APPENDIX II

DECISION OF THE INQUIRY COMMITTEE

CONSTITUTED UNDER SUBSECTIONS 63(2) AND 63(3) OF THE *JUDGES ACT* IN RELATION TO MR. JUSTICE THEODORE MATLOW OF THE ONTARIO SUPERIOR COURT OF JUSTICE

Re: Motion to Quash the Summons to Witness served on John Barber

Issued December 7, 2007

MEMBERS OF THE INQUIRY COMMITTEE

The Honourable Clyde K. Wells
Chief Justice of Newfoundland and Labrador
(Chair)

The Honourable François Rolland
Chief Justice of the
Superior Court of Quebec
(Member)

The Honourable Ronald Veale
Senior Judge of the
Supreme Court of Yukon
(Member)

Douglas M. Hummell
Barrister and Solicitor
St. Catharines, Ontario
(Member)

Maria Lynn Freeland
Barrister
Meadow Lake, Saskatchewan
(Member)

COUNSEL FOR THE HONOURABLE THEODORE MATLOW

Paul J.J. Cavalluzzo
Fay C. Faraday

INDEPENDENT COUNSEL

Douglas C. Hunt, Q.C.
Andrew Burns

COUNSEL FOR JOHN BARBER

Peter M. Jacobsen
Iona Bala

COUNSEL TO THE INQUIRY COMMITTEE

Nancy K. Brooks

REASONS FOR DECISION

Introduction

[1] This proceeding was initiated by a complaint concerning Justice Theodore Matlow, a judge of the Ontario Superior Court of Justice, received from the City Solicitor of the City of Toronto, Anna Kinastowski. In her letter to the Canadian Judicial Council, Ms. Kinastowski requested 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 *Judges Act*, R.S., 1985, c. J-1 (the "*Act*"). Pursuant to the Council's *Complaints Procedures*, a Panel of the Council was established to consider the allegations raised in the complaint. The Panel reported its conclusions to the Council which, after considering the report of the Panel and the written submissions of Justice Matlow, concluded that there should be an investigation pursuant to subsection 63(2) of the *Act*. Under that provision of the *Act*, the Council may investigate any complaint or allegation made in respect of a judge of a superior court. Section 63(3) provides that the investigation may be carried out by an Inquiry Committee.

[2] The Council designated three of its members to sit on this Inquiry Committee: The Hon. Clyde K. Wells (chair), The Hon. François Rolland and The Hon. Ronald Veale. The Minister of Justice designated Douglas Hummell and Maria Lynn Freeland, members of the bars of the Provinces of Ontario and Saskatchewan, respectively, to sit on this Committee.

[3] The Chairperson of the Judicial Conduct Committee of the Council appointed Douglas Hunt, Q.C., as Independent Counsel. In accordance with s. 3 of the *Canadian Judicial Council Inquiries and Investigations By-laws*, SOR/2002-371 (the "By-laws"), it is the role of Independent Counsel to present the case to the Inquiry Committee, including making submissions on questions of procedure or applicable law that are raised during the proceedings. Independent counsel is to perform his duties impartially and in accordance with the public interest.

Nature of the Motion

[4] Ms. Kinastowski's allegations in respect of Justice Matlow arise following court proceedings (the "SOS Application") in which Justice Matlow sat as a member of a three-

judge panel of the Ontario Divisional Court, which followed a quite public dispute between a group of citizens, including Justice Matlow, and the City of Toronto. For the purposes of this motion, the Committee does not need to say more about the Divisional Court proceedings. Given the nature of the complaint, the Committee's mandate requires it to investigate, amongst other matters, the interaction between Justice Matlow and Mr. Barber, a journalist writing for the Globe and Mail newspaper. At the request of Independent Counsel, the Inquiry Committee issued a summons to witness requiring Mr. Barber to attend the hearing of the Committee scheduled to commence January 8, 2008, to give evidence and to bring with him documents falling within the description of documents set out in the summons to witness.

[5] Mr. Barber brought a motion to have the summons to witness quashed. His position, in essence, is that documents produced by Mr. Barber, and testimony by Mr. Barber before a special examiner, in response to a summons to witness issued on the City's motion to have Justice Matlow recuse himself from the SOS Application, (the "Recusal Motion") should be accepted into evidence by the Committee, obviating the need for Mr. Barber to testify.

[6] Both Independent Counsel and counsel for Justice Matlow opposed Mr. Barber's motion. At the conclusion of the hearing, the motion was dismissed by the Committee, with reasons to follow. These are those reasons.

Issues

[7] In support of his motion, Mr. Barber made several arguments. In general terms, he asserted that:

(i) his testimony is neither necessary nor relevant;
(ii) alternative sources of information are available to Independent Counsel and to counsel for Justice Matlow; and
(iii) compelling him to testify would be an infringement of his rights as a journalist, under section 2(b) of the *Canadian Charter of Rights and Freedoms*, to gather and disseminate news.

[8] Mr. Barber also contends that the infringement of his *Charter* rights would be particularly serious "given that Mr. Barber has no further information to provide other than

that which is already available to Independent Counsel on the public record" (Barber factum para. 1). However, he identifies the issues on the motion to be:

(a) What is the test for compelling members of the media to testify through a summons or subpoena?

(b) Has Independent Counsel met the test in this case?

Analysis

[9] Counsel for Mr. Barber cites numerous authorities to provide support for his arguments. Legal guidance for the Committee to consider and dispose of Mr. Barber's application can be found in one of the cases he cited, *Canadian Broadcasting Corporation v. Lessard*, [1991] 3 S.C.R. 421. From that decision, counsel for Mr. Barber quoted the following excerpt from the reasons of Justice McLachlin (as she then was), writing in dissent:

> The history of freedom of the press in Canada belies the notion the press can be treated like other citizens or legal entities when its activities come into conflict with the state. Long before the enactment of the *Charter*, the courts recognized the special place of the press in a free and democratic society. (at p. 450)

[10] There are limitations, however, on the "special place of the press". Having made the observation cited above, McLachlin J. quoted with approval from a decision of the English Court of Appeal in *Senior v. Holdsworth, Ex parte Independent Television News Ltd.*, [1976] 1 Q.B. 23 (C.A.), at p. 34, where Denning M.R. summarized the position of the media as follows:

> ... there is the special position of the journalist or reporter who gathers news of public concern. The courts respect his work and will not hamper it more than is necessary. [Emphasis added.]

[11] Cory J., writing for the majority in *Lessard*, also accepted that the media are entitled to special consideration because of the importance of their role in a democratic society but he too recognized that the media's rights are not absolute. In deciding this motion, this Committee is guided by the principle that it should not hamper Mr. Barber's role as a member of the media more than is necessary in all of the circumstances of this investigation.

[12] Mr. Barber argued that the criteria set out in *R. v. Hughes*, [1998] B.C.J. No. 1695, should be applied when a court is considering whether a member of the media should be

summoned as a witness in respect of a matter in which he has been involved as a member of the media. Independent Counsel addressed Mr. Barber's arguments in the context of what he referred to as "Mr. Barber's proposed test".

[13] *R. v. Hughes*, a decision of the B.C. Supreme Court, was concerned with an application to compel production of a reporter's notes in a criminal case. In the Committee's view, the B.C. Supreme Court aptly set out the relevant principles where evidence is sought to be compelled from a member of the media. The Committee is not bound by *R. v. Hughes.* However, given the manner in which counsel framed their argument and the Committee's view that the analysis in *R. v. Hughes* sets out a non-exhaustive list of the relevant factors to be considered, it will consider the factors as presented in that case.

[14] Before doing so, the Committee notes that, as stipulated by section 7 of the By-laws, it shall conduct its investigation in accordance with the principle of fairness. This Committee has no power to make a decision regarding the removal, or not, of Justice Matlow from office. Under Canada's constitution, that is a decision for Parliament alone. However, the Committee's mandate is to submit a report to the Council setting out its findings and its conclusions in respect of whether or not a recommendation should be made for the removal of Justice Matlow from office. Given the mandate of the Committee, and the impact a Committee's findings and report may have on the judge whose conduct is under investigation, Justice Matlow is entitled to a high standard of procedural fairness. The Committee notes as well that section 64 of the *Act* affords the judge "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". It is in this statutory context that Mr. Barber's motion to quash the summons to witness must be considered.

[15] In *R. v. Hughes*, the court considered the following list of factors, noting that the list was non-exhaustive.

(i) Whether the testimony sought is material and relevant

[16] Mr. Barber's assertions respecting materiality and relevance contain no factual basis or argument that would dislodge the cogent argument of Independent Counsel as to the relevance of the interaction between Justice Matlow and Mr. Barber to the purpose of the Committee's investigation. It is manifest from the content of the particulars, filed by Independent Counsel, that Mr. Barber can provide material and relevant evidence respecting

certain actions of Justice Matlow that are the subject matter of the investigation. The Committee is satisfied that Mr. Barber's testimony will be material and relevant.

(ii) Whether the testimony sought is necessary

[17] In addition to materiality and relevance being manifest on the face of the particulars, it is also manifest that Mr. Barber may be the only compellable witness who can provide evidence in relation to the interaction between Justice Matlow and Mr. Barber. As Independent Counsel and counsel for Justice Matlow point out, the evidence of Mr. Barber bears on the very essence of the purpose of the inquiry. In the Committee's view, there is no question as to the necessity of Mr. Barber's evidence. Necessity, therefore, is also established.

(iii) Whether the testimony sought has probative value

[18] Relying on *R. v. Hughes*, Mr. Barber argues that "where the probative value of the evidence is slight it may not justify the compelling of members of the media to testify, particularly where the media's function may be compromised" (Barber factum, para. 63). He then argues that "since the evidence has not been shown to be material or relevant, it can have no possible probative value" (Barber factum, para. 65). However, given the Committee's conclusion that materiality and relevance have been clearly established, Mr. Barber's underlying premise fails.

[19] Mr. Barber also argues that because he "has nothing to add, other than what is already available to Independent Counsel on the public record, any evidence he would provide could have no additional probative value" (Barber factum, para. 65). Independent Counsel argues that Mr. Barber's position assumes that the fact that Mr. Barber gave evidence in some other forum "can somehow obviate the requirement of his attendance by the mere fact of the information's public availability" (Independent Counsel's factum, para. 3).

[20] Mr. Barber's argument assumes that cross-examination will elicit nothing more than what he said when he was examined on the Recusal Motion. However, as Independent Counsel points out, and Mr. Barber's counsel concedes, the evidence given on the Recusal Motion was restricted in scope, by prior agreement. This is apparent from the transcript of the examination of Mr. Barber on the Recusal Motion. The Committee accepts Independent

Counsel's argument that it is reasonable to believe Mr. Barber may have material and relevant evidence beyond that which is on the public record in the Recusal Motion.

[21] Moreover, even if Mr. Barber's evidence on the Recusal Motion had not been restricted by prior agreement, it has not been proven in this forum. The allegations regarding the interaction between Justice Matlow and Mr. Barber are central to this investigation. As noted earlier in these reasons, Justice Matlow has a right to cross-examine and this is codified in the *Act*. Independent Counsel must be able to examine, and counsel for Justice Matlow must be able to cross-examine, Mr. Barber, in order to ensure that all relevant and material evidence, which is probative of the issues in the investigation, is brought before the Committee. Mr. Barber's evidence is material and relevant. The Committee is satisfied as to the probative value of the testimony of Mr. Barber.

(iv) Whether alternative sources of Information are reasonably available

[22] Again, Mr. Barber relies on *R. v. Hughes* to argue that, "the party who seeks this information should show that there are no alternative sources for this information and that a reasonable investigation has been conducted to look for other sources" (Barber factum at para. 66, emphasis in original). From that he argues that because Independent Counsel is already in possession of a transcript of oral evidence given by Mr. Barber on the Recusal Motion, and in possession of copies of the relevant documents, the evidence is available from another source and the summons should be quashed.

[23] Counsel for Mr. Barber argues that this Committee is able to set its procedures as it sees fit, and therefore there is no need to have Mr. Barber's evidence tendered and proved in accordance with the ordinary rules of evidence. He argues that it is open to the Committee to accept into evidence the transcript and exhibits tendered on the Recusal Motion.

[24] The procedures of this Committee must respect the statutory directives to the Committee, including the provision in the *Act* deeming it to be a superior court. It must, therefore, not only conduct its investigation in accordance with the principle of fairness, but to a standard appropriate to a superior court. It must afford Justice Matlow an opportunity to cross-examine witnesses at the hearing. Taking these statutory directives into account, the Committee holds that the evidence of Mr. Barber must be tendered and be open to cross-examination in accordance with the ordinary rules of evidence, without regard to the fact that it may have been proven on the Recusal Motion. Even if the record of the evidence given by

Mr. Barber on the Recusal Motion could be placed on the record of this inquiry, the Committee could not, in fairness, consider the evidence without according to Justice Matlow an opportunity to cross-examine on it.

[25] Further, even if the Committee were inclined to relax the rules of evidence in the manner sought by Mr. Barber, the court hearing the Recusal Motion is not an alternate source of the evidence. It is not a source at all. It is merely a forum in which the source of the evidence – Mr. Barber – has previously tendered it. The only source of the evidence is Mr. Barber. There is, therefore, no alternate source of the evidence.

(v) Whether the media's ability to gather and report the news will be impaired

(vi) Whether the necessity of the evidence outweighs the impairment

[26] As the above two headings would indicate, those two criteria are treated separately in *R. v. Hughes.* However, Mr. Barber addressed them together and we will consider his arguments on the same basis. Mr. Barber argued in his factum that compelling him to testify "would unduly infringe his right to freedom of the press" (Barber factum, para. 72). In oral submissions before the Committee, counsel for Mr. Barber asserted that if Mr. Barber were compelled to testify, this would discourage the collection and dissemination of news by the media in the future.

[27] Mr. Barber did not file an affidavit and no other evidence was filed in support of the assertion that compelling Mr. Barber to testify would have a chilling effect on the media's ability to collect and disseminate the news.

[28] The Supreme Court of Canada considered a similar argument in *Moysa v. Alberta (Labour Relations Board)*, [1989] 1 S.C.R. 1572. As in the present proceeding, no evidence was filed to support the assertion in that case that compelling journalists to testify before administrative bodies (in *Moysa* it was the Labour Relations Board) would detrimentally affect journalists' ability to gather information. Justice Sopinka noted:

> No evidence was placed before the Court suggesting that such a direct link exists. While judicial notice may be taken of self-evident facts, I am not convinced that it is indisputable that there is a direct relationship between testimonial compulsion and a "drying up" of news sources as alleged by the appellant. (at 1581)

[29] The Court in *Moysa* concluded that no violation of s. 2(b) of the *Charter* had been made out. This Committee reaches the same conclusion here. No evidence was placed before the Committee to support the assertion that the media's ability to gather and report the news would be in any degree impaired or compromised by reason of Mr. Barber being summoned to give the requested evidence. Neither can it be credibly argued that potential impairment can reasonably be inferred from the particulars, or any other information before the Committee.

[30] The Committee has already concluded that Mr. Barber's testimony is necessary. There being no evidence of impairment or potential impairment of the media, there is nothing to weigh against the necessity for the evidence.

(vii) Whether impairment of the media can be minimized by confining the evidence

[31] As noted, Mr. Barber's position is, in essence, that documents produced by him, and his testimony before a special examiner on the Recusal Motion, should be accepted into evidence by the Committee, thereby obviating the need for Mr. Barber to testify and be subjected to cross-examination. The Committee has dealt with this argument under (iv), above, and rejected it.

[32] In the alternative, Mr. Barber makes the request that, if the Committee is not satisfied that the summons should be quashed, "the scope of the summons be explicitly limited to production of the documents already on the public record and, in questioning, to confirmation by Mr. Barber of the circumstances in which these documents were obtained" (Barber factum, para. 80). In oral argument, counsel for Mr. Barber repeated his request that cross-examination be limited. Both Independent Counsel and counsel for Justice Matlow opposed Mr. Barber's requests. Independent Counsel argues the necessity to address the existence of additional evidence beyond the documents delivered by Justice Matlow to Mr. Barber. Counsel for Justice Matlow argued that his right of cross-examination ought not to be pre-empted in this manner.

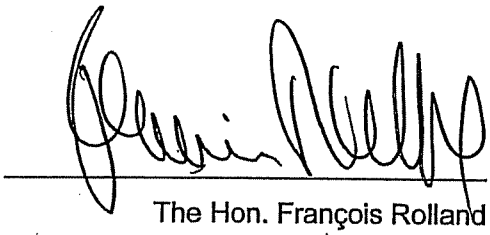
[33] The Committee agrees with Independent Counsel and counsel for Justice Matlow. The Committee has concluded that there is no impairment of the media's ability to collect and disseminate the news. The Committee will not delegate to Mr. Barber the determination of the scope of material and relevant evidence that he may give before the Committee at its

hearing. Given the high standard of procedural fairness owed to Justice Matlow, the Committee declines to limit cross-examination in the manner sought by Mr. Barber.

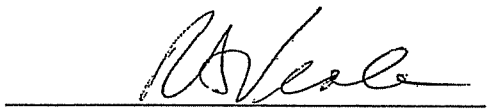
Conclusion

[34] For the foregoing reasons, the motion of Mr. Barber to quash the summons to witness is dismissed. The Committee makes no order respecting costs.

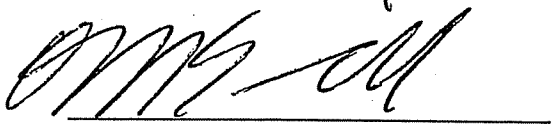
The Hon. Clyde K. Wells
Chair



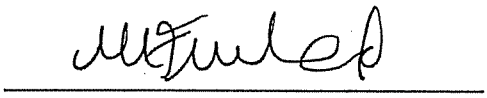
The Hon. François Rolland
Member



The Hon. Ronald Veale
Member



Douglas M. Hummell
Member



Maria Lynn Freeland
Member