

## **APPENDIX I**



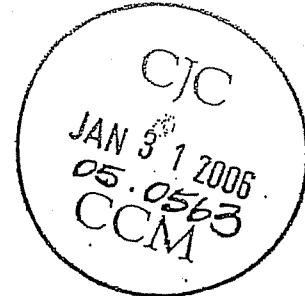
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File No.

January 30, 2006

Canadian Judicial Council  
15 - 150 Metcalfe Street  
Ottawa, ON K1A 0W8



Dear Sir:

Re: The Honourable Mr. Justice P. Theodore Matlow

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

It is my respectful opinion that an investigation into the conduct of Justice Matlow in, among other matters, publicly criticizing the City in media reports and writing to at least one municipal affairs columnist in which he accused the City of conduct akin to corruption while at the same time hearing a very important and highly notorious case involving the City, will show that it was such as to undermine public confidence in the administration of justice in Ontario, and has rendered Justice Matlow incapable of executing his judicial office. It is my opinion that the investigation will demonstrate that the conduct of Justice Matlow meets the test to be applied in these matters, as articulated by the Inquiry Committee of the Canadian Judicial Council in the *Marshall* case, namely that:

*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?*

The conduct to be investigated demonstrates that Justice Matlow has become incapacitated or disabled from the due execution of the office of judge within the meaning of subsection 65(2) of the *Act*. The history of the matter giving rise to this request is summarized in the attached Appendix to this letter.

In brief, in early October, 2005, Justice Matlow presided over a panel of the Divisional Court in *SOS-Save Our St. Clair Inc. v. City of Toronto and Toronto Transit Commission* ("the SOS application"), an application by SOS to stop the St. Clair Avenue West Transit Improvements Project ("the Project"), a joint project of the City and the Toronto Transit Commission ("TTC") that calls for the reconstruction of the existing streetcar tracks on portions of St. Clair Avenue West in the form of a dedicated streetcar right of way. The outcome of that application will affect a large number of citizens in Toronto and its hearing was "highly notorious".

On the morning of the second day of the two-day hearing of the application, I became aware that Justice Matlow was presiding over the SOS application. I was concerned as he had had extensive involvement as President of a ratepayers' association ("Friends of the Village") in a previous matter involving a proposed City-sponsored development located at the corner of Spadina Rd. and Thelma Avenue in Forest Hill Village (the "Spadina/Thelma matter"), the same neighbourhood as the Project. As my recollection was limited and any allegation of bias would be very serious, I initiated a review of that matter before taking any steps within the SOS application. As the relevant files were in storage, that review took almost a week to complete, and the decision on the SOS application (but not the reasons) was released in the interim. The City retained external counsel to review the files and brought a motion promptly thereafter, seeking to recuse Justice Matlow from participating further in the application and to have the decision set aside.

Justice Matlow had been very active in his opposition to the development at the heart of the Spadina/Thelma matter. In his capacity as the President of the Friends of the Village, Justice Matlow was interviewed by various media publications in 2002-2004 in which he was quoted as being critical of the development agreement. Among other claims, he alleged that the City's handling of the Spadina/Thelma matter was improper and a "whitewash." Justice Matlow also engaged in political lobbying, was harshly critical of the City and City staff in various communications, including in letters to Mayor Miller and the Attorney General of Ontario, and was involved as a party, counsel, and source of information in tribunal and legal proceedings in which the City was a party.

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

On the motion to recuse, Justice Matlow refused to recuse himself. In doing so, he was harshly critical of the City's conduct in bringing the motion to recuse after the decision had been reached but before reasons had been released. He stated in his reasons:

"It is even more deplorable for a party against whom an adverse judgment has already been granted to raise frivolous allegations of reasonable apprehension of bias in order to have that judgment set aside so that the party might have another opportunity before another judge, or panel of judges to attempt to do better. I am satisfied that this is what has occurred in this case..." (paragraph 16)

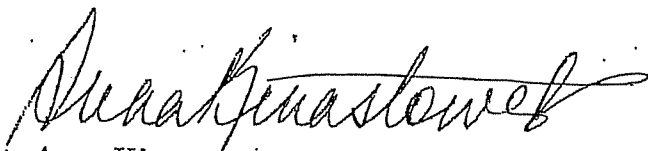
Justice Matlow's reasons contain his review of the Spadina/Thelma matter, including reference to evidence that was not before the court but of which he had intimate knowledge. In his reasons, he alleged that the motion to recuse was a backlash by the City for his conduct in the Spadina/Thelma matter stating: "Having become such a thorn in the side of some people in this City's administration, perhaps I should not be surprised of the reaction which is reflected in the bringing of this motion." Not only is this statement untrue and suggests, without any evidence, misconduct and an improper motive by the City, the inclusion of such statements in the reasons further destroys the concepts of impartiality upon which the justice system is based.

Justice E. MacDonald and Justice Greer, the other two members of the panel, disagreed with Justice Matlow's decision not to recuse himself. They stepped down and ordered that a new panel be struck, stating that they could not support the decision. Leave to appeal this decision has been denied by the Court of Appeal and a new panel of the Divisional Court will be hearing the SOS application *de novo*.

The unsatisfactory manner in which Justice Matlow conducted these proceedings, including not advising his colleagues of the extent of his involvement in the Spadina/Thelma matter, making comments in the media in relation to the Spadina/Thelma matter, and alleging corruption on behalf of the City the day before he was to hear a similar matter, serves to negatively affect the perception of the administration of justice. More details of the City's concerns are set out in the attached Appendix and are described in detail in the Factum filed by the City and TTC in this matter. Given these unfortunate circumstances, the public, particularly the public that the City is charged to represent, can no longer be confident that Justice Matlow will be fair and impartial in adjudicating matters involving the City or indeed in other matters in which he may take a personal interest. I ask that the Canadian Judicial Council investigate this matter and, if found appropriate, take action to restore public confidence in the administration of justice.

Enclosed please find the Factum of the City and TTC on the motion to recuse, the motion materials filed by the City and TTC, the Factum of SOS on the motion to recuse, and the reasons on the motion to recuse by Justice Matlow, and by Justices Greer and E. MacDonald. Should the Canadian Judicial Council need any additional information concerning this matter, please do not hesitate to contact me.

Yours truly,



Anna Kinastowski  
City Solicitor

Encls.

## APPENDIX

## THE SPADINA/THELMA MATTER

In November, 2000, Toronto City Council provided the Toronto Parking Authority ("TPA") with the authority to enter into an agreement for the sale of the above-grade lands located at the corner of Spadina and Thelma Avenue in Forest Hill Village. TPA negotiated with a developer, First Spadina Place Inc. ("First Spadina") for the construction of a ten unit residential complex with underground parking on the site. By the time the agreement was actually executed in November, 2001, First Spadina had changed its plan and was seeking an amendment to the zoning by-law to construct a larger residential and commercial complex (with underground public parking) on the site.

A number of local residents, including Justice Matlow, who resides on Thelma Avenue, opposed the development proposed by First Spadina and formed a ratepayers' association, The Friends of the Village ("Friends"), to fight the sale of the property. Friends alleged that the City Council approval of November, 2000 did not permit the TPA to sell the property to First Spadina for the construction of a residential and commercial complex on the site. An application against the City was commenced in December, 2003 by some members of Friends. First Spadina also eventually made an application to the Ontario Municipal Board ("OMB"). Ultimately, the City retained an independent counsel to review the matter and, upon receipt of his opinion, ratified the agreement between the TPA and First Spadina on January 28, 2004. Friends withdrew from the OMB appeal and the application did not proceed.

(i) **Comments in Media**

Between 2002 and 2004, Justice Matlow was interviewed on several occasions by the media regarding the Spadina/Thelma matter. His reasons for decision in the SOS application make clear that he did so willingly. Justice Matlow commented on what he perceived to be an illegal agreement between the TPA and First Spadina, and was very critical of the City's handling of the matter. In the articles which appeared in a local newspaper (The Town Crier Online) and the National Post, the following comments were attributed to Justice Matlow:

- a) He referred to the agreement with First Spadina as a "secret deal with the developer" and stated that "you can fight City Hall and win" – Town Crier Online article published February 3, 2003

b) Regarding the subsequent ratification by City Council on January 28, 2004, the media reported: "Mr. Matlow says that it is tantamount to an admission the City felt legally vulnerable... "They want to whitewash everything," Mr. Matlow says". - National Post article published February 2, 2004

c) He compared the Spadina/Thelma matter to the notorious MFP computer leasing scandal and stated: "I think they [the City] didn't want another scandal, so they wanted to hush the thing up and sweep it under the carpet". - Town Crier Online article, dated March 19, 2004.

A complete set of the newspaper articles filed by the City in which comments are attributed to Justice Matlow is contained in the motion materials attached. Many of the comments include Justice Matlow's views of the legality of the development agreement.

**(ii) Political Lobbying**

Justice Matlow appeared in person before the Administration Committee of the City on May 28, 2002 and before the Midtown Community Council on July 8, 2003, all to oppose the development. He also contacted Councillor Holyday, then a member of the Administration Committee by email. These lobbying efforts were made with the intention to affect decisions made by the City.

**(iii) Criticisms of City Staff**

In addition to the political lobbying and media interviews, Justice Matlow also wrote to the Auditor-General for the City in September, 2003. In his correspondence, he was unfairly critical of a City solicitor. He stated that the opinion of the solicitor "is blatantly wrong and ridiculous" and that "if her report had been written as part of a first year law school examination, she would undoubtedly receive a failing mark".

Justice Matlow also wrote to Mayor Miller, seeking his intervention to "reverse a violation of law".

Justice Matlow also told independent counsel (to whom he referred to as "so called independent counsel" in his reasons on the motion to recuse) retained by the City that "devious acts had taken place" and advised independent counsel that the City could avoid a legal confrontation and adverse legal media publicity, if the independent counsel gave the City sound advice. These comments implicitly contained a threat of legal proceedings against the City.

(iv) **Tribunal and Legal Proceedings**

In November, 2003, Justice Matlow wrote to the Attorney-General of Ontario, seeking his intervention to "require that the City comply with the rule of law". Justice Matlow indicated that legal proceedings were then being contemplated and that his letter to the Attorney-General was made, in part, in an attempt to avoid that litigation. Justice Matlow indicated that time was of the essence as there was an appeal to the OMB to be heard on January 12 and 13, 2004.

In January 2004, Justice Matlow sought and was made a party to the appeal to the OMB brought by First Spadina. He was subsequently noted to have appeared at the OMB as counsel to Friends (something Justice Matlow denies occurring). Justice Matlow also was the source of information in an application brought in the Superior Court of Justice in Ontario by certain area residents, who are also members of Friends, in which the City was named as a respondent. Justice Matlow threatened the City with legal proceedings on a number of occasions, including to independent counsel, but did not join the application as a party.

Following the ratification by City Council in January, 2004, Justice Matlow withdrew from the OMB hearing. The application did not proceed.

**SOS APPLICATION**

SOS, a ratepayers' association, brought an application in August, 2005 to the Divisional Court in Ontario ("the SOS application") seeking a determination that the St. Clair Avenue West Transit Improvements Project, a joint project with the City and the Toronto Transit Commission for the reconstruction of the existing streetcar tracks on St. Clair Avenue West in the form of a dedicated streetcar right-of-way did not conform with the Official Plan, among other matters.

The SOS application was heard on October 6 and 7, 2005 before Justices Matlow, Greer and E. MacDonald. At no time during the hearing did Justice Matlow advise counsel or his colleagues of the extent of his previous involvement in the Spadina/Thelma matter.

Counsel who attended in Divisional Court on behalf of the City on the SOS application was not aware of Justice Matlow's involvement in the Spadina/Thelma matter until the evening of the first day of hearing when he was preparing for his argument the next day. At that time, he was given no specific information on which he could reasonably act. When I was advised the following morning of Justice Matlow's involvement (the hearing ended midday), I authorized a review into matters involving Justice Matlow to determine whether there was a basis for concern.

Given the seriousness of an allegation of a reasonable apprehension of bias, a thorough review was necessary before any action was taken. The Divisional Court rendered its decision on October 11, 2005, while the investigation by the City was ongoing. All files were pulled and reviewed, and external counsel retained on Friday, October 14. The recusal motion was brought promptly on Wednesday, October 19, 2005, at the earliest opportunity.

### THE RECUSAL MOTION

On October 20, 2005, the day after the recusal motion was filed in the Divisional Court, an article appeared in the Globe and Mail by municipal affairs columnist, John Barber. In this article, Mr. Barber indicated that Justice Matlow had been in communication with him a few weeks previously, in which he had made allegations against the City in relation to the Spadina/Thelma matter. Mr. Barber was examined as a witness on the recusal motion, in which he produced the materials he received from Justice Matlow. These materials revealed that, on October 5, 2005, the day before the hearing of the SOS application, Justice Matlow delivered a package of documents to Mr. Barber and sent an email in which he explained the background to the Spadina/Thelma matter. In that email, he alleged activity akin to corruption on behalf of the City, stating:

"A group composed of local businesses who belonged to the local BIA and local residents, then started a court action to have the agreement with the developer set aside. That led to more *really awful and devious things* and, finally, without notice, city council met one night and approved the unauthorized agreement retroactively. In accordance with the legal advice that they then received, the applicants stopped the court action and gave up.

For all of us what occurred was a betrayal of our community. We no longer believed that the new mayor was interested *in uncovering dishonesty at City Hall* and preserving existing neighbourhoods as he so often proclaimed.....

Despite my misgivings about getting involved in a public issue because of my judicial position, I decided to go ahead because the issue affected me directly as a resident and I was entitled to speak out against what I perceived to be *improper conduct by a group of city officials.*" [emphasis added]

In his article of October 20, 2005, Mr. Barber indicated that he had previously read all of Justice Matlow's "unsolicited emails" to him which he interpreted as a complaint that the City's handling of the Spadina/Thelma matter was "somehow crooked". The column further indicated that the package of documents by Justice Matlow delivered to Mr. Barber on October 5, 2005 "landed on his desk" during the course of the hearing of the SOS application. During the course of the hearing of the recusal motion, Justice Greer confirmed that at the time



that Justice Matlow delivered these documents and email to Mr. Barber, he was aware, as were all members of the panel, that he had been assigned to hear the SOS application in which the City was a named respondent. Justice Matlow indicated in his dissenting decision that he had sent information to a few columnists, in addition to Mr. Barber, to solicit them to write "his story". The identities of the other columnists is unknown to the City.

(i) The Decisions on the Recusal Motion

Justice Matlow wrote the dissenting decision on the recusal motion, in which he refused to recuse himself from the SOS application. In doing so, he indicated that the City had waived its right to bring this motion because of the delay in waiting until after the judgment was reached. In particular, he stated that the City had only brought the motion and had raised what he considered to be "frivolous" allegations of a reasonable apprehension of bias solely in order to judge shop, having received an unfavourable decision. Justice Matlow also found that there was no reasonable apprehension of bias.

In his decision, Justice Matlow reviewed the entirety of the Spadina/Thelma matter, including reference to information that was not in evidence. In that decision, he again reiterated that he "saw clear evidence of what (he) perceived was wrongdoing by officials of the City" (paragraph 45). With respect to the ratification, he stated:

"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).

With respect to the development itself, Justice Matlow remained critical of the City stating "The rationale for the joint venture, namely, to increase the number of public parking spaces in the Village was so transparently false as to defy belief" (paragraph 80).

Though the panel decided that Justice Matlow should determine whether or not to recuse himself, having refused to do so, Justices Greer and MacDonald rendered their own separate decision, indicating that they had not been aware of the extent of Justice Matlow's involvement in the Spadina/Thelma matter, including the email to John Barber the day before the application hearing was to commence. In their view, there was a reasonable apprehension of bias. Upon

receipt of that decision, Justice Matlow wrote additional paragraphs to his reasons which were critical of the decision taken by his colleagues.

A motion for leave to appeal the decision by SOS has been denied by the Court of Appeal and the application will be remitted to the Divisional Court for a new hearing. Nonetheless, I remain concerned of the allegations that Justice Matlow has publicly made against the City and, as well, the effect that these proceedings may have on any further matters before him, given his obvious suspicion of and perceived animosity towards the City. In my view, such conduct and his public exposition of it has jeopardized the perception of the administration of justice.