence before us, we expect that Justice Matlow will refrain from any similar conduct in the future now that the nature and gravity of his inappropriate behaviour has been brought home to him. We also believe that Justice Matlow will be impartial in continuing to decide matters brought before him in the future.

[184] After taking into account all relevant materials and factors, it is our opinion that while Justice Matlow made serious errors of judgement which constituted judicial misconduct and also placed him in a position incompatible with the due execution of his office, that a recommendation for removal from the Bench is not warranted in this case. In all the circumstances, we are of the opinion that Justice Matlow's conduct is not "so manifestly and profoundly destructive of the concept of 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." Accordingly, we do not recommend that he be removed from office.

[185] Nevertheless, we have found that Justice Matlow has been guilty of judicial misconduct and that through his inappropriate and unacceptable actions, Justice Matlow placed himself in a position incompatible with the due execution of the office of judge. We strongly disapprove of the way in which Justice Matlow repeatedly conducted himself in connection with the Thelma Road Project. There are limits to what a judge can do in pursuit of his or her personal or private interests and this case serves as notice to all judges of the limitations that properly apply to a judge's right to pursue civic or personal interests while serving as a judge. For the reasons given herein, Justice Matlow put himself well outside the boundaries of permissible and acceptable behaviour for a judge. For this and his obsessive conduct in connection with this matter, Justice Matlow must accept full personal responsibility.

(d) Directions to Justice Matlow

[186] Therefore, we make the following directions:

1. Justice Matlow will provide, in writing and in a manner satisfactory to the CJC, full and unqualified individual apologies to the City Solicitor; the staff lawyer about whom Justice Matlow wrote to the City Solicitor; the independent counsel retained by the City; the City; the Attorney General of Ontario; and the TPA, with respect to Justice Matlow's actions that were directed to them or affected them in any way in connection with the Thelma Road Project.

2. Justice Matlow will, within a time frame acceptable to the CJC, attend a seminar on Judicial Ethics sponsored by the National Judicial Institute or the Ontario Superior Court Judges Association.

3. If Justice Matlow ever considers participating in a public debate in any matter, whether he has a personal interest in a subject or not, prior to involving himself in such debate, he must obtain a favourable opinion from the ACJE before embarking on any such activity and he must comply with, and abide by, any conditions or limitations contained in that opinion.

THESE REASONS are agreed by the following Council members:

- The Honourable Beverley Browne
- The Honourable Patrick D. Dohm
- The Honourable Catherine A. Fraser
- The Honourable J. Derek Green
- The Honourable Joseph P. Kennedy
- The Honourable John Klebuc
- The Honourable Robert D. Laing
- The Honourable Michael MacDonald
- The Honourable Jacqueline R. Matheson
- The Honourable Gerald Mercier
- The Honourable Marc M. Monnin
- The Honourable Gerald Rip
- The Honourable Eugene P. Rossiter
- The Honourable David D. Smith
- The Honourable Deborah K. Smith
- The Honourable Allan H.J. Wachowich
- The Honourable Neil C. Wittmann

MINORITY REASONS OF THE CANADIAN JUDICIAL COUNCIL IN THE MATTER OF AN INQUIRY INTO THE CONDUCT OF THE HONOURABLE P. THEODORE MATLOW

I. INTRODUCTION

[1] We have had the advantage of reading in draft form the reasons of the majority of the Canadian Judicial Council on review of the Inquiry Committee Report of 28 May 2008 into the conduct of the Honourable P. Theodore Matlow. With respect, we agree with the Inquiry Committee that a recommendation for removal from office of Justice Matlow is warranted. We disagree with the conclusion of the Majority Reasons to the contrary, and we disagree with a substantial part of the majority's reasoning that led them to that conclusion.

[2] The Inquiry Committee found as fact, based on ample evidence, that for over two years Justice Matlow, identifying himself as a justice of the Supreme Court of Ontario, led an active neighbourhood campaign against a City of Toronto zoning decision. In pursuing his and his neighbours' political goal, the judge made direct representations to public officials, and to the media, used intemperate language and made inappropriate comments.

[3] A year after the campaign against the City had apparently lapsed, and immediately before hearing a case involving another disputed zoning decision of the City of Toronto, Justice Matlow resurrected his earlier efforts to interest the media in "his story." He did so, again identifying himself as a judge, by providing a media representative with documents relating to his issue.

[4] Despite his conflict of interest he then sat on the panel that heard that case, and when subsequently challenged by the City, maintained his right to hear and decide it.

[5] The Majority Report accepts some, but not all, of the facts as found by the Inquiry Committee. The majority accepts that Justice Matlow's conduct was wrong, and incompatible with the due execution of the office of judge in a number of ways.

[6] In particular, the majority accepts that:

1. Justice Matlow inappropriately acted as a legal advisor, or publicly offered legal advice, over a lengthy period of time (para. 115);
2. Justice Matlow repeatedly used intemperate language in circumstances where the listener would know he was a judge, in a way that adversely affected the perception of judicial impartiality, some of which comments were "particularly egregious" (para. 116);
3. Justice Matlow on more than one occasion deliberately used the fact that he was a Superior Court Judge, and hence the prestige of the judicial office, to gain access to public officials or to add legitimacy to the positions he took (para. 117);
4. Justice Matlow inappropriately used the title "Justice" in his dealings with third parties and thereby adversely affected public perceptions of his impartiality (para. 120); and
5. Justice Matlow on 4 and 5 October 2005 misconducted himself in pursuing the Thelma Road controversy with the media, when he knew he was to hear another case involving a disputed municipal planning case on 6 October 2005 (paras. 162 and 163).

[7] The majority holds the view that each aspect of this misconduct is incompatible with the due execution of the office of judge. It stops short, however, of holding that these failures have incapacitated or disabled the judge from the due execution of the judicial office (see s. 65(2) of the *Judges Act*, R.S. c. J-1).

[8] The majority notes (at para. 184) that none of this misconduct occurred in the performance of the judge's judicial duties. There has been, and can be, no suggestion that any of this misconduct is shielded from review by the principle of judicial independence.

[9] In our opinion, whether based on the limited version of the facts accepted by the majority, or on the more complete factual basis as found by the Inquiry Committee, right thinking Canadian citizens would regard the judge's conduct as incompatible with the conduct to be expected of a Superior Court judge, and so totally contrary to the impartiality, integrity and independence of the judiciary, that it would severely undermine public confidence in the administration of justice.

II. THE THELMA ROAD ISSUE

[10] The majority appears to differ from the Inquiry Committee in its first three 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:
>
> > 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;
> >
> > 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;
> >
> > 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; …

[11] The majority suggests that these conclusions are either "overly broad" or "unduly general" (at paras. 107-113). The majority opinion implies that the conduct summarized in those three conclusions was engaged in by the judge in his personal capacity as a private citizen.

[12] With respect, these first three conclusions cannot be read in isolation from, or without reference to, the evidence or to the underlying factual conclusions of the Inquiry Committee. When one looks at the Inquiry Committee's findings of misconduct that the majority does accept, as set out above at para. 6, it is clear that one cannot compartmentalize the judge's conduct in the way the majority would. The judge did not conduct himself one day as a private citizen, and the next as a judge, in the matter of the Thelma Road project.

[13] The judge's own evidence shows why this is so. He recognized his position as a judge as an important aspect of his identity:

> Q. Can you tell us why, in your interactions with Mr. Barber in 2002 and 2005, you identified yourself as a judge?
>
> A. Yes, I think that the fact that I am a judge is part of my identify, 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, to 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 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.

[14] And further:

> I knew I was about to do something that likely most other judges would not do. But I thought that 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.
>
> I was entitled to do things that fulfilled my concept of my role as a judge, within the confines that I had to accept.
>
> 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.
>
> Q. But at least one of your colleagues said to you, "Ted, now be careful." Do you remember that?
>
> A. Yes, I said that earlier.
>
> Q. When your colleague said that, did you not think at that point that maybe you could use some assistance from another colleague, or from the Advisory Committee, in terms of advice on whether you were crossing some line you shouldn't cross?
>
> A. No, because I know the colleague who said this; no one else here does.
>
> I can tell you that although I respected many aspects of this person, and he was in many ways a wonderful judge, he was a very, very cautious and conservative person who would certainly not do anything approaching what I would do.
>
> So to use him as a standard for governing my own conduct would have been absurd.

[15] What the evidence, and the Inquiry Committee's findings of fact make clear, is that the identity of the judge as a judge was an important feature of his and his neighbours' campaign against the City. The Majority Report is critical (see para. 117) of how the judge used the prestige of his office to influence others, but appears to suggest that that conduct was severable from the legitimate ends he might pursue as a private citizen (paras. 109-113). With respect, this is an artificial and unrealistic distinction.

[16] The Inquiry Committee found that the "political representation approach was a deliberate strategy." The judge and his neighbours chose to avoid a conventional legal challenge to the zoning proposal because of the cost involved, and instead decided to "develop another approach where we could put forth an effective challenge, but on the cheap" (para. 52).

[17] In following his chosen course of action, the judge did what no ordinary citizen, or group of citizens, could do. He traded on his identity as a Superior Court judge and his presumed knowledge of the law. He also traded on the reputation of the Canadian Superior Court judiciary for integrity and impartiality. This may well have been the least expensive route for the judge and his neighbours to follow in attempting to persuade civic and provincial politicians, as well as media representatives. However, it was thoroughly improper conduct for a judge.

[18] With respect, the majority opinion provides no clear reason for its refusal to accept the first three conclusions of the Inquiry Committee.

[19] A judge must know the limits of judicial office. The proper function of a judge is to exercise the powers of the office the judge is accorded. The judge must not use either judicial title or judicial powers for any other purpose. The judge should ask himself what he is meant to do both in his professional and personal capacities. The judge must exercise restraint, and demonstrate mastery of himself in all aspects of his life.

[20] This does not mean that a judge may not have a private life. Nor does it mean that he cannot protect his own personal interests. However, he must at all times remember he is a judge and may be seen by others as a judge in everything he does. The judge must conduct himself with restraint and humility, remembering always the limits imposed by the office he occupies.

[21] The Statement of *Ethical Principles*, in the section on Impartiality says:

> 1. Judges are free to participate in civic, charitable and religious activities subject to the following considerations:
>
> (a) Judges should avoid any activity or association that could reflect adversely on their impartiality or interfere with the performance of judicial duties.

[22] Justice Matlow would have been well advised to follow the advice of his colleague, referred to in para. 14 above.

[23] We can see no proper basis for refusing to accept, unmodified, all the findings of fact the Inquiry Committee made at para. 205(i) to (iii).

[24] The majority opinion appears to accept the Inquiry Committee's findings in paras. 205(iv) and (v) and it is not necessary to comment further on them.

[25] When the findings of the Inquiry Committee set out at paras. 205(i)-(v) are considered as a whole, as they must be, there can be no doubt that the judge's conduct in the Thelma Road project is beyond anything acceptable in the conduct of a judge. This was not a spontaneous comment or an isolated act. Rather, the judge followed a deliberate course of conduct for a period of more than two years. It is conduct worthy of removal from office.

III. THE CREDIBILITY ISSUE

[26] Counsel for Justice Matlow submitted that the Inquiry Committee erred in failing to accept the judge's uncontradicted evidence on three specific issues.

[27] The first issue was whether the judge knew that he was assigned to sit on the SOS hearing before he sent an e-mail to John Barber on Sunday, 2 October 2005 (paras. 70-77). The second issue

is whether the judge's explanation for sending the e-mail of 2 October 2005 was true (paras. 174-181). The third issue concerns the judge's explanation, or lack of same, for delivering a bundle of documents to Mr Barber on 5 October 2005 (paras. 179-80).

[28] The e-mail to Mr Barber of 2 October 2005 is set out at para. 66. It resurrected the City's conduct in the Thelma Avenue Property development. That development had formally been approved by the City in January 2004, and the Inquiry Committee found that the judge and his neighbours had ceased all opposition to the project no later than 12 August 2004.

[29] The majority opinion appears to accept that it can not interfere with the Inquiry Committee's refusal to accept the judge's evidence that he was not aware on 2 October 2005 that he had been assigned to sit on the SOS application (paras. 154-156). And the majority accepts the Inquiry Committee's findings that, on 4 and 5 October 2005 when he sent the e-mail and documents to Mr Barber, the judge knew he had been assigned to sit on the SOS application (para. 161).

[30] That leaves the question of whether the Inquiry Committee was wrong in not accepting the judge's explanation for sending the e-mail to Mr Barber on 2 October 2005. That explanation was the judge's recent reading of the Bellamy report. The judge appears to have put that forward in his evidence to explain the troubling coincidence of his sending the e-mail to Mr Barber on 2 October 2005, rather than knowledge on that date that he was assigned to sit on the SOS application.

[31] The judge's explanation based on the Bellamy report was not unequivocal. In his evidence he said:

> Q. You indicated that (you) weren't aware that you were going to be sitting on the SOS application when you emailed Mr. Barber on the 2nd.
>
> A. That is correct.
>
> Q. And what prompted your email on the 2nd was the Bellamy report.

A. Correct.

Q. That had come out several weeks earlier. How was it that several weeks after the report came out, with all of the attendant publicity, that you decided on a Sunday to email Mr. Barber?

A. I don't know. Everyone in our court got a copy of the complete Bellamy report with a CD. I brought it home, and I was looking for an opportunity when I could spend some time and read it.

It interested me. I had read about it in the newspapers, and I knew generally what she had said in her report, and I finally got around to reading the actual report.

I cannot tell you now exactly when I read it, but it was not long before October 2.

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

[32] It was open to the Inquiry Committee to find the explanation unconvincing.

[33] However, even if one accepts the judge's recent reading of the Bellamy report as his explanation for sending the e-mail of 2 October to Mr Barber, it is difficult to see how that fact could justify or legitimize his conduct. The judge was again engaging in his public campaign against the Thelma Road project in a way that was entirely inappropriate for a judge. What triggered this renewed activity is really irrelevant to the question of whether it was appropriate conduct for a judge to engage in.

[34] The Inquiry Committee said:

> [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 finding of fact that reflects the position expressed by Justice Matlow.

> [190] However, clear and cogent evidence established 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*.

[35] The majority opinion discloses no good reason for interfering with that conclusion.

IV. THE EVIDENTIARY ISSUE

[36] Counsel for Justice Matlow argued that the Inquiry Committee erred in holding that letters attesting to the judge's good character, and a statement of community support, were not relevant. The Inquiry Committee's Report on this issue is quoted at para. 147 of the Majority Reasons. The majority holds the view (at paras. 150 and 151) that character evidence is:

> [151] ... relevant to why the acts occurred, the context of the acts, and whether the acts were committed without malice and without bad faith. Character is also highly relevant to the issue of what recommendations should flow from a finding of judicial misconduct. While the weight to be given to this evidence is admittedly for the inquiry committee, and while an inquiry committee may elect to give it little weight, still it is an error in principle to simply ignore this kind of evidence for all purposes. In particular, the evidence is relevant to the sanction phase of the proceedings and ought to have been considered in that context. It was not.

[37] The majority refers to the relevance of the good character evidence again at para. 179.

[38] Having read, and re-read, all of the character letters there is nothing in them that adds to an understanding of why the judge conducted himself as he did, nor to the context in which that conduct occurred. Neither the complainant, nor anyone else, has suggested that the judge acted with malice or in bad faith.

[39] Leaving aside for the moment the possible relevance of the letters to the question of what recommendation should be made, there was no issue before the Inquiry Committee to which the letters had any relevance.

[40] The Majority Report suggests at para. 150 that if there were letters tendered in evidence alleging that a judge was unfit to hold office, such evidence would be relevant and admissible. Depending on the facts of the case, that might well be so. Such evidence would tend to rebut the presumption of good character that a judge enjoys and his general reputation for integrity and good character would be an issue. However, that reasoning cannot support the relevance or admissibility of evidence of good character. On all matters other than the recommendation, evidence of good character in this case is an inconsequential "make weight."

[41] As to whether the letters and statement of community support are a mitigating factor with respect to the appropriate penalty, there is little force in this argument. Those who express support for the judge have no doubt done so in good faith, but they can hardly be said to be objective observers. The community supporters are generally persons who shared the judge's interest in opposing the Thelma Road Project, and who are grateful to him for his efforts on their behalf. Who would not appreciate and be grateful for free legal advice and advocacy from a judge? As to the lawyers and judges who expressed their support for the judge, there is nothing in any of their letters to indicate that they were aware of the full extent of the judge's conduct as developed in the evidence before the Inquiry Committee. As friends and colleagues of the judge, their views can do little more than add to the presumption of good character the judge already enjoyed.

[42] We respectfully agree with the opinion expressed by the Inquiry Committee on this issue at para. 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.

V. THE RECUSAL ISSUE

[43] The Inquiry Committee held that there were three aspects to the judge's conduct in relation to the SOS application. Those three aspects were (para. 182): (1) failing to avoid sitting on the SOS Application; (2) failing to disclose to counsel and to the other two judges his involvement in the Thelma Road controversy, and (3) actually sitting on the SOS Application.

[44] The Inquiry Committee said it would not consider the third aspect, the actual decision not to recuse (para. 183).

[45] However, the Inquiry Committee held that Justice Matlow was in breach of his ethical duties on the first two aspects. As to the first it said:

> [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 any 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 exchanges 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.

[46] As to the second aspect, it said:

> [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 any 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 [sic] the course of which he raised again allegations of impropriety against City Officials and staff.

[47] The Inquiry Committee held that the combination of those two breaches constituted a failure in the due execution of the office of judge.

[48] The majority takes issue with these conclusions for a number of reasons. It says that:

1. In deciding to sit on cases involving the City the judge acted in good faith (para. 132);

2. The Inquiry Committee imposed a purely objective standard on a discretionary judicial decision (para. 133).

[49] As to the first point, the majority opinion implies that a breach of ethical duties may be excused if the judge makes his decisions in "good faith." This seems to be another way of saying that it is not a breach of an ethical duty if one is unaware that his conduct is in breach of an ethical duty. With respect, this is neither good logic nor good ethics.

[50] No doubt the intentional breach of an ethical duty would be a more serious matter. It would evidence dishonesty and lack of integrity. But not all breaches of ethical duties are intentional or deliberate. A person may breach his ethical duties because he is unaware of, or insensitive to, the ethical norms he is expected to observe. Judges are selected from the ranks of the legal profession, which has its own standards of ethical behaviour. By professional training and experience, all judges are expected to be cognizant of, and sensitive to, their ethical obligations in all matters. This is especially so for judges with long years of service. Justice Matlow was first appointed a judge in 1981.

[51] To say that a judge committed the breach of an ethical duty in "good faith" is to say that the judge did not know, or forgot, what his ethical duties were. We do not consider the "good faith" argument to be a satisfactory answer to this aspect of the judge's conduct.

[52] The majority acknowledges that Justice Matlow has a deficient understanding of his ethical obligations when it directs:

> [187] …Therefore, we make the following directions:
>
> …
>
> 2. Matlow will, within a time frame acceptable to the CJC, attend a seminar on Judicial Ethics sponsored by the National Judicial Institute or the Ontario Superior Court Judges Association.

[53] We address the majority's other key concern.

[54] On this point, Independent counsel, Mr Hunt, referred us to the Supreme Court of Canada judgement in *Ruffo*. He said the Canadian Judicial Council does have jurisdiction to consider questions of judicial ethics which are separate and distinct from the standard for recusal. *Ruffo*

makes the point that recusal is a sanction for a "violation" that has already occurred, whereas ethical standards are designed to prevent any "violations" and maintain confidence in judicial institutions.

[55] In *Ruffo*, Justice Gonthier for the majority said:

> 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. … Moreover, the distinctive nature of ethical standards becomes apparent when they are compared with the standard for recusation set out in art. 234 of the *Code of Civil Procedure*, R.S.Q., c. C-25. Article 234 contains a series of precisely defined criteria such as relationship, mortal enmity and conflict of interest, which when present make it possible to initiate recusation proceedings against a judge. Recusation is therefore a necessary sanction for a violation that has already occurred or been perceived, whereas the primary purpose of ethics, in contrast, is to prevent any violation and maintain the public's confidence in judicial institutions. It goes without saying that the same legislative response is not required for these two separate concepts.
>
> (Emphasis added)

[56] The Canadian Judicial Council's statement of *Ethical Principles for Judges* is expressly not a "code." Its purpose is "to provide ethical guidance for federally appointed judges." The principles "… are not and shall not be used as a code of prohibited behaviours. They do not set out the standards defining judicial misconduct."

[57] In *Ruffo*, Justice Gonthier interpreted the relevant section of the *Quebec Code* as aspirational in nature, just as the Statement of *Ethical Principles for Judges* is explicitly stated to be. We are therefore of the view that his analysis of a judge's ethical duties in his conduct preceding recusal proceedings is applicable in this case.

[58] The Inquiry Committee found that the judge failed in his ethical duty to avoid sitting on any matter in which the City was a party, and in his ethical duty to disclose to counsel and to the other two judges with whom he was sitting, the nature and extent of his prior dispute with the City over the Thelma Road Project.

[59] Judges routinely take steps to avoid sitting on any case where there could be a perceived conflict of interest by advising administrative staff that they decline to sit on that case. The conflict might arise because of the judge's relationship with counsel (e.g. a close relative); or because of the judge's relationship with a litigant (e.g. a former client); or because of the judge's interest in a particular issue that could affect his or her objectivity.

[60] The judge takes steps to avoid sitting on all such cases because he or she knows of the potential conflict. The judge avoids sitting without reference to whether anyone else would be aware of the potential conflict. The judge protects his own, and the system's integrity "through compliance with personally imposed constraints" (per *Ruffo*).

[61] Similarly, judges sometimes find it necessary to advise counsel and judicial colleagues of a potential conflict in their hearing a particular case. The judge may be aware that if he does not sit on that case there will be no one to replace him, and there will be attendant delay and expense to the litigants, and inconvenience to counsel. If a replacement judge is not available, counsel, when advised of the judge's apparent conflict may consent to his sitting in any event, because they regard the apparent conflict as of no consequence, or because they are confident the judge will act impartially in spite of the facts he has disclosed. The judge's duty to disclose in advance of his sitting on the case is an ethical duty to be open, honest, and candid with both counsel and colleagues. The duty to disclose is a "personally imposed constraint" to ensure the highest standards of professionalism and collegiality.

[62] These two duties, to avoid sitting, and to disclose in certain circumstances, do not engage the judge's discretion to recuse or not to recuse. They are independent ethical obligations that exist

before the judge commences to hear the case. Those duties are calculated to ensure judicial impartiality and the appearance of same.

[63] We do not consider this analysis to be inconsistent with the Canadian Judicial Council's statement in *Boilard*:

> 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 of 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 to do so. Exercise of a judicial discretion is at the heart of judicial independence.
>
> (Emphasis added)

[64] To quote further from the Canadian Judicial Council Report in *Boilard*:

> … When Justice Boilard was in the middle of an extremely difficult and highly-publicized jury trial, the Canadian Judicial Council sent him a strongly-worded letter criticizing him for the way he had treated one of the counsel in a related case. Before receiving his copy, Mr. Justice Boilard became aware that a copy of the letter was in the hands of a journalist. After considering the matter for four days, Justice Boilard determined that he no longer had the "moral authority and perhaps also the necessary capacity to continue my function as a judge in this trial" and that the parties, counsel and others, presumably including the jurors, might "question the propriety of my decisions or of any actions I may take."

[65] The "circumstances leading up to" Justice Boilard's decision to recuse himself occurred well after he had commenced presiding at that trial. He had no opportunity in advance of the trial to avoid sitting on it, or to advise counsel. His only choice was to recuse himself or not. Not all judges might have followed the same course of action, but it was his decision to make. There was an ethical component to his decision, but it was within his discretion to recuse or not.

[66] The Inquiry Committee correctly understood the clear distinction between the *Boilard* case and this case:

> [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. …

[67] With respect, the Inquiry Committee correctly applied the analysis provided in *Ruffo* to the facts of this case.

[68] In our opinion, the Council's statement in *Boilard* excepting "bad faith or abuse of office" from discretionary decisions that are not reviewable by Council, does not require the further explanation or elaboration the majority suggests (at paras. 131, 135 and 138). In the first place, in the context of *Boilard*, the statement quoted at para. 63 above clearly refers to the conduct of a judge already engaged in a hearing, and not to anything that occurred before. Secondly, both "bad faith" and "abuse of office" are phrases capable of broad meaning, but which must be understood and applied against particular facts. To add to those phrases, "analogous conduct" as the majority proposes, is both unnecessary and apt to lead to confusion.

[69] We disagree that the Inquiry Committee treated *Ethical Principles for Judges* as a code of conduct. The *Ethical Principles* do not prohibit judges from hearing cases where the judge is in a position of conflict, nor do they mandate disclosure to fellow judges of the facts that would put a judge in a position of conflict. As explained above, those are ethical duties which should be self-evident to the ethical judge.

[70] What the *Ethical Principles* give to judges is general guidance as to how they should conduct themselves so as to maintain public confidence in judicial impartiality. The *Ethical Principles* say (p. 27):

> Statement:
>
> *Judges must be and should appear to be impartial with respect to their decisions and decision making.*
>
> Principles:
>
> A. General
>
> 1. Judges should strive to ensure that their conduct, both in and out of court, maintains and enhances confidence in their impartiality and that of the judiciary.
>
> 2. Judges should as much as reasonably possible conduct their personal and business affairs so as to minimize the occasions on which it will be necessary to be disqualified from hearing cases.
>
> 3. <u>The appearance of impartiality is to be assessed from the perspective of a reasonable, fair minded and informed person.</u>
>
> (Emphasis added)

[71] The third principle is an explicit statement of an objective test. It is the test judges should apply in deciding whether to sit on a case, whether to inform counsel or judicial colleagues of the facts that might give rise to a conflict, and whether they should recuse themselves. So we do not consider that the Inquiry Committee erred in articulating an objective standard (paras. 170-172 and 186 of its report) as the majority suggests. The Inquiry Committee correctly understood and applied the *Ethical Principles for Judges.* The majority opinion does not give effect to the third principle of impartiality quoted above.

[72] Finally, it is important to remember that the Inquiry Committee expressed no opinion on the judge's decision not to recuse himself.

[73] If the judge had considered in advance of the SOS application whether a "reasonable fair-minded and informed person" would have seen an appearance of bias in his sitting on that application, he could only have come to the conclusion that such a person would. Similarly, if he

had told counsel and the other two judges about his history with the Thelma Road Project, there can be no doubt that all would have encouraged him to step aside and to avoid the evident apprehension of bias.

[74] In his evidence before the Inquiry Committee, Justice Matlow belatedly acknowledged his error. He said in part:

> If I had to do it over again, I would have followed one or two other and I think better approaches. I could have, I think, at the opening of the hearing, told counsel and my two colleagues on the panel what I had done 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.

[75] As Justice Gonthier points out in *Ruffo*, the primary purpose of ethics is to avoid circumstances that necessitate recusal. Their purpose is to prevent the appearance of impropriety from occurring, rather than to address one that has already occurred. It is important not to conflate a judge's ethical duties, by which he is always bound, with a judge's discretion in making a particular judicial decision.

[76] With respect, the Majority Reasons misapprehend the Inquiry Committee's findings in this respect. The judge failed in his ethical duties before he commenced to hear the SOS application. What he did after he heard the application, in failing to recuse himself, was a matter the Inquiry Committee did not address, and is an issue that we need not consider on this aspect of the review.

[77] In short, we see no error in the findings, analysis or conclusions of the Inquiry Committee on the recusal issue, and agree with the Inquiry Committee's conclusion at para. 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*.

V. THE APOLOGY

[78] Justice Matlow made a statement to the Canadian Judicial Council on Monday, 21 July 2008. That statement should be read in its entirety. It contains the following points:

1. He is sad because these proceedings have caused embarrassment to the administration of justice (p. 4);

2. He is prepared to accept the consequences of his conduct exactly as it occurred (p. 6);

3. He believes he was acting as a good citizen and a good judge (p. 7);

4. The complaint against him had nothing to do with the Thelma Project (p. 9); and

5. He is now painfully aware that the Inquiry Committee determined that he made many errors and engaged in various forms of inappropriate conduct.

6. He has already acknowledged some of his errors of judgement and apologized for them. For any other errors he made and for any inappropriate conduct he engaged in he apologizes without reservation.

7. He is particularly sorry for any embarrassment that he has caused to the administration of justice. He wishes that he had acted differently. If he were aware

at the time that any of his conduct was wrong or inappropriate he would not have engaged in it.

8. The Inquiry Committee expressed concern that he would repeat the conduct that led them to recommend that he be removed from the bench.

9. In response to that concern he promises in the most binding way that he can conceive that if he is permitted to remain in office as a judge he will never repeat conduct similar in any way to the conduct that might be found offensive. He will, without exception, conform to Councils' views. (pp. 11 and 12)

[79] In his evidence on cross-examination before the Inquiry Committee the judge said 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)

[80] The Inquiry Committee dealt with the judge's expression of regret in its report and quoted substantially the whole of the judge's evidence on this issue.

[81] The Inquiry Committee concluded:

> [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.

[82] The apology tendered by the judge to the Canadian Judicial Council on 21 July 2008 must be read in light of the Inquiry Committee's findings of misconduct at para. 205 of its report, and in light of the judge's expression of regret in his evidence.

[83] It is clear from the judge's statement that he does not consider any apology is necessary for his involvement in the Thelma Road Project. In our view this is a serious omission, and

demonstrates a lack of insight into the limits imposed by the judicial office, and the impropriety of his conduct in using his position as a judge to advance his and his neighbour's cause against the City of Toronto.

[84] With respect to sub-paras. (vi) and (viii) of para. 205, sitting on cases involving the City, and participating in the SOS hearing, the apology is incomplete and equivocal. The judge apologizes "if" he has caused harm to the administration of justice. Similarly, his expressions of regret as to the matters summarized at sub-paras. (vii) and (ix) of para. 205 have more to do with the harm that his conduct has caused to him and his family, than they have to do with acknowledging the full extent of his wrongful conduct, and the harm it caused to public confidence in the administration of justice.

[85] The apology to the Canadian Judicial Council was inadequate. The conduct complained of spanned the years 2002, 2003, 2004 and 2005. The judge's acknowledgment of misconduct has been slow in coming. When the judge was asked to recuse himself from the SOS case in October 2005 the judge rejected any suggestion of impropriety. Rather, in his decision refusing to recuse, he attacked others. He said:

> Rather than reprimand the City officials who had exceeded their authority and had executed the unauthorized formal joint venture agreement and then rescind it, members of City Council met in a secret meeting and retroactively authorized it. This, I felt, was the ultimate whitewash and betrayal. I and thousands of people in my community who had joined in the cause could not believe what the City had done to our neighbourhood against our wishes and for no good reason. Having become such a thorn in the side of some people in the City's administration, perhaps I should not be surprised at the reaction which is reflected in the bringing of this motion (paragraphs 51 & 52).

[86] In 2006 when the City's complaint was referred to a panel of the Council constituted under s. 9 of the *Complaint Procedures* it does not appear that the judge offered any kind of an apology or expression of remorse. According to the panel's report of 1 February 2007, the judge attempted to justify his conduct, or challenged the Council's jurisdiction to inquire into it.

[87] The first attempt at an apology therefore appears to have been in his evidence to the Inquiry Committee in January 2008. As we have said this is not a full acknowledgement of the extent of his misconduct, or an unequivocal apology.

[88] To that must be added his statement to the Council on 21 July. In the context of all that went before, the statement is not a full and frank acknowledgement of misconduct, nor a genuine expression of remorse. The majority appears to acknowledge that Justice Matlow's apology has thus far been inadequate, when it directs that Justice Matlow:

> [188] Therefore, we make the following directions:
>
> 1. Justice Matlow will provide, in writing and in a manner satisfactory to the CJC, full and unqualified individual apologies to the City Solicitor; the staff lawyer about whom Justice Matlow wrote to the City Solicitor; the independent counsel retained by the City; the City; the Attorney General of Ontario; and the TPA, with respect to Justice Matlow's actions that were directed to them or affected them in any way in connection with the Thelma Road Project.

[89] We consider Justice Matlow's statement to Council on July 21, 2008 to be of limited value in deciding what recommendation should be made.

VI. IS A RECOMMENDATION FOR REMOVAL FROM OFFICE WARRANTED?

[90] Whether one accepts all of the findings of misconduct made by the Inquiry Committee, as we do, or the modified findings of the Majority Report, the essential question in this case is whether the judge's conduct warrants a recommendation of removal from office for any of the reasons specified in s. 65(2) of the *Judges Act*.

[91] Counsel for Justice Matlow made a forceful submission that such a recommendation would be disproportionate to the impugned conduct.

[92] He said that conduct does not meet the Marshall test of being "so manifestly and profoundly destructive of the concept of impartiality and integrity and independence of the judicial role that public confidence would be sufficiently undermined to render the judge incapable of executing judicial office." Counsel said this is not a "capital case" and further, that if the judge were not a judge "we would be praising his conduct." In his oral submissions on whether removal from office is justified, counsel for the judge said that "like other professional cases" it was important to look at the "whole person" and not focus solely on misconduct. Counsel stressed the evidence of support for the judge including letters from his peers and others, and the statement of community support.

[93] Other cases of misconduct by Superior Court judges provide little guidance in the circumstances of this case. The Canadian Judicial Council recommended the removal of Justice Bienvenue for some inappropriate remarks, and other conduct, in the course of one case. It did not recommend removal of Justice Flynn for having made inappropriate comments to the media in an isolated incident. It held it did not have jurisdiction to review Justice Boilard's decision to recuse himself, as discussed above.

[94] The New Brunswick Judicial Council recommended removal of Judge Moreau-Bérubé of the Provincial Court for stereotypical comments she made in the course of a sentence hearing. Its decision was upheld by the Supreme Court of Canada.

[95] None of these, or other conduct review cases, approach the duration or magnitude of the misconduct engaged in by Justice Matlow in this case. He participated in the Thelma Road Project for over two years, and even now does not recognize that to have been serious misconduct, or consider that he should apologize for it. His failure to apologize for his intemperate language and his inappropriate comments to the Attorney General of Ontario, the City solicitor and others demonstrate a regrettable lack of insight into the nature and extent of his misconduct, and its damaging effect on public confidence in the administration of justice.

[96] We respectfully agree with the Inquiry Committee (paras. 114-122) that the *Charter* protections of free speech and free association have no application to the circumstances of this case. We do not accept the submissions advanced by counsel for Justice Matlow to the contrary.

[97] The *Marshall* test requires us to assess the judge's conduct from the public's perspective. We are to assess how the judge's conduct would affect the public's view of judicial impartiality, integrity, and independence. We are to inquire whether public confidence would be so damaged as to render the judge incapable of exercising the judicial office.

[98] Here, adopting the majority's reduced findings of fact as set out in para. 6 above, the judge's conduct was incompatible with the due execution of the office of judge in five particulars. Each of them is serious. The conduct persisted over a period of more than two years. The majority acknowledges that the judge has yet to make a fully apology, and his failure to do so must of necessity demonstrate a lack of insight on his part.

[99] The Canadian public is entitled to expect much better of its judges. We believe it does expect much better. To permit this conduct to pass with an admonition and with the advice contained at para. 187 of the Majority Report, would fail to meet those reasonable expectations.

[100] In his submission, counsel for the judge said that if Justice Matlow were not a judge "we would be praising his conduct." With respect, both counsel and the judge miss the point. As we have attempted to explain in the second part of these reasons, a judge is always a judge, whether in the courtroom or not. What may be praiseworthy in others, can be unacceptable in a judge.

[101] In addressing the nature of the process following inquiries conducted under the provisions of the *Judges Act*, the majority makes the point that Council is not bound by the findings of an Inquiry Committee. We do not disagree.

[102] The majority then goes on to say:

> [55] This responsibility on the CJC to make its own independent assessment and judgement is as it should be given the serious nature of the interests at stake. Those interests include both the need to preserve public confidence in the integrity of the judiciary and the need to ensure that judicial independence is not improperly compromised through the use of disciplinary proceedings. …

[103] And further:

> [57] The steps in this process form part of the protections essential in preserving judicial independence. This foundational principle of Canada's democracy protects the public by allowing individual judges to make decisions without fear or favour from anyone. In the end, judicial independence ensures judicial impartiality and both reinforce public trust and confidence in our judicial system. Preserving public trust and confidence are essential for, without them, another bedrock principle of our Parliamentary democracy – the rule of law – would be imperilled.

[104] The important distinguishing feature of Justice Matlow's case is that no issue of judicial independence arises. No one has attempted to interfere with the judge's exercise of his judicial functions. All of the impugned conduct occurred in the sphere of non-judicial activity. The judge's failure to recognize and fulfill his ethical duties before hearing the SOS case occurred without the participation or influence of anyone else.

[105] In our opinion, even on the limited findings of fact accepted by the majority, the judge's conduct in this case meets the standard calling for a recommendation for removal from office.

[106] We respectfully endorse the Inquiry Committee's recommendation for removal from office as expressed at paras. 207-208 of its report.

THESE REASONS are agreed by the following Council members:

- The Honourable Ernest Drapeau
- The Honourable Lance Finch
- The Honourable Michel Robert
- The Honourable André Wery