

Court File No.: T - 1009-08

FEDERAL COURT – TRIAL DIVISION

BETWEEN:

PAUL THEODORE MATLOW

Applicant

– and –

ATTORNEY GENERAL OF CANADA

Respondent

APPLICATION UNDER Section 18 of the *Federal Court Act*

NOTICE OF APPLICATION

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED by the applicant. The relief claimed by the applicant appears on the following pages.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicant. The applicant requests that this application be heard at Toronto, Ontario.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the Federal Court Rules, 1998 and serve it on the applicant's solicitor, or where the applicant is self-represented, on the applicant, **WITHIN 10 DAYS** after being served with this notice of application.

Copies of the Federal Court Rules, 1998, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date JUN 25 2008

Issued by: Garnet Morgan
Senior Registry Officer
(Registry Officer)

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TO: ATTORNEY GENERAL OF CANADA
c/o Deputy General of Canada
Department of Justice Canada
284 Wellington Street, Room 4121
Ottawa, ON K1A 0H8

APPLICATION

This is an application for judicial review in respect of the Report issued by the Inquiry Committee of the Canadian Judicial Council on 28 May 2008. The Report arises from an investigation conducted by the Inquiry Committee under s. 63(2) of the *Judges Act*, R.S.C. c. J-1, and makes findings of fact and recommendations regarding whether, under s. 65(2) of the *Judges Act*, the Applicant, Mr. Justice Theodore Matlow, has become incapacitated or disabled from the due execution of the office of judge.

The applicant makes application for:

1. An order quashing and setting aside the Report;
2. A declaration that the Inquiry Committee erred in law, exceeded its jurisdiction and violated the rules of procedural fairness and natural justice by excluding relevant evidence from the investigation;
3. A declaration that the Inquiry Committee erred in law, exceeded its jurisdiction and violated the rules of procedural fairness and natural justice by failing to take into consideration relevant evidence that was before the Inquiry Committee and by making findings of fact that were not supported by the evidence;

4. A declaration that the Inquiry Committee erred in law and exceeded its jurisdiction by investigating and making findings and recommendations with respect to matters of judicial discretion and judicial decision-making that are beyond its jurisdiction;
5. A declaration that the Inquiry Committee erred in law, exceeded its jurisdiction and violated the rules of procedural fairness and natural justice by expanding the scope of its investigation to investigate matters and to make findings and recommendations with respect to issues that were not part of the original complaint or the matters referred to the Inquiry Committee;
6. A declaration that the Inquiry Committee erred in law and exceeded its jurisdiction by 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;
7. A declaration that the Inquiry Committee erred in law and exceeded its jurisdiction by deciding that Justice Matlow should have disclosed his past activity to counsel on the *SOS Application* without advertent to an applicable ethical principle which suggests that Justice Matlow acted appropriately;

8. A declaration that the Inquiry Committee erred in law and exceeded its jurisdiction in that it failed to correctly interpret and apply the *Canadian Charter of Rights and Freedoms* in respect of the freedom of expression and freedom of association of judges to participate in the local affairs of his or her community;
9. A declaration that the Inquiry Committee erred in law and exceeded its jurisdiction by failing to appreciate the advisory nature of the applicable ethical principles;
10. Costs of this application; and
11. Such further and other relief as counsel may advise and this Honourable Court permits.

The grounds for the application are:

1. Mr. Justice Matlow is a judge of the Ontario Superior Court of Justice which is a superior court pursuant to s. 96 of the *Constitution Act, 1867*.
2. A superior court judge may be removed from office under s. 99 of the *Constitution Act, 1867* only after a judicial determination of incapacity as set out in the *Judges Act*.

3. On or about 31 January 2006, the City Solicitor for the City of Toronto filed a written complaint with the Canadian Judicial Council with respect to Justice Matlow.
4. On or about 3 April 2007, under s. 63(2) and (3) of the *Judges Act*, the Canadian Judicial Council by resolution constituted an Inquiry Committee to investigate the complaint regarding Justice Matlow.
5. Pursuant to the Canadian Judicial Council Inquiries and Investigations By-Laws, the Inquiry Committee's investigation is conducted by way of public hearing. In particular, s. 7 of the By-Laws provide that:

“The Inquiry Committee shall conduct its inquiry or investigation in accordance with the principle of fairness.”
6. The Inquiry Committee conducted its investigation in respect of Justice Matlow by holding a public hearing on 8, 9 and 10 January 2008 and 8 April 2008.
7. On or about 28 May 2008, the Inquiry Committee released its Report on its investigation.

8. The fairness of the Inquiry Committee's Report is critical in the Canadian Judicial Council's professional misconduct proceedings under the *Judges Act*. In conducting its investigation and making its Report, the Inquiry Committee is required to provide Justice Matlow with a very high standard of procedural fairness because the Inquiry Committee's Report sets out the findings of fact upon which the Canadian Judicial Council as a whole relies in making its independent determination of whether to make a recommendation that Justice Matlow be removed from office. As the Inquiry Committee has noted in para. 13 of its Report:

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

9. The Inquiry Committee has failed to include in its Report relevant facts – including many facts that were uncontradicted in the evidence – that are significant to the proceedings and as a result the Report is unfair,

incomplete and does not provide a basis upon which the Canadian Judicial Council can make an independent, informed and fair recommendation on whether Justice Matlow should or should not be removed from office. The evidence that the Inquiry Committee failed to address in its Report included, but was not limited to, the following:

- a. The evidence disclosed that Justice Matlow had served as a judge since 1981 and made other valued contributions to the profession;
- b. The dispute about the Thelma Parking lot was a local issue concerning the residents on a small street in a neighbourhood community in a very large metropolitan area;
- c. In opposing the development of the Thelma Parking Lot, Justice Matlow had the support of numerous members City Council and other City officials;
- d. In opposing the development of the Thelma Parking Lot, Justice Matlow's position was supported by legal opinions;
- e. The City Council and City Solicitor were aware of Justice Matlow's conduct in opposing the Thelma Parking Lot development during the period from 2002 to 2004. At no point prior to October 2005 did the City complain about Justice Matlow's conduct or request that he not sit on matters involving the City;

- f. Between 2002 and October 2005, Justice Matlow sat on five matters involving the City and the City was successful on four of those matters;
 - g. The City did not complain about Justice Matlow's conduct until after the judicial review application in *SOS - Save Our St. Clair Inc. v. Toronto* (the "*SOS Application*") was decided against the City;
 - h. The Divisional Court panel that allowed the *SOS Application* was unanimous in its conclusion;
 - i. The evidence disclosed that despite knowing of his involvement in opposing the Thelma Project, the community continued to have respect and confidence in Justice Matlow;
 - j. The evidence disclosed that despite knowing generally of his involvement in opposing the Thelma Parking Lot development, Justice Matlow's Chief Justice and judicial colleagues did not raise any complaint about his conduct;
 - k. Such other evidence as counsel may advise and this Honourable Court permits.
10. The Inquiry Committee made findings of fact that were contrary to and not supported by the uncontradicted evidence before the Committee. In particular,

- a. The Inquiry Committee rejected the uncontradicted evidence that Justice Matlow contacted the *Globe and Mail* in October 2005 after he read and because he had read Justice Bellamy's Report on the public inquiry regarding improprieties in the City's computer leasing practices which addressed concerns similar to those that Justice Matlow had regarding whether actions by City employees were inconsistent with authorizations given by City Council; and
 - b. The Inquiry Committee declined to accept Justice Matlow's evidence that he did not know that he would be sitting on the *SOS Application* until Monday 3 October even though this evidence was uncontradicted and was consistent with the independent recollection of the other two judges on the panel that heard the *SOS Application*.
11. The Inquiry Committee rejected evidence regarding Justice Matlow's character which is relevant to the proceedings:
- a. The Inquiry Committee erred in rejecting this character evidence because it is evidence that is relevant to Justice Matlow's integrity, credibility and mitigating factors with respect to appropriate penalty; and
 - b. The Inquiry Committee denied Justice Matlow procedural fairness and natural justice by the manner in which it decided to reject the evidence. At the public hearing before the Committee, numerous

letters providing evidence of Justice Matlow's character were admitted into the record. After the hearing was completed, without notice to Justice Matlow and without any opportunity to make submissions, the Inquiry Committee "on reconsideration" decided to exclude that evidence.

12. The Inquiry Committee denied Justice Matlow procedural fairness and natural justice by failing to consider evidence of community support and confidence with respect to Justice Matlow. This evidence is critical to the ultimate issue of whether public confidence has been undermined by Justice Matlow's conduct. The Inquiry Committee erred in law and denied Justice Matlow natural justice by:
 - a. refusing to admit into evidence a community statement setting out support for Justice Matlow;
 - b. failing to consider and address the evidence that Justice Matlow was honoured by the local community newspaper for his contributions to the community through his leadership in opposing the Thelma Parking development; and
 - c. failing to consider and address the evidence of the witnesses Ron Lieberman and Judith Collard regarding community support for and confidence in Justice Matlow, including evidence that his leadership in the Thelma Parking lot matter enhanced respect for the judiciary.

13. The Inquiry Committee erred in law and exceeded its jurisdiction by investigating and making findings and recommendations with respect to the propriety of Justice Matlow sitting on the panel that heard the *SOS Application*. In doing so, the Committee erred and exceeded its jurisdiction because:
 - a. The question of whether a judge should hear a matter or should recuse himself is a question of judicial discretion and decision-making that is beyond the jurisdiction of the Canadian Judicial Council;
 - b. Despite indicating in its Report that the Committee would not review Justice Matlow's decision to sit on the *SOS Application*, the Inquiry Committee proceeded to make a finding against him specifically because he decided to sit on the *SOS Application*;
 - c. In reviewing Justice Matlow's decision to sit on the *SOS Application*, the Inquiry Committee applied an objective rather than subjective test;
 - d. The Inquiry Committee failed to refer to the applicable legal guidelines regarding conflict of interest and consent; and
 - e. The Inquiry Committee failed to consider that on the *SOS Application* and the five prior cases, the City did not object to Justice Matlow sitting on each case.

14. The Inquiry Committee exceeded its jurisdiction, erred in law and violated the rules of procedural fairness and natural justice by expanding the scope of its investigation to investigate the issue of whether beginning in 2002, Justice Matlow should have recused himself from sitting on any matter involving the City of Toronto. The Inquiry Committee erred and denied natural justice because:
 - a. The Inquiry Committee expanded the investigation of its own motion to address this issue even though:
 - i. the issue was not raised by the City of Toronto at any of the five matters which came before Justice Matlow;
 - ii. Despite being aware of Justice Matlow's activities regarding the Thelma Parking Lot, the City Solicitor had at no point advised lawyers in the City Legal Department that they should not appear before Justice Matlow;
 - iii. The City Solicitor, in her complaint to the Canadian Judicial Council, did not raise any complaint about any of the matters on which Justice Matlow had heard prior to the *SOS Application*;
 - iv. Independent Counsel to the Canadian Judicial Council had not identified this as a concern in the particulars provided to Justice Matlow;
 - v. In referring this matter to the Inquiry Committee for investigation, the Canadian Judicial Council did not raise

concerns regarding these five prior cases involving the City; and

- vi. The Inquiry Committee made a blanket finding that Justice Matlow had acted improperly in sitting on the five prior cases without any information about the circumstances of each case and without allowing Justice Matlow an opportunity to review and address the circumstances of those five cases.
 - b. The Inquiry Committee exceeded its jurisdiction by addressing the propriety of Justice Matlow sitting on the five prior cases because his decision to do so is a matter of judicial discretion and decision-making relating to the issue of recusal which is beyond the jurisdiction of the Canadian Judicial Council.
15. The Inquiry Committee erred in law and denied Justice Matlow natural justice by making findings that he had used “intemperate language” without assessing the context in which Justice Matlow’s comments were made, and without considering whether his concerns that individuals may have been acting beyond their legal authority were valid or whether his views were held honestly, reasonably and in good faith.
 16. The Inquiry Committee erred in law and exceeded its jurisdiction by failing to address the ultimate issue raised by the investigation which is

whether “public confidence would be sufficiently undermined to render the judge incapable of executing the judicial office”. In this respect, the Inquiry Committee failed to consider and/or admit the relevant evidence on this point and instead substituted their own view on the issue.

17. The Inquiry Committee erred in law and exceeded its jurisdiction in finding that Justice Matlow should have disclosed his past involvement in the Thelma Project to counsel for the parties on the SOS Application by failing to consider paragraph E.15 of the “Ethical Principles for Judges”. Paragraph E.15 provides that judges should not disclose a possible conflict of interest to and seek the consent of counsel for the parties to sit on a case when the judge concludes that no reasonable, fair minded and informed person would have a reasoned suspicion of a lack of impartiality.

18. The Inquiry Committee erred in law and exceeded its jurisdiction by failing to apply the appropriate *Charter* analysis to the issue of whether section 2(b) and/or 2(d) would be contravened by imposing restrictions on a judge’s freedom to participate in the local affairs of his or her own community. Indeed, the Committee appears to rule that ss. 2(b) and 2(d) of the *Charter* are not engaged because it viewed any restrictions to be the normal duties of a judge which are voluntarily accepted upon

accepting an appointment to judicial office. This is an analysis that has been rejected by the Supreme Court of Canada.

19. The Inquiry Committee erred in law and exceeded its jurisdiction by failing to conduct an appropriate legal analysis under s. 1 of the *Charter*. As an alternative position, the Inquiry Committee found that if there are limitations on a judge's freedom of expression or association, they are justified in a free and democratic society to ensure the preservation of impartiality and independence of the judiciary and the rule of law. This finding was made without conducting the section 1 analysis that is required by the clear and unequivocal jurisprudence of the Supreme Court of Canada.
20. Such further and other grounds as Counsel may advise and this Honourable Court permits.

This application will be supported by the following material:

1. The affidavit of Melissa O'Connor and the exhibits attached thereto;
2. The transcripts of the proceedings before the Inquiry Committee, dated 8, 9 and 10 January 2008 and 8 April 2008; and

3. Such further and other material as Counsel may advise and this Honourable Court may permit.

Date: 25 June 2008

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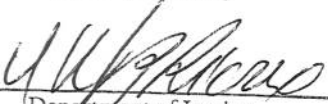
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Theodore Matlow

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ON BEHALF OF THE
DEPUTY ATTORNEY GENERAL OF CANADA
JOHN H. SIMS

JUN 26 2008

per:


Department of Justice
10.46

I HEREBY CERTIFY that the above document is a true copy of
the original issued out of / filed in the Court on the _____

day of _____ A.D. 20 _____

Dated this _____ day of _____ 20 _____
