CANADIAN JUDICIAL COUNCIL

IN THE MATTER OF AN INVESTIGATION REGARDING THE HONOURABLE JUSTICE THEODORE MATLOW

SUBMISSIONS
RESPONDING TO THE
REPORT OF THE INQUIRY COMMITTEE
ON BEHALF OF JUSTICE MATLOW

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INTRODUCTION

1. These submissions are made on behalf of Justice Ted Matlow pursuant to s.9 of the Canadian Judicial Council Inquiries and Investigations By-Laws responding to the report of the Inquiry Committee dated 28 May 2008. These submissions are organized as follows:

I. OVERVIEW

This overview sets out the background to the present proceedings, provides an overview of the legal submissions on behalf of Justice Matlow and addresses Justice Matlow's request that the present Canadian Judicial Council proceedings be stayed until

such time as his application for judicial review is finally determined.

A. Background to the Proceedings

2. At issue is whether, in accordance with s. 65(2) of the *Judges Act*, Justice Matlow has become incapacitated or disabled from the due execution of the office of judge such that the Canadian Judicial Council ("the Council") may recommend that he be removed from office. The relevant parts of s. 65(2) of the *Judges Act* provide as follows:

> 65. (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
>
> (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.

3. The facts at the heart of this matter relate to Justice Matlow's conduct – in his capacity as a private citizen – in opposing a retail/condominium development that was proposed to be built a few doors from his house on a small residential street in mid-town Toronto ("the Thelma Project" or the "Thelma Parking Lot development").

4. By letter dated 30 January 2006, the City Solicitor for the City of Toronto filed a

written complaint with the Canadian Judicial Council regarding Justice Matlow. On or about 3 April 2007, under s. 63(2) and (3) of the *Judges Act*, the Council by resolution constituted an Inquiry Committee to investigate the complaint. The Inquiry Committee conducted its investigation by way of public hearings held on 8, 9 and 10 January 2008 and 8 April 2008. In its Report dated 28 May 2008, the Inquiry Committee made findings and expressed its conclusion that "a recommendation for removal of Justice Matlow from office is warranted."

B. Overview of Submissions

5. We submit that Justice Matlow's conduct has not incapacitated him or disabled him from the due execution of his office as judge and that a recommendation for his removal from office is not warranted. We submit as follows:

(a) The test for removal from office is very onerous and the conduct at issue does not warrant this ultimate sanction. The penalty of removing Justice Matlow from office is disproportionately severe in the circumstances. While the conduct at issue may warrant discussion, counselling and/or reprimand, it does not warrant Justice Matlow's removal from judicial office. The Council should decline to follow the Inquiry Committee's recommendation.

(b) The conduct at issue relates to a judge's constitutional freedom of

expression and freedom of association and, in particular, to the exercise of these fundamental *Charter* rights in the context of a judge's private life. Any restrictions on such constitutional rights should impair a judge's rights as a citizen as little as possible. The Inquiry Committee erred in law

(I) by failing to conduct an appropriate legal analysis of either s. 2(b) or s. 2(d) of the *Charter* and in particular by failing to consider whether the rights were minimally impaired under s. 1 of the *Charter*; and

(ii) by failing to take into consideration the relevant and critical context in which the exercise of these *Charter* rights arose. The Inquiry Committee failed entirely to consider or address the undisputed fact that what is considered an acceptable exercise of free speech and association by judges has evolved significantly in recent years during which time the scope of permissible judicial speech has expanded. During this period, the antiquated "monastic" view of the judiciary has been expressly rejected in favour of a view that recognizes that judges are and should be members of the broader community, and should be able to participate in local community affairs as citizens. It is now accepted that such participation will not only benefit local affairs but will also enhance the judge's ability, skill and experience to administer justice in the community.

(c) Judges are not given precise guidance on the scope of their permissible

conduct as private citizens. The Ethical Principles for Judges are advisory only. Judges are afforded a wide range of discretion – and are expected to exercise that discretion – to determine the appropriate scope of their own conduct in specific circumstances. The Inquiry Committee erred in law and exceeded its jurisdiction by applying the Ethical Principles for Judges as if it were a prescribed "code of conduct", by creating "positive ethical obligations" to replace judicial discretion and by applying this test, which was developed after the fact, to measure the propriety of Justice Matlow's conduct.

(d) Judges must be afforded scope to exercise independent judgment as to what information must be pro-actively disclosed in particular circumstances to identify a potential for conflict. No clear and binding rules apply to the determination of such circumstances. A simple error in judgment where a judge believes honestly and in good faith that there cannot be any reasonable apprehension of bias should not result in removal from office. The threat of removal from office in the circumstances infringes upon judicial independence and would likely have an undesirable chilling effect on all judges. The Inquiry Committee erred in law and denied Justice Matlow natural justice by creating new positive obligations of disclosure and by testing Justice Matlow's conduct against this newly articulated standard which is in conflict with the discretion set out in the Ethical Principles for Judges.

6. We further submit that the Inquiry Committee's report is fundamentally flawed, has denied Justice Matlow very significant rights of procedural fairness and as a result cannot fairly be relied upon by the Council in making its recommendation on whether Justice Matlow should be removed from office.

7. In conducting its investigation and making its Report, the law requires that the Inquiry Committee provide Justice Matlow with a very high standard of procedural fairness. This high standard of fairness is required 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 itself noted, the findings in the Report must be sufficiently complete and detailed to enable the Council to make an independent assessment of whether to accept or reject the Inquiry Committee's findings and recommendations and to develop its own independent conclusions:

> "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."
>
> *Inquiry Committee Report* (28 May 2008) at p. 5, para. 13

8. We submit that the Inquiry Committee's Report fails to meet this high standard and is, as a result, unfair, incomplete and unable to provide a basis upon which the Council can make an independent, informed and fair recommendation on whether Justice Matlow should be removed from office. In particular, we submit that the Inquiry Committee has violated the rules of procedural fairness and natural justice, erred in law and exceeded its jurisdiction 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 the 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.

C. Application for Judicial Review and Request for a Stay

9. Justice Matlow has filed an application for judicial review in the Federal Court seeking an order quashing and setting aside the Inquiry Committee Report for the reasons set out in paragraph 8 above. A copy of the Notice of Application for Judicial Review which was issued on 25 June 2008 is included at Tab in the Book of Documents filed with this submission.

Notice of Application for Judicial Review, issued 25 June 2008

10. We respectfully submit that the Council should defer its proceedings in this matter until such time as the judicial review application is finally determined. The present request for a deferral meets all the established criteria for granting a stay of proceedings:

(a) **There is a serious issue to be tried:** The threshold on this issue is very low and will be met as long as the issue is neither vexatious nor frivolous. The application for judicial review raises serious and legitimate claims with respect to errors of law, jurisdiction and denials of natural justice. The fairness of the Inquiry Committee's Report is fundamental to ensuring that the Council is able to properly carry out its function and make a fair and independent assessment of whether Justice Matlow has been incapacitated from carrying out judicial office.

(b) **The failure to grant the stay will result in irreparable harm that cannot adequately be compensated by monetary damages:** Justice Matlow will suffer irreparable harm if the Council relies upon the impugned Report because he will be deprived of a fair determination by the Council on the most significant issue of whether he should be removed from office. It is of fundamental importance that proceedings which place reputation and the right to continue in office in jeopardy be conducted in accordance with natural justice. If a stay is not granted, the harm that will arise is, in its nature, not one that can be quantified in monetary terms or adequately compensated with monetary damages.

(c) **The preponderance of convenience weighs in favour of Justice Matlow:** Balance of convenience is assessed by weighing any irreparable harm to Justice Matlow if the stay is denied against any irreparable harm to the Council if the stay is granted. We submit that there would be no harm and certainly no irreparable harm to either the Council or the public interest if the Council proceedings were deferred. Justice Matlow would continue on leave and would not be sitting as a judge which is the status quo that has continued since 5 April 2007. The importance of ensuring that the Council's proceedings are fair significantly outweigh any inconvenience caused by a deferral.

RJR-Macdonald v. Canada (1994), 111 D.L.R. (4th) 385

(S.C.C.), Book of Authorities, Vol. 1, Tab 3 at 400, 402-403, 405, 406

II. FACTUAL BACKGROUND

11. To expedite matters before the Inquiry Committee, the evidence was presented through an Agreed Statement of Facts as well as through *viva voce* evidence which supplemented that Agreed Statement of Facts. This section provides a general overview of the facts.

A. Justice Matlow's Background

12. Justice Matlow was born in Kitchener, Ontario on 14 April 1940. He is now 68 years old.

13. He graduated from the University of Toronto Faculty of Law in 1965 and was called to the Ontario Bar in 1967. After serving as a law clerk to the Chief Justice of the High Court of Ontario, he entered private practice in the area of civil litigation. He obtained his LL.M. in 1979.

Agreed Statement of Facts, para. 2-3

14. Justice Matlow has served continuously as a judge since 1981. He was appointed

to the County Court for the Judicial District of York in 1981. In conjunction with successive court amalgamations, he became a judge of the District Court of Ontario in 1985 and of the Ontario Court (General Division) [now Superior Court of Justice] in 1990. In recent years he has served extensively on the Divisional Court presiding over appeals and applications for judicial review. In April 2005, he elected to become a supernumerary judge although he continued with a full case load and with his specialty on the Divisional Court.

> Agreed Statement of Facts, para. 4-5, Book of Evidence, Tab 4
> Transcript, Examination of Justice Matlow (9 January 2008), p.252, line 11-25, Book of Evidence, Tab 9

15. Since 1977, Justice Matlow has also contributed to the profession by serving as the editor of a national civil litigation journal, *The Advocates' Quarterly*.

> Agreed Statement of Facts, para. 6, Book of Evidence, Tab 4

B. Background to the Complaint: The Thelma Parking Lot Dispute

16. The particulars and allegations of misconduct addressed by the Inquiry Committee focussed on Justice Matlow's conduct in opposing the development of a building on the parking lot on his street (the "Thelma Project").

> *Amended Particulars, Appendix "A" to the Notice of Hearing* (Exhibit 4B), Book of Evidence, Tab 3

17. The merits of the dispute at the heart of the Thelma Project are obviously not at

issue in these proceedings. However, it is necessary for the Council to understand the nature of the concern underlying the Thelma Project in order to understand the nature and quality of Justice Matlow's conduct and, very importantly, to understand why he contacted *Globe & Mail* reporter John Barber in October 2005.

18. We submit that the Inquiry Committee failed to accurately describe the nature of the dispute in the Thelma Project and that this fundamental error led them to disregard relevant evidence of whether Justice Matlow had a dispute "with the City", to disregard evidence of the Bellamy Report, and to disregard the uncontradicted evidence of why Justice Matlow contacted John Barber in October 2005.

1. Thelma Avenue and the Parking Lot

19. At all material times, Ted Matlow owned and resided at a small house on Thelma Avenue in an area of mid-town Toronto called Forest Hill Village. Forest Hill Village was a separate and unique village with residential buildings and small shops that was amalgamated with Toronto in the mid-1960s. Thelma Ave. is a short, one-block long, dead end street with very small workers' cottages dating from around 1930, 2- and 3- storey old frame houses, newer townhouse-like homes on narrow lots and two low-rise apartment buildings.

Agreed Statement of Facts, para. 7-9, Book of Evidence, Tab 4
Transcript, Examination of Ron Lieberman (8 January 2008), p. 99, line 7-25, Book of Evidence, Tab 7

20. Ted Matlow's house is approximately 20 metres from a surface parking lot ("the Thelma Parking Lot") that is owned by the City of Toronto and operated by the Toronto Parking Authority.

Agreed Statement of Facts, para. 10-11, Book of Evidence, Tab 4

2. The Nature of the Thelma Parking Lot Dispute

21. In October 1999, Ted Matlow attended a public meeting in his neighbourhood that was convened by the city councillors who represented the neighbourhood. At this meeting, the Toronto Parking Authority and a developer, First Spadina Place Inc., announced a proposed joint venture to build a development on the lands occupied by the Thelma Parking Lot. The proposed development was for 10 residential townhouses (total 24,000 square feet) and a below-grade parking lot which would be within the existing zoning and building by-laws. This proposed development was accepted by the local community.

Agreed Statement of Facts, para. 12-13, Book of Evidence, Tab 4
Transcript, Examination of Ron Lieberman (8 January 2008) at p. 91, line 14 to p. 94, line 4, Book of Evidence, Tab 7

22. Because the lands on which the parking lot is situated were owned by the City of Toronto, authorization of City Council by way of a Council resolution was required before any joint venture agreement could be executed.

Agreed Statement of Facts, para. 14, Book of Evidence, Tab 4

23. In April 2000, City Council passed a resolution providing authorization for the joint venture. In the Administration Committee Report attached to and adopted by City Council's resolution, the development at issue was described as a "ten unit residential complex" with a below grade parking lot that was "permitted under the existing zoning".

Agreed Statement of Facts, para. 15-16, Book of Evidence, Tab 4

24. Negotiations between the developer, the Toronto Parking Authority and the City culminated in an agreement dated November 2001 which, instead of the development described in Report adopted in the 2000 City Council resolution, provided for a 30,000 square foot mixed-use commercial/residential development with underground parking.

Agreed Statement of Facts, para. 17, Book of Evidence, Tab 4

25. In the events in which Ted Matlow was subsequently involved with Friends of the Village, the crux of the dispute was whether this 2001 Agreement and later amendments to it were in accordance with the legal authorization set out in the April 2000 City Council Resolution. The concern was whether in negotiating and signing these agreements contemplating larger developments, City staff had acted beyond the legal authority granted to them by City Council.

26. In April 2002, Ted Matlow attended a second public meeting convened by the local City councillor. At that meeting, the local community was advised that the Toronto Parking

Authority and developer planned to build a single, six-storey, mixed commercial-residential building of up to 50,000 square feet on the Thelma Parking Lot site.

Agreed Statement of Facts, para. 18-20, Book of Evidence, Tab 4

27. In or around April 2002, Ted Matlow, along with a small group of other residents of Forest Hill Village, formed a single-issue, *ad hoc* neighbourhood group called The Friends of the Village to coordinate their opposition to this development.

Agreed Statement of Facts, para. 21, Book of Evidence, Tab 4

28. There were two phases to the Friends of the Village's opposition to the development:

(a) The first phase, from April to November 2002, opposed the six-storey 50,000 square foot development. In November 2002, the City's Administration Committee declined to approve this development.

Agreed Statement of Facts, para. 24, Book of Evidence, Tab 4
Transcript, Examination of Ron Lieberman (8 January 2008), p. 110, line 21 to p. 112, line 25, Book of Evidence, Tab 7

(b) The second phase, from April 2003 to the spring of 2004, addressed a subsequent attempt by the developer to build a nearly 33,000 square foot four-storey mixed use commercial/residential building that exceeded both the

maximum permitted density for the lot and the maximum building height in the zoning by-laws.

Agreed Statement of Facts, para. 25-26, Book of Evidence, Tab 4

29. The uncontested evidence before the Inquiry Committee was that a key issue at the heart of the Friends of the Village's opposition to the Thelma Parking Lot development was a concern that in making agreements to pursue these larger scale development projects, City staff were acting beyond the legal authorization granted in the April 2000 City Council resolution. Whether staff were or were not acting beyond their authorization obviously need not be determined by this Council. However, the fact that this was the nature of the dispute is significant and is supported by evidence, including the following:

(a) contemporaneous statements made by Ted Matlow in 2003 and 2004;

See, for example,

Email from Ted Matlow to members of City Council (6 December 2003), excerpt from Appendix 50 to the Agreed Statement of Facts , Book of Evidence, Tab 4(q)

Statements by Ted Matlow quoted in the media, including *Town Crier* (19 September 2003) and (19 March 2004), excerpts from Appendix 33 to the Agreed Statement of Facts Book of Evidence, Tab 4(i)

(b) a June 2003 report from the Director of Community Planning which in response to the developer's April 2003 request for a zoning variance stated that "Planning staff will be consulting with Legal Services staff to determine

if the application as submitted remains consistent with the standing direction from City Council";

Agreed Statement of Facts, para. 27, Book of Evidence, Tab 4
Director of Community Planning's Preliminary Report (June 2003), Appendix 14 to the Agreed Statement of Facts, Book of Evidence, Tab 4(b)
Transcript, Examination of Ron Lieberman (8 January 2008) at p. 115, line 15 to p. 117, line 24, Book of Evidence, Tab 7

(c) the fact that the Friends of the Village sought and received two legal opinions from an expert in municipal law on whether the agreement signed respecting the development was authorized by City Council's April 2000 resolution;

Agreed Statement of Facts, para. 29, Book of Evidence, Tab 4
Opinion letters of Michael Melling (2 September 2003) and (5 September 2003), Appendix 16 to the Agreed Statement of Facts, Book of Evidence, Tab 4(c)

(d) the fact that City Council adopted resolutions to appoint outside counsel to investigate and provide an opinion on whether the April 2000 resolution authorized the terms of the subsequent development agreement;

Agreed Statement of Facts, para. 30, 36, Book of Evidence, Tab 4
Opinion of David Boghosian, Appendix 25 to the Agreed Statement of Facts, esp. at p. 16 and 18 of that legal opinion, Book of Evidence, Tab 4(g)

(e) the fact that Ron Lieberman and 23 other applicants commenced an application in court specifically seeking a determination of whether the development agreements were valid under the City resolution;

Agreed Statement of Facts, para. 34, Book of Evidence, Tab 4
Lieberman Notice of Application, Appendix 21 to the Agreed Statement of Facts, Book of Evidence, Tab 4(d)

(f) the fact that City Councillor Michael Walker, the local councillor, wrote a letter to the Mayor, all members of City Council and the Auditor General for the City raising concerns that the proposed development was not authorized by the April 2000 Council resolution;

Agreed Statement of Facts, para. 38, Book of Evidence, Tab 4
Letter from Michael Walker to City Council (16 January 2004), Appendix 27 to the Agreed Statement of Facts, Book of Evidence, Tab 4(h)

and

(g) the fact that, after receiving the opinion of outside counsel, in January 2004 City Council passed a resolution retroactively ratifying the later development agreement.

Agreed Statement of Facts, para. 39, Book of Evidence, Tab 4

3. Ted Matlow's Conduct in Relation to Friends of the Village

30. As indicated above, in or around April 2002, Ted Matlow and other residents of Forest Hill Village formed the neighbourhood group Friends of the Village to oppose the

expanded Thelma Parking Lot development.

31. Before becoming involved with Friends of the Village, Justice Matlow consulted a legal advisory opinion from the Canadian Judicial Council with respect to judges' permissible involvement in municipal disputes. That opinion on Municipal Democracy (1999-06) states that:

> "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."
>
> Opinion of the Advisory Committee on Judicial Ethics, Municipal Democracy (1999-06), Appendix 9 to the Agreed Statement of Facts, Book of Evidence, Tab 4(a)

32. Justice Matlow also re-read various articles that had come to his attention that dealt with the proper role of judges in the community, including material on the Judicom website, material on the website of the Canadian Judicial Council, material in the judges' library at Osgoode Hall, as well as Justice Sopinka's well-known article advocating that judges cease acting like monks and a well-known speech to the same effect by the Chief Justice of Canada.

> Transcript, Examination and Cross-Examination of Justice Matlow (9 January 2008) at p. 195, line 4 to p. 196, line 1; p.274, line 6-21, Book of Evidence, Tab 9

33. Ted Matlow assumed a central, but not exclusive, public role as one of the leaders

of and one of the spokespersons for the Friends of the Village. He was personally engaged in a variety of activities challenging the legality of the various amended development agreements, including:

(a) making public comments to the media about his reasons for opposing the Thelma Project;

(b) meeting with Mayor Mel Lastman;

(c) appearing in person before the City's Administrative Committee in 2002;

(d) contacting Councillor Holyday was is a member of the City's Administrative Committee by email in October 2002;

(e) appearing before the Mid-Town Community Council in July 2003;

(f) meeting with the Auditor General for the City in August 2003 and making critical comments to him about a lawyer employed by the City Solicitor;

(g) sending an email in November 2003 to the Attorney General of Ontario who is his local Member of Provincial Parliament;

(h) writing a letter to Mayor David Miller and all members of City Council on behalf of Friends of the Village in November 2003; and

(I) in December 2003, meeting with and corresponding with the outside counsel retained by the City.

Agreed Statement of Facts, para. 43, para. 33, 44-51, Book of Evidence, Tab 4
Transcript, Examination of Judith Collard (9 January 2008) at p. 183, lines 12-24, Book of Evidence, Tab 8

34. In December 2003, Ron Lieberman and 23 other local residents and business

owners commenced an application in the Superior Court of Justice seeking a determination of the validity of the development agreement. Ted Matlow was not a party to this litigation. However, he did assist them peripherally by providing information to Mr. Lieberman about his own efforts to obtain documents under the *Municipal Freedom of Information and Protection of Privacy Act*, about his appearance as a spokesperson of Friends of the Village before the City's Administration Committee, and about the fact that he had written to the Attorney General, who is his local M.P.P., and the Mayor with respect to the Thelma Project without response. As well, he assisted the applicants in making a choice of counsel to represent them.

> Agreed Statement of Facts, para. 34, Book of Evidence, Tab 4
> Transcript, Examination of Ron Lieberman (8 January 2008), at p. 126, line 12 to p. 127, line 21, Book of Evidence, Tab 7

35. In accordance with a protocol of the Ontario Superior Court of Justice, in December 2003 Justice Matlow advised his Chief Justice, Regional Senior Judge and the judge responsible for scheduling lengthy motions about the *Lieberman Application*, that the claim involved an agreement that affected a property very close to his own and that the applicants were members of the Friends of the Village of which he was the president. He indicated that they may wish to decide that the application should be heard by a judge from another city. Arrangements were in fact made for the matter to be assigned to a judge from outside Toronto.

> Agreed Statement of Facts, para. 35, Book of Evidence, Tab 4
> Email from Justice Matlow to Chief Justice Smith, Justice Ferrier and Justice Nordheimer (2 January 2004), Appendix 23 to the Agreed Statement of Facts, Book of Evidence, Tab 4(e)

Ontario Court of Justice protocol: Judges and their Families as Litigants or Witnesses, Appendix 24 to the Agreed Statement of Facts, Book of Evidence, Tab 4(f)
Transcript, Examination and Cross-examination of Justice Matlow (9 January 2008), at p. 227, line 17 to p. 229, line16 and p. 313, line 23 to p. 314, line 2, Book of Evidence, Tab 9

36. In December 2003, in his personal capacity and not as a representative of Friends of the Village, Ted Matlow was given notice of a proceeding at the Ontario Municipal Board in which the developer sought an amendment to the zoning by-law to permit the four-storey development on the Thelma Parking Lot. Ted Matlow received the statutory notice as of right because he lived in very close proximity to the proposed development. The extent of Ted Matlow's participation in that appeal was to appear in order to seek standing and seek an adjournment (which was also sought by the City) of the OMB proceedings pending City Council's review of outside counsel's opinion. After City Council ratified the development in January 2004, he appeared to give notice that he was abandoning his participation.

Agreed Statement of Facts, para. 31-33, 41, Book of Evidence, Tab 4
Transcript, Examination of Justice Matlow (9 January 2008) at p. 207, line 2 to p. 208, line 21, Book of Evidence, Tab 9

37. In opposing the Thelma Parking Lot development, Ted Matlow did not have a dispute with the City as a whole. He and Friends of the Village had good relations with and the active support of various people at the City, including numerous City councillors. The two local councillors were supportive of Friends of the Village. His own City Councillor Michael Walker, introduced him to other members of Council, recommended that the Friends of the Village meet with the Auditor General and took the Friends' concerns so

seriously that he arranged an immediate meeting with the Auditor General and personally drove them to that meeting.

> Transcript, Examination of Ron Lieberman (8 January 2008) at p. 98, line 7 to p. 99, line 3; p. 103 line 12-21; p. 129, line 11 to p. 131, line 15; p. 159, line 16-21; p. 168, line 6 to p. 169, line 5; p. 170, line 10 to p. 171, line 7, Book of Evidence, Tab 7
> Transcript, Examination of Justice Matlow (9 January 2008) at p. 199, line 16-25, Book of Evidence, Tab 9

38. The uncontradicted evidence before the Inquiry Committee was that even though the City Solicitor knew about Justice Matlow's involvement in and his position in opposing the Thelma Parking Lot development – including having read Justice Matlow's letter to Mayor Miller – the City never raised any concern about his conduct and raised no concern about his ability to sit on cases involving the City prior to October 2005. The City Solicitor did not at any time disseminate any information regarding Justice Matlow's involvement in the Thelma Parking Lot matter beyond the management team, and did not issue any memorandum to City Staff expressing concerns about appearing before Justice Matlow.

> Agreed Statement of Facts, para. 52-53, Book of Evidence, Tab 4

39. Between 2002 and 2005, prior to the SOS Application discussed below, Justice Matlow presided as a single judge or as part of a panel in the Divisional Court over five matters in which the City was either a party or an intervenor. The City was successful in four of those five cases.

Agreed Statement of Facts, para. 53, Book of Evidence, Tab 4
Transcript, Examination of Justice Matlow (9 January 2008) at p. 246, line 1-12, Book of Evidence, Tab 9

40. The uncontradicted evidence before the Inquiry Committee was that Justice Matlow's Chief Justice and judicial colleagues were generally aware of his involvement in opposing the Thelma Project and they did not raise concerns with him about it or advise him to curtail his activities.

Transcript, Examination of Justice Matlow, at p. 201, line 15 to p. 202, line 15; p. 279, line 2-9, Book of Evidence, Tab 9

D. The Bellamy Report and the Communication with John Barber

41. In February 2002, Toronto City Council passed a resolution to establish a public inquiry into the City's computer leasing contracts with MFP Financial Services. The Honourable Madam Justice Denise Bellamy of the Superior Court of Justice was appointed the Commissioner of the Inquiry. The public inquiry, which lasted for over three years, inquired into matters relating to malfeasance, breach of trust and other misconduct by members of council and other officers and employees of the City in relation to external contracts and computer leasing arrangements with the City.

Agreed Statement of Facts, para. 63, Book of Evidence, Tab 4

42. On 12 September 2005, Justice Bellamy released her report arising from the public inquiry.

Agreed Statement of Facts, para. 64, Book of Evidence, Tab 4

43. Justice Bellamy's report was very critical of governance and administrative practices within the City, including the fact that contracts negotiated by municipal bureaucrats exceeded the authority granted by City Council.

News Release re Bellamy Report (September 2005),
Justice Bellamy's Speaking Notes on release of the Inquiry Report, and Executive Summary of Justice Bellamy's Report, Appendices 43, 44 and 45 to the Agreed Statement of Facts
Book of Evidence, Tabs 4(k), 4(l) and 4(m)

44. On 13 September 2005, John Barber, who is the municipal affairs columnist for the *Globe and Mail* newspaper and who covered the *MFP Computer Leasing* inquiry for three years, wrote a column commenting on the release of Justice Bellamy's report.

Agreed Statement of Facts, para. 65, Book of Evidence, Tab 4
John Barber column (13 September 2005), Appendix 46 to the Agreed Statement of Facts, Book of Evidence, Tab 4(n)
Transcript, Examination of John Barber (8 January 2008) at p. 60, line 22-23, Book of Evidence, Tab 6

45. Justice Matlow, along with all members of the Superior Court of Justice, was provided with a copy of Justice Bellamy's complete report after it was released. Justice Matlow brought it home. He read the report, not immediately when it was released, but shortly before 2 October 2005. It was his view that the findings that Justice Bellamy made in her report about widespread conduct of various officials employed by the City exceeding the authority that City Council had given them was the same pattern that he had

encountered with respect to the Thelma Project.

> Transcript, Examination of Justice Matlow (9 January 2008) at p. 230, line 10 to p. 231, line 10, Book of Evidence, Tab 9
> Transcript, Cross-Examination of Justice Matlow (9 January 2008) at p. 303, line 1 to line 22, Book of Evidence, Tab 9

46. The uncontradicted evidence before the Inquiry Committee was that, influenced by his recent reading of the Bellamy report and acting in what he perceived to be the role of a whistleblower, Justice Matlow sent an email to John Barber on Sunday 2 October 2005. In that email he identified that he was a "Superior Court judge and was, until recently, the president of Friends of the Village". He invited Mr. Barber to contact him about the Thelma Parking Lot matter stating that "now that you know and have written about, what goes on at City Hall, you might like to hear my story".

> Agreed Statement of Facts, para. 66, Book of Evidence, Tab 4
> Email from Ted Matlow to John Barber, 2 October 2005, Appendix 47 to Agreed Statement of Facts, Book of Evidence, Tab 4(o)
> Transcript, Examination of Justice Matlow (9 January 2008) at p. 231, line 11 to p. 232, line 1
> Transcript, Cross-Examination of Justice Matlow (9 January 2008) at p. 303, line 1 to line 22, Book of Evidence, Tab 9

47. On Tuesday 4 October Mr. Barber responded by email requesting relevant documents. Justice Matlow responded by email on 4 October that he was in Sudbury and would get a package to Barber when he returned.

> Agreed Statement of Facts, para. 67, Book of Evidence, Tab 9
> Email exchange between Ted Matlow and John Barber (4 October 2005, Appendix 48 to the Agreed Statement of Facts

Book of Evidence, Tab 4(p)

48. On the morning of 5 October 2005, Justice Matlow sent an email to John Barber and delivered an envelope of documents to the *Globe and Mail* mailroom for John Barber.

Agreed Statement of Facts, para. 69, Book of Evidence, Tab 4

E. The SOS Application

49. The uncontradicted evidence before the Inquiry Committee was that at the time that Justice Matlow wrote to John Barber on 2 October 2005, he did not know that he would be sitting on the *SOS Application*.

Transcript, Examination of Justice Matlow (9 January 2008) at p. 232, line7 to p. 234, line 6; Transcript, Cross-Examination of Justice Matlow at p. 302, line 22 to 25, Book of Evidence, Tab 9

50. The *SOS Application* was an application for judicial review which challenged the construction of a dedicated streetcar right-of-way on St. Clair Avenue West. St. Clair Ave. is a busy multi-lane east-west thoroughfare running across mid-town Toronto. The St. Clair West streetcar line starts at Yonge Street, a major north-south street in central Toronto, and runs west for several kilometres to Gunn Road. St. Clair Avenue crosses Spadina Road at the first major intersection south of Forest Hill Village, approximately .5 km south of Thelma Ave.

Agreed Statement of Facts, para. 55-56, Book of Evidence, Tab 4

51. In the *SOS Application*, an incorporated community organization of residents and business owners who opposed the dedicated streetcar right-of-way sought a declaration that the project was in breach of the *Planning Act* because it conflicted with the City's Official Plan and a declaration that the City of Toronto and the Toronto Transit Commission had failed to complete a Class Environmental Assessment as required under the *Environmental Assessment Act.*

Agreed Statement of Facts, para. 58, Book of Evidence, Tab 4

52. The *SOS Application* was originally scheduled to be heard on 3 October 2005 before a single judge of the Divisional Court.

Agreed Statement of Facts, para. 59, Book of Evidence, Tab 4

53. Justice Matlow, Justice Susan Greer and Justice Ellen MacDonald were assigned to constitute a Divisional Court panel to hear applications in Sudbury, Ontario commencing on Monday 3 October 2005. They had initially been scheduled to be in Sudbury for the entire week.

Agreed Statement of Facts, para.60, Book of Evidence, Tab 4

54. Late in the afternoon of Friday 30 September 2005, Livia Sessions, the Registrar of the Divisional Court sent an email to Justice Matlow, Justice Greer and Justice MacDonald advising that they had been scheduled for an urgent application involving SOS - Save Our St. Clair Inc. v. City of Toronto on Thursday 6 October 2005.

Agreed Statement of Facts, para. 61, Book of Evidence, Tab 4
Email from Livia Sessions (30 September 2005), Appendix 42
to the Agreed Statement of Facts, Book of Evidence, Tab 4(j)

55. The uncontradicted evidence is that Justice Matlow did not see this email until Monday 3 October when he got to his assigned office in Sudbury and connected his laptop computer.

Transcript, Examination of Justice Matlow (9 January 2008) at
p. 232, line 7 to p. 234, line 6, Book of Evidence, Tab 9

56. The uncontradicted evidence is that Justice Matlow, Justice Greer and Justice Maconald each 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 SOS Application. The three judges returned to Toronto on the evening of Tuesday 4 October.

Transcript, Examination of Justice Matlow (9 January 2008) at
p. 232, line 7 to p. 234, line 6, Book of Evidence, Tab 9
Agreed Statement of Facts, para. 62, Book of Evidence, Tab 4

57. On Wednesday 5 October, Justice Matlow dropped off the documents for John

Barber before he went to his office at Osgoode Hall and before he read any of the materials relating to the *SOS Application*.

58. After reading the *SOS Application* materials, Justice Matlow considered whether he should sit on the *SOS Application* in light of his past activities with the Thelma Project. He examined the material closely to see if the issues that were being raised or had to be canvassed could be even remotely connected with the Thelma Project. He concluded that there was no connection and decided he could sit on the application. He had no views on the merits of the St. Clair right-of-way. In assessing whether he should sit on the Application, he also considered the fact that he had already sat on five cases involving the City and never once did counsel representing the City object to his presence on the cases.

Transcript, Examination of Justice Matlow (9 January 2008) at p. 236, line 7 to p. 238, line 23, Book of Evidence, Tab 9

59. Prior to hearing the *SOS Application*, Justice Matlow did not disclose details of his involvement in the Thelma Parking Lot matter to the other members of the Divisional Court panel, did not disclose information regarding his dealings with Mr. Barber to the other members of the panel or the parties in the application and did not take any steps to ensure that he was not assigned to sit on the panel hearing the *SOS Application*.

Agreed Statement of Facts, para. 79-81, Book of Evidence, Tab 4

60. The Divisional Court panel chaired by Justice Matlow heard the *SOS Application* on

Thursday 6 October and Friday 7 October. Counsel for the City requested that the panel's decision be released as quickly as possible because the construction of the right-of-way was ready to begin.

Agreed Statement of Facts, para. 70-71, Book of Evidence, Tab

61. On Friday 7 October 2005, the City Solicitor attended a management team meeting at which the director of litigation advised that he had become aware, on the evening of 6 October, that Justice Matlow was on the panel hearing the *SOS Application*. The director of litigation raised a concern about Justice Matlow presiding over the *SOS Application* given the similar between it and the Thelma Parking Lot matter.

Agreed Statement of Facts, para. 72, Book of Evidence, Tab 4

62. On Tuesday 11 October, the Divisional Court panel released its decision on the *SOS Application* in a brief endorsement with detailed reasons to follow. The panel unanimously allowed the application.

Agreed Statement of Facts, para. 74-75, Book of Evidence, Tab 4

63. On 19 October 2005, the City of Toronto brought a motion returnable before Justice Matlow on 25 October 2005 requesting that Justice Matlow recuse himself from the panel, that the panel be struck, that the SOS matter be remitted for a new hearing before a new panel, and that the panel's decision of 11 October be declared null and void. It is important

to note that in this motion for recusal, the City of Toronto did not allege or complain that Justice matlow was guilty of actual bias. Indeed, there has never been an allegation or complaint of actual bias against Justice Matlow.

Agreed Statement of Facts, para. 77, Book of Evidence, Tab 4

64. On 3 November 2005, the panel released its reasons on the recusal motion. Justice Matlow dismissed the motion. In separate reasons, Justices Greer and MacDonald stood down from the panel.

Agreed Statement of Facts, para. 78, Book of Evidence, Tab 4

III. INQUIRY COMMITTEE'S ERRORS REGARDING THE EVIDENCE

65. We submit that the Inquiry Committee in its Report erred in law, exceeded its jurisdiction and violated the rules of procedural fairness and natural justice by excluding relevant evidence, failing to take into consideration relevant evidence and by making findings of fact that were unsupported by the evidence.

66. We will address these issues in more detail in Part V of these submissions where we address the particular allegations of misconduct against Justice Matlow. We note our concerns in general terms at this stage, though, because the cumulative effect of these errors is that the Inquiry Committee through its Report has failed to provide Justice Matlow

with the high standard of procedural fairness that is required in the circumstances. Through its errors, the Inquiry Committee's Report fails to provide the fair and complete representation of the evidence which is necessary to enable the Council as a whole to either accept or reject the Inquiry Committee's findings and recommendation and to make its independent determination of the facts and its appropriate recommendation.

67. We outline the evidentiary errors thematically below.

Failure to Include Relevant Facts in the Report

68. We submit that 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. 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.

69. 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 has served as a judge since 1981 and made other valued contributions to the profession. As will be addressed later, this evidence is relevant in assessing the appropriate penalty in the circumstances.

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 of 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. This evidence is particularly relevant to the issue of whether Justice Matlow is capable of carrying out the impartiality, independence and integrity required by judicial office.

g. The City did not complain about Justice Matlow's conduct until after the judicial review application in 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, 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. From 2002 onwards, including the time the *SOS Application* was heard in October 2005 until he took a leave of absence in April 2007, Justice Matlow continued to carry out his office as judge without any concern or complaint.

Findings of Fact Contrary to the Uncontradicted Evidence

70. We further submit that the Inquiry Committee made findings of fact that were contrary to and unsupported 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.*

Failure to Admit and/or Consider Relevant Evidence

71. The Inquiry Committee erred by rejecting evidence regarding Justice Matlow's character which is relevant to the proceedings.

72. At the public hearing before the Inquiry Committee in January 2008, numerous letters providing evidence of Justice Matlow's character were accepted and admitted into the record with the consent of independent counsel. These letters did not address the specifics of the allegations of misconduct but rather provided general information about Justice Matlow's character and integrity.

Letters of Support, Exhibits 6, 6(a), 6(b), Book of Evidence, Tab 5(b)

73. After the hearing was completed, without notice to Justice Matlow and without any opportunity to make submissions, the Inquiry Committee "on reconsideration" decided to disregard that evidence.

Inquiry Committee's Report, para. 33, Book of Evidence, Tab 1

74. This character evidence, however, is relevant to Justice Matlow's integrity, credibility

and mitigating factors with respect to appropriate penalty.

75. The Inquiry Committee's failure to give any weight to the letters gives rise to a particular denial of natural justice in view of the Committee's findings of credibility regarding Justice Matlow's evidence. Although the letters consistently address Justice Matlow's integrity, honesty, principles and commitment to the rule of law, the Inquiry Committee, without reasons, failed to accept Justice Matlow's uncontradicted evidence on the two key questions of (a) his reasons for contacting John Barber in October 2005; and (b) the fact that he did not know he would be sitting on the *SOS Application* when he contacted Mr. Barber.

76. The Inquiry Committee also erred in law and denied Justice Matlow natural justice by refusing to admit into evidence a community statement setting out the local community's support for Justice Matlow. This evidence is directly relevant to the ultimate issue of whether public confidence was undermined by Justice Matlow's conduct.

> Transcript, Examination of Judith Collard (9 January 2008) at p. 176, line 18 to p. 179, line 2, Book of Evidence, Tab 8
> Transcript, Examination of Justice Matlow, and p. 219, line 15 to p. 220, line 8, Book of Evidence, Tab 9

IV. JURISDICTION OF THE CANADIAN JUDICIAL COUNCIL

77. The Inquiry Committee's investigation in many instances focussed on Justice

Matlow's conduct with respect to sitting on the Divisional Court panel which heard the *SOS Application*. While the Amended Particulars and allegations of misconduct do not raise any allegations or concerns with respect to his ruling on the recusal motion in the *SOS Application*, they do raise allegations with respect to

(a) the fact that he sat on the panel;

(b) whether he should have taken pre-emptive steps to avoid sitting on the panel;

(c) whether he should have disclosed information about his involvement with the Thelma Project to his judicial colleagues; and

(d) whether he should have disclosed information about his dealings with Mr. Barber to either his judicial colleagues or the parties in the *SOS Application.*

Amended Particulars (Exhibit 4B), para. 26, 30, 35(a), 35(b), 35(c), 35(d) and 35(e), Book of Evidence, Tab *3*

78. In addition, the Inquiry Committee of its own motion added further allegations of misconduct which expanded the scope of its investigation to address the broader issue of whether, in light of his participation in the Thelma Project, Justice Matlow engaged in misconduct by failing to take steps to ensure that he did not sit on any matter involving the City.

Amended Particulars (Exhibit 4B), para. 35(k) and 35(l), Book of Evidence, Tab 3

79. The fundamental issue that underlies all of these allegations is whether Justice Matlow should have recused himself from the panel hearing the *SOS Application* – or any other case involving the City – because of a possible conflict of interest or reasonable apprehension of bias.

80. We submit that the Canadian Judicial Council lacks jurisdiction to review and investigate Justice Matlow with respect to any of the allegations in paragraphs 26, 30, 35(a), 35(b), 35(c), 35(d), 35(e), 35(k) and 35(l) of the Amended Particulars. These particulars and allegations of misconduct relate directly to Justice Matlow's assessment of whether he was in a possible conflict of interest or whether there was a reasonable apprehension of bias. These are matters of an individual judge's discretion and judicial decision-making that are beyond the jurisdiction of the Canadian Judicial Council.

81. Justice Matlow's November 2005 decision on the motion to recuse himself is a matter of judicial discretion and decision-making which is subject to review only on appeal to the appellate courts. As is clear from the Amended Particulars and the Inquiry Committee's Report, Justice Matlow's conduct and decision on the formal recusal motion are <u>not</u> the subject of this investigation.

82. This principle should apply with equal force to Justice Matlow's assessment – prior to the *SOS* hearing – of his status to hear the *SOS* case and his assessment of whether he should recuse himself from <u>any</u> matter involving the City.

83. Justice Matlow's decision – prior to the *SOS* hearing and in the absence of any motion – on whether to take steps to ensure he did not sit on the *SOS Application* or to disclose particular information to the other judges or parties relates directly to and turns precisely on whether Justice Matlow was of the opinion that his conduct in the Thelma Project or in connection with Mr. Barber gave rise to a reasonable apprehension of bias or a conflict of interest in respect of the *SOS Application*. This determination is a matter of an individual judge's discretion and decision-making which, absent bad faith or abuse of office, cannot be the subject of disciplinary proceedings.

84. The Canadian Judicial Council has previously confirmed that discretionary decisions by judges cannot, absent actual evidence of bad faith or abuse of office, be the subject of disciplinary proceedings. In the *Boilard* Inquiry, reviewing a complaint about Justice Boilard's decision to recuse himself from a case, the Council ruled:

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

> after issuance of his or her decision, he or she may be called upon to justify it to another branch of government. ... [J]udicial immunity is central to the concept of judicial independence.
>
> *Report of the Canadian Judicial Council to the Minister of Justice of Canada under ss. 65(1) of the Judges Act concerning Mr. Justice Jean-Guy Boilard of the Superior Court of Quebec* (19 December 2003) at pp. 2-3 [emphasis added]

85. This position is reiterated in a 2004 Opinion of the Advisory Committee on Judicial Ethics on the question of recusal. In that opinion, the Advisory Committee stresses that a decision on whether a judge should recuse himself or herself is one that lies within the discretion of the judge alone and falls outside the jurisdiction of the Canadian Judicial Council:

> The Committee wishes to emphasize that recusal decisions and the reasons for them are judicial decisions rather than matters of judicial conduct and are dealt with by the judge in open court and thus subject to appellate review. ... [T]he judge's recusal decision is his or her own judicial decision because the Committee has no role in judicial decision making.
>
> Recusal is a matter for a judge to decide acting judicially in open court on the basis of submissions made and judicial authorities considered.
>
> *Opinion of the Advisory Committee on Judicial Ethics* (2004-14) Recusal at p. 2, Book of Authorities, Vol. 1, Tab 4

86. In respect of exercising judicial discretion, the Advisory Committee advises that "If the judge does not perceive herself to be biased, there is no question but that she should not recuse herself."

Opinion of the Advisory Committee on Judicial Ethics (2004-14) Recusal at p.4, Book of Authorities, Vol. 1, Tab 4

87. The Canadian Judicial Council's jurisdiction necessarily excludes matters of judicial discretion and decision-making in order to protect the independence of the judiciary. As has been stated by the former Chairman of the Council's Judicial Conduct Committee, "the Council cannot become ... a Court of Appeal reviewing and criticizing decisions made by judges, criticizing judges and setting aside or amending their decisions."

> The Honourable Chief Justice Allan McEachern, "Openness and Independence in Judicial Discipline Matters" (Paper presented at the Open Justice conference of the Canadian Institute for the Administration of Justice, Oct. 12-15, 1994) at p. 319, Book of Authorities, Vol. 1, Tab 5

88. When a judge is assessing whether he or she is in a conflict of interest or is assessing whether sitting on a case may give rise to a reasonable apprehension of bias, the judge's decision-making process is identical and is directed towards the identical legal question whether that assessment is made prior to a hearing or in response to a formal request for recusal.

89. Where Justice Matlow did not perceive there to be a reasonable apprehension of bias and did not perceive that his conduct gave rise to any conflict of interest, the fact that Justice Matlow did not of his own initiative pre-emptively recuse himself prior to the hearing and in the absence of any motion cannot be the basis of professional discipline and for his removal from judicial office. To make such assessments the basis for professional

discipline would impose a chill on a judge's independence.

90. The impugned paragraphs in the particulars and allegations of misconduct seek to examine indirectly what the Council does not have jurisdiction to examine directly. The Council does not have jurisdiction to review the merits of Justice Matlow's formal recusal decision. However, the impugned paragraphs in the particulars and allegations of misconduct seek to review and penalize Justice Matlow for the merits of his judgment on the exact same issue in the pre-hearing period. The impugned particulars posit that a breach of professional conduct occurred because Justice Matlow did not proactively perceive there to be a reasonable apprehension of bias. By subjecting Justice Matlow's judgment on these issues to discipline for professional misconduct, the Council's investigation strays beyond its jurisdiction, and intrudes upon and pre-empts any independent exercise of judicial decision-making or discretion by the judge on this issue.

91. The Council and the Inquiry Committee must exercise their statutory powers in accordance with constitutional law. One of the bedrock principles of our constitutional law is judicial independence. We submit that any review conducted by the Council and Committee relating to the particulars and allegations of misconduct in question would be an infringement of this fundamental principle.

> *Slaight Communications Inc. v. Davidson* (1989), 59 D.L.R. (4th) 416 (S.C.C.), Book of Authorities, Vol. 1, Tab 6 at 444-445, per Lamer J.
>
> *The Queen in Right of Canada v. Beauregard* (1986), 30 D.L.R. (4th) 481 (S.C.C.), Book of Authorities, Vol. 1, Tab 7 at

491-492, 494, 496

92. In addition to the analysis above, we submit that by adding the allegations of misconduct in paragraphs 35(k) and 35(l) of the Amended Particulars the Inquiry Committee erred in law and exceeded its jurisdiction in a further way by improperly expanding the scope of its investigation. Paragraphs 35(k) and 35(l), which were raised by the Inquiry Committee in December 2007 and incorporated into the Amended Particulars on 8 January 2008, for the first time raised the issue of whether, beginning as early as 2002, Justice Matlow should have recused himself from sitting on <u>any matter</u> involving the City of Toronto. We submit that these allegations are beyond the jurisdiction of the Inquiry Committee and this Council because they are not matters that have been properly raised in any complaint or referred for investigation through the Council's own procedures:

(a) The Inquiry Committee only has jurisdiction to consider any complaint or allegation that is brought to its attention.

Inquiries and Investigations By-Law, s. 5(1)

(b) No party at any time made any complaint or raised any allegations or concerns about Justice Matlow's conduct in sitting on the five cases involving the City prior to the *SOS Application*. No complaint was raised by the City itself in those five proceedings. Even though in 2002 to 2004 the City

Solicitor was personally aware of Justice Matlow's participation in opposing the Thelma Project and the position that he had taken, she did not disseminate any information about this beyond the management team and did not issue any memorandum to City staff expressing concerns about appearing before Justice Matlow. If the City, who is the party most directly affected, has not raised any concern about misconduct regarding these earlier cases, the Inquiry Committee and the Council have no jurisdiction to expand the scope of the investigation. If, at the time, the City had raised a concern that Justice Matlow erred by failing to recuse himself in any of those five cases, that would have been a matter for review by the Court of Appeal.

Agreed Statement of Facts, para. 52-53, Book of Evidence, Tab 4

(c) In October 2005 when the City Solicitor learned that Justice Matlow was sitting on the *SOS Application*, the concern expressed was that there was a similarity of issues between the *SOS Application* and the Thelma Project. The City did not raise a blanket concern about Justice Matlow sitting on any City case and the City did not raise a concern about his participation in any prior cases.

Agreed Statement of Facts, para. 72, Book of Evidence, Tab 4

(d) No complaint regarding these prior cases was raised by the City Solicitor in

her complaint to the Canadian Judicial Council in January 2006. Her complaint was directed towards the *SOS Application* itself and whether Justice Matlow's comments to Mr. Barber in October 2005 raised concerns about him sitting on future cases.

Letter from City Solicitor (30 January 2006), (Exhibit 1), Book of Evidence, Tab 5(a)

(e) Throughout the lengthy process under the Council's "Complaint Procedures" prior to the constitution of the Inquiry Committee, the question of Justice Matlow having sat on five prior cases involving the City was never raised as a concern. It was not a matter referred to the Panel and upon which Justice Matlow had the opportunity to make submissions under s. 9 of the Complaints Procedure. Similarly, it was not an issue considered by the Council under s. 10 of the Complaints Procedure in referring the complaint to the Inquiry Committee.

Procedures for Dealing with Complaints made to the Canadian Judicial Council about Federally Appointed Judges ("*Complaints Procedures*"), para. 9-10, Book of Authorities, Vol. 1, Tab 2

(f) Following his investigation in preparation for the public hearing by the Inquiry Committee, Independent Counsel did not identify any concern about Justice Matlow sitting on these earlier cases involving the City prior to the *SOS*

Application in the particulars that were provided to Justice Matlow.

Notice of Hearing and Particulars (Exhibit 4A), Book of Evidence, Tab 2

(g) Where throughout the entire process leading up to the Inquiry Committee, no complaint or allegation of misconduct was raised about Justice Matlow sitting on cases involving the City prior to October 2005, the Inquiry Committee and this Council lack jurisdiction to investigate and subject Justice Matlow to discipline in relation to those cases and his exercise of discretion and decision-making in relation to sitting on those earlier cases.

(h) The Inquiry Committee compounded this jurisdictional error by denying Justice Matlow natural justice in the manner in which it addressed this issue. 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 of those cases and it made this ruling without allowing Justice Matlow an opportunity to review and address the circumstances of those five cases.

Transcript, (8 January 2008) at pp. 1-26, Book of Evidence, Tab 10

V. REVIEW UNDER SECTION 65 OF THE *JUDGES ACT*

A. The Test for Removal

93. Under s. 65(2) of the *Judges Act*, the Canadian Judicial Council has jurisdiction to review a judge's conduct and recommend that a judge be removed from judicial office in the following circumstances:

> 65. (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
>
> (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.

94. Before the Canadian Judicial Council may make a recommendation that a judge be removed from office, the subject matter of the complaint must be measured against a very strict test. The conduct which is the subject of the complaint must be such that it "could reasonably be expected to shock the conscience and shake the confidence of the public." The test which has been applied by the Council and adopted by the courts 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?
>
> *Report of the Inquiry Committee re the Royal Commission on the Donald Marshall Jr. Prosecution* (August 1990) at p. 27 Book of Authorities, Vol. 1, Tab 8
>
> *Report of the Inquiry Committee re Mr. Justice Bernard Flynn* (12 December 2002) at pp. 22-23 and cases cited therein Book of Authorities, Vol. 1, Tab 9

95. In its history, the Council has only once recommended that a judge be removed from office.

> *Report of the Inquiry Committee re Mr. Justice Jean Bienvenue* (June 1996), Book of Authorities, Vol. 1, Tab 10

96. The conduct that is at issue in the present case is in no measure comparable to the conduct which warranted the recommendation for removal from office in the *Bienvenue* Inquiry.

97. It is well-established that statutes imposing professional discipline must be interpreted strictly and narrowly. Apart from the implications any ruling by the Council may have for the judiciary at large, the Council's ruling has the most serious consequences for the individual judge. The Council's disciplinary jurisdiction puts the judge in the highest jeopardy as the Council's jurisdiction is exercised in relation to the ultimate penalty – removal from office. This has, in professional discipline cases, been referred to as the "professional death penalty". Accordingly, the test for establishing that a judge's conduct

warrants removal must remain at the highest threshold.

> cf. *Henderson v. College of Physicians and Surgeons of Ontario* (2003), 65 O.R. (3d) 146 (C.A.) at paras. 26-27
> Book of Authorities, Vol. 1, Tab 11

98. We accept that the applicable standard by which to establish professional misconduct is the civil standard of balance of probabilities applied in a manner such that misconduct is only established by "clear and convincing proof based on cogent evidence."

B. *Charter of Rights and Freedoms:* Freedom of Expression and Freedom of Association

1. Framework for Interpreting and Applying the *Charter*

99. Every administrative tribunal, including the Canadian Judicial Council, must exercise its statutory powers in a manner that is consistent with the *Canadian Charter of Rights and Freedoms*. Accordingly, in conducting its review under s. 65 of the *Judges Act* and assessing the propriety of Justice Matlow's conduct, the Council must be careful to ensure that its analysis and recommendation are consistent with upholding fundamental *Charter* rights and freedoms.

> *Slaight Communications Inc. v. Davidson,* Book of Authorities, Vol. 1, Tab *6, supra* at 444-445, per Lamer J.

100. The Council must ensure that it interprets and applies s. 65(2) of the *Judges Act* consistently with the *Charter.* This means that the Council's interpretation of

(a) what it means to be incapacitated or disabled from the due execution of judicial office;

(b) what constitutes misconduct;

(c) what constitutes a failure in the due execution of judicial office; and

(d) what conduct is incompatible with the due execution of judicial office

must all be consistent with the protection of the rights and freedoms in the *Charter*.

101. The conduct at issue in the present case involves an individual's exercise of his constitutional rights to freedom of expression and freedom of association. The allegations of misconduct regarding Ted Matlow's conduct in opposing the Thelma Project are very precisely about what Ted Matlow said, what he communicated in writing, how he expressed his beliefs and opinions, and to whom he communicated them. The allegations of misconduct are also very precisely about his activities in associating with his neighbours and communicating their collective concerns with the support of his municipal councillor to relevant municipal committees and authorities. These are all activities that fall within the core activities protected by freedom of expression and freedom of association under the *Charter*.

102. It has long been recognized that freedom of expression and association are the most critical freedoms and manifestations of citizenship in a democratic society and the most significant means of association with one's fellow citizens. Accordingly, it is of fundamental importance that the Council have due consideration for and apply the

appropriate legal analysis in safeguarding judges' freedom of expression and freedom of association.

103. At the heart of this proceeding are the questions of

(a) what limitations may lawfully be imposed on a judge's exercise of freedom of expression and freedom of association in the context of his or her private life; and

(b) whether those limitations infringe these fundamental freedoms as little as possible.

104. We submit that the Inquiry Committee erred in law by failing entirely to engage in an appropriate legal analysis of the constitutional rights at issue. The Inquiry Committee failed to correctly interpret and apply the *Charter* in respect of freedom of expression and freedom of association.

a. Freedom of Expression

105. In *Edmonton Journal v. Alberta (Attorney General)*, the Supreme Court described the fundamental importance of freedom of expression to Canadian democracy as follows:

> It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech

> permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over-emphasized. No doubt that was the reason why the framers of the Charter set forth s. 2(b) in absolute terms which distinguishes it, for example, from s. 8 of the Charter which guarantees the qualified right to be secure from unreasonable search. It seems that the rights enshrined in s. 2(b) should therefore only be restricted in the clearest of circumstances.
>
> *Edmonton Journal v. Alberta (Attorney General)* (1989), 64 D.L.R. (4th) 577 (S.C.C.) Book of Authorities, Vol. 1, Tab 12 at 607

106. This freedom is so fundamental that even prior to the *Charter*, Canadian courts recognized that freedom of expression was a constitutionally protected freedom. The Supreme Court has stated that "the purpose of the guarantee is to permit free expression to the end of promotion truth, political or social participation, and self-fulfilment".

> *R.W.D.S.U. v. Dolphin Delivery* (1986), 33 D.L.R. (4th) 174 (S.C.C.), Book of Authorities, Vol. 1, Tab 13 at 183
>
> *R. v. Zundel* (1992), 95 D.L.R. (4th) 202 (S.C.C.), Book of Authorities, Vol. 1, Tab 14 at 260

107. Under s. 2(b), freedom of expression is given a "large and liberal interpretation". The Supreme Court of Canada has established a two-part test to determine if freedom of expression is infringed:

(a) First, it must be determined if the activity in question falls within the protected sphere of free expression. In view of the purposes of s. 2(b) set out above, the scope of expression protected under the *Charter* is extremely broad: "[the Supreme] Court has repeatedly affirmed that all communications which convey or attempt to convey meaning are protected by s. 2(b)." Only

expression that is conveyed through *methods* which are violent or in *physical locations* which are prohibited (some forms of expression on public property) fall outside the scope of s. 2(b)'s protection.

(b) Second, if the purpose or effect of legislation or government action – here s.65(2) of the *Judges Act* and its application by the Council – is to restrict expression, there is an infringement on s. 2(b) and the legal analysis shifts to s. 1 of the *Charter*.

Irwin Toy Ltd. v. Attorney General (Quebec) (1989), 58 D.L.R. (4th) 577 (S.C.C), Book of Authorities, Vol. 1, Tab 15 at 604-614

R. v. Zundel, Book of Authorities, Vol. 1, Tab 14, *supra* at 259-261, 264

Baier v. Alberta, [2007] 2 S.C.R. 673, 2007 SCC 31 at para. 19-20, Book of Authorities, Vol. 1, Tab 16

108. There is in effect a very low threshold for establishing a *prima facie* breach of s.2(b). Once there is a limit on expression, the legal analysis must turn to the question of whether that infringement can be justified in a free and democratic society. The merits of any limitations on freedom of expression are only considered under the justification stage under s. 1 of the *Charter* and are not considered in defining the scope of s. 2(b) protection.

Irwin Toy, Book of Authorities, Vol. 1, Tab 15, *supra*

R. v. Zundel, Book of Authorities, Vol. 1, Tab 14 *supra* at 259-264

Osborne v. Canada (Treasury Board) (1991), 82 D.L.R. (4th) 321 (S.C.C.) Book of Authorities, Vol. 1, Tab 17 at 332-338,

esp. at 337-338

Baier v. Alberta, Book of Authorities, Vol. 1, Tab 16 *supra* para. 19

b. Freedom of Association

109. Freedom of association under s. 2(d) of the *Charter* is similarly given a large and liberal interpretation. Whether there is a breach of s. 2(d) follows the same two-part test that applies to find a breach of s. 2(b): first, do the activities in question fall within the range of activities protected by freedom of association; and second, does the purpose or effect of legislation or government action – here s.65(2) of the *Judges Act* and its application by the Council – interfere with those activities. Again, the merits of any infringement must only be assessed and justified under s. 1.

Dunmore v. Ontario (Attorney General) (2001), 207 D.L.R. (4th) 193 (S.C.C.), Book of Authorities, Vol. 1, Tab 18 at para. 13

Baier v. Alberta, Book of Authorities, Vol. 1, Tab 16 *supra* at para. 103

110. As with s. 2(b), the scope of activities protected under s. 2(d) is given a large and liberal interpretation in view of the importance of the freedom. As stated by Chief Justice Dickson,

> "Freedom of association is the freedom to combine together for the pursuit of common purposes or the advance of common causes. It is one of the fundamental freedoms guaranteed by the Charter, a *sine qua non* of any free and democratic society, protecting individuals from the vulnerability of isolation and

> ensuring the potential of effective participation in society. In every area of human endeavour and throughout history individuals have formed association for the pursuit of common interests and aspirations. Through association individuals are able to ensure that they have a voice in shaping the circumstances integral to their needs, rights and freedoms.

This has been echoed in the following statement by Justice McIntyre which has also been unanimously adopted by the Court:

> While freedom of association like most other fundamental rights has no single purpose or value, at its core rests a rather simple proposition: the attainment of individual goals, through the exercise of individual rights, is generally impossible without the aid and cooperation of others. "Man, as Aristotle observed, is a 'social animal, formed by nature for living with others', associating with his fellows both to satisfy his desire for social intercourse and to realize common purposes."
>
> *Reference re Public Service Employee Relations Act (Alberta)* [1987] 1 S.C.R. 313, Book of Authorities, Vol. 1, Tab 19 at 334 (per Dickson C.J.C) and at 395 (per McIntyre J.)
>
> *Dunmore v. Ontario (Attorney General)*, Book of Authorities, Vol. 1, Tab 18 *supra* at para. 14-15

111. We submit that the Inquiry Committee erred in law and exceeded its jurisdiction by failing to apply the well-established *Charter* analysis set out above to address the issue of whether s. 2(b) and/or s. 2(d) would be contravened by imposing restrictions on a judge's freedom to participate in the local affairs of his community. The Inquiry Committee erred by ruling that the *Charter* rights were not engaged because it viewed any restrictions on s. 2(b) and s. 2(d) to be part of the "normal duties" of a judge which are voluntarily accepted upon accepting the appointment to judicial office. This approach is directly contrary to the

established *Charter* law. In particular, the Inquiry Committee erred by failing to give s. 2(b) and s. 2(d) their broad interpretation and by instead reading down the scope of s.2(b) and s. 2(d) protection rather than addressing the merits of any restrictions under s. 1 of the *Charter*.

> *Inquiry Committee Report* at para. 119-121, Book of Evidence, Vol. 1, Tab 1
>
> *Osborne v. Canada (Treasury Board)*, Book of Authorities, Vol. 1, Tab 17 *supra* at 332-338, esp. at 337-338

c. Section 1: Limitations on Fundamental Freedoms that are Justifiable in a Free and Democratic Society

112. Section 1 of the *Charter* provides that:

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

113. To establish that an infringement of a substantive *Charter* right is "demonstrably justifiable in a free and democratic society", it must be demonstrated on the basis of evidence and the application of logic that

(1) the objective served by the infringement is "of sufficient importance to warrant overriding a constitutionally protected right or freedom"; and

(2) that the impairment of the right is proportional to the importance of the objective in that

(a) the means chosen to implement the objective are rationally connected

to the objective;

(b) the means chosen impair the *Charter* right "as little as possible"; and

(c) the deleterious effects of the limit on the right are not disproportionate to the beneficial effects of achieving the objective.

R. v. Oakes, [1986] 1 S.C.R. 103 , Book of Authorities, Vol. 1, Tab 20 at 138-140

RJR MacDonald Inc. v. Canada (Attorney General), [1995] 3 S.C.R. 199, Book of Authorities, Vol. 1, Tab 21at para. 126-130

Thomson Newspaper Co. v. Canada, [1998] 1 S.C.R. 887, Book of Authorities, Vol. 1, Tab 22 at para. 123-126

Newfoundland (Treasury Board) v. N.A.P.E. (2004), 244 D.L.R. (4th) 294, Book of Authorities, Vol. 1, Tab 23 at para. 53

114. The s. 1 analysis must be conducted contextually. The s. 1 inquiry is by its very nature a fact-specific inquiry which looks at the particular circumstances in which *Charter* values and pressing and substantial objectives are in tension. For this reason, the Supreme Court has repeatedly indicated that s. 1 must be analysed by means of "a sensitive, case-oriented approach" having regard to the factual and social context of the particular case.

RJR MacDonald Inc. v. Canada (Attorney General), Book of Authorities, Vol. 1, Tab 21 *supra* at para. 131-134

R. v. Oakes, Book of Authorities, Vol. 1, Tab 20 *supra* at 135-138

115. We submit 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*. In its Report, the

Inquiry Committee's full consideration of this issue was to state that "to the extent that there may be limitations on a judge's speech or association off the bench, they are justified in a free and democratic society to ensure the preservation of the impartiality and independence of the judiciary and the rule of law." This conclusion was reached without conducting any of the s. 1 legal analysis that is required by the clear and unequivocal jurisprudence of the Supreme Court of Canada.

d. Context for Conducting the Section 1 Analysis: The Evolution in Judicial Free Speech and Association

116. As set out above, there is no doubt that Ted Matlow's conduct in opposing the Thelma Project is expressive activity and association that fall within the core of activities that are protected by both s. 2(b) and s. 2(d) of the *Charter*.

117. There is also 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.

> Canadian Judicial Council, *Ethical Principles for Judges* (Ottawa: Canadian Judicial Council, 1998) at p.15, para. 5, (Exhibit 10), Book of Evidence, Tab 5(d)
>
> see also, *Ruffo v. Conseil de la magistrature* (1995), 130 D.L.R. (4th), 1 Book of Authorities, Vol. 1, Tab 25 at para. 108

118. However, in view of the importance of these *Charter* rights, the restrictions which are imposed must be drawn as narrowly as possible and must be limited to what is strictly

necessary in order to ensure the impartiality, integrity and independence of judicial office.

119. It is submitted that any restrictions on free speech and association by judges must be scrutinized particularly closely where they relate to a judge's conduct in private life rather than in the course of judicial office.

120. The task of drawing these lines is complicated by the fact that what constitutes an acceptable exercise of judicial free speech is in a state of transition. In the decades since the *Berger* Inquiry, there has been an increased acceptance – and even expectation – of the fact that members of the judiciary may participate in various kinds of public discourse.

> See, for example,
>
> A. Wayne MacKay, "Judicial Free Speech and Accountability: Should Judges Be Seen but Not Heard?", (1993) 3 N.J.C.L. 159, Book of Authorities, Vol. 2, Tab Q
>
> The Honourable John Sopinka, "Must a Judge Be A Monk – Revisited", (1996), 45 U.N.B. Law Journal 167 at 167 contrasting the approach of the "old school" and the "modern school", Book of Authorities, Vol. 2, Tab D
>
> Canadian Judicial Council, Letter from the Panel inquiring into the complaint re Justice Angers, reprinted in (1996), 45 U.N.B. Law Journal 185 at 186 noting criticism of the *Berger* Inquiry Committee, Book of Authorities, Vol. 1, Tab 26
>
> Remarks of the Right Honourable Beverley McLachlin, P.C., "The Role of the Judges in Modern Society" (May 5, 2001), Book of Authorities, Vol. 2, Tab P
>
> Lorne Sossin, "The Evolution of Freedom of Expression and Freedom of Association for Judges" (3 January 2008) at pp. 8-15, Book of Authorities, Vol. 2

121. Judicial commentary on issues of public interest is growing, as is acceptance of such commentary in the public. This trend reflects and reinforces the more general shift away from the view that judges lead an aloof and monastic life. This was highlighted by Chief Justice McLachlin in her 2004 speech on "Judging in a Democratic State":

> In short, judges are human beings. They are sons and daughters, husbands and wives, parents and friends. They coach the local soccer team, cook dinner when they come home at night, and line up in airports when they go on vacation. Insofar as their humanness may be a distraction, as Tolstoy suggests, judges must strive to overcome it. But the benefits of judges being human beings greatly outweigh the detriments. Judges deal with human problems. They must be able to relate to these problems, to understand them. We would not want a robot for a judge even if we could find one. We would worry that the robot would be unable to understand the human condition, the basic requirement for being a judge.
>
> Remarks of the Right Honourable Beverley McLachlin, P.C., "Judging in a Democratic State" (June 3, 2004) at p. 7, Book of Authorities, Vol. 2, Tab E

122. It is submitted that the increased tolerance with respect to judicial free speech is grounded in the mutually reinforcing changes that have emerged from

(a) the development of the principles of judicial ethics and a nuanced understanding their relationship to judicial independence;

(b) an evolution in the concept and content of judicial impartiality; and

(c) an evolution in the public expectations of public engagement by judges in a constitutional democracy.

123. It is further submitted that there is an expanded recognition of the freedom of

association of judges in community affairs. Judges have, for example, formed associations for the purpose of participating in remuneration commissions and providing information on behalf of the judiciary in this context. As a further example, the Ontario Justice Education Network is a judicial-led initiative, founded by the Chief Justices of the Ontario Court of Appeal, the Superior Court of Justice and the Ontario Court of Justice with a mandate to promote education about the justice system. So long as the associational conduct is not partisan, a judge should be entitled to participate in local affairs as a citizen of the community.

124. Former Chief Justice Roy McMurtry, who retired in 2007, provided a modern model for judges' active engagement in their communities. While in judicial office, Chief Justice McMurtry sponsored a wide range of community initiatives including a breakfast program in public schools, after-school programs to keep at-risk youth off the streets, a 'second chance' program for young people involved in the criminal justice system, the Mayor of Toronto's Advisory Panel on Community Safety, promoting jobs for young people from low-income families, assisting Frontier College, the Law Society's Feed the Hungry program and raising funds for various charities through the sale of his paintings. Far from being viewed as controversial or diminishing respect for the judiciary, Chief Justice McMurtry's community leadership was widely praised by the public and their representatives and was a source of genuine pride within the judiciary. On his retirement, he was touted as "a model citizen" because of his volunteer activities.

> Sossin, "The Evolution of Freedom of Expression and Freedom of Association for Judges", *supra* at pp. 11-13, and

Appendices M and N, Book of Authorities, Vol. 2, and Tabs M and N

125. The task in the present circumstances is to determine how the evolution in these freedoms applies to a judge who exercises the freedom of expression and association in the context of his private life and how this evolution informs an understanding, in the current context, of what restrictions on freedom of expression and association minimally impair these *Charter* rights.

126. We submit that in determining whether Justice Matlow's conduct in opposing the Thelma Project incapacitates or disables him from the execution of judicial office, the Council must analyse whether restrictions on his free speech and association are justified in a free and democratic society and impair his rights as little as possible. The Council must conduct that s. 1 analysis with due consideration of the context which includes

(a) the evolution in mores regarding judicial speech and public engagement in the community;

(b) the recent development and advisory nature of the ethical principles for judges;

(c) the evolution in the notions of judicial impartiality; and

(d) the fact that Justice Matlow's conduct which is the subject of this proceeding is conduct which arose in the context of his life as a private citizen.

These aspects of the appropriate context for analysis are addressed in more detail below.

i. Ethical Principles for Judges

127. It is significant that the Canadian model of judicial accountability is based not on a prescriptive code of conduct, but on a very general statement of ethical principles.

128. The Canadian Judicial Council *Ethical Principles for Judges* – which were released only in 1998 – expressly indicates that it provides only a general guide to principles and standards of judicial conduct and is not a code of prohibited behaviours. Section 1 of the document states as follows:

> 1. The Statements, Principles and Commentaries describe the very high standards toward which all judges strive. They are principles of reason to be applied in light of all of the relevant circumstances and consistently with the requirements of judicial independence and the law. Setting out the very best in these Statements, Principles and Commentaries does not preclude reasonable disagreements about their application or imply that departures from them warrant disapproval.
>
> 2. The Statements, Principles and Commentaries are advisory in nature. Their goal is 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.
>
> *Ethical Principles for Judges* (1998) at p. 3, para. 1-2 (Exhibit 10) [emphasis added], Book of Authorities, Vol. 1, Tab 24

129. The *Ethical Principles* further stress that the need to use the principles only in an

advisory rather than prescriptive capacity is fundamentally connected to preserving judicial independence:

> 3. An independent judiciary is the right of every Canadian. A judge must be and be seen to be free to decide honestly and impartially on the basis of the law and the evidence, without external pressure or influence and without fear of interference from anyone. Nothing in these Statements, Principles and Commentaries can, or is intended to limit or restrict judicial independence in any manner.
>
> *Ethical Principles for Judges* (1998) at p. 4, para. 3 (Exhibit 10), Book of Authorities, Vol. 1, Tab 24

130. As a result, the *Ethical Principles* do not tell a judge what he or she can or must do. Instead, as stated by Madame Justice Georgina Jackson, the document "describes an ethical and moral culture. The language of the *Ethical Principles* is not directive. The language is in the form of advice." She stresses that "ethical principles leave more to the individual good conscience of the judge than a code that can lead simply to legalistic ritual."

> The Honourable Georgina R. Jackson, "The Mystery of Judicial Ethics: Deciphering the 'Code", (2005) 68 Sask. L. Rev. 1 at paras. 63-69, Book of Authorities, Vol. 1, Tab 27
>
> See also the Memo to Judges from the Judicom Website (Exhibit 11) which observes that "matters pertaining to ethics evolve" and states that the Ethical Principles "give ethical guidance to federally appointed judges leaving the ultimate decision to the judge whether he or she wishes to engage in the proposed activity.", Book of Evidence, Tab 5(e)

131. The Supreme Court of Canada has similarly accepted that statements of judicial ethics and principles are aspirational in that they speak to the highest possible standards

to which a judge should aspire. As stated by Justice Gonthier,

> 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.
>
> *Ruffo v. Conseil de la magistrature*, *supra* at para. 110, Book of Authorities, Vol. 1, Tab 25

132. It follows from the fact that Canada has chosen a model based on ethical principles, that the *Ethical Principles* cannot be a code of behaviour for discipline. The standard for imposing discipline is different from and higher than the threshold for determining whether there has been a breach of ethics. As stated by Justice Jackson, "all conduct capable of being sanctioned must be a breach of ethics, but not every breach of the *Ethical Principles* can amount to sanctionable conduct."

> Jackson, J., "The Mystery of Judicial Ethics: Deciphering the 'Code'", *supra* at para. 77, Book of Authorities, Vol. 1, Tab 27

ii. The Concept of Judicial Impartiality

133. The second development in judicial culture relates to the evolution in the notion of impartiality. The traditional view of impartiality denied the operation of personal

preferences or experience in judging in favour of the image of the judge as possessing ultimate objectivity. This traditional perspective led to a conservative approach to judicial free speech which suggested that "judges must be restrained in most matters and where possible err on the side of caution." Over the past two decades, however, there has emerged "a more modern conception of the role of the judge which is more tolerant of elements of subjectivity" and which "admits that objectivity is more of an ideal than a reality". What the implications of this evolution are for the scope of judicial free speech remains an area under cultural negotiation.

> MacKay, "Judicial Free Speech and Accountability", *supra* at pp. 170-172, Book of Authorities, Vol. 2, Tab Q
>
> Sossin, "The Evolution of Freedom of Expression and Freedom of Association for Judges", *supra* at pp. 8-15, esp. at 8, 13-15, Book of Authorities, Vol. 2

134. Chief Justice Beverley McLachlin has recently endorsed the modern notion of impartiality stating with respect to the myth of the wholly objective judge that "nothing could be further from the truth. Judges are first and foremost human beings. As such, their conclusions on the facts and the law are shaped by their training and their personal experience." She writes that acknowledging that judges are shaped by their training and personal experiences does not prevent impartiality:

> It is true that judges must guard against preconceptions and prejudices influencing their findings of fact and law. It is equally true that they must be neutral as between the contesting parties. However, this does not mean that the judge's mind must be a blank slate. ...
>
> . . .

> To insist that a judge purge all preconceptions and values from the mind is to place an impossible burden on the judge and induce impossible expectations in the public. The best the judge can do is to become aware of his or her mind-set and guard against errors it may engender. What is required is not mechanical robot-like impassivity, but human impartiality.
>
> McLachlin, C.J.C., "Judging in a Democratic State", *supra* at pp. 5-6, Book of Authorities, Vol. 2, Tab E

135. Finally, the Supreme Court of Canada has recognized that impartiality is not equated with objectivity because "objectivity [is] an impossibility." To this end the Supreme Court has endorsed the notion that impartiality requires judges to acknowledge, consciously allow for, and question their sympathies and act upon different points of view with an open mind:

> As the Canadian Judicial Council noted in *Commentaries on Judicial Conduct* (1991), at p. 23, "[t]here is no human being who is not the product of every social experience, every process of education, and every human contact." What is possible and desirable, they note, is impartiality:
>
> > ... the wisdom required of a judge is to recognize, consciously allow for, and perhaps to question, all the baggage of past attitudes and sympathies that fellow citizens are free to carry, untested, to the grave.
> >
> > True impartiality does not require that a judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind.
>
> *R. v. S. (R.D.)* (1997), 151 D.L.R. 4th 193, Book of Authorities, Vol. 1, Tab 28 at paras. 32-35

iii. Public Engagement by Judges

136. The third element of cultural change is that over the past two decades with the advent of the *Charter* judges are increasingly taking on a public profile and engaging in public discourse. With this has come an expansion of the notion of what constitutes acceptable judicial free speech and association.

137. Chief Justice Beverley McLachlin has recently addressed this issue. In a 2001 speech, she reiterated that the standards have shifted in favour of increased freedom of speech and association for judges. She began her speech by outlining the traditional image of a judge who "decides only what is necessary, and on no account ever talks to the press" but elaborated that "though some will say that things have not changed enough, it is inarguable, I think, that things have changed." She first outlined the traditional role of the judge:

> The new role of judges in modern society has changed, and will continue to change, the traditional relationship between judges and the public. Judges have traditionally held themselves aloof from the public. They have lived in quiet isolation. They have deliberately severed ties with old friends and acquaintances, the better to assure their independence. Save for exceptional circumstances, they have refused to talk to the press. And they have generally declined to speak out in public on anything other than the dull business of the legal process, and then only with great circumspection.
>
> McLachlin, C.J.C., "The Role of the Judges in Modern Society", *supra* at 1, and at Section 5, pp. 7-8, Book of Authorities, Vol. 2, Tab P

138. But, she then noted, there has recently emerged "much controversy" over whether a judge may or may not speak out on issues, particularly with respect to criticisms of the court. She concluded that there is no consensus on the appropriate role for judges in this respect, "the appropriate response is not at all clear":

> Needless to say, there is a spectrum of opinion on the issue. What seems clear, however, is that, over the last twenty or so years, the entire spectrum has shifted in favour of a greater willingness on the part of judges to speak out. This shift is a reflection of the changing role of the judiciary, and perhaps a reflection of the fact that our democracies are becoming more participatory, with citizens taking a more active interest in the way social policy is made.
>
> McLachlin C.J.C., "The Role of Judges in Modern Society", *supra* at pp. 7-8, Book of Authorities, Vol. 2, Tab P

139. Recently, there have been a number of highly publicized issues upon which judges have spoken publicly and which have been the subject of debate both substantively and with respect to the propriety of judge's exercise of free speech. For example,

(a) There has been significant debate in recent years with respect to the process for appointing federal judges, particularly in the lead up to the February 2006 public questioning of Mr. Justice Marshall Rothstein prior to his appointment to the Supreme Court of Canada.

(b) There has been significant public debate beginning in or around November 2006 relating to the composition and functioning of the Judicial Advisory Committees which recommend candidates for appointment as federal

judges. Chief Justice McLachlin has been quoted in the press on this issue. In November 2006 and again in February 2007, the Canadian Judicial Council issued press releases asserting that proposed changes to the Advisory Committees would compromise judicial independence of the Advisory Committees and "raises questions about whether the most qualified individuals will be identified for appointment." In both instances, the Canadian Judicial Council purposively sought to influence public debate about a political decision in relation to the appointment process.

Canadian Judicial Council, news release, "Canadian Judicial Council calls on government to consult on proposed changes" (9 November 2006), Book of Authorities, Vol. 2, Tab J

Canadian Judicial Council, news release, "Judicial Appointments: Perspective from the Canadian Judicial Council" (20 February 2007), Book of Authorities, Vol. 2, Tab J

(c) There has been significant public discussion about the cost of litigation and the length of time that litigation takes as posing barriers to seeking justice in the courts. There has also been public discussion about the increasing length of criminal and civil trials and the delays to justice that arise as a result. These are both topics on which Chief Justice McLachlin has spoken publicly. Justice Moldaver of the Ontario Court of Appeal has also spoken out on this issue and has noted that "with every passing day, more and more judges are voicing concerns about the length and complexity of criminal trials and the urgent need to address the problem now, before it's too late".

"Chief Justice McLachlin v. those unending trials", *Globe and Mail* (13 March 2007), Book of Authorities, Vol. 2, Tab G

Justice Michael Moldaver, Remarks to the Justice Summit 2006, "The State of the Criminal Justice System in 2006: An Appellate Judge's Perspective" (15 November 2006), Book of Authorities, Vol. 2, Tab F

140. Despite the fact that these are all issues directly relating to the operation of the courts, the independence of the judiciary or fundamental aspects of the administration of justice, and clearly endorsed by the Canadian Judicial Council as falling within the parameters of permissible public speech by judges under the *Ethical Principles*, some elements of the press have been critical of judges for taking positions on these "political" issues.

See, for example, *National Post* editorials "Judges with Attitude" (22 February 2007) and "Don't speak" (10 March 2007), Book of Authorities, Vol. 2, Tab K

Globe and Mail editorial, "Chief Justice McLachlin v. those unending trials" (13 March 2007), Book of Authorities, Vol. 2, Tab G

141. Apart from addressing the administration of justice, to the extent that the public statements by judges set out above touch on controversial political topics such as how the judicial appointment process may affect judicial independence and how litigation strategies and ability to fund litigation may affect fair trials, these public statements also touch on substantive legal issues that may be raised before the courts. In other situations, judges have spoken publicly and directly on substantive and controversial legal issues – such as the propriety of the *Indian Act,* comparing it to the former apartheid regime in South Africa,

and the conduct of *Charter* litigation – that have clear potential to arise before the courts.

> Justice Harry LaForme, "The Role of Aboriginal Judges", quoted in "Aboriginal Judges Speak Out", *Lawyers' Weekly* (27 June 2007), Book of Authorities, Vol. 2, Tab I
>
> Justice Doherty quoted in "Uneven Abilities Lead to Erratic Charter Decisions, Judges Says", *Globe and Mail* (27 October 2007) and in "Public's Embrace of the Charter is at Risk", *Toronto Star* (27 October 2007), Book of Authorities, Vol. 2, Tab H

142. The above examples are identified merely to illustrate that the lack of consensus – either within the judiciary and among the public at large – as to what are the appropriate boundaries of judicial free speech creates real difficulty for individual judges exercising their independent discretion in view of the deliberately non-prescriptive guidelines as to what free speech is consistent with judicial office.

143. If there has over the decades been increased tolerance for judges speaking out, in their judicial capacity and in respect of matters relating to the execution of their judicial office, what are the implications for judges' speech in their private lives or for judges' associations within the local community?

iv. A Judge's Private Life

144. The statements of ethical principles that relate to judicial free speech are for the most part focussed on a judge's engagement with public discourse in his or her capacity

as a judge, i.e. those circumstances in which a judge is invited to or takes the initiative to speak publicly with the weight of judicial office.

145. By contrast, there is very little guidance on what scope of speech and association are acceptable in a judge's private life. The *Ethical Principles* do note the necessity to respect judges' private lives and their need for engagement with their communities:

> 4. Judges, of course, have private lives and should enjoy, as much as possible, the rights and freedoms of citizens generally. Moreover, an out of touch judge is less likely to be effective. Neither the judge's personal development nor the public interest is well served if judges are unduly isolated from the communities they serve. ... Therefore, judges should, to the extent consistent with their special role, remain closely in touch with the public."
>
> *Ethical Principles for Judges* at p. 15, para. 4 (Exhibit 10), Book of Evidence, Tab 5(d)

146. The commentary continues to observe that because a judge's conduct in and out of court is bound to be the subject of public scrutiny, a judge must accept some restrictions on their activities. However, the commentary concludes that "Judges need to strike a delicate balance between the requirements of judicial office and the legitimate demands of the judge's personal life, development and family."

> *Ethical Principles for Judges* at p. 15, para. 5 (Exhibit 10), Book of Evidence, Tab 5(d)

C. Application of the Principles to the Present Facts

147. There is admittedly great difficulty in measuring the shades of grey in the propriety of a judge's conduct. As Justice Gonthier has stated, while there is a consensus on the need for judicial standards of conduct in order to maintain the public's confidence in the rule of law,

> the same consensus does not exist ... regarding how such standards can be translated into conduct, be it conduct that is appropriate in court or conduct that judges may adopt in public. Some are strict while others advocate greater freedom. ... It is simply the reflection of ethical rules themselves, which by nature are difficult to define precisely.
>
> *Ruffo v. Conseil de la magistrature, supra* at para. 109, Book of Authorities, Vol. 1, Tab 25

148. As a result, even the most senior judges can and do disagree on the propriety of particular exercises of judicial speech.

> *R. v. S. (R.D.), supra* at para. 30, para. 148-152 While Justices Cory and Iacobucci found Justice Spark's remarks in the course of an oral ruling were "troubling", "worrisome" and "close to the line" in terms of raising a reasonable apprehension of bias, Justices L'Heureux-Dubé and McLachlin disagreed and found her words "to reflect an entirely appropriate recognition of the facts in evidence in this case and of the context within which this case arose".
>
> cf. also the majority and minority reports in the CJC's *Inquiry Committee re the Royal Commission on the Donald Marshall Jr. Prosecution*

149. The materials provided to judges through judicial education themselves concede that there is real imprecision in determining how ethical principles should relate to a judge's

out-of-court behaviour and that, in particular, "the issue of judicial free speech is a difficult one." These educational materials have observed that "the appropriate limit on the restriction of the out-of-court activities of judges is not so clear" and that one of the key difficulties in analysing appropriate ethical standards is "an acknowledgement that standards concerning out of court behaviour may vary from time to time."

> Joanne B. Veit, *Ethical Principles Relating to a Judge's Out-of-Court Behaviour: A Comparative Analysis* (Paper presented at National Judicial Institute Seminar on Judicial Ethics, February 3-4, 2004) at pp. 3, 4, 15, Book of Authorities, Vol. 1, Tab 29

150. What is clear is that the trends in thinking about judicial ethics and standards of judicial conduct have evolved to recognize and embrace the humanity of judges as individuals who each have their unique experiences, subjectivity, personalities, private interests and engagements which do not per se impair their ability to duly execute the independence, impartiality and integrity of their office. The ethical principles also acknowledge – as a critical element of judicial independence – the need for judges to exercise their individual discretion in determining what are appropriate actions consistent with their judicial office. This does not make judges unaccountable; it simply recognizes that independence and impartiality require that the mere fact that a judge may have erred in exercising their discretion does not necessarily implicate their capacity to duly execute their office. Part of judicial independence includes the right to be wrong.

151. We submit that the substantive issues raised by this matter are fundamentally

rooted in a dispute about the appropriate scope of judicial free speech and freedom of association. The issues of judicial free speech and association are very important. However, we submit that the development of consensus on what is appropriate judicial free speech and association is best developed and negotiated through a discussion among judges in conference as colleagues. It is a matter of cultural evolution that is ill-suited to being resolved through a disciplinary inquiry in respect of an individual case as a matter of a capital offence.

152. With this context in mind, our submissions address the following themes identified in the allegations of misconduct:

1. The Thelma Project – Conduct Prior to October 2005
2. Sitting on Cases Involving the City of Toronto
3. Communications with John Barber in October 2005
4. SOS Application and Issues of Disclosure
5. Public Confidence in Justice Matlow

1. The Thelma Project – Conduct Prior to October 2005

153. The allegations of misconduct relating to the Thelma Project pre-October 2005 are

(a) that Justice Matlow "participated and undertook a leadership role as 'President' of Friends in respect of the Thelma Road Project controversy";

(b) that Justice Matlow "used language that was intemperate, improper and inappropriate in the course of [his] participation in and leadership role as

'President' of Friends, with respect to the Thelma Road Project controversy";

(c) that Justice Matlow "repeatedly communicated [his] status as a judge of the Ontario Superior Court of Justice to those engaged in the Thelma Road Project controversy and to the media. [His] communications identified [him] as a 'judge', 'Justice Ted Matlow', 'Mr. Justice Matlow' or a 'Superior Court Judge'";

(d) that Justice Matlow "used the prestige of the office of judge to further [his] personal interests in the Thelma Road Project", particularly in "the solicitation of support from elected officials and members of the media".

(e) that Justice Matlow "publicly involved [himself] in legal issues in the Thelma Road Project controversy that [he] 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"; and

(f) that Justice Matlow's conduct in taking the role he did in the Thelma Road Project controversy and making out of court statements in relation to it, 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 and issues relating to the City that could come before the courts".

Amended Particulars, Allegations of Misconduct, para 35(g), 35(h), 35(I), 35(j), 35(k), and 35(m), Book of Evidence, Tab 3

154. Before addressing the specifics of the allegations of misconduct, we submit that Justice Matlow's conduct must be looked at fairly in the whole context in which it arose. In particular, we underscore that:

(a) Justice Matlow's conduct was carried out, not in his capacity as a judge, but in his capacity as a private citizen protecting his personal and community interests as a homeowner. Justice Matlow's conduct was not carried out in his judicial capacity and he did not use or abuse his judicial office for personal advantage.

(b) Justice Matlow was not involved in partisan politics. His private conduct was restricted to an ad hoc single-issue neighbourhood committee to address a local development project only a few doors from his home. The matter in which he was involved was not a "controversial political discussion" but a local dispute relating to his street and his rights as a private homeowner.

(c) Justice Matlow did not act dishonestly and did not through his activities seek improper personal or financial gain.

(d) Justice Matlow did not exhibit any willingness or intention to violate judicial ethics or the rule of law. On the contrary, before engaging with Friends of the Village, he specifically sought out and consulted the advisory opinion available to judges in respect of judges' participation in local issues affecting their personal interests. Throughout, Justice Matlow was mindful of this

advice and exercised his judgment as to how to comply with that advice.

155. We submit that the facts addressed in this matter do not provide the foundation for a "capital" case. Any rules which may apply to the issue of a judge's free speech and association in his or her private life are not enshrined in any manner that is compulsory. The principles are set out only in guidelines which are advisory and which are intended to be applied by a judge exercising his or her independent judgment. While Justice Matlow may have, in some instances, overstepped the appropriate judicial boundaries, no error is so egregious that it renders him incapable of carrying out his judicial duties or warrants his removal from judicial office. Moreover, it is the kind of error which is amenable to counselling and correction.

156. This matter raises what is known in professional discipline law as a "boundaries" case. It is a matter which attempts to determine what are the boundaries of appropriate behaviour in circumstances where there are no clear and precise rules. In professional discipline law, "boundaries" cases may give rise to reprimands or counselling, but they are not cases which can give rise to the "capital" punishment of removal from office.

157. We reiterate that the development of appropriate boundaries with respect to a judge's freedom of expression and association in personal life is a complex and important issue which is evolving and which is best resolved by discussion and consensus among judges as a whole rather than through discipline proceedings in respect of a single judge as a matter of a "capital" offence.

158. We turn now to examine the specific concerns raised in the allegations of misconduct.

Justice Matlow was acting in his capacity as a resident and neighbour in a local dispute

159. Justice Matlow did take a leadership role within his neighbourhood community in opposing the Thelma Parking Lot development. However, it is our position that this conduct – both through speech and associating with his neighbours – does not render him either incapacitated or disabled from the due execution of judicial office.

160. It is submitted that the fact that Justice Matlow has engaged in activities opposing a municipal development on his street does not amount to conduct that is 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 him incapable of executing his judicial office.

161. It must be remembered that Justice Matlow's activities were carried out in his role as a private citizen. In accordance with the opinion from the Advisory Committee on Judicial Ethics regarding municipal democracy, Justice Matlow "is entitled to have and express views on a purely local and municipal question". Justice Matlow sought out and relied upon that opinion on appropriate judicial conduct in good faith.

162. That Justice Matlow expressed his views in association with his fellow neighbours, by contacting the responsible City Councillors and Mayors, by addressing the appropriate Committees, and by responding to media inquiries – all in his private capacity – is not *per se* a basis for censure or removal from office.

163. It must be borne in mind that there are no clear guidelines for the extent and scope of engagement a judge may have as a private citizen. Justice Matlow consulted the relevant opinions of the Advisory Committee and exercised his discretion with respect to them.

164. This matter at all times remained a local municipal dispute and was not a matter of general political controversy. The dispute did not go beyond the local neighbourhood in a greater metropolitan area of over 4.5 million residents.

165. Friends of the Village was not a political or "ratepayers" organization. It was not allied with any partisan political party. Instead it was a single-issue informal gathering of a few neighbours seeking to call attention to what they perceived to be misconduct on the part of certain City officials in regards to the Thelma Project which affected them directly. The group had no rules and no memberships. It was a very informal grassroots organization.

166. Similarly, the issues surrounding the Thelma Project did not take the form of a notorious political controversy which a judge might refrain from commenting upon in an

effort to preserve the perception of judicial impartiality. The Thelma Project was a discrete neighbourhood concern which, although it raised serious questions regarding the handling of the issue by City officials, was localized to one neighbourhood and one small group of neighbours seeking to oppose a development project that was imposed upon them.

167. Significantly, in opposing the development, Justice Matlow's dispute was not an attempt to subvert the rule of law but was rather the action of an engaged citizen directed at upholding the rule of law.

168. It is noteworthy that the comments made by Justice Matlow concerned the conduct of public officials in respect of their legal authority to enter into an arrangement which could have had a significant and harmful impact upon his life as a private citizen. These issues are the hallmark of freedom of expression, the rule of law, and participatory democracy at the local level.

169. In this respect, Justice Matlow's conduct is distinguishable from that which was at issue in the Flynn Inquiry in which the real estate transaction involving the judge's wife and their cottage was under investigation to determine if the transaction was contrary to the law. In the Flynn case the judge's comments in the media raised questions regarding the judge's commitment to application of the rule of law in the circumstances.

> Report of the Inquiry Committee re Mr. Justice Bernard Flynn (12 December 2002) at pp. 8-9, Book of Authorities, Vol. 1, Tab 9

170. By contrast, Justice Matlow's conduct was at all times aimed at ensuring that City officials acted within their legal authority. As such, his conduct was aimed at upholding the rule of law in a manner consistent with his judicial office.

Intemperate Language

171. The allegations of misconduct allege that in the course of his involvement regarding the Thelma Project, Justice Matlow used language that was "intemperate, improper and inappropriate."

172. Language cannot be assessed to be intemperate, improper or inappropriate in a vacuum. Whether language is or is not intemperate only has meaning with reference to the context and circumstances in which the language was expressed.

173. We submit that 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.

174. Whether his views that individuals were acting beyond their legal authority were ultimately correct is not relevant to these proceedings. However, it is relevant and the evidence is uncontradicted that his views were held honestly, reasonably and in good faith.

His views were supported by two legal opinions by an expert in municipal law. His views were supported by his local City councillor and by others within the City administration. Justice Matlow's comments were made in a context where he viewed himself as a whistleblower exposing improper action.

175. It must be stressed that the language at issue is language that was used outside the courtroom and in Ted Matlow's role as a private citizen.

176. It is admitted that Justice Matlow's speaking and writing style is more colloquial, plain-spoken and direct than many judges, but this is not *per se* grounds for removal from office. The judiciary is composed of individuals with a wide range of personalities and styles; there is not a single model for conduct or speech that is consistent with judicial office.

177. As the Council has previously ruled, the real question is "whether inappropriate language, even grossly inappropriate language, constitutes judicial misconduct" in the circumstances of the particular case.

> *Report of the Inquiry Committee re the Royal Commission on the Donald Marshall Jr. Prosecution,* Book of Authorities, Vol. 1, Tab 8 *supra* at pp. 33-34

178. In the past, an Inquiry Committee has ruled that where remarks in *obiter* are in error and inappropriate, the question still remains whether they are reflective of conduct so destructive that it renders the judge incapable of executing his office impartially and

independently with continued public confidence.

> *Report of the Inquiry Committee re the Royal Commission on the Donald Marshall Jr. Prosecution, supra* at p. 35, Book of Authorities, Vol. 1, Tab 8

179. As stated by McEachern J. in his minority report of the Inquiry Committee regarding the Donald Marshall Jr. Prosecution, "[I]t is of crucial importance that judges speak forthrightly, even bluntly whenever the circumstances require us to do so."

> *Minority Report of the Inquiry Committee re the Royal Commission on the Donald Marshall Jr. Prosecution, supra* at p. 2

180. Although Justice Matlow used strong language in his communications with the Mayor, City employees and Mr. Barber, these communications were made in his personal capacity as a private citizen. His strong words were intended to call attention to the fact that certain City officials appeared to exceed their authority and had acted in what Justice Matlow considered to be bad faith in their dealings with his neighbourhood group. In referring to the "improper conduct" and "awful and devious" actions on the part of some City officials, he was referring to the actions of officials who exceeded their authority in executing the joint venture agreement for the Thelma Project as well as the City Council's subsequent actions in passing a resolution retroactively approving the Thelma Project with no notice to neighbourhood residents.

181. Although Justice Matlow's comments were forthright and even blunt, at all times Justice Matlow took care to support his positions and to make clear that his concern was

to ensure that City officials involved with the Thelma Project conducted themselves in accordance with the rule of law. While he used strong language to communicate his position, the substance of his communications was at all times consistent with his duty to preserve the integrity of the rule of law and judicial office. Moreover, he has acknowledged that he should have expressed himself in a more business-like manner. As a result, it is submitted that Justice Matlow's comments do not constitute judicial misconduct. Indeed, they are far from reflecting conduct so destructive that they render him incapable of executing his office impartially and independently with continued public confidence.

Justice Matlow's identification as a judge

182. Throughout the Thelma Parking Lot matter, Justice Matlow normally identified himself in his private capacity as a resident of Thelma Avenue and President of an ad hoc committee of local residents. He did not use his judicial office for private advantage. Justice Matlow normally identified himself as Ted or as Ted Matlow. When asked what he did, he identified himself as a judge. Justice Matlow normally used his private email account for his correspondence and his personal stationery. An exception was his email correspondence with Mr. Barber which was sent when he was in Sudbury and which he concedes was an error.

183. In media articles and other communications, he was referred to as a judge because journalists or others knew who he was. For example, David Boghosian, the City's outside counsel, addressed him as "Your Honour" although Justice Matlow's communications to

him were signed only as Ted Matlow and did not identify him as a judge.

184. He acknowledges that in his communication with John Barber he identified himself as a judge but that he did so because he did not wish to be viewed as a trouble-maker. In 2002, he contacted Mr. Barber to get public attention on the Thelma Parking Lot matter. In 2005, he contacted Mr. Barber because of the Bellamy Report.

Participation in Legal issues

185. A judge, as a private citizen, is not prohibited from accessing the legal system in order to enforce rights affecting his or her private interests. Justice Matlow did not improperly participate in litigation that could come before his own Court. We submit that Justice Matlow's conduct in relation to either the *Lieberman* Application or the Ontario Municipal Board proceedings does not in any way provide a basis for a finding of professional misconduct.

186. We submit that the Inquiry Committee erred in failing to address the fact that there is no prohibition against judges acting as either witnesses or parties in litigation. The Ontario Superior Court expressly anticipates that there will be circumstances in which a judge will be either a litigant or witness in legal proceedings and the Court has a protocol to address this very situation. That protocol does not prohibit judges from taking part in litigation. It merely requires that, when the judge is a litigant or witness in the court of which the judge is a member, the judge promptly notify the Regional Senior Justice of this

fact.

> Court Protocol on "Judges and Their Families as Litigants or Witnesses", Appendix 24 to the Agreed Statement of Facts, Book of Evidence, Tab 4(f)

187. We further submit that the Inquiry Committee erred in law by making an incorrect and unreasonably narrow interpretation of the Advisory Opinion on Municipal Democracy. That Advisory Opinion does not prohibit a judge from being a party or witness in litigation. It simply indicates that where a judge takes a public position on a matter of municipal democracy, he or she is disqualified from participating in any litigation that arises. We submit that, in accordance with the general principles around conflict of interest, this simply means that where a judge has taken a public position on a matter, he or she is disqualified *from sitting as a judge* in respect of that matter. To read this Advisory Opinion in any other way deprives a judge from any right of participation in litigation to protect his or her personal rights, including rights to private property.

> Advisory Opinion on Municipal Democracy, Appendix 9 to the Agreed Statement of Facts, Book of Evidence, Tab 4(a)

188. With respect to the proceedings at the Ontario Municipal Board to amend the zoning by-law in respect of his street, Justice Matlow sought standing in his personal capacity as an affected resident and not as counsel to any group. He had a statutory right to notice of those proceedings and to participate in them because he lived in such close proximity to the proposed development. He sought standing so that he could continue to receive notice of what was happening in the proceedings. He and the City of Toronto both sought

a stay of the OMB proceedings so that the City could consider the legal opinion of its outside counsel. Justice Matlow ultimately did not participate in the OMB hearing as the City Council retroactively ratified the formal agreement at the root of the dispute and so Justice Matlow gave notice that he was abandoning his participation. None of his conduct in this respect was improper or a basis for a finding of professional misconduct.

189. Justice Matlow was not a party to the *Lieberman* application. He did, however, take the proper steps to notify the Chief Justice, Regional Senior Judge and Scheduling Judge of his conflict so that arrangements could be made for a judge from outside Toronto to hear the application. Again, nothing in his handling of this process was improper or evidence of professional misconduct.

> Email from Justice Matlow dated 28 December 2003, Appendix 23 to the Agreed Statement of Facts, Book of Evidence, Tab 4(e)
>
> Court Protocol on "Judges and Their Families as Litigants or Witnesses", Appendix 24 to the Agreed Statement of Facts, Book of Evidence, Tab 4(f)

190. Ted Matlow and Friends of the Village in their activities set out their position with respect to the propriety of the formal agreement regarding the Thelma Project. That position was based upon and supported by two written legal opinions by a recognized expert in municipal law. Expressing that opinion, as Ted Matlow did, cannot *per se* constitute a basis for his removal from office. Seeking a legal opinion was a legitimate and responsible precaution to take to ensure the validity of his position. That Ted Matlow relied on that legal position in his discussions with those officials and committees responsible for oversight of the Thelma Project is also not *per se* a basis for his removal from office.

Justice Matlow recognized throughout that, in accordance with the opinion of the Advisory Committee on Judicial Ethics, his involvement with the Thelma Project would disqualify him from participation in his judicial capacity in any litigation arising from the matter. Moreover, he advised the Chief Justice, Regional Senior Justice and Scheduling Judge of his potential conflict of interest.

2. Sitting on Cases Involving the City of Toronto

191. The allegations of misconduct address three issues relating to Justice Matlow's conduct in sitting on cases involving the City of Toronto:

(a) One allegation raises a blanket concern that given his participation the Thelma Project, he "failed to take steps to ensure that [he] did not sit on any matter involving the City".

(b) Two other allegations relate specifically to the fact that he sat on the Divisional Court panel hearing the *SOS Application.* These are that "having regard to [his] involvement in the Thelma Road Project controversy, [Justice Matlow] did not take steps to ensure that [he] did not sit on the Divisional Court Panel hearing the SOS Application"; and that "having regard to [his] involvement with Mr. Barber of the Globe and Mail [he] did not take steps to ensure that [he] did not sit on the Divisional Court Panel hearing the SOS

Application".

Allegations of Misconduct, para 35(a), 35(b) and 35(l)

192. Despite indicating in its Report that it 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 did sit on the *SOS Application* and other earlier cases involving the City. We submit that in finding that Justice Matlow acted improperly in sitting on cases involving the City, the Inquiry Committee exceeded its jurisdiction, erred in law and denied Justice Matlow natural justice.

Jurisdiction

193. For the reasons set out in Part IV of these submissions regarding the Jurisdiction of the Canadian Judicial Council, we submit that these allegations of misconduct are beyond the jurisdiction of the Council. An individual judge's assessment of whether he or she is disqualified from sitting on a particular case due to either a conflict of interest or a reasonable apprehension of bias is an exercise of judicial discretion and decision-making that is, absent evidence of bad faith or abuse of office, subject to review only by the appellate courts. To subject such assessments – whether made before a hearing or in response to a request at a hearing – to review for professional discipline undermines judicial independence.

Errors of Law

194. A decision on whether a judge should recuse himself or herself is one that lies within the discretion of the individual judge alone. It is a discretion that a judge is expected to exercise independently.

> *Opinion of the Advisory Committee on Judicial Ethics* (2004-14) Recusal at p. 2, Book of Authorities, Vol. 1, Tab 4

195. The uncontradicted evidence is that Justice Matlow did, of his own initiative, consider whether, due to a conflict of interest, he was disqualified from sitting on the *SOS Application*. After reviewing the materials and considering the issues that were raised and needed to be canvassed in that case, he determined that there was no similarity to the Thelma Project situation and that he was not in a conflict of interest. He also had in mind the fact that the City had not, in five previous cases, objected to him sitting on matters involving the City.

> Transcript, Examination of Justice Matlow, p. 236, line 6 to p. 238, line 23, Book of Evidence, Tab 9

196. Justice Matlow has also acknowledged that he erred in his judgment of whether, in light of his communications with Mr. Barber, there may have been a reasonable apprehension of bias and that in hindsight he would have exercised his judgment differently.

> Transcript, Examination of Justice Matlow, p. 242, line 9 to p. 244, line 7, Book of Evidence, Tab 9

197. While Justice Matlow acknowledges that he erred in his assessment, this remains,

nonetheless, a matter on which he was required to exercise his independent judgment subject to review by the appellate courts. This is not a matter for professional discipline.

198. In reviewing Justice Matlow's conduct in sitting on these cases, the Inquiry Committee erred in law by applying an objective rather than subjective test to determine if a judge should pre-emptively recuse himself from a matter.

199. The Inquiry Committee also erred in finding that there was a positive duty on Justice Matlow to disqualify himself from sitting on any matter involving the City. In making this finding, the Inquiry Committee erred in law and fundamentally misconstrued the nature of the Ethical Principles for Judges. The Ethical Principles are not prescriptive. They are advisory only. While they provide ethical guidance, they leave the ultimate decision on any given issue to the individual judge.

> *Ethical Principles for Judges* (1998) at pp. 3-4, para 1-3 (Exhibit 10), Book of Authorities, Vol. 1, Tab 24
>
> cf. Memo from Judicom Website (28 February 2003), Exhibit 11, Book of Authorities, Vol. 1, Tab 5(e)

Natural Justice

200. In any event, we submit that on the particular facts there is no doubt that Justice Matlow was able to carry out his judicial office with integrity, impartiality and independence. We submit that the Inquiry Committee denied Justice Matlow natural justice by failing to consider the relevant evidence which is uncontradicted:

(a) Justice Matlow did not have a dispute "with the City". Many municipal politicians and officials supported the Friends of the Village. The dispute was localized to the conduct of particular City staff who appeared to have authorized the development agreement in a manner not authorized by the City Council resolution.

(b) The City Council and City Solicitor were aware of Justice Matlow's conduct in opposing the Thelma Parking Lot development from 2002 onwards and that at no point prior to October 2005 did the City express any concern about appearing before Justice Matlow.

Agreed Statement of Facts, para. 52-53, Book of Evidence, Tab 4

(c) Prior to October 2005, Justice Matlow sat on five cases involving the City. In four of those matters the City was successful. There is no evidence that Justice Matlow was unable to carry out his judicial office with appropriate integrity, impartiality and independence. On the contrary, the evidence indicates that he was able to properly carry out his duties.

Agreed Statement of Facts, para. 53, Book of Evidence, Tab 4

(d) Justice Matlow did not act improperly in sitting on the *SOS Application.* The

Divisional Court panel that allowed the *SOS Application* was unanimous in its conclusion with each judge reaching his or her conclusion independently.

Agreed Statement of Facts, para. 74-75, Book of Evidence. Tab 4

(e) The City did not complain about Justice Matlow's conduct in any way until after the judicial review in the *SOS Application* was decided against the City.

201. In all of the circumstances, we submit that Justice Matlow did not engage in professional misconduct by not pre-emptively removing himself from any cases involving the City of Toronto.

3. Communications with John Barber in October

202. The allegations of misconduct raise two specific allegations regarding Justice Matlow's communications with John Barber on 2 October 2005:

(a) that "having been assigned on September 30, 2005 to sit on the SOS Application, [he] entered into communications on October 2, 2005 and subsequently, with Mr. Barber of the Globe & Mail on the subject of the Thelma Road Project, in the course of which [he] made allegations of impropriety by City officials"; and

(b) that "on October 2, 2005 and following [he] identified himself as a 'Superior Court Judge' and contacted Mr. Barber of the Globe and Mail concerning [his] criticisms of the City and [his] opposition to the Thelma Road Project with the intention of persuading Mr. Barber to write a story based on [his] criticisms of the City and [his] opposition to the Thelma Road Project".

Amended Particulars, Allegations of Misconduct para. 35(f) and 35(n)

203. Justice Matlow acknowledges that he did contact John Barber on 2 October 2005 and did deliver materials to him on 5 October 2005. He acknowledges that this was an error in judgment and that he appreciates that his conduct in this respect could have raised a reasonable apprehension of bias. We submit however that his error in this respect did not reflect any bias that undermined his capacity to fulfil the duties of judicial office in respect of the *SOS Application* and that they do not reflect any real or perceived bias that could undermines his capacity generally to fulfil the duties of judicial office.

204. We submit, however, that the Inquiry Committee made two significant findings of fact in relation to these allegations which were contrary to and unsupported by the uncontradicted evidence before the Committee. These findings related to the question of why Justice Matlow renewed his communications with Mr. Barber specifically on 2 October.

205. Justice Matlow's communications with Mr. Barber in October were prompted by the mid-September release of the Bellamy Report into the City's *MFP Computer Leasing*

contracts. His communications were in no way connected with or prompted by the *SOS Application*. He had also given up his opposition to the Thelma development in early 2004 when City Council retroactively ratified the agreement. The uncontradicted evidence before the Inquiry Committee was that

(a) The fundamental concern that Ted Matlow had regarding the Thelma Parking Lot development was a concern that individuals employed by the City had negotiated development agreements that were beyond the authority that had been granted to them by the City Council resolution.

(b) From 2003 onwards, Ted Matlow was concerned that this conduct regarding the Thelma Project was similar to the conduct being investigated by Justice Bellamy in the *MFP Computer Leasing Inquiry* which was taking place at the same time. The *MFP Computer Leasing Inquiry* was investigating the conduct of municipal bureaucrats who were believed to have been acting beyond the scope of the authority granted by City Council.

(c) Justice Bellamy's Report was released on 12 September 2005. John Barber, who is the municipal affairs columnist who had been covering the *MFP Computer Leasing Inquiry*, wrote a column that was published on 13 September 2005 addressing Justice Bellamy's Report.

(d) Justice Matlow, like all other judges on the Superior Court, was given a copy of Justice Bellamy's full report. He took it home but did not read it immediately when it was released. He read the full report sometime shortly before 2 October 2005.

(e) Ted Matlow contacted John Barber on 2 October 2005 specifically after he had read Justice Bellamy's Report and <u>because</u> he had read Justice Bellamy's Report which he believed addressed concerns similar to that he had had with respect to the Thelma Project. In contacting Mr. Barber, Ted Matlow saw himself as acting in the role of a whistleblower who was bringing to light improper conduct relating to municipal governance.

206. Moreover, the uncontradicted evidence before the Inquiry Committee was that when Ted Matlow wrote to Mr. Barber on 2 October 2005, he did not know that he would be sitting on the *SOS Application*. Although an email was sent to him late on the afternoon of Friday 30 September, the uncontradicted evidence is that he was not at the Court and was in fact playing tennis at the time. The uncontradicted evidence is that Justice Matlow did not see the email from the Registrar until the morning of Monday 3 October 2005 when he connected his laptop computer in Sudbury. Not only is Justice Matlow's evidence on this matter uncontradicted. It is entirely consistent with the recollection of the other two members of the panel who independently recalled that they learned they would be hearing the *SOS Application* on either Monday 3 October or Tuesday 4 October. It was not until Wednesday 5 October, after he dropped off materials for Mr. Barber, that Justice Matlow

saw the materials from the *SOS Application* for the first time.

207. Justice Matlow intended his contact with Mr. Barber to be confidential and that his identity would not be disclosed. Even though he did introduce himself as a judge, he did so only because he did not wish to have his serious and valid concerns dismissed as those of a disgruntled trouble-maker. Justice Matlow's intention in renewing contact with Mr. Barber was to provide him with information that he might consider relevant following the release of the Bellamy Report which raised accountability concerns similar to those voiced by Friends of the Village in regards to the Thelma Project.

208. Justice Matlow acknowledges the oversight of using a note card with the Superior Court's insignia on it for the note he enclosed with the materials he provided to Mr. Barber. However, there is nothing in Justice Matlow's communications with Mr. Barber to suggest that he was in any way attempting to improperly use his judicial office to promote his affairs as a private citizen.

209. We submit that by failing to properly consider this evidence and reflect it in its Report, and by making findings contrary to the evidence, the Inquiry Committee erred in law and denied Justice Matlow procedural fairness.

4. SOS Application – October 2005

210. The allegations of misconduct raise a number of concerns about whether in the context of the *SOS Application* Justice Matlow had an obligation to disclose information about his communications with Mr. Barber or his earlier involvement with the Thelma Project either to his judicial colleagues or to the parties in the *SOS Application*.

211. The allegations of misconduct in this respect are:

(a) that he "failed to disclose details of [his] involvement in the Thelma Road Project controversy and [his] criticisms of the City" to Justice Greer and Justice Macdonald prior to the *SOS Application;*

(d) that "[he] failed to disclose to Justice Greer and Justice Macdonald details of [his] dealings with Mr. Barber of the Globe and Mail, shortly before the hearing of the SOS application";

(e) "[he] failed to disclose to the City and the other parties details of [his] dealings with Mr. Barber of the Globe and Mail, shortly before the hearing of the SOS application";

Allegations of Misconduct, para. 35(c), 35(d), and 35(e)

212. We submit that the fact that Justice Matlow did not disclose information about his involvement regarding the Thelma Project or his communications with Barber prior to the

SOS Application cannot constitute a basis that warrants Justice Matlow's removal from office. There are no precise rules on what information must be pro-actively disclosed by a judge either to judicial colleagues or to parties who appear before him or her in court. What ought to be pro-actively disclosed and in what circumstances are matters for the exercise of the judge's individual discretion and judgment as to what may give rise to a potential conflict of interest.

213. We submit that in prescribing a positive duty to disclose such information, the Inquiry Committee erred in law and denied Justice Matlow natural justice.

Error in Law

214. The Ethical Principles suggest that "a judge should disclose on the record anything which might support a plausible argument in favour of disqualification". This is similar to an assessment of whether the judge has a real bias in respect of a party or whether in all the circumstances a reasonable fair minded and informed person would have a reasonable apprehension of bias. This is, in essence, similar to a judge's exercise of discretion in respect of a motion to recuse himself or herself.

> *Ethical Principles for Judges* (1998) at p. 48, para. E12 (Exhibit 10), Book of Authorities, Vol. 1, Tab 24

215. However, the Ethical Principles are equally clear that if the judge concludes that no reasonable, fair minded and informed person would have a reasoned suspicion of a lack

of impartiality, the judge should not disclose a possible conflict of interest and should not seek the consent of the parties.

> *Ethical Principles for Judges* (1998) at p. 49, para. E15 (Exhibit 10), Book of Authorities, Vol. 1, Tab 24

216. We submit that the Inquiry Committee erred in law by failing to consider these ethical guidelines with respect to conflict of interest and consent.

217. In regard to the exercise of Justice Matlow's discretion, it should be noted again that he had heard five prior cases involving the City. In none of these cases did the City raise any question as to his impartiality. His exercise of discretion was reasonable in all of the circumstances.

218. To find that a judge should be removed from office for failing to disclose a potential conflict of interest – in circumstances in which the judge honestly and in good faith believes that there was no reasonable apprehension of bias – would amount to an infringement on judicial independence.

219. There has never been an allegation or complaint of actual bias against Justice Matlow. Moreover, Justice Matlow has not acted dishonestly or attempted to conceal his position in respect of the Thelma Project. On the contrary, his position on the Thelma Project has been well known by his colleagues and publicly. Justice Matlow has not acted in bad faith, in abuse of office or for personal gain.

220. In retrospect, Justice Matlow now appreciates that the timing of his October 2005 communication with Mr. Barber is problematic in that reasonable people could view this communication as supporting a plausible argument in favour of disqualification. Although Justice Matlow did not view this communication as raising a reasonable likelihood of bias at the time, retrospection has given him a different perspective. As stated above, at the time, with respect to the issue of impartiality, he only focussed on whether the SOS application raised a similar issue to those which existed in the Thelma Project.

221. In all the circumstances, while Justice Matlow may have erred in his judgment in not disclosing any perceived potential for conflict, this is at most a matter for reprimand or counselling. It is not a matter which fundamentally renders him incapable of fulfilling his judicial duties such as would warrant his removal from office.

5. Public Confidence

222. Finally, we submit 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 which is whether public confidence has been undermined such that it renders Justice Matlow incapable of executing his judicial office.

223. The evidence that was before the Inquiry Committee disclosed that despite knowing of his involvement in opposing the Thelma Project, the community continued to have

respect for and confidence in Justice Matlow. Moreover, the evidence was specifically that the local community did not lose respect for the judiciary due to Justice Matlow's conduct and that, on the contrary, their respect for Justice Matlow and the judiciary was enhanced by his leadership in the community and his conduct in expressing the community's views on the Thelma Project.

> Transcript, Examination of Ron Lieberman, p. 138, line 2-20, p. 146, line 6-19, Book of Evidence, Tab 7
> Transcript, Examination of Judith Collard, p. 185, line 8-18, p. 186, line 18 to p. 188, line21, Book of Evidence, Tab 8

224. The evidence further indicated that Justice Matlow was honoured by the local Forest Hill community newspaper for his involvement in opposing the Thelma Project and singled out as someone who made a positive difference to the community.

> *Forest Hill Today* (Spring 2007) (Exhibit 9), Book of Evidence, Tab 5(c)

225. We submit that the Inquiry Committee erred in law and denied Justice Matlow natural justice by refusing to accept into evidence a community statement signed by people who were directly involved with or active with Friends of the Village which expressed the community's views of Justice Matlow as a civic-minded citizen.

> Transcript (9 January 2008), p. 176, line 18 to p. 179, line 22 and p. 219, line 15 to p. 220, line 8,

226. The Inquiry Committee further erred in law by assigning no weight to the numerous letters from the judicial community and legal profession regarding Justice Matlow's character and integrity. These letters provide specific evidence of Justice Matlow's

integrity, honesty, principles, commitment to the rule of law and his ability to execute his judicial office and also provide evidence of the continuing public confidence in him. Moreover the Inquiry Committee denied Justice Matlow natural justice by making a decision to reject these letters "on reconsideration", after the hearing was completed, without notice and without an opportunity to make submissions.

Letters of Support (Exhibits 6, 6a, 6b), Book of Evidence, Tab 5(b)

227. The evidence before the Inquiry Committee also clearly indicated that even though Justice Matlow's judicial colleagues, including his Chief Justice, were aware of his public opposition to the Thelma Project, they did not at any point complain about his conduct or raise concerns about it.

Transcript, Examination of Justice Matlow, p. 201, line 15 to p. 202, line 15, Book of Evidence, Tab 9

228. Finally, the evidence before the Inquiry Committee was that Justice Matlow continued to carry out his judicial office for 18 months after the *SOS Application* – from October 2005 until April 2007 when this matter was referred to the Inquiry Committee – without any complaint or concern.

229. In professional discipline matters, it is important to look at the whole person – their contributions as well as their errors. Justice Matlow has had a long and distinguished career on the bench. He has served continuously as a judge since 1981. He has made

further contributions to the legal community by serving as the editor of the leading civil litigation journal, *The Advocates' Quarterly*, since 1977. He has been engaged with this community and has advocated for fairness and the rule of law. In the 1960s he was instrumental in forming the Canadian Society for the Abolition of the Death Penalty. In the 1980s he was active with the Canadian Jewish Congress concern the right of Soviet Refuseniks.

> Transcript, Examination of Justice Matlow, p. 253, line 8 to p. 255, line 17, Book of Evidence, Tab 9

230. We submit that by failing to consider and/or admit this relevant evidence regarding public confidence in Justice Matlow and his ability to discharge his duties as a judge, the Inquiry Committee erred in law and exceeded its jurisdiction. Rather than addressing the evidence on the specific issue of whether public confidence was undermined, the Inquiry Committee substituted its own opinion.

VI. CONCLUSION

231. As stated above, we agree that some restrictions on a judge's freedom of speech and association must be accepted in order to preserve the independence and impartiality of the judicial office. However, we return to the question posed at the beginning of these submissions:

> 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?

232. It is submitted that the conduct which is the subject of the allegations of misconduct does not approach the high threshold for imposing judicial discipline warranting removal from office. The conduct is not such that could reasonably be expected to shock the conscience and shake the confidence of the public. When the conduct is viewed fairly and in its full context, including the context of the evolving culture of judicial free speech and association, it is not so manifestly and profoundly destructive of the concept of the impartiality, integrity and independence of the judicial role that public confidence would be undermined to such an extent that Justice Matlow would be incapable of executing his judicial office. Indeed, the evidence is that public confidence within the community was not undermined by Justice Matlow's participation in this community issue.

233. Simply put, this is not a capital case. This is rather a matter which explores the important question of the boundaries of acceptable free speech and association by judges in their capacity as private citizens. While the conduct at issue may warrant discussion, counselling and/or reprimand it is not such as warrants Justice Matlow's removal from judicial office. Significantly, the city councillors who chaired and vice-chaired the Toronto Transit Commission at the time that it brought the recusal motion on the SOS application are of the view that the removal of Justice Matlow from the bench would be "excessive punishment in light of an otherwise distinguished career".

234. Finally, we submit that if Justice Matlow were not a judge, we would be praising his conduct as a wonderful example of participatory democracy operating at the local level. The facts demonstrate a textbook example of how local municipal democracy should work. The invasion of a neighbourhood by an unwanted development opposed by the local residents and retailers, gives rise to a situation in which neighbours will sometimes act together in furtherance of a common objective – to stop a development which they feel is not good for the community. This is not a political dispute in the sense that political parties are involved or elections are held. It is a dispute which bands together neighbours of many political stripes on this one local issue. It required getting the support of local residents, local businesses, local politicians and the local media to cast light on what the neighbours viewed to be an injustice carried out by some officials of the City. All of their actions were transparent, visible and public. Moreover, most of the activities were conducted on a volunteer basis because it was local residents "fighting city hall". Their fight was supported by many local politicians who agreed with their position.

235. One may disagree with the language used or the wisdom of a particular tactic. However, what was involved was founded on two of our most cherished fundamental freedoms, freedom of expression and freedom of association and one of our most important common law rights, the quiet enjoyment of one's home. Moreover, the activities conducted by the neighbours were directed at two further important constitutional values – the rule of law and participatory democracy by local citizens.

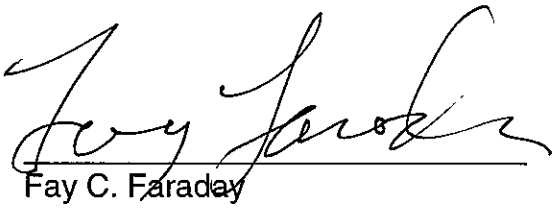
236. It is within this context that Justice Matlow's conduct should be reviewed. Likely, if

it had not been for Justice Matlow and Mr. Lieberman, these actions of community members working in association would not have occurred. Justice Matlow took on the responsibility because he was capable of providing the necessary tools in this local joint venture. If not him, who? Ultimately, the question is whether, in the words of Chief Justice McLachlin, Justice Matlow's activities are "a reflection of the fact that our democracies are becoming more participatory with citizens taking a more active interest in the way social policy is made." What could be more important to democracy than local citizens banding together to protect their local neighbourhood.

237. For all the above reasons, we respectfully submit that the Canadian Judicial Council should decline to make a recommendation for his removal pursuant to s. 65(2) of the *Judges Act*.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 27th DAY OF JUNE, 2008.

Paul J.J. Cavalluzzo



Fay C. Faraday