

THE CANADIAN JUDICIAL COUNCIL

**IN THE MATTER OF AN INQUIRY COMMITTEE CONSTITUTED
PURSUANT TO SECTION 63 OF THE JUDGES ACT R.S.C. 1985,
C. J-1 AS AMENDED INTO THE CONDUCT OF
THE HONOURABLE THEODORE MATLOW OF
THE SUPERIOR COURT OF JUSTICE OF ONTARIO**

* * * * *

**HELD BEFORE THE HONOURABLE CLYDE K. WELLS (CHAIRPERSON),
THE HONOURABLE FRANCOIS ROLLAND,
THE HONOURABLE RONALD VEALE,
MARIA LYNN FREELAND and DOUGLAS M. HUMMELL**
at Federal Court of Canada
180 Queen Street West, Courtroom No. 7A, Toronto, Ontario
on Thursday, January 10, 2008 at 10:03 a.m.

* * * * *

APPEARANCES:

Douglas Hunt, Q.C.
Andrew Burns

Paul Cavalluzzo
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Nancy Brooks

Independent Counsel appointed
pursuant to the *Complaints Procedure*

for The Honourable Theodore Matlow

Counsel to the Inquiry Committee

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1 Toronto, Ontario
2 --- Upon commencing on Thursday, January 10, 2008
3 at 10:03 a.m.

4 THE CHAIR: Please be seated.
5 Gentlemen.

6 MR. HUNT: Good morning.

7 MR. CAVALLUZZO: Good morning.

8 THE CHAIR: How do you propose to
9 proceed? You are going first?

10 MR. CAVALLUZZO: No, I am not.
11 Chief Justice, I promised yesterday to file the
12 correction and apology from the Globe and Mail in
13 respect of the article I referred to in the
14 examination, and I just file that now as the next
15 exhibit.

16 THE CHAIR: That will be marked
17 Exhibit 12.

18 EXHIBIT NO. 12: Correction
19 and apology from the Globe
20 and Mail.

21 MR. CAVALLUZZO: The other matter,
22 Chief Justice and members of the panel, is Justice
23 Matlow did a thorough search of his computer and he
24 could not come up with the e-mails we talked about
25 late yesterday afternoon. Thank you.

1 THE CHAIR: Mr. Hunt.

2 SUBMISSIONS BY MR. HUNT:

3 MR. HUNT: Thank you. I have for
4 the panel, and I believe it is this pile right
5 here, two documents. One is the memorandum of
6 independent counsel and the second one -- I guess
7 it is two volumes, actually, of some relevant
8 cases. Just dealing with the cases, I can assure
9 you I don't intend to take you through those cases.
10 I know you are familiar with them, and those are
11 for your convenience.

12 There are five of them set out
13 there. There is Ruffo versus Conseil de la
14 magistrature, a Supreme Court of Canada decision
15 1995 re Ruffo, a decision of the Quebec Court of
16 Appeal 2005, and then two judgments of the Supreme
17 Court that really deal directly with the issue of
18 the test to be applied in these cases, Therrien and
19 Moreau-Berube.

20 Finally, there is a decision of
21 the Ontario Judicial Council in re Douglas at tab
22 5, which does provide some clarification of how the
23 test is applied. As well, there is the Ethical
24 Principles for Judges.

25 It is not the function of

1 independent counsel, as I know you are well aware,
2 to urge on an inquiry committee any particular
3 result. The function of the independent counsel is
4 to ensure, to the best of one's ability, all the
5 relevant evidence is before the inquiry committee
6 and the issues are clearly defined.

7 I note from the past two days that
8 the committee is well aware of the issues in this
9 case and the evidence. Although most of it was
10 presented by way of an agreed statement of fact,
11 the evidence beyond that is very fresh, so I don't
12 intend to really dwell at any length on the
13 evidence.

14 In the memorandum of independent
15 counsel, for your assistance we have set out the
16 principles that we believe must guide this inquiry
17 committee in discharging its mandate in this
18 particular matter. The mandate, in its simplest
19 form, is to investigate and consider the conduct of
20 Justice Matlow as it has been particularized in the
21 amended particulars attached to the notice of
22 hearing, but the purpose of investigating and
23 considering is to make findings and conclusions
24 with respect to that conduct for the purpose of
25 determining whether or not a recommendation should

1 be made to the Canadian Judicial Council for the
2 removal of Justice Matlow from office.

3 The basis on which such a
4 recommendation would be made would be if the
5 committee is satisfied that the conduct, as
6 particularized, has been made out and is so
7 manifestly and totally contrary -- and those are
8 important words, "manifestly" and "total contrary"
9 -- to the impartiality, integrity and independence
10 of the judiciary that public confidence, the
11 confidence of people who would appear before Judge
12 Matlow, or public confidence in the justice system
13 would be undermined, rendering Justice Matlow
14 incapable of performing the duties of his office.

15 In paragraph 3 we have set out the
16 links between the various stages and the statutory
17 requirements and jurisdiction of the committee. A
18 couple of things that will come out of your reading
19 of these cases which I think are important to
20 mention is, firstly -- and I am referring to
21 paragraph 4 in the Ruffo versus Conseil de la
22 magistrature, which is in the case book -- is the
23 mandate of this inquiry committee is to ensure
24 compliance with judicial ethics for the purpose of
25 preserving the integrity of the judiciary.

1 The role of this inquiry committee
2 is to look into that, and it is for that purpose,
3 rather than relating to the particular judge.
4 There is a high purpose behind the work that this
5 inquiry committee must do.

6 As well, it is important to
7 examine the nature of ethical duties of judges, and
8 in paragraph 8 there is an excerpt from the Supreme
9 Court's decision in Therrien and there are some
10 portions of Justice Gonthier's judgment that I
11 would commend to your attention.

12 Part way down page 4 of the factum
13 in the second paragraph of the excerpt of Justice
14 Gonthier's judgment, in the second sentence the
15 Supreme Court stated:

16 "The judge is the pillar of
17 our entire justice system and
18 of the rights and freedoms
19 which that system is designed
20 to promote and protect.
21 Thus, to the public judges
22 not only swear by taking
23 their oath to serve the
24 ideals of justice and truth
25 on which the rule of law in

1 Canada and the foundations of
2 our democracy are built, but
3 they are asked to embody
4 them."

5 A little further down:

6 "Accordingly, the personal
7 qualities, conduct and image
8 that a judge projects affects
9 the members of the judicial
10 system as a whole, therefore,
11 the confidence that the
12 public places in it.
13 Maintaining confidence on the
14 part of the public in the
15 justice system ensures its
16 effectiveness and proper
17 function."

18 Then excerpted from the Ethical
19 Principles for Judges of the Canadian Judicial
20 Council by Justice Gonthier is commentary number 1
21 under chapter 3, "Integrity", which we looked at
22 yesterday. This passage concludes:

23 "The public will therefore
24 demand virtually
25 irreproachable conduct from

1 anyone performing a judicial
2 function. It will at least
3 demand that they give the
4 appearance of that kind of
5 conduct. They must be and
6 must give the appearance of
7 being an example of
8 impartiality, independence
9 and integrity. What is
10 demanded of them is something
11 far above what is demanded of
12 their fellow citizens."

13 In *Re Ruffo*, the judgment of the
14 Quebec Court of Appeal, it is noted that the
15 ethical duties of judges don't depend on formalized
16 codes, and that is why the ethical principles for
17 judges is not set out as a formalized code of
18 conduct. It is a guide.

19 The ethical duties of judges come
20 from the very function that goes with being a
21 judge. It is noted in *Re Ruffo* that the ethical
22 duties are as much a result of the commitment made
23 by judges in their oath of office as of the
24 obligations inherent to the judicial function.

25 Indeed, the objective, *Ruffo*

1 notes, of judicial ethics to which judges are
2 subject is the preservation of the judicial
3 function which is essential to maintaining the rule
4 of law.

5 We have heard reference in this
6 case from time to time to recusal, and obviously we
7 haven't got into any of the decision making as it
8 related to the SOS case. I think it is relevant to
9 note, in the comment made by the Supreme Court of
10 Canada in Ruffo versus Conseil de la magistrature,
11 which is set out at paragraph 10, which makes the
12 distinction between issues of recusal -- this is
13 not a case about recusal, but it has been mentioned
14 -- but it makes the distinction between issues of
15 recusal and the nature of ethical standards, and
16 particularly in the latter quarter of that quote
17 which is over on page 6, it notes that:

18 "Recusation is therefore a
19 necessary sanction for a
20 violation that has already
21 occurred or been perceived,
22 whereas the primary purpose
23 of ethics in contrast is to
24 prevent any violation and
25 maintain the public's

1 confidence in judicial
2 institutions."

3 In my submission, central to the
4 function of this committee is an examination of the
5 ethical standards, which are part and parcel of the
6 judicial office, and whether or not the conduct of
7 Justice Matlow has lived up to the ethical
8 standards that are expected of him as a result of
9 his having accepted the role of being a judge.

10 Lastly, in the Re Douglas case,
11 which is referred to at paragraph 11, the panel of
12 the Ontario Judicial Council in that case noted
13 that in respect of a test for judicial misconduct,
14 there are two really related concerns involved in
15 this test. The first is public confidence and the
16 second is the integrity, impartiality and
17 independence of the judge or the administration of
18 justice.

19 Just picking up a few lines about
20 five lines from the bottom, the panel in that case
21 noted that:

22 "The maintenance of public
23 confidence in the judge
24 personally and in the
25 administration of justice

1 generally, are central
2 considerations in evaluating
3 impugned conduct. In
4 addition, the conduct must be
5 such that it implicates the
6 integrity, impartiality or
7 independence of the judiciary
8 or the administration of
9 justice. Accordingly, a
10 judge must be and appear to
11 be impartial and independent.

12 He or she must have and
13 appear to have personal
14 integrity. If a judge
15 conducts himself or herself
16 in a manner that displays a
17 lack of any of these
18 attributes, he or she may be
19 found to have engaged in
20 judicial misconduct."

21 I commend that to you, because in
22 my submission that is an appropriate way of going
23 about the analysis of the evidence that you have
24 heard in this case.

25 Finally, in terms of the legal

1 issues, what is the standard that must be applied?

2 And I would submit that the standard of clear and
3 convincing proof based on cogent evidence.

4 In this case you have an agreed
5 statement of fact which covers many facts, and I
6 would submit there is no issue about the clear and
7 convincing nature of that.

8 We then heard the evidence of a
9 number of witnesses, and you will have to assess
10 whether or not, in your judgment, their evidence is
11 clear and convincing, but ultimately it will
12 require an assessment on all of the evidence, that
13 is, the agreed statement of facts and the evidence
14 that you have heard, and a determination whether on
15 all of that evidence you are satisfied that it is
16 clear and convincing, cogent and that it relates to
17 the issues that the test demands.

18 The case before you, I submit, is
19 not about whether a judge can oppose a municipal
20 decision that affects him or her personally. I
21 suggest that you may conclude that it is within the
22 parameters of the ethical principles that are part
23 and parcel of the judicial function, but within the
24 parameters of those principles there is undoubtedly
25 room for a judge to take appropriate and effective

1 action, although perhaps not the same kind of
2 action as a private citizen who is not a judge
3 could take.

4 I also suggest to you that the
5 case is not about judicial decision making in any
6 aspect. We have heard that the SOS case was an
7 important aspect of this case in terms of timing.
8 I suggest it is only the nature of that case, the
9 timing of the hearing of that case and the fact
10 that Justice Matlow was participating in that case,
11 now that all evidence is in, can clearly be seen
12 that those features provide context and context
13 only in which you can evaluate the conduct of
14 Justice Matlow between October the 2nd and October
15 the 5th of 2005.

16 As you look at the amended
17 particulars, those set out in paragraph 35(a)
18 through (n), in my submission none of them deal
19 with issues that are related to judicial decision
20 making. They all relate to issues of conduct,
21 having regard to the total tapestry of the evidence
22 that occurred before any aspect of the judicial
23 decision making inherent in being on the panel in
24 the SOS case even begins.

25 I don't intend to go through each

1 of those allegations, nor to make reference to the
2 evidence, although I believe have a chart. I have
3 a chart that relates those paragraphs of the agreed
4 statement of fact to each of the subsections of
5 section 35 to assist you in determining which
6 aspects of the agreed statement might relate to
7 each subsection.

8 I won't review the evidence,
9 because the evidence is fresh in your minds and it
10 seems to me that in reviewing evidence with you, it
11 will almost occur as a function of that review that
12 I will end up suggesting inferences.

13 I don't believe that is the
14 function of independent counsel. I believe that is
15 the function of the committee to assess the
16 evidence and determine where it leads.

17 I may make some submissions in
18 reply to my friend, but subject to any questions
19 you have, those are my submissions.

20 THE CHAIR: Mr. Hunt, the
21 committee is going to ask you and Mr. Cavalluzzo to
22 comment on appendix 9. Appendix 9 has received a
23 good deal of attention and was referred to by
24 Justice Matlow. It is the opinion expressed
25 respecting municipal democracy by the Ethics

1 Committee.

2 When Justice Matlow gave evidence
3 on that -- and I don't know that I have the
4 immediate reference to it. I would ask you to turn
5 to the transcript at page 198, the transcript of
6 yesterday, when I think it was counsel for Justice
7 Matlow, Mr. Cavalluzzo, was asking him about this
8 and read it to him. Justice Matlow said:

9 "Then I looked at the
10 advisory and I saw that there
11 was no objection to my
12 challenging my municipality,
13 subject to one proviso that
14 this advisory opinion sets
15 out, and the proviso is
16 that --"

17 And he quotes it:

18 "The judge realizes that in
19 so doing, the judge must be
20 disqualified from any
21 participation in any
22 litigation arising from the
23 matter."

24 He then goes on to say:

25 "That was a proviso that I

1 had no difficulty with. The
2 first thing is that when I
3 started my involvement with
4 this, I had no idea then what
5 was going to evolve. It
6 never occurred to me that
7 what took place over the next
8 couple of years was going to
9 take place. This was a very
10 unique experience --"

11 He goes at the bottom paragraph on
12 page 198:

13 "My first idea was that
14 somewhere along the road, we
15 would have to become involved
16 in proceedings at the Ontario
17 Municipal Board. Even though
18 the parking lot was owned by
19 the city and what was about
20 to take place was going to be
21 a joint venture between the
22 city and the developer and
23 the parking authority,
24 somewhere along the road
25 there was going to have to be

1 a rezoning of the parking
2 lot."

3 And he goes on along the same
4 lines.

5 At page 272, when you were dealing
6 with the matter, Mr. Hunt, you refer to it and you
7 refer to the advisory opinion, and you pose this
8 question at the top of page 272:

9 "Question: It does to an
10 extent, in the sense that the
11 judge who availed himself or
12 herself of the opportunity to
13 get the advice of the
14 Advisory Committee in this
15 case had a situation that
16 involved traffic flow through
17 a neighbourhood and wanted to
18 know if they could write to a
19 council member indicating
20 opposition to a move by some
21 citizens to halt traffic in
22 the judge's community.

23 "The response was that, yes,
24 you can write, provided it is
25 on private or plain note

1 paper, and you don't sit on
2 any litigation arising from
3 the matter."

4 I see that as somewhat different
5 than the interpretation that the evidence of
6 Justice Matlow indicated he was giving it. You
7 seem to be indicating that when the Advisory
8 Committee was answering the question posed, which
9 was:

10 "Whether a judge can
11 participate in municipal
12 democracy by opposing an
13 initiative put forward by his
14 or her municipality?"

15 To which the Advisory Committee
16 gave this answer:

17 "The committee is of the view
18 that there is no objection to
19 the judge writing the
20 proposed letter provided it
21 is on private or plain
22 notepaper. As a ratepayer
23 and a citizen, the judge is
24 entitled to have and express
25 views on a purely local and

1 municipal question provided
2 of course that the judge
3 realizes that in so doing the
4 judge must be disqualified
5 from any participation in any
6 litigation arising from the
7 matter."

8 Justice Matlow's answers led me to
9 conclude that he was interpreting it to mean that
10 you can participate in resisting a proposal of a
11 municipal government, but when you look at how it
12 is going to evolve, you have to be concerned about
13 what it is going to involve you in. Litigation, in
14 this case he mentioned the Ontario Municipal Board,
15 in particular.

16 You seem in your wording of it to
17 have interpreted that the judge simply couldn't sit
18 on any matter. I am going to ask you to tell me
19 whether that is your actual interpretation of it or
20 whether it is a misstatement.

21 MR. HUNT: I think it is a
22 misstatement, in the sense of an attempt to
23 summarize it, and had I been more precise, I would
24 have used the word "participation".

25 THE CHAIR: I will ask Mr.

1 Cavalluzzo to comment on this, of course.

2 MR. HUNT: Thank you.

3 SUBMISSIONS BY MR. CAVALLUZZO:

4 MR. CAVALLUZZO: Chief Justice, I
5 might answer that question at the commencement of
6 my submissions in case I forget. Certainly if
7 Justice Matlow was re-called to the stand, he would
8 in effect agree with what Mr. Hunt initially said.

9 His view is disqualification
10 implies you are sitting as a judge. You are not
11 participating in the litigation before the court,
12 but our interpretation would be disqualification
13 from participation means being disqualified as a
14 judge, and when he was referring to the OMB at page
15 198 and 199, you will see he goes on to say, Well,
16 this thing might go to the OMB, but to go to the
17 OMB is going to be very, very expensive, because we
18 would have to retain experts, lawyers, and so on
19 and so forth, and we decided because of our lack of
20 funds we had to pursue a different route, which was
21 the political route, in raising the consciousness
22 of the local community in the area and the local
23 council so that we can stop the development, and
24 that was the reference to the OMB.

25 So, respectfully, I submit that

1 when it talks about disqualification from
2 participating in litigation, it means disqualifying
3 himself as a judge in hearing a matter which
4 related to the dispute, not participating as a
5 party before the -- and when Justice Matlow
6 referred to participating, he was just quoting the
7 municipal democracy protocol itself.

8 THE CHAIR: My question to you
9 arising out that assertion, Mr. Cavalluzzo, is:
10 Why would it be necessary to state that a judge
11 could not sit on any matter in respect to which
12 there was an obvious personal interest where the
13 municipality was taking an action that might affect
14 -- obviously a judge could not sit on that matter.

15 Why would they be giving that
16 answer to --

17 MR. CAVALLUZZO: I think it is the
18 right qualification, Yes, yes, you can have a
19 dispute with your city, but obviously you cannot
20 sit hearing a dispute relating to that particular
21 dispute in which you have an interest. I think it
22 is just a statement of the impartiality
23 qualification, which is extant throughout the
24 ethical principles.

25 Certainly, I am even prepared to

1 have Justice Matlow re-called. I specifically
2 asked him that. His interpretation is the one that
3 I have just given you, and unfortunately perhaps I
4 should have expanded on that, but I just thought
5 that it was obvious and I interpreted it the same
6 way that Mr. Hunt did in his question.

7 THE CHAIR: We have your position.

8 MR. CAVALLUZZO: Thank you.

9 THE CHAIR: Okay, Mr. Cavalluzzo,
10 you can move on.

11 MR. CAVALLUZZO: We are going to
12 file some materials for you. Needless to say,
13 these materials were created last night and there
14 may be some mistakes in them, and I will hopefully
15 point them to you if there are any.

16 Members of the panel, what you
17 should have before you is a factum which is
18 entitled "Legal Submissions". You should also have
19 a case book, and you should also have an article by
20 Professor Lorne Sossin, which has a number of
21 articles appended to it, and I will take you
22 through some of these articles to make it a little
23 easier for your reference.

24 On behalf of Justice Matlow, we
25 thank the committee for their patience and

1 attention during the last few difficult days, and
2 hopefully we will provide you with some assistance
3 in respect of these submissions.

4 Let me take you through the factum
5 itself. It may be more organized that way.
6 Usually I don't do it that way, but it may be
7 better to do it that way in terms of an organized
8 and more concise presentation.

9 In paragraph 2 we set out the
10 statutory mandate, which obviously is applicable to
11 these proceedings, and it is our submission that
12 Justice Matlow's conduct has not incapacitated him
13 or disabled him from what is the test of due
14 execution of his office as judge and that a
15 recommendation for removal is not warranted.

16 In this respect and in our
17 submissions this morning, we are going to really
18 highlight a few areas. First of all, it is our
19 submission that the test for removal is a very
20 onerous one, and we will refer to some case law
21 which talks about the requirements for warranting
22 removal.

23 The second point, and I am going
24 to spend a little time on this, and we submit
25 respectfully that the conduct at issue relates to a

1 judge's constitutional freedom of association and
2 speech and other important constitutional values,
3 which we will be focusing on.

4 What we say, as a result of that,
5 any restrictions on this kind of conduct should
6 impair a judge's right as a citizen as little as
7 possible, to pick up the wording in the tabs under
8 section 1 of the Charter of Rights and Freedoms.

9 Thirdly, we will be reviewing the
10 Ethical Principles, which I think it is clear do
11 not provide precise guidance to judges, and, as the
12 cases say, these principles are advisory only, and
13 judges are afforded a wide degree or range of
14 discretion in determining the appropriate scope of
15 their conduct.

16 You will see from the cases that
17 the acceptable exercise of free speech by judges
18 has undergone significant evolution over the last
19 few years and, indeed, decade or so. We submit
20 that the consensus now in the judiciary, but more
21 importantly, more importantly, the consensus in the
22 public, because that is who we should be concerned
23 about -- this case doesn't involve judges and
24 lawyers. It involves the public, and the whole
25 point of this proceeding and the Ethical Principles

1 is to ensure that the public's confidence is
2 maintained in the judiciary and in the
3 administration of justice.

4 What the authority suggests is
5 that as members of the broader community, judges
6 should participate in local community affairs as
7 citizens. Such participation will not only benefit
8 local affairs, but will also enhance the judge's
9 ability, skill and experience to administer justice
10 in the community. Then we go on to say:

11 "The monastic view of the
12 judiciary --"

13 This is at paragraph ©, I am
14 sorry, at page 2:

15 "The monastic view of the
16 judiciary is an antiquated
17 one which has been rejected
18 because of its obvious
19 limitations."

20 We will refer in that regard to,
21 as you are obviously aware, a couple of articles by
22 Justice Sopinka wherein he uses he uses and talks
23 about a judge as a monk, and controversial at the
24 time. It was in the early nineties before his
25 unfortunate death, but controversial at the time

1 but accepted dogma today, in my respectful view.

2 The fourth point that we will
3 focus on is that judges must be afforded scope to
4 exercise independent judgment as to what
5 information must be proactively disclosed in
6 particular circumstances to identify a potential
7 conflict. No clear and binding rules apply to such
8 determinations, and I will bring you to some case
9 law to that.

10 Let us move initially, members of
11 the panel, to the test for removal, and we refer to
12 the test in paragraph number 5 on page 3, and just
13 picking up from the third line:

14 "The conduct which is the
15 subject of the complaint must
16 be such that it 'could
17 reasonably be expected to
18 shock the conscience and
19 shake the confidence of the
20 public.'"

21 I think those are very, very
22 important words. Once again, focussing on the
23 public interest is what we are concerned about in
24 these proceedings.

25 Then from the Marshall report, the

1 test is put this way:

2 "Is the conduct alleged so
3 manifestly and profoundly
4 destructive of the concept of
5 impartiality, integrity and
6 independence of the judicial
7 role that public confidence
8 would be sufficiently
9 undermined to render the
10 judge incapable of executing
11 the judicial office?"

12 I think that is very similar to
13 the provincial case that Mr. Hunt referred to, the
14 Stanley case, which talks about, We need public
15 confidence in the judiciary in order to enhance
16 impartiality, integrity and independence.

17 The other point, just as a matter,
18 just to amplify what Mr. Hunt said regarding the
19 test, this is a quasi-professional case, and, as
20 Mr. Hunt has stated, in professional cases, clear
21 and convincing proof is required to persuade you
22 that there is misconduct, but the cases go on and I
23 point out in paragraph number 8 to say that:

24 "It is well-established that
25 statutes imposing

1 professional discipline must
2 be interpreted strictly and
3 narrowly."

4 The reason for that, as I pointed
5 out in our preliminary motion back in November, is
6 what we are talking about today, whether it be
7 removal from the judiciary or the legal profession
8 or the medical profession, is referred to
9 throughout as the "professional death penalty", and
10 that, in effect, is what we are dealing with today.

11 I would like to move on to what I
12 view to be the essence of this case, and that is
13 freedom of expression and association. I think we
14 would all agree that both expression and
15 association are really the most critical freedoms
16 and manifestations of citizenship in a democratic
17 society.

18 Certainly, association is the most
19 significant means by which citizens affect their
20 freedom of speech. They get together, they have a
21 common objective, they pursue that common objective
22 and hopefully they are successful at the end of the
23 day.

24 Certainly, as was pointed out in
25 the Ruffo case or in the Ethical Principles

1 themselves, needless to say, and we obviously can
2 see, that there have to be some restrictions on a
3 judge's exercise of speech and association in order
4 to, once again, enhance independence and
5 impartiality.

6 However, an important fact that we
7 say, once again, is that we are talking about
8 constitutional rights, and, clearly, clearly
9 judges, as any other citizens, are entitled to the
10 protection of section 2(b) and 2(d) of the Charter
11 of Rights, because of course the opening words of
12 section 2 detailed in the fundamental freedoms is
13 everyone is entitled to these freedoms and judges
14 are entitled to those freedoms.

15 However, the restrictions that
16 must be imposed, in my respectful submission, and
17 we set this out in paragraph 11, must be strictly
18 necessary in order to ensure the impartiality,
19 integrity and independence of the judicial office,
20 because that is the purpose of maintaining public
21 confidence and so on.

22 Similar to the wording of section
23 1, we say that is the rationale for restriction on
24 speech and association of judges.

25 The other point we would raise

1 which I think is important, some of the cases
2 relate to, for example, discriminatory language or
3 conduct occurring within the courtroom itself.
4 This case is somewhat different, qualitatively
5 different, because here in this case we are talking
6 about the conduct of a judge in his or her private
7 life as a local citizen. I think that is an
8 important qualification that you should keep in
9 mind.

10 However, what is very clear,
11 members of the panel, is that I am going to talk
12 about the border line, because this is really a
13 case of borders. We see it in the teaching
14 industry, the legal profession, and so on,
15 borderline cases. It is not always clear to
16 professionals which side of the fence their conduct
17 falls on.

18 Certainly the borders or the
19 acceptable exercise of judicial free speech and
20 related association is in a state of transition.
21 Certainly since the Berger inquiry, there has been
22 an increased acceptance and, indeed, expectation of
23 the fact that members of the judiciary participate
24 in various kinds of public discourse.

25 I need not refer back to the

1 Berger situation. We are clear on what occurred in
2 that situation, but of course that occurred way
3 back in 1983 at the time of the enactment of the
4 Charter. A lot of water has passed under the
5 bridge.

6 We have given you the cases, and I
7 am not going to refer to them now, but just let me
8 point out the important cases -- excuse me, not
9 cases, but authorities. The first is by Professor
10 MacKay, and that can be found in tab Q of the
11 Sossin affidavit. Justice Sopinka's article, "Must
12 a Judge be Monk", can be found at D.

13 The other article that I will
14 refer to is the second from the bottom of that
15 paragraph at page 6, "Remarks of the Chief
16 Justice", "The Role of Judges in Modern Society",
17 and that can be found at tab P of the Sossin's
18 article.

19 JUSTICE ROLLAND: Did you say G?

20 MR. CAVALLUZZO: P.

21 JUSTICE ROLLAND: Q, D and P?

22 MR. CAVALLUZZO: That is correct.

23 Thank you, Justice. It might be useful at this
24 time, just so that I can --

25 THE CHAIR: I was making some

1 other notes. I have tab Q and I have tab D.

2 MR. CAVALLUZZO: Tab P.

3 THE CHAIR: That is the last one.

4 MR. CAVALLUZZO: Let me briefly
5 bring you to these articles, and no doubt you will
6 read them, but I just want to point out a couple of
7 parts in them right now before we get to the facts.
8 It is in the Sossin.

9 Let us first refer to Justice
10 Sopinka's article, "Must a Judge be a Monk", at tab
11 D. This, as I said earlier, is an article that was
12 written in 1996. The earlier one was earlier in
13 the nineties. There are just a couple of points.
14 No doubt you will read it.

15 On the first page, he summarizes
16 some of the Judicial Council cases wherein he says
17 that:

18 "The Canadian Judicial
19 Council had not clarified
20 matters, being limited, of
21 course, by the fact that its
22 only statutory power of a
23 disciplinary nature under ss.
24 63-65 of the Judges Act is a
25 recommendation for removal."

1 And here is the part here. He
2 says:

3 "No such recommendation has
4 ever been made based on
5 public utterances of a judge.
6 Four complaints with which
7 the Canadian Judicial Council
8 has dealt are --"

9 Those respecting Justice Wilson
10 concerning the gender bias speech which you are
11 obviously aware of, the Chief Justice's speech to
12 the Elizabeth Fry Society on crime and women, of
13 course the situation with Justice Berger where he
14 criticized the lack of protection for aboriginal
15 rights in the Charter, and then the more recent
16 case of Jean-Claude Angers where the New Brunswick
17 Court of Appeal justice wrote an open letter to the
18 Prime Minister criticizing gun policy.

19 What I wanted to refer to are a
20 couple of things that -- and I am going to deal
21 with this, but in the next paragraph, for example,
22 about three lines down, he says:

23 "In the Berger matter, the
24 Council expressed an opinion
25 that judges 'should avoid

1 taking part in controversial
2 political discussion except
3 only in respect of matters
4 that directly affect the
5 operation of a court.'"

6 That is something that I am going
7 to deal with, because there is a consensus that
8 judges can speak out amongst the judiciary and the
9 legal profession on matters affecting the courts or
10 the administration of justice because of obviously
11 their expertise, and so on and so forth.

12 He goes on to quote Professor
13 Webber, and, Professor Webber, you have the article
14 in here of Professor Webber, but just the first
15 line there I would read, "The line is crossed --"
16 Once again, the boundary line, in my view:

17 "The line is crossed, I
18 believe, when the judge
19 identifies himself closely
20 with a particular faction in
21 the legislature or executive,
22 or when he lobbies
23 consistently and forcefully
24 for a specific political goal
25 - in short, when his

1 activities become partisan in
2 nature."

3 I am going to deal with that in
4 terms of the context of Justice Matlow's conduct.

5 The other reference I think is
6 important for you is on the opposite page at page
7 169 where Justice Sopinka makes a very important
8 statement, in my view. He says:

9 "In the absence of any legal
10 restriction, or indeed
11 well-defined guidelines,
12 judges must determine for
13 themselves what is
14 appropriate. Surely judges
15 who daily make decisions
16 affecting the lives of others
17 can be trusted to determine
18 this matter for themselves."

19 I think that is important, and
20 that is referred to in other areas. Then the next
21 page, Justice Sopinka goes on and I say that
22 because the evolution is still occurring. This
23 article is in 1996. We are now a decade later and
24 I submit that, if we can call it, the ball has
25 moved much closer to -- I was going to say the goal

1 line, a sports -- but certainly the ball has moved.

2 In any event, he at the time at page 171, once
3 again, this exception about the administration of
4 justice, he says under the title "Controversial
5 Issues":

6 "These are to be avoided.
7 Invariably, involvement in
8 such issues gives the
9 appearance of taking sides
10 and partisanship. I would,
11 however, make an exception
12 with respect to matters
13 directly affecting the
14 administration of justice and
15 concerning which judges are
16 particularly knowledgeable."

17 JUSTICE VEALE: I am sorry, you
18 were reading from page 171?

19 MR. CAVALLUZZO: I am sorry, 171,
20 the very first two sentences, Justice.

21 JUSTICE VEALE: Thank you.

22 MR. CAVALLUZZO: The other
23 reference on this article I would make is to page
24 172, and this brings it closer to home, in my view,
25 where it says under the title "Outside Activity",

1 and then (B), "Business", in the second paragraph,
2 it states:

3 "Participation in
4 educational, religious,
5 charitable, cultural or civic
6 organizations, so long as not
7 designed for the economic or
8 political advantage of their
9 members, seems perfectly
10 acceptable, although active
11 participation in fundraising
12 activities should be avoided
13 for fear that potential
14 donors may feel compelled to
15 donate or may expect future
16 favours."

17 I commend the other articles that
18 we have there relating to freedom of speech, but I
19 think that Justice Sopinka's article is very, very
20 important, as is the Chief Justice -- because in
21 the evidence, of course Justice Matlow said he read
22 other things apart from the municipal democracy
23 protocol. He read articles in the area.

24 If I could move on now perhaps to
25 just following through and to quote from the

1 present Chief Justice, Chief Justice Beverley
2 McLachlin. I refer to that in paragraph 14 of the
3 factum. You have the article there. This is an
4 article called "Judging in a Democratic State".
5 That is tab E of the Sossin article. Rather than
6 referring to it, I just quote from the factum to
7 save some time, wherein the Chief Justice states:

8 "In short, judges are human
9 beings. They are sons and
10 daughters, husbands and
11 wives, parents and friends.
12 They coach the local soccer
13 team, cook dinner when they
14 come home at night, and line
15 up in airports when they go
16 on vacation. Insofar as
17 their humanness may be a
18 distraction, as Tolstoy
19 suggests, judges must strive
20 to overcome it. But the
21 benefits of judges being
22 human beings greatly outweigh
23 the detriments. Judges deal
24 with human problems. They
25 must be able to relate to

1 these problems, to understand
2 them. We would not want a
3 robot for a judge even if we
4 could find one. We would
5 worry that the robot would be
6 unable to understand the
7 human condition, the basic
8 requirement for being a
9 judge."

10 In this speech and indeed remarks,
11 you will see what is clear from the Chief Justice's
12 statements is that she views a judge's engagement
13 in his or her community as being beneficial to
14 society, to Canadian society, for a couple of
15 reasons. One is that by being more engaged with
16 the public, the judge will be more empathetic to
17 the human problems which come before him or her
18 every day.

19 The second important aspect I
20 think which is very important in this particular
21 case is that there is tremendous value which judges
22 can bring to the local community. They have values
23 that are very important and which are a huge asset
24 to the local community.

25 I move on in the factum and refer

1 to certain developments, and we say that there is
2 increased tolerance with respect to judicial speech
3 because of a number of developments in three areas.

4 First are developments in judicial ethics, second
5 would be developments in our view of impartiality,
6 and the third and to me the most important one,
7 because we are here in the public interest, are the
8 public expectations of public engagement by judges.

9 What we go on to refer to in terms
10 of freedom of association of judges, of course
11 everyone has the right to associate. Judges do it.
12 Judges have their own associations. Lawyers do
13 it, and so on and so forth.

14 Of course the association or your
15 association have limits because of judicial
16 impartiality and independence, but that doesn't
17 mean, these limits doesn't mean, to use the words
18 of Justice Sopinka, that the judge has to be a monk
19 or has to lead a monastic life.

20 In paragraph 17, we refer to in
21 our province our former Chief Justice, Chief
22 Justice McMurtry, who had led, as you know, a
23 public life --

24 THE CHAIR: I would ask anybody
25 that has cell phones in the room to either remove

1 them or ensure that they are turned off, please.
2 It is disturbing and interferes with counsel and
3 their presentation. Thank you.

4 MR. CAVALLUZZO: Thank you, Chief
5 Justice.

6 Our former Chief Justice was a
7 person of public affairs. As you know, before he
8 joined the judiciary he led a very active political
9 life and became the Chief Justice of Ontario after
10 being on the High Court, but even while on the High
11 Court, Justice McMurtry was thoroughly engaged in
12 the public, thoroughly engaged in the community in
13 terms of some people would view it to be
14 controversial areas -- not now, obviously -- not
15 disabled youth, but youth that were prone to
16 criminal activities, youth that were having
17 difficulty getting jobs, and we set this out in the
18 paragraph.

19 I won't review them all, but the
20 important point is that when he retired, when Chief
21 Justice McMurtry retired, he was lauded, and we
22 have got an article in there that you can see. He
23 was lauded as a model citizen because of his
24 activities in the community, because of what he
25 brought to the community.

1 The citizens of Ontario paid
2 tribute to him not only because he was a great
3 judge or a great politician, but because of what he
4 brought to bear in the community while he was on
5 the judiciary, and that, incredibly, in my
6 respectful submission, incredibly increased the
7 respect for the judiciary in this province.

8 Let me briefly move to the ethical
9 principles and the developments in that area. The
10 first one we refer to is in paragraph 20, and of
11 course we all agree it is a statement of principle.

12 It is something we strive towards. It is not a
13 prescriptive code of conduct, but there are a
14 couple of points that I would refer to.

15 One is in paragraph 1 of the
16 statements, where it is highlighted here. It says:

17 "Setting out the very best in
18 these Statements, Principles
19 and Commentaries does not
20 preclude reasonable
21 disagreements about their
22 application or imply that
23 departures from them warrant
24 disapproval."

25 At this point, I don't have this

1 in the factum, but I want to comment here on the
2 fact that obviously in any kind of ethical
3 principle, no matter what the profession, there can
4 be reasonable disagreements on the interpretation,
5 but I say this, that this is particularly true when
6 we appreciate that the judiciary, like any
7 profession, is made up of different personalities
8 and styles.

9 I say what may be appropriate and
10 second nature to one judge may not be the standard
11 or the style for another judge. In our situation,
12 without doubt, there are judges that would not have
13 become as engaged in community affairs as Justice
14 Matlow. However, we must be careful, in my
15 respectful submission, that one particular
16 personality or style is not preferred to the other.

17 The test, once again, is whether
18 the conduct involved would shock the public
19 conscience or would shake the confidence of the
20 public in the judiciary. It is the effect of the
21 conduct on the public perception of the justice
22 system that is important, not whether a particular
23 style or method is followed.

24 We go on on the next page in
25 paragraph 2, and the highlighted portion are there,

1 and I just refer to the last three lines where it
2 says, "They", the statements, principles, et
3 cetera:

4 "They are not to be used as a
5 code or a list of prohibitive
6 behaviours. They do not set
7 out standards defining
8 judicial misconduct."

9 What I say here, and I don't have
10 that in the factum -- by the way, the ethical
11 principles can be found in our case book at tab 6
12 if you need to refer to them. What I say here, in
13 terms of the advisory nature of these guidelines,
14 is that necessarily they are like fundamental
15 freedoms in a sense that they are necessarily
16 framed in very general terms or very general
17 language, and this may lead to varying
18 interpretations of their effect and this is
19 inevitable.

20 However, I submit, as a matter of
21 fairness, one in interpretation should not be
22 retroactively implied to sanction the conduct of a
23 judge who has acted on another interpretation which
24 you may disagree with, so long as his or her
25 interpretation was made honestly and in good faith.

1 What are these ethical principles?

2 I think they have been well defined by a colleague
3 of yours, Madam Justice Georgina Jackson. In
4 paragraph 22, refer to her description, where she
5 says "the document", that is the Ethical Principles
6 document:

7 "-- describes an ethical and
8 moral culture. The language
9 of the Ethical Principles is
10 not a directive. The
11 language is in the form of
12 advice."

13 She stresses that:

14 "Ethical principles leave
15 more to individual good
16 conscience of the judge than
17 a code can lead simply to
18 legalistic ritual."

19 Of course certainly I think that
20 that is what Justice Sopinka was talking about,
21 where the border or the scope of the permissible
22 activity should be left to the individual decision
23 of the judge.

24 The Supreme Court of Canada
25 obviously agrees with that. We refer, as did Mr.

1 Hunt, to the Ruffo case, where Justice Gonthier in
2 paragraph 23, we have quoted, says in the last line
3 that:

4 "As an ethical standard, it
5 is more concerned with
6 providing general guidance
7 about conduct than with
8 illustrating specifics and
9 the types of conduct
10 allowed."

11 Then we refer to some materials by
12 Jackson which can be found in the case book at tab
13 9. Justice Jackson says:

14 "All conduct capable of being
15 sanctioned must be a breach
16 of ethics, but not every
17 breach of the Ethical
18 Principles can amount to
19 sanctionable conduct."

20 Let me move now, Justices, to
21 developments in the concept of judicial
22 impartiality. Certainly as with speech, there has
23 been a great deal of evolution in the notion of
24 impartiality.

25 As we point out at page 11, about

1 five lines down, we say:

2 "Over the past two decades,
3 however, there has emerged 'a
4 more modern conception of the
5 role of the judge which is
6 more tolerant of elements of
7 subjectivity' and which
8 'admits that objectivity is
9 more of an ideal than a
10 reality.'"

11 The McKay article can be found in
12 the Sossin article at tab Q. I have mentioned
13 that. The present Chief Justice has commented on
14 this evolution and refers to I think the consensus.
15 She talks about:

16 "The myth of the wholly
17 objective judge, that nothing
18 could be further from the
19 truth. Judges are first and
20 foremost human beings. As
21 such, their conclusions on
22 the facts and the law are
23 shaped by their training and
24 personal experience."

25 And then she writes an article

1 called "Judging in a Democratic State", which can
2 be found in the Sossin article at tab E. Let me
3 quote what she says, rather than referring to the
4 article itself in the factum. She says:

5 "It is true that judges must
6 guard against preconceptions
7 and prejudices influencing
8 their findings of fact and
9 law. It is equally true that
10 they must be neutral as
11 between the contesting
12 parties. However, this does
13 not mean that the judge's
14 mind must be a blank slate --
15 "To insist that a judge purge
16 all preconceptions and values
17 from the mind is to place an
18 impossible burden on the
19 judge and induce impossible
20 expectations in the public.
21 The best the judge can do is
22 to become aware of his or her
23 mind-set and guard against
24 errors it may engender. What
25 is required is not mechanical

1 robot-like impassivity, but
2 human impartiality."

3 In the next paragraph, we refer to
4 the R.V.S. case, which can be found in our case
5 book at tab 10, and that is where this evolution,
6 in terms of the notion of impartiality, is referred
7 to.

8 I think we certainly have reached
9 a consensus on the direction that judicial
10 impartiality has reached in this country, and there
11 is a modern conception whereby pure objectivity has
12 been rejected that judges are products of obviously
13 their past experiences, knowledge and education and
14 so on.

15 I would like to move on to what I
16 think is the most important of the three
17 developments, and that is what I refer to as
18 "Public Engagement by Judges" and how this has
19 changed over the last few years.

20 I will pick this up at paragraph
21 29 of the factum, another speech of the Chief
22 Justice in 2001, and this is from her speech called
23 "The Role of a Judges in Modern Society". That can
24 be found at tab 0 of the Sossin article. Quoting
25 from the factum, she says:

1 "The new role of judges in
2 modern society has changed,
3 and will continue to change,
4 the traditional relationship
5 between judges and the
6 public. Judges have
7 traditionally held themselves
8 aloof from the public. They
9 have lived in quiet
10 isolation. They have
11 deliberately severed ties
12 with old friends and
13 acquaintances, the better to
14 assure their independence.
15 Save for exceptional
16 circumstances, they have
17 refused to talk to the press.
18 And they have generally
19 declined to speak out in the
20 public on anything other than
21 the dull business of the
22 legal process, and then only
23 with great circumspection."
24 That was the old view. How has
25 that evolved? We say in paragraph 30:

1 "But, she then noted, there
2 has recently emerged 'much
3 controversy' over whether a
4 judge may or may not speak
5 out on issues, particularly
6 with respect to criticisms of
7 the court. The Chief Justice
8 concluded that there is no
9 consensus on the appropriate
10 role for judges in this
11 respect, 'the appropriate
12 response is not clear.'"

13 The statement I am going to read
14 from is in her article, "The Role of Judges in
15 Modern Society", which can be found at tab P, as in
16 Paul, in the Sossin article. She says:

17 "Needless to say, there is a
18 spectrum of opinion on the
19 issue. What seems clear,
20 however, is that, over the
21 last 20 or so years, the
22 entire spectrum has shifted
23 in favour of a greater
24 willingness on the part of
25 judges to speak out. This

1 shift is a reflection of the
2 changing role of the
3 judiciary, and perhaps a
4 reflection of the fact that
5 our democracies are becoming
6 more participatory, with
7 citizens taking a more active
8 interest in the way social
9 policy is made."

10 What we try to do in the next
11 couple of paragraphs is to show examples, show that
12 there is a great deal of difficulty in terms of
13 what the appropriate boundaries are in respect of
14 judicial speech. We refer, if you go to paragraph
15 31 we say:

16 "Recently, there have been a
17 number of highly publicized
18 issues upon which judges have
19 spoken publicly and which
20 have been the subject of
21 debate both substantively and
22 with respect to the propriety
23 of judge's exercise of free
24 speech."

25 We refer, for example, to the

1 process of appointing federal judges, the
2 controversy we recently had with the appointment of
3 Justice Rothstein to the Supreme Court of Canada.

4 We refer in paragraph B to the
5 significant public debate surrounding the
6 statements of the Judicial Council concerning
7 whether the makeup of the committees appointing
8 judges, federal judges, indeed.

9 We have in the materials for you
10 the two press releases of the Canadian Judicial
11 Council commenting on the government's position in
12 respect of the makeup of the committees regarding
13 federal appointments.

14 We talk in paragraph © about the
15 significant issues about the cost of litigation,
16 the time that criminal trials are taking, and so on
17 and so forth, barriers indeed to the seeking of
18 justice by the public.

19 We refer to speeches by Justice
20 Moldaver of this province and Chief Justice
21 McLachlin.

22 By the way, as I go on, just to
23 save you time, the top of page 15, the news
24 releases from the CJC concerning the makeup of the
25 committees can be found at tab J of the Sossin

1 article, and the McLachlin article referred to in
2 the Globe and Mail is tab G, and Justice Moldaver's
3 remarks can be found at tab F.

4 What is important in this regard
5 is what we are talking about here, what we are
6 talking about here for the most part, is really the
7 administration of justice, how the courts operate,
8 and so on and so forth, which, as I said before,
9 there seems to be consensus that judges can speak
10 out on these issues.

11 Just to show that there is no
12 consensus even on that, that there is, we refer in
13 paragraph 32 to two very critical editorials in one
14 of our national newspapers concerning two things.
15 Maybe I will take you to it.

16 Any time you want to break,
17 just --

18 THE CHAIR: I didn't want to
19 interfere with your flow. I was going to wait
20 until you got to the end of this, but if now is
21 okay with you, it is okay with us.

22 MR. CAVALLUZZO: That is fine.

23 THE CHAIR: We will take our break
24 now for about 10 minutes.
25 --- Recess at 11:18 a.m.

1 --- Upon resuming at 11:43 a.m.

2 THE CHAIR: Please be seated. Mr.
3 Cavalluzzo.

4 MR. CAVALLUZZO: Thank you, Chief
5 Justice. At the break, I had just referred to some
6 of the public positions that had been taken by the
7 Canadian Judicial Council on the appointment
8 process, and so on and so forth, and, clearly, on
9 an issue of the administration of justice,
10 something that we thought there was a consensus
11 that this was appropriate, but just to demonstrate
12 that, even there, there is somewhat of a lack of
13 consensus or controversy.

14 I refer to a couple of editorials,
15 which can be found initially behind tab K of the
16 Sossin article. As you can see, this is an
17 editorial from one of our national newspapers
18 referring to the public position of the Canadian
19 Judicial Council, and you will see, for example, in
20 the first paragraph:

21 "Canada's judges would do
22 well to remember that
23 'judicial independence' works
24 in two directions. Yes, the
25 concept rightly prevents

1 politicians from meddling in
2 judicial decisions. But in
3 return judges are expected to
4 avoid intruding on political
5 debates. Regrettably,
6 certain members of our
7 judiciary seem to have
8 forgotten this fact."

9 It goes on, for example, in the
10 third paragraph, about what the council is doing,
11 and they say in the last sentence of the fourth
12 paragraph, starting with "No Canadian law", they
13 say:

14 "As such, they are entirely
15 beyond the jurisdiction of
16 the CJC, and indeed the
17 council is exceeding its
18 mandate by issuing a public
19 opinion on the makeup of the
20 advisory committees."

21 It goes on. I recommend the last
22 couple of sentences in the editorial on the second
23 page:

24 "In other words, it looks
25 like Liberal-appointed judges

1 asserting the partisan
2 colours of the former
3 political masters that
4 engineered their own
5 appointments. Even if this
6 is not entirely true judges,
7 more than anyone, must be
8 acutely aware of the
9 perception created by such
10 unwarranted public
11 statements."

12 Et cetera, et cetera. The same is
13 true in the next tab, tab L, which is another
14 editorial from the same national newspaper, which
15 is very critical of Chief Justice McLachlin's
16 concern about access to justice, and this was in a
17 speech she made to the Empire Club in Toronto
18 concerning the increasing inability of ordinary
19 Canadians to seek justice in the courts, primarily
20 because of the high costs and long waits.

21 As you see in the fourth
22 paragraph, starting with "Litigation" about halfway
23 down:

24 "But even if we accept Judge
25 McLachlin's contention that

1 the situation has
2 deteriorated of late, her
3 remarks -- coming as they do
4 on the heels of the
5 Conservative government
6 cutting two major sources of
7 funding for litigious
8 interest groups -- gives the
9 appearance that the chief
10 justice may be taking a
11 political stance."

12 Et cetera, et cetera. I raise
13 this not because I agree with these editorials, but
14 just to point out that even in the public, there is
15 a lack of consensus concerning the appropriate
16 boundaries of judicial speech, even when we are
17 talking about the administration of justice.

18 One final point on that. I think
19 that you could say, for example, in respect of the
20 makeup of the committees, judicial committees
21 appointing the federal judges, that is a very
22 controversial issue. It is controversial in the
23 sense that political parties are divided on the
24 issue. It is controversial within the public, the
25 electorate itself, and I will come back to that

1 when I am speaking of Judge Matlow.

2 More importantly, it is the kind
3 of issue that could end up before the Supreme Court
4 of Canada. It is a constitutional issue. If
5 certain actions weren't taken, a constitutional
6 challenge could occur.

7 JUSTICE ROLLAND: Not that it
8 would go to the Supreme Court. It would be a
9 committee process?

10 MR. CAVALLUZZO: Yes. I submit
11 that if the committee process was made in such a
12 way that certain citizens thought it might be
13 unfair, that that could be constitutionally
14 challenged. It hasn't. I am suggesting it could,
15 on the basis of judicial independence, one of the
16 foundations, bedrocks of our constitution.

17 Once again, that does not preclude
18 council from making statements in that regard,
19 because it relates to the administration of
20 justice.

21 JUSTICE ROLLAND: The committee is
22 not the creation of the law. It is not the result
23 of the law. It is the government that has decided
24 to implement committees that would make
25 recommendations to help them to appoint judges.

1 MR. CAVALLUZZO: Right. But the
2 creation of a committee itself by a government is
3 government action, which would be subject to
4 Charter challenge if a citizen felt that the action
5 was contrary to the constitution.

6 You may disagree with the
7 challenge, but I respectfully submit that it could
8 be made, because some people feel very strongly
9 that if you change the makeup of the character of
10 the committee, that that in fact is not judicial
11 independence, which Chief Justice Lamer said, in
12 many cases, is a bedrock principle of our
13 constitution.

14 Let us move, then, finally in this
15 part to -- we have been talking, for the most part,
16 about public statements made by judges in their
17 judicial capacity. Let us move on to page 17 of
18 the factum to the judge's private life, which is,
19 in my submission, one step removed.

20 What we say in this regard,
21 members of the panel, is that the ethical
22 principles relating to judicial speech are, for the
23 most part, related to public discourse in the
24 capacity of a judge, in their role as a judge.

25 There is very little guidance on

1 what scope of speech and association are acceptable
2 in a judge's private life. We referred to this
3 yesterday. Page 15 of the Ethical Principles are
4 referred to in paragraph 37, where it says:

5 "Judges, of course, have
6 private lives and should
7 enjoy as much as possible the
8 rights and freedoms of
9 citizens generally."

10 That is, in my submission, a
11 recognition obviously, with section 2 of the
12 Charter, is applicable to the judges if there
13 needed to be any recognition in the Ethical
14 Principles.

15 The commentary continues to
16 observe that because a judge's conduct in and out
17 of court is bound to be subject of some public
18 scrutiny, a judge must accept restrictions on their
19 activities, and the commentary goes on to say:

20 "Judges need to strike a
21 delicate balance between the
22 requirements of the office
23 and the legitimate demands of
24 the judge's personal life,
25 development and family."

1 That brings us to an application
2 of these principles to the present facts. Before
3 coming to the facts themselves, we point out in the
4 factum that, as Justice Gonthier recognized, while
5 there is a consensus on the need for judicial
6 standards of conduct, in order to maintain public
7 confidence in the rule of law, that:

8 "-- the same consensus does
9 not exist -- regarding how
10 the standards can be
11 translated into conduct, be
12 it conduct that is
13 appropriate in court or
14 conduct that judges may adopt
15 in public. Some are strict
16 while others advocate greater
17 freedom."

18 It then goes on to talk about the
19 lack of precision in these kinds of standards. We
20 refer in the next paragraph to once again the
21 R.V.S. case, even our most senior judges can and do
22 disagree on the propriety of particular exercises
23 of judicial speech, and we say that:

24 "While Justices Cory and
25 Iacobucci found Justice

1 Spark's remarks in the course
2 of an oral ruling were
3 'troubling', 'worrisome' and
4 'close to the line' in terms
5 of raising a reasonable
6 apprehension of bias,
7 Justices L'Heureux-Dube and
8 McLachlin disagreed and found
9 her words 'to reflect an
10 entirely appropriate
11 recognition of the facts in
12 evidence in this case --'"

13 And so on and so forth. So that,
14 for the most part, there is some degree of
15 question, ambiguity in terms of the appropriate
16 border line even with our senior judges on the
17 Supreme Court of Canada.

18 We refer in paragraph 41 to the
19 educational materials that are provided to judges,
20 where it refers to:

21 "The issue of judicial speech
22 is a difficult one."

23 And that the materials observed
24 that:

25 "The appropriate limit on the

1 restriction of the
2 out-of-court activities of
3 judges is not so clear."

4 And that one of the key
5 difficulties in analyzing appropriate ethical
6 standard is:

7 "-- an acknowledgement that
8 standards concerning
9 out-of-court behaviour may
10 vary from time."

11 Obviously, it evolves.

12 That brings me to the facts of the
13 case, if you would refer now to page 20. With
14 these contextual submissions in mind, I will refer
15 to the facts, and I have tried to break the facts
16 down into three different areas. One is the Thelma
17 project before October 2005, then I refer to the
18 Thelma project past or post October 2005, and then
19 I refer, as a separate issue, Justice Matlow's
20 communications with Mr. Barber in October of 2005.

21 Dealing initially with pre-October
22 2005, the Thelma project, we set out the
23 allegations, which can be found in paragraph 45
24 that:

25 "He participated and

1 undertook a leadership role
2 as president of the Friends--
3 "He used language that was
4 intemperate, improper and
5 inappropriate in the course
6 of (his) participation in
7 leadership with the Friends.
8 "(C) He repeatedly
9 communicated (his) status as
10 a judge of the Ontario
11 Superior Court --"

12 Et cetera, and:

13 "(D) He publicly involved
14 (himself) in legal issues in
15 the Thelma Road Project
16 controversy that (he) knew
17 ought to have known were
18 likely to come before the
19 Superior Court, in
20 particular, the processes of
21 the OMB and the Application
22 for judicial review."

23 Those paragraphs, you will see
24 from the allegations of misconduct, are (g), (h),
25 (I) and (j) of paragraph 35.

1 There are couple of introductory
2 comments that I would ask you to keep in mind when
3 reviewing Justice Matlow's comments in this regard,
4 and I have referred to some of them, and I will
5 briefly refer you to, first of all, he is not
6 acting in his capacity as judge. He is acting as a
7 private citizen.

8 Secondly, he is not involved in
9 what I view to be partisan politics. Indeed, in my
10 view, it is not even a controversial issue in the
11 sense that there is no debate going on amongst the
12 community. The community is virtually and indeed
13 is unanimous as far as this issue is concerned.
14 They do not want the development.

15 Opposed to them, of course, is the
16 developer and the city. It is not like an issue of
17 abortion or gay marriage, or whatever, where there
18 is a great debate going on within the public. This
19 is a situation of, in my view, unanimity in terms
20 of the public on this local issue.

21 JUSTICE ROLLAND: How do you
22 qualify public? How do you qualify public? You
23 say it is unanimous. The city is not part of the
24 public? The developer is not part of the public?

25 MR. CAVALLUZZO: In response to

1 that, Justice, what I would say is that the
2 relevant public here is the local community that is
3 being affected by the government action.

4 THE CHAIR: Isn't the whole of the
5 public relevant? We know what we think you mean by
6 the community, and that is understood to be the
7 area, but can you simply say the interest of that
8 community is the parameters of the public
9 interest --

10 MR. CAVALLUZZO: No, I am not --

11 THE CHAIR: Justice Rolland
12 says --

13 MR. CAVALLUZZO: I am not saying
14 that. Justice Sopinka said, in terms of an
15 injunction application, What is the public
16 interest, and said, There could be many public
17 interests. You know, there is the public here.
18 You are right. I can see that point. Yes, under
19 our legal system, the City of Toronto represents
20 the public, the metropolitan area, but what I am
21 talking about is this public; that is, as you refer
22 to it, as the local community, and I have been
23 saying public and I will refer to it as the local
24 community. There is unanimity and that's -- so it
25 is within the community that is directly affected

1 by the development.

2 JUSTICE ROLLAND: Still, there is
3 a controversy. There is a controversy with the
4 city.

5 MR. CAVALLUZZO: Yes, that is
6 right. That is right. The controversy --

7 JUSTICE ROLLAND: It is not
8 unanimous; otherwise, the City of Toronto would
9 agree with the community position.

10 MR. CAVALLUZZO: Right. What I am
11 saying is normally we talk about, in terms of
12 participatory democracy, there is the government
13 here that does things, and then there are the
14 citizens that react to what the government does.

15 What I am saying is that as far as
16 the citizens are concerned that are affected by the
17 government action, there is unanimity. On the
18 other side, as I said before, we have the city and
19 we have the developer.

20 THE CHAIR: And the rest of the
21 citizens in the city.

22 MR. CAVALLUZZO: Right, that are
23 represented by the city, right.

24 The third point we raise, which I
25 think is very important, is that Justice Matlow did

1 not act dishonestly and did not, through his
2 activities, seek any personal or financial gain.

3 The only case, as we have noted --
4 I think either my friend or I have noted, the only
5 case where a recommendation has been made by such
6 an inquiry committee for removal is a case of
7 disgraceful, conduct wherein judge made sexist
8 comments within court about women, made
9 anti-Semitic comments about Auschwitz, and made
10 other gross and very, very offensive anti-Charter
11 comments within court.

12 That is the one case where a
13 recommendation was made, and when we come to our
14 case, and I will come back to this at the end when
15 I talk about the factors that you should take into
16 account, is that you may disagree with what Judge
17 Matlow did, but I think even if you disagree with
18 him, he acted in good faith and did what he thought
19 was appropriate at the time.

20 THE CHAIR: Mr. Cavalluzzo, in
21 fairness to you -- I, for one, and I can't speak
22 for the rest of the members of the committee, but I
23 see the responsibility that this committee has is
24 coming to a conclusion as to whether Justice
25 Matlow's ability to continue to function as a judge

1 has been so impaired that the judicial council
2 should recommend his removal.

3 It is not a question of
4 sanctioning what he did by way of a punishment.
5 Whether it may be commendable to another citizen to
6 undertake that, does it affect the ability of
7 Justice Matlow --

8 MR. CAVALLUZZO: I agree.

9 THE CHAIR: That is what we --

10 MR. CAVALLUZZO: I agree.

11 Certainly --

12 THE CHAIR: We are not looking at
13 sanctioning any actions of Justice Matlow as a
14 citizen.

15 MR. CAVALLUZZO: No, but you are
16 looking at the possibility of sanctioning him as a
17 judge in the sense of recommending that he --

18 THE CHAIR: Not in terms of
19 sanctioning. In terms of making a recommendation
20 respecting whether or not his ability to continue
21 to function as a judge has been so affected.

22 MR. CAVALLUZZO: That is right,
23 but, with respect, that has the effect on Justice
24 Matlow as being the ultimate capital penalty. If
25 you remove him from the judiciary, you are taking

1 away his profession.

2 THE CHAIR: We understand that.

3 MR. CAVALLUZZO: The fourth point
4 that I would ask you to consider is his evidence
5 that he did not exhibit any willingness or
6 intention to violate judicial ethics or the rule of
7 law, which is important.

8 It certainly was important in the
9 Flynn case, which I am sure you are aware of. Once
10 again, we say that the other contextual fact is
11 that, in our respectful submission, we are dealing
12 with a boundaries case, this is paragraph 48, a
13 boundaries case, where the appropriate behaviour in
14 the circumstances are not clear or precise.

15 Let's look at the evidence in
16 terms of Justice Matlow acting in his capacity as a
17 resident and neighbour in a local dispute. Once
18 again, as you say, the question as we referred to
19 earlier is: Does his activity in the eyes of the
20 public, does his activity in the eyes of the public
21 shock their conscience, shake their confidence in
22 the judiciary, and so on and so forth?

23 We point out, and just picking up
24 at 56, that the Friends was not a political group,
25 was not a ratepayer's organization, wasn't allied

1 with any partisan political party. It was a single
2 issue, an informal gathering of neighbours where it
3 didn't even have membership rules, as you heard in
4 the evidence, no bylaws, no constitution and so on.

5 It was a discreet dispute wherein
6 probably -- we don't have evidence of this, but it
7 is obvious -- that the group represented a number
8 of political viewpoints and perspectives. I think
9 it is noteworthy that certainly what Justice Matlow
10 was concerned about here, he was concerned about
11 the conduct of public officials in respect of their
12 legal authority to enter into certain arrangements,
13 which had an impact on the lives of him and
14 personal lives of himself and certainly his
15 neighbours, as well.

16 When you dispute what the
17 government does because you believe the government
18 or government officials are acting without
19 authority, it seems to me what we are talking about
20 here, we are talking about the hallmark of freedom
21 of expression, freedom of association, the rule of
22 law and participatory democracy when citizens band
23 together to stop city officials from acting what
24 they view to be beyond their legal authority.

25 Once again, certainly from the

1 community's perspective, there was unanimity the
2 community was acting on a legal opinion. I think
3 it is fair to say you need not get into the merits
4 of the dispute amongst the citizens with the city
5 and the city officials, but you can surely see the
6 source of their frustration and anxiety where there
7 is lack of transparency.

8 There is a cloak of secrecy going
9 on. The city, in effect, is not listening to them.
10 The development does not make sense to them. The
11 whole rationale for the development, additional
12 parking, there isn't going to be additional
13 parking. The city is going to earn less revenue as
14 a result of the development, all of these kinds of
15 issues facing, which is facing the local citizens
16 in the face, and what they are doing is banding
17 together to stop that, in effect, in my respectful
18 submission, attempting to advance the rule of law,
19 not to impede it.

20 As Justice Matlow said in his
21 evidence, Why did you do it? The question I had in
22 my mind, if a judge isn't part of advancing the
23 rule of law as a private citizen, who do you expect
24 to do it? That is an important value, and if a
25 judge at the local community can bring to bear

1 assets that assist his or her neighbours, I
2 respectfully submit that that should be lauded.

3 There are restrictions, obviously,
4 and I am going to come to them, but that, for the
5 most part, should be lauded. As Justice McLachlin
6 said, We want judges to be more engaged in their
7 community, because that makes them better judges
8 because they bring more to the judiciary by having
9 more empathy and compassion and knowing what the
10 public thinks.

11 On the other hand, judges have a
12 lot to bring to their local community, because of
13 their qualities and experience.

14 The allegation is he used
15 intemperate language; he used inappropriate or
16 improper language. What I say to that, members of
17 the panel, is that certainly Justice Matlow has a
18 speaking style that may be different than others,
19 and indeed may be different than most. He speaks
20 very directly, colloquially, in very plain
21 language.

22 Once again, this is my point I
23 made earlier. The judiciary has a wide range of
24 personalities and styles. There has to be some
25 accommodation, some tolerance for people that speak

1 more directly. In retrospect, he said, Sure, I
2 could have put my language in a more moderate way
3 that made the same point.

4 I didn't have to say "devious" or
5 that she would have failed a first-year law exam.
6 I could have made that same point without using
7 that language, but I was very frustrated and
8 emotional at the time. He recognizes that, but
9 surely the kind of intemperate language, whatever
10 that means, but, once again, we have got to afford
11 some kind of accommodation for differences in
12 language that people use, but, at the same time,
13 surely even if we criticize him for using
14 intemperate language, it is not the kind of conduct
15 that merits the kind of threshold that we are
16 talking about that would incapacitate him from
17 being a judge in the future.

18 Yes, his language was blunt.
19 Unquestionably it was blunt, but if we look at the
20 motives, the good faith and what he was attempting
21 to achieve, I think we can understand what you may
22 view to be the extremity of the language.

23 The allegation for identifying
24 himself as a judge, this is starting at paragraph
25 69, and the allegation, just to read it -- in

1 particular, this is allegation 35(I) -- is that he
2 repeatedly communicated his status as a judge of
3 the Ontario Superior Court.

4 We submit that the uncontradicted
5 evidence is that Justice Matlow normally identified
6 himself in his private capacity as Ted Matlow or
7 just as Ted. Many people knew who he was. Many
8 people may have asked what he did, and he would
9 identify himself as what his profession was, but,
10 for the most part, he identified himself as Ted,
11 and that was the evidence from the neighbours, as
12 well.

13 There were occasions where he
14 identified himself as a Superior Court judge, in
15 particular, to Mr. Barber in both October of 2005
16 and August of 2002, and in those situations Justice
17 Matlow said that he wanted to identify himself as
18 such because he didn't want to be viewed to be a
19 crank, and that is the way he identified himself.

20 Unfortunately, we saw Mr. Barber's
21 article, who in public said he was a crank, but, in
22 any event, that was his purpose for identifying
23 himself as a judge. He also recognizes, when he
24 delivered the documents to Barber on October 5th, I
25 think it was the court stamp, and he recognizes

1 Justice.

2 The fact is that you can
3 participate as a party, but obviously there is a
4 protocol there. I think that that lends credence
5 to the earlier submission that participation in the
6 context of municipal democracy applies to your
7 opinion, means participating as a judge, not as a
8 party.

9 THE CHAIR: Which is, in essence,
10 what Justice Matlow did when he sent the note to
11 Chief Justice Heather Smith to advise her that
12 while he was not a named party, he was associated
13 with the group and she may want to get a judge from
14 outside of the City of Toronto to recognize it.

15 MR. CAVALLUZZO: That is correct.
16 If I can summarize the evidence here, hopefully it
17 will be of assistance to you. As far as the OMB
18 application is concerned, I just remind you because
19 he was so close to the development by statute, he
20 gets notice of that.

21 His intention was to participate
22 in that so that he would get all of the materials,
23 which would be useful to the Friends of the
24 Village, so they what was going on at the building
25 or the planning, with the planning issues before

1 the OMB, and, after he felt that the battle had
2 been lost in January of 2004 when the city passed
3 the resolution, he withdrew from the proceedings.

4 He did identify himself as a
5 Superior Court judge in the affidavit, and he said
6 he did that as a courtesy. He feels that when a
7 judge or a quasi-judge appears before another
8 tribunal as a courtesy, you should identify that.

9 As far as the Lieberman
10 application for judicial review is concerned, we
11 heard evidence that he did contribute information
12 to the affidavit where Mr. Lieberman was lacking in
13 the information, and also gave advice concerning
14 the form of the affidavit, and so on and so forth.

15 I would like to move on the
16 secondary of the facts; that is, the Thelma project
17 post October 2005. There were two allegations here
18 that I will deal with, paragraph, 76(a):

19 "Having regard to (his)
20 involvement with the Thelma
21 Road Project, he did not take
22 steps to ensure that (he) did
23 not sit on the Divisional
24 Court Panel hearing the SOS
25 Application."

1 And he failed to disclose details
2 of his involvement in the Thelma controversy to his
3 colleagues on the panel of the Divisional Court.
4 For your benefit, these are paragraphs 35(a) and ©.

5 THE CHAIR: Mr. Cavalluzzo, just
6 for correctness, they are not, technically
7 speaking, post October 2005. It would be post
8 September 2005 or perhaps post August 2005. Wasn't
9 the SOS hearing in October?

10 MR. CAVALLUZZO: October 6th, yes.

11 THE CHAIR: I don't think anything
12 turns on it.

13 MR. CAVALLUZZO: You are much more
14 precise, Chief Justice, than I. I accept that.
15 You understand --

16 THE CHAIR: I understand.

17 MR. CAVALLUZZO: In respect of
18 these paragraphs, members of the panel, I won't
19 spend a lot of time here in reiterating my
20 jurisdictional argument that we made at the
21 preliminary motion.

22 You may have recall in November
23 that you felt that it would be better for you to
24 make a determination on the jurisdiction after you
25 have heard all of the evidence, to make that

1 determination, and we reiterate and we rely on our
2 previous factum on that; and just the two
3 authorities that we would refer to, this would be
4 now in the book of authorize or the case book,
5 which one of the books we have given you, is at tab
6 12.

7 MS. FREELAND: I am sorry, where
8 are you?

9 JUSTICE ROLLAND: Tab 12, the case
10 book.

11 THE CHAIR: The position we
12 understand, Mr. Cavalluzzo, is that the arguments
13 that you made are still before us and we have to
14 deal with those arguments. We have to address
15 those arguments that you made at the earlier
16 hearing and that you may want to add to that now.

17 MR. CAVALLUZZO: That is right. I
18 will be very brief here, because I made extensive
19 arguments before you have a written factum on
20 point, and I trust that you will obviously review
21 this at the appropriate time.

22 I want to make two references to
23 you that I think are important. One is the Boilard
24 case. You have that now. At page 2 of the report,
25 and this obviously is a recusal motion issue, and

1 just the bottom paragraph. You have my points as
2 far as the others are concerned.

3 I will just read to you:

4 "Except where a judge has
5 been guilty of bad faith or
6 abuse of office, a
7 discretionary judicial
8 decision cannot form the
9 basis for any kinds of
10 misconduct, or failure or
11 incompatibility in due
12 execution of office,
13 contemplated by clauses
14 65(2), nor can the
15 circumstances leading up to
16 such a decision do so.
17 Exercise of a judicial
18 discretion is at the heart of
19 judicial independence."

20 It goes on the next page:

21 "The judge's right to refuse
22 to answer to the executive or
23 legislative branches of
24 government or the appointees
25 as to how and why the judge

1 arrived at a particular
2 judicial conclusion is
3 essential to the personal
4 independence of the judge,
5 the one of the two main
6 aspects of judicial
7 independence -- The judge
8 must not fear that after
9 issuance of his or her
10 decision, he or she may be
11 called upon to justify it to
12 another branch of government
13 -- Judicial immunity is
14 central to the concept of
15 judicial independence."

16 The point we make here, I will put
17 it simply to you, and that is that the decision,
18 the decision to sit on the SOS application -- and
19 that is whether you didn't sit or ensure you didn't
20 sit, that decision -- or the decision not to advise
21 colleagues of his past dealings with the Thelma
22 project are grounded in the same basic question;
23 that is, whether or not at that time Justice Matlow
24 was of the view that there was a reasonable
25 apprehension of bias because of his past activities

1 in the Thelma project.

2 That is how you would answer both
3 of those questions raised by those two allegations,
4 and we submit that this is the very same question,
5 the very same question that would be before him on
6 a recusal motion; that is, the appropriateness of
7 himself to sit on that panel because of his past
8 dealings.

9 JUSTICE VEALE: What I would like
10 to probe on this is the issue is raised I think in
11 section 35. It is the issue about the duty to
12 disclose. If you are counsel at SOS, if the judge
13 discloses past involvement in Thelma and whatever,
14 it seems to me that after that disclosure, the
15 judge can sit on the recusal application and issue
16 his reasons. But if there is no disclosure,
17 doesn't that raise an ethical issue?

18 How do you deal with that, because
19 if there is no disclosure, no one knows anything?
20 They can't even raise the application.

21 MR. CAVALLUZZO: The answer to
22 that is the guidance -- and we will come to this --
23 the guidance and the ethical principles is, if
24 there is a plausible case for a reasonable
25 apprehension of bias, you should disclose to the

1 party or the colleague, and I will come to that
2 specific issue. But if you honestly reach the
3 decision yourself that there is no reasonable
4 apprehension of bias and because of that decision
5 -- and it is an exercise of discretion or judgment
6 -- you don't disclose it to your colleagues and
7 that is the issue here, or you don't ensure that
8 you don't sit on the panel, I submit that that is
9 an exercise in judicial discussion.

10 It doesn't mean that mistakes
11 can't be made and, if mistakes are made, there is
12 no sanction or way to correct the error. Of course
13 the way to correct the error is by way of an
14 application to The Court of Appeal.

15 JUSTICE VEALE: Except that no one
16 will know the error, perhaps, because there is no
17 disclosure. I am having difficulty with that
18 particular point. It seems to me there is some
19 obligation to make that disclosure apparent on the
20 record at the outset of the case and that the
21 discretion that you refer to in Boilard refers to
22 the discretion exercise in making the recusal
23 decision, but you say the discretion goes back to,
24 Well, I don't have to disclose this, because I
25 don't see it as a problem.

1 MR. CAVALLUZZO: That is right,
2 and because Boilard doesn't just talk about the
3 recusal decision itself. Boilard talks about the
4 circumstances leading up to the recusal decision,
5 and I think the circumstances leading up to the
6 recusal decision, one of them would be, Am I going
7 to disclose this to my colleagues because of my
8 past dealings, or should I avoid sitting on this
9 case?

10 I think that the important point
11 is: What is the essence of the decision? And it
12 is an exercise of discretion.

13 JUSTICE ROLLAND: I thought it was
14 that he recused himself.

15 MR. CAVALLUZZO: He did, that is
16 correct.

17 THE CHAIR: It was different
18 circumstances.

19 JUSTICE ROLLAND: It was totally
20 different. He decided to recuse himself and he
21 told the lawyers and the litigants why he recused
22 himself and all of the reasons. So there was a
23 disclosure.

24 MR. CAVALLUZZO: That is right.
25 We point that out. We read that, and that is what

1 it said. What the report also talks about are the
2 circumstances leading up to the recusal --

3 JUSTICE ROLLAND: Yes, you may not
4 be in agreement with the circumstances leading up
5 to the recusal, but what Justice Veale is talking
6 about, he is talking about the disclosure. He is
7 not talking the circumstances --

8 MR. CAVALLUZZO: I understand.

9 JUSTICE ROLLAND: It is just a
10 question of disclosure.

11 MR. CAVALLUZZO: Yes, I understand
12 that distinction, but it seems to me that the duty
13 that Justice Veale is talking about is the duty to
14 disclose your interest or your past dealings,
15 whatever the activity is.

16 JUSTICE ROLLAND: Or your concern
17 or the absence of it to reassure the litigants,
18 Listen, there is that situation, but I feel totally
19 impartial and I assure you that there is no
20 problem, but I wanted to disclose that to you in
21 case of.

22 MR. CAVALLUZZO: What I am
23 submitting to you is that the duty that Justice
24 Veale talks about is a duty to disclose and the --
25 let me use the particular wording. I will come to

1 it. The wording is where there is a plausible
2 case.

3 JUSTICE VEALE: In the guidelines.

4 MR. CAVALLUZZO: In the
5 guidelines. When there is a plausible case. That
6 is your duty, and it seems to me that faced with
7 that duty, if you decide in your discretion that
8 there is no duty to disclose because, in your
9 view --

10 JUSTICE VEALE: It says "plausible
11 argument."

12 MR. CAVALLUZZO: "Plausible
13 argument", right, and if you come to the conclusion
14 honestly that there is a no plausible argument that
15 there is a reasonable apprehension of bias, then
16 that decision, that decision, affects whether you
17 are going to disclose your past dealings with your
18 colleagues before the case starts, and you wouldn't
19 because there is no plausible argument, or it would
20 determine whether you avoided sitting on the panel,
21 and it is the very same decision.

22 THE CHAIR: I go back to Justice
23 Veale's question: What protects the public in the
24 administration of justice if the parties don't know
25 about this interest of the judge and the judge just

1 simply does not disclose? What if there is a most
2 egregious failure to disclose? Is it never subject
3 to review, except on appeal, no matter what the
4 circumstances?

5 MR. CAVALLUZZO: No. I submit
6 that there is the duty. I agree -- how can you
7 disagree -- that there is a duty on a judge when a
8 case --

9 THE CHAIR: If there is a failure
10 to failure to fulfil that duty.

11 JUSTICE ROLLAND: What happens if
12 there is a failure to disclose? What is the
13 consequence of a failure to disclose?

14 MR. CAVALLUZZO: The consequence
15 would be if it is subsequently found out, the
16 interest is found out, then an application --

17 JUSTICE ROLLAND: But if it is
18 not --

19 MR. CAVALLUZZO: If it is not,
20 then that is part of our judicial decision making.
21 That is part of our judicial decision making.

22 JUSTICE ROLLAND: So are you to
23 say that if a judge would have a particular
24 interest in a case, wouldn't disclose it, would
25 render a judgment in his favour since he had a

1 particular interest in this case, and it wouldn't
2 be appealed, nothing could be found, nothing could
3 be done if it is found out two years after that the
4 judge had decided a case where he had a particular
5 interest in this case, because they didn't do an
6 appeal, and he would not be subjected to --

7 MR. CAVALLUZZO: If it was found
8 out two years after the fact, if it was found out
9 two years after the fact, you could appeal the
10 case.

11 THE CHAIR: Suppose the parties
12 don't want to appeal. You mean the judicial
13 council and nobody else, the attorney general and
14 nobody else, could assert a public interest in
15 asking that the judge's failure to disclose, and
16 assume an egregious failure to disclose, there is
17 nothing you can do about it because it wasn't
18 appealed?

19 MR. CAVALLUZZO: Once again, this
20 is what, in my respectful submission, the ethical
21 standards say. The duty to disclose, the duty to
22 disclose, is a matter of discretion, because what
23 your duty is, if there is a plausible argument --

24 THE CHAIR: How can it be a matter
25 of discretion? It is either a duty or it is not.

1 How can it be a matter of discretion?

2 MR. CAVALLUZZO: Because that is
3 how the duty is expressed. The duty is expressed
4 in a way that you have a duty to disclose if there
5 is a plausible argument that there is an interest
6 or there is a bias.

7 THE CHAIR: And suppose it is a
8 very clear and unavoidable argument and there is
9 still no disclosure? It is only subject to review
10 on appeal?

11 MR. CAVALLUZZO: That is correct.

12 THE CHAIR: If no appeal is taken
13 and it becomes known that this has occurred and
14 might even have occurred two or three times, there
15 is no recourse except by way of appeal?

16 MR. CAVALLUZZO: No. If it
17 happens two or three times, surely we are acting
18 outside of what the duty is. In other words, there
19 is bad faith in that kind of situation, and
20 obviously we are saying, in the factum we are
21 saying, Absent honesty and bad faith.

22 JUSTICE VEALE: You are saying,
23 your submission is, that you have to find an abuse
24 of office before you can set aside that
25 discretionary decision?

1 MR. CAVALLUZZO: That is right,
2 and before this tribunal has jurisdiction. You
3 understand my point? It appears that some of you
4 don't agree with it, but --

5 THE CHAIR: We understand the
6 point you are making.

7 MR. CAVALLUZZO: I think it is a
8 very valid point, particularly in light of the
9 wording of the cases, particularly Boilard, which I
10 agree Boilard is a recusal decision, but it talks
11 about the circumstances and --

12 JUSTICE ROLLAND: In Boilard, they
13 concluded that you couldn't blame him to have him
14 recuse himself, you couldn't blame him for invoking
15 the reasons and the circumstances invoked. That is
16 what they told Boilard, right? They said in
17 Boilard that he disclosed that and recused himself.

18 MR. CAVALLUZZO: Yes, he disclosed
19 it. He recused himself on his own.

20 JUSTICE ROLLAND: Yes.

21 MR. CAVALLUZZO: He recused
22 himself on his own, so he had to disclose
23 something, because he was no longer there. He
24 disclosed that, but that was a matter of
25 discretion, as I pointed out earlier.

1 The other point, and I will move
2 on here, the other point, I will refer to Chief
3 Justice McEarchern, and, of course, interesting, he
4 was also counsel to Justice Berger in the Berger
5 inquiry. At paragraph 80, we say that:

6 "The Canadian Judicial
7 Council's jurisdiction
8 necessarily excludes matters
9 of judicial discretion and
10 decision-making in order to
11 protect the independence of
12 the judiciary. As has been
13 stated by the former Chairman
14 of the Council's Judicial
15 Conduct Committee, 'the
16 Council cannot become -- a
17 Court of Appeal reviewing and
18 criticizing decisions made by
19 judges, criticizing judges
20 and setting aside or amending
21 their decisions.'"

22 Let me move on to the merits,
23 assuming you have jurisdiction. In the first point
24 we raise as to whether he should have disclosed to
25 his colleagues or whether he should have avoided

1 sitting.

2 JUSTICE VEALE: Which paragraph
3 are you at?

4 MR. CAVALLUZZO: Paragraph 82. In
5 82 on, we are talking about the merits itself. The
6 first point is we have already discussed that we
7 are talking about very important issues of freedom
8 of expression and freedom of association and that
9 those were very important activities and legitimate
10 activities of Justice Matlow. As a local citizen,
11 everything was done transparently and publicly, and
12 clearly the evidence is uncontradicted in that
13 regard.

14 There was no suggestion that the
15 SOS application had anything to do, at least in his
16 mind, in terms of the Thelma project. What
17 eventually happened, in terms of the fact, is that
18 the Divisional Court reached an unanimous ruling on
19 the SOS case, and the evidence that you have before
20 you is that Justice Matlow made no effort to
21 influence his other two panel members. That is an
22 agreed fact from the other two justices.

23 The other important facts, member
24 of the panel, are that prior to SOS, Justice Matlow
25 sat on five separate hearings involving the City of

1 Toronto, and it is clear from the evidence that the
2 City of Toronto, indeed the city solicitor, was
3 very, very familiar with Justice Matlow's
4 activities on the Thelma matter, didn't issue any
5 direction to her staff that, Whenever you see this
6 guy, Matlow, ask for his recusal, because he is
7 biased.

8 Also, I think it is important that
9 when the SOS matter came up, the evidence is they
10 didn't say, We can't have Matlow sitting on any
11 case. What they said is, in the SOS case, Well,
12 there is a similarity of issue. There is a parking
13 issue in SOS and Thelma.

14 So it wasn't a blanket exclusion,
15 so to speak, of Mr. Justice Matlow. It is just
16 that the issues were similar.

17 I respectfully submit that the
18 first time, the first time that they raised the
19 issue was after they were faced with this unanimous
20 ruling against the city, and that is the first time
21 that they raised the issue, even though they were
22 quite aware of his Thelma activities.

23 The other point we make, and I
24 think as Justice Matlow eloquently put it in the
25 witness box or indeed in his judgment that you have

1 on the recusal motion, that he thought that you
2 could have a fight with your city on a particular
3 dispute and still, at the same time, judge another
4 matter in good faith.

5 It wasn't as if the city in unison
6 was acting. The Friends of the Village councillors
7 were on board. The vote to retroactively approve
8 all of the past development agreements was a very
9 close vote, so it wasn't as if this fight was with
10 the city, per se. The fight was with the conduct
11 of certain city officials.

12 I think those are all contextual
13 factors that should be taken into account in making
14 your determination as to whether he was guilty of
15 misconduct because he didn't disclose to his
16 colleagues or fail to avoid sitting on the panel.

17 Just in closing on this point, as
18 we point out in paragraph 86, we say:

19 "Finally, there is no
20 allegation that Justice
21 Matlow did not advise the
22 City of his Thelma
23 activities. The City was the
24 party most directly affected
25 by his activities and it had

1 knowledge of those
2 activities. If there is no
3 need to advise the directly
4 affected party, why is there
5 a duty to advise colleagues
6 or to avoid sitting on the
7 case."

8 The point is that it seems just
9 common sense to me that if there is no allegation
10 that you should have advised the city, and there is
11 mentioned no allegation because the city knew about
12 it, so if there is no allegation that you advised
13 the party directly affected, why would there be a
14 duty to advise your colleagues or avoid sitting?

15 THE CHAIR: Mr. Cavalluzzo, you
16 ought to address, so we have your views on them,
17 the indications that the people responsible for the
18 SOS matter did not have knowledge of the Thelma
19 matter. The city did, as the city, but that is
20 like saying, I suppose, that if you give notice in
21 an action in B.C., every province in the country
22 knows about it.

23 The city is not just a single
24 entity or somebody who knows everything. The City
25 of Toronto is a large city, and the administration

1 is a substantial organization of many divisions and
2 parts. Is that fair to say that the city knew
3 about it?

4 MR. CAVALLUZZO: Just in response
5 to that, Chief Justice, three or four points in
6 terms of what the facts are, the agreed facts.
7 First of all, when the city solicitor, the city
8 solicitor was quite aware of Justice Matlow's
9 activities in Thelma. She issued no memorandum to
10 staff not to have Justice Matlow sit on a case.

11 Secondly, at no time, at no time,
12 did anybody in the City of Toronto ever say to
13 Justice Matlow, confront him in any way saying, You
14 are acting inappropriately by being a judge at the
15 same time as acting in the Thelma project.

16 The third point is the city found
17 out that Justice Matlow was sitting on the very
18 first day of the hearing, and that is the evidence,
19 is that the lawyer doing the case, the application,
20 went back to the office in the middle of the
21 hearing and told the chief of litigation, who was
22 aware of Justice Matlow and his activities, and at
23 that time the chief of litigation said, We may have
24 a concern, because there is a similarity of issue,
25 not because it is Justice Matlow and he is

1 biased --

2 JUSTICE ROLLAND: When you are
3 saying that is because of Justice Matlow, it could
4 have been Justice Smith instead of Justice Matlow.

5 They wouldn't have raised the question. It was
6 because of Justice Matlow, if they are talking
7 about similar issues to the Thelma project.

8 MR. CAVALLUZZO: That is right.

9 THE CHAIR: You said the --

10 JUSTICE ROLLAND: You said not
11 because of Justice Matlow.

12 MR. CAVALLUZZO: No, you are
13 misunderstanding me. Let me just repeat my thought
14 and try to clear my mind. I am saying that the
15 chief of litigation didn't say that Justice Matlow,
16 per se, should never sit on a city case. What he
17 did say is, You know what, there may be similar
18 issues between the SOS --

19 JUSTICE ROLLAND: And Justice
20 Matlow --

21 MR. CAVALLUZZO: And Justice
22 Matlow.

23 JUSTICE ROLLAND: And that
24 concerns us that Justice Matlow sits on this case.

25 MR. CAVALLUZZO: That is right.

1 JUSTICE ROLLAND: That is what I
2 said.

3 MR. CAVALLUZZO: I think we are
4 saying the same thing, and I am not going to get
5 into a debate with you, because we are saying the
6 same thing. That is another point. It is not as
7 if, Oh, God, it is Justice Matlow. Let's go to
8 court Friday morning, which would be the next day,
9 and say, Justice Matlow, would you please recuse
10 yourself because of your past activities?

11 These are the facts, and what was,
12 once again, the important thing what was in Justice
13 Matlow's mind, and what was in Justice Matlow's
14 mind, This is the sixth case I have had for the
15 city, and I don't think there is a similar issue
16 here. It is an environmental case or a planning
17 case, and Thelma is different from that, and he
18 made the decision.

19 So that would be in response to
20 your question, Chief Justice.

21 In terms of timing, I could
22 probably be finished in -- I don't know what your
23 views are on lunch.

24 THE CHAIR: If you were going to
25 be finished in a brief period, but there wouldn't

1 be much point, because Mr. Hunt will want to reply.

2 MR. CAVALLUZZO: If you would like
3 to break, this would be an appropriate time to
4 break. Just to give you in terms of timing and
5 your travel schedules, I think that both with Mr.
6 Hunt and I, we will probably be finished in an
7 hour.

8 THE CHAIR: We should break now,
9 if it is going to take another hour.

10 --- Luncheon recess at 12:43 p.m.

11 --- Upon resuming at 2:02 p.m.

12 THE CHAIR: Mr. Cavalluzzo?

13 MR. CAVALLUZZO: I have one other
14 point, before I get to my final submissions.
15 Hopefully, this will be of assistance.

16 In terms of municipal democracy
17 and the Sossin article at Tab B, it says:

18 "The Committee is of the view
19 that there is no objection to
20 the judge writing the
21 proposed letter, providing it
22 is on private or plain note
23 paper. As a ratepayer and
24 citizen, the judge is
25 entitled to have and express

1 views on purely local and
2 municipal questions provided;
3 of course, the judge realizes
4 that in so doing, he or she
5 would be disqualified from
6 participation."

7 If you interpret that as meaning
8 that participation means participating in
9 litigation as a party, it would seem to me that
10 this would give immunity to the municipality from
11 ever being sued by a judge, or a judge
12 participating in litigation if the judge had ever
13 expressed a view on a local matter.

14 Surely, that cannot be the case.
15 Of course, protocol recognizes, at least in
16 Ontario, that judges can sue entities and there is
17 no exemption for municipalities.

18 I think that once again gives
19 credence to our suggestion that participation means
20 sitting and hearing the dispute that you have
21 expressed your views on.

22 THE CHAIR: You have to relate
23 that, I think, to the response that was given to
24 the question that was asked.

25 Considering that in the context of

1 the question asked that led to the advisory opinion
2 that was rendered, the question was whether a judge
3 can participate in municipal democracy by opposing
4 an initiative put forward by his or her
5 municipality.

6 This is not a judge dealing with
7 his own action against the city in an automobile
8 case, or any other kind of case --

9 MR. CAVALLUZZO: That is right.

10 THE CHAIR: A judge can do that
11 as well as anyone else. A judge has a right to
12 protect his or her legal rights.

13 But the question asked was whether
14 a judge can participate by opposing an initiative
15 put forward by his or her municipality.

16 That is not a legal action
17 context. That is participating by opposing a
18 position. The answer was given in that context.

19 Does it not say that the judge who
20 participates, provided that the judge realizes that
21 in so participating, the judge must be disqualified
22 from participation in any litigation arising the
23 matter; and that is the community opposition.

24 Is not the way you -- if it is
25 not, I would like to hear your views as to why it

1 should not be interpreted in that way.

2 MR. CAVALLUZZO: The fact that we
3 are having this debate is once again indicative of
4 some of the problems with ethical standards,
5 because there are various interpretations. I think
6 that is a fair comment.

7 But to come back to your point,
8 what it would mean, if your interpretation is
9 correct, is that if I am a judge and have never
10 expressed a view on a problem, I can sue the
11 municipality.

12 But if I suddenly express a view
13 on the issue, I cannot participate in a group as a
14 party litigant.

15 It seems to me that --

16 JUSTICE ROLLAND: If I may
17 intervene here?

18 It means that if you oppose the
19 decision of the city with regard to traffic that
20 would flow from a change of direction, you could
21 not institute a proceeding on behalf of the
22 citizens of this area, being a judge.

23 You could oppose and send a
24 letter, but from my understanding of what Chief
25 Justice Wells is saying, you could not institute

1 proceedings unless you are directly affected.

2 It is clear that you can institute
3 proceedings if you have a personal interest. And
4 if you are sued by someone, you can defend
5 yourself. If you object to an expropriation of
6 your property, you can defend your property.

7 But here we are talking about
8 municipal democracy, and something you oppose.
9 What we would read from that response and according
10 to the facts is that you could not institute legal
11 proceedings to manifest your position.

12 THE CHAIR: If that is your
13 interpretation, I would suggest once again that the
14 context is if you write a letter, or you have views
15 -- it doesn't just say "express", but have views on
16 a purely local question, that you cannot
17 participate -- this is your interpretation -- even
18 though it affects you directly.

19 I submit that that is one
20 interpretation, but I would ask you to look at the
21 other interpretation, which I think is just and
22 reasonable, and once again this is part of our
23 argument.

24 JUSTICE ROLLAND: May I ask you
25 then: Can a judge give a public opinion on a

1 specific legal subject, a legal matter?

2 MR. CAVALLUZZO: If it is an
3 expression of freedom of speech, freedom of
4 expression, yes.

5 But obviously a judge could not
6 sit on a case wherein that opinion was in dispute.

7 I would submit that, at best, it
8 is debatable, and it would seem that the proof of
9 the pudding is how independent counsel interpreted
10 it when asking the question.

11 In any event, you understand the
12 point.

13 THE CHAIR: I raised it, Mr.
14 Cavalluzzo, to ensure that it was drawn to your
15 attention, so that you had an opportunity to speak
16 to it.

17 MR. CAVALLUZZO: Thank you, and
18 I appreciate the opportunity. It is just
19 unfortunate that Justice Matlow was not asked that
20 question by me in his examination, because I know
21 what his response would have been.

22 I will move now to the final area
23 of my submissions, and this is the interaction and
24 communications with Mr. Barber.

25 This can be found in Paragraph 87

1 of the factum, and the allegations are set out
2 there that because of his communications with
3 Barber, he did not take steps to ensure that he did
4 not sit. He failed to disclose the Barber
5 interaction to his colleagues on the panel and to
6 the parties.

7 Then there is the free-standing
8 allegation in Paragraph (D) about the approach to
9 Barber and identifying himself as a Superior Court
10 judge, et cetera.

11 Obviously, we have made the
12 jurisdictional argument on that point, and we will
13 move to the merits.

14 This is the situation in which the
15 testimony is that Justice Matlow said that at the
16 time he looked at the SOS application, and decided
17 there was no similarity in issue between that and
18 the Thelma project. At the time, he felt there was
19 no reasonable likelihood of bias, or whatever way
20 you want to characterize that test.

21 But he did say that in retrospect,
22 he regrets that he made an error, and the error was
23 that reasonable people could look at this and say
24 that the interaction with Barber could -- to use
25 the words of the ethical guidelines -- create a

1 plausible argument that there was a reasonable
2 perception of bias.

3 He recognizes that, and he is
4 regretful and remorseful for it, and obviously that
5 is a difficult thing to acknowledge in front of
6 your family and the public.

7 In any event, he has done it, and
8 I think he deserves huge credit for it.

9 But the context once again is very
10 important. The reason why this thing came about
11 was because of the release of the Bellamy report in
12 September 2005.

13 Upon reading that report, what
14 came to mind were very similar issues relating to
15 the conduct of City officials, lack of authority,
16 and so on and so forth.

17 He thought that what happened to
18 his community, in terms of the conduct of City
19 officials, should have some light shed on it.

20 He did this by communicating with
21 Mr. Barber on October 2 and, very importantly, he
22 made this communication before he was assigned to
23 the SOS panel. And in his view, there was no
24 relationship between the SOS panel and the Thelma
25 project activities.

1 However, the fact is that on
2 Monday, October 3, he was notified that he would be
3 sitting on the SOS panel when he came back from
4 Sudbury.

5 On October 5, the Wednesday, he
6 delivered a packet of material to the Globe & Mail
7 offices on Front Street, and that is where the
8 little note said "Superior Court of Justice", which
9 was a mistake as well that he recognized.

10 Going to Paragraph 94, on page 36,
11 we submit that there were no precise rules on what
12 information might be pro-actively disclosed by a
13 judge either to judicial colleagues or to parties
14 who appear before the court.

15 What ought to be pro-actively
16 disclosed and in what circumstances are matters
17 which obviously a judge has to make a decision on.

18 There is some guidance in
19 Paragraph 95 of "Ethical Principles", and we say
20 that the ethical principles suggest that a judge
21 should disclose on the record anything which might
22 support a plausible argument in favour of
23 disqualification -- which is, in effect, again the
24 same exercise of discretion you would make when
25 someone says you are not qualified because of a

1 reasonable likelihood of bias.

2 That is the guide, and I think the
3 evidence is clear that he exercised his discretion
4 in good faith and honestly. He felt that there was
5 no reasonable apprehension of bias, and there was
6 no similarity in his eyes.

7 He was focusing on similarity of
8 issues and, as a result of that, he did not
9 disclose his interaction with Barber to his
10 colleagues or the parties.

11 Other factors that would have been
12 part and parcel of his decision at the time were
13 the fact that the City had never before objected to
14 his presence on a panel, or sitting as a single
15 judge. That was part and parcel of his decision-
16 making process.

17 The decision was made in good
18 faith, and made honestly. In retrospect, he has
19 said, "Well, I made a mistake, and I am sorry I
20 did. I should have disclosed this because, in the
21 words of the principles, a reasonable person might
22 feel that there was a plausible argument in favour
23 of disqualification. I erred."

24 In all of the circumstances,
25 should this error disqualify this man from serving

1 on the bench, which is what he has always wanted to
2 do, and which he has done successfully for years,
3 as I have said before, there is a balance you have
4 to make, with respect. On the one hand, you have
5 the error that was made; he shouldn't have done it
6 and, as a result, he finds himself here today.

7 However, on the other side of the
8 balance, I would respectfully ask that you take
9 into account the following factors, which I think
10 are relevant in the exercise of your
11 recommendation.

12 The first is the evolving nature
13 of judicial free speech and association, and the
14 lack of consensus on where the borders lie.

15 This is really a borderline issue
16 and, unfortunately, he found himself on the wrong
17 side of the border. It was an honest mistake.

18 Secondly, there is the lack of
19 precision in other rules, in terms of participation
20 in community affairs. How far does that go?

21 Certainly the encouragement from
22 the Chief Justices has been, "We want judges to be
23 participate, to be engaged citizens." Our former
24 Chief Justice was the most engaged citizen we have
25 had in Ontario. But we agree there are limits.

1 The other factor, which any
2 Canadian citizen is entitled to, is to look at
3 one's service. Here we have someone who has
4 provided many years of valuable service to this
5 province, and this country, since 1981.

6 His other positive qualities are
7 recognized by his colleagues, and I would ask you
8 to review the letters of support -- I won't read
9 them to you, but you will find them in Exhibit
10 No. 6.

11 If you look at Tab 1, you will see
12 there is a consistency here. This is from one of
13 Justice Matlow's colleagues on the Superior Court,
14 and some of the terms she uses are quite recurrent.

15 In the middle paragraph, she talks
16 about his propensity for hard work:

17 "He has tackled many
18 difficult issues with
19 integrity, industry and
20 intelligence. He has also
21 consistently given generously
22 of his time and advice to
23 help assist others in his
24 work."

25 JUSTICE ROLLAND: May I draw your

1 attention to Tab 2, the last paragraph? Could you
2 read that?

3 MR. CAVALLUZZO: "I have no
4 knowledge of the facts and allegations that are
5 involved in the allegations."

6 JUSTICE ROLLAND: "And I make no
7 comment, except to say that from my experience with
8 Justice Matlow, it is unlikely that he would have
9 acted improperly."

10 MR. CAVALLUZZO: Yes. I am
11 sorry; what is the question?

12 JUSTICE ROLLAND: Do you have any
13 comments about this paragraph?

14 MR. CAVALLUZZO: This is
15 obviously the view of this particular judge.

16 JUSTICE ROLLAND: But he says
17 that he has no knowledge of the facts of the
18 allegations, and goes on to say that from his
19 experience, it is unlikely that he would have acted
20 improperly.

21 MR. CAVALLUZZO: You do have the
22 exhibit, Exhibit No. 7, which is what the judges
23 received, and the allegations were referred to.

24 I have absolutely no idea what is
25 being referred to here.

1 May I carry on with Tab 1?

2 THE CHAIR: Please do, Mr.
3 Cavalluzzo.

4 MR. CAVALLUZZO: Thank you, Chief
5 Justice.

6 The justice goes on in the next
7 paragraph, and talks about Justice Matlow being a
8 keen and committed member of the community.

9 The final paragraph talks about:
10 "-- the decisions he made
11 with integrity, a sense of
12 fairness, and the belief he
13 is doing the right thing. He
14 is a man of principle and a
15 true gentleman."

16 I won't read the other letters for
17 you, but you will see there is a consistency of
18 theme: hard work, fairness, integrity, and so on.

19 Going back to the balance of
20 factors that I would ask you to take into account
21 in making your recommendation, there is work
22 outside the court; Justice Matlow is a valuable
23 contributor to Canadian society.

24 Obviously, as I have said before,
25 he acted in good faith and honestly.

1 The other factor that is always
2 important in these kinds of situations is that he
3 has recognized his mistake. He has apologized.

4 This has caused embarrassment to
5 the system, caused embarrassment to his family, and
6 so on and so forth. The personal anxiety and
7 frustration caused by these events is also an
8 important factor, in terms of: was his conduct such
9 that he can't be a judge in future in light of the
10 public's perception of the administration of
11 justice.

12 In my respectful submission, it
13 would be a real human tragedy if this man was
14 foreclosed from pursuing the profession that he
15 opted for many, many years ago, and in which he has
16 performed quite valuably.

17 Justices and members of the panel,
18 let me conclude by reading a document at this point
19 in time, Paragraph 102.

20 As we said before, we agree that
21 some restrictions on a judge's freedom must be
22 expected, in order to preserve the values of
23 independence and impartiality of judicial law.

24 However, we come back to the
25 question we posed at the beginning of this factum,

1 and that is: Is the conduct alleged so manifestly
2 and profoundly destructive of the concept of
3 impartiality, the integrity or independence of the
4 judicial role so that public confidence would be
5 sufficiently undermined to render this judge
6 incapable of executing that office?"

7 We submit that the conduct which
8 is the subject of the allegations of misconduct
9 does not approach the high threshold imposed in
10 judicial discipline warranting removal from office.

11 As I said before, there has only
12 been one such recommendation, and that is for a
13 judge who in court made racist comments, anti-
14 Semitic comments, sexist comments, and so on and so
15 forth. Clearly not in good faith, honest
16 behaviour.

17 We say that the conduct is not
18 such that could reasonably be expected to shock the
19 conscience, or shake the confidence of the public.

20 When the conduct is viewed in the
21 full context, including the context of the evolving
22 culture of judicial free speech and association, it
23 is not so manifestly and profoundly destructive of
24 the concept of impartiality, integrity and
25 independence in the judicial role, or that public

1 confidence would be undermined to such an extent
2 that he would be incapable of executing that
3 office.

4 Simply put, this should not be a
5 capital case. This is rather a matter which
6 explores the important question of the boundaries
7 of acceptable speech and associations by judges in
8 their capacity as private citizens.

9 While the conduct at issue may
10 warrant direction, correction and counseling, it is
11 not such that warrants his removal from office.

12 Although we agree that some
13 restrictions must be placed on the judicial office,
14 we submit that were Justice Matlow not a judge, we
15 would be praising his conduct as a wonderful
16 example of participatory democracy operating at a
17 local level.

18 The facts demonstrate a textbook
19 example of how municipal democracy should work.
20 The invasion of a neighbourhood by an unwanted
21 development, universally opposed by the local
22 residents and retailers, gives rise to a situation
23 in which neighbours will sometimes act together in
24 furtherance of a common objective; in this case, to
25 stop a development they feel is no good for their

1 community.

2 This is not a political dispute in
3 the sense that political parties are involved, or
4 elections are held.

5 It was a dispute which banded
6 together neighbours of many political stripes on
7 this one local issue. It required getting the
8 support of local residents, local businesses, local
9 politicians and local media to cast light on what
10 the neighbourhood deemed to be an injustice caused
11 by City officials.

12 All of their actions were
13 transparent, visible and public. Moreover, most of
14 the activities were conducted on a volunteer basis,
15 with hours and hours of hard work, because it was
16 local residents fighting City Hall.

17 Their fight was supported by many
18 local politicians who agreed with their position.

19 One might disagree with the
20 language used, or the wisdom of a particular
21 tactic. However, what was involved was founded on
22 two of our most cherished fundamental freedoms, and
23 that is freedom of expression and association, and
24 one of our most important common law rights, the
25 quiet enjoyment of one's home.

1 All of the activities conducted by
2 the neighbours were directed at two further
3 important constitutional values; the rule of law
4 and participatory democracy at the local level.

5 It was within that context that
6 Justice Matlow's conduct should be reviewed.
7 Likely, if it had not been for Justice Matlow and
8 Mr. Lieberman, these actions of the community
9 members working in association would never have
10 occurred.

11 Why would a judge do this?
12 Justice Matlow took on this responsibility because
13 he was capable of providing the necessary tools in
14 this local joint venture. If not him, then who?

15 Ultimately, the question is
16 whether, in the words of Chief Justice McLachlin,
17 Justice Matlow's activities are "a reflection of
18 the fact that our democracies are becoming
19 participatory, with citizens taking a more active
20 interest in the way social policy is made."

21 What could be more important to
22 democracy than local citizens banding together to
23 protect their own neighbourhood?

24 Of course, there are restrictions
25 on a judge. But because this activity, in my

1 This is the on-the-ground evidence
2 we have concerning public confidence, and it seems
3 to me that it is clear, at least in respect of that
4 public, that respect for the judiciary increased as
5 a result of the input of this particular judge.

6 On the other hand, you have the
7 complaint of the City Solicitor, who happens to be
8 the same public official whose conduct was being
9 attacked by this local community.

10 That, in terms of the public
11 conscience being shocked and so on, is what you
12 have to weigh.

13 It is a very difficult decision
14 you have before you, but let me suggest to you that
15 it is a very important one, because it deals with
16 the constitutional liberty of judges. Any decision
17 you make will be viewed, looked at, and reviewed by
18 every judge across this country.

19 We suggest to you, for the reasons
20 we have given you, that although an error has been
21 made, we strongly urge you to keep this man on the
22 bench, and in his profession that he chose at the
23 age of seven.

24 Unless you have any questions,
25 that completes my submissions on behalf of Justice

1 Matlow.

2 THE CHAIR: I have just one, Mr.
3 Cavalluzzo. I would like you to emphasize a point
4 for me, because I may have missed something.

5 The basis on which you would
6 suggest that the receipt of the Bellamy report in
7 October 2005 would justifiably prompt a
8 resurrection of a matter that, as far as Justice
9 Matlow was concerned, had been put to bed in
10 February 2004, a year and a half earlier: what was
11 there in the Bellamy report that would resurrect
12 concern about the Thelma development, and what was
13 happening with the building of this project?

14 MR. CAVALLUZZO: With respect,
15 Chief Justice, it was not really the Bellamy
16 report.

17 It was the actions of City
18 officials who were acting, from his perspective, in
19 the very same way that Justice Bellamy found was
20 happening in the leasing department; that is:
21 acting under a cloak of secrecy, and acting beyond
22 the authority granted to them by City Council,
23 getting into business arrangements that made
24 absolutely no sense from the City's perspective or
25 the community's perspective.

1 It was these kinds of public
2 officials' actions that gave rise to his instinct
3 to say, "We should take away the cloak of secrecy
4 here." It was very similar to what happened in the
5 Bellamy report, and perhaps the problem at City
6 Hall is much broader than the Bellamy report, which
7 was broad.

8 THE CHAIR: So it had nothing to
9 do with taking action to protect his personal
10 interest on Thelma Avenue, or taking action to
11 further the community's interest in resisting that.

12 Rather, it was focused on dealing
13 with the issue that, in his view, City officials
14 were acting improperly and that he, as a judge, was
15 willing to do something about it?

16 MR. CAVALLUZZO: I would put it
17 this way: he was acting in the furtherance of the
18 rule of law.

19 The rule of law is very clear in
20 that appointed public officials cannot act beyond
21 the authority granted to them by the delegator, and
22 that is in effect what he was doing.

23 THE CHAIR: Thank you, Mr.
24 Cavalluzzo. You have answered the question I had.

25 I did not quite see the nexus, but

1 you have now explained it for me.

2 JUSTICE VEALE: On the rule of
3 law issue, wasn't the rule of law issue dealt with
4 in the legal case that went forward and was
5 subsequently abandoned, and when the City made
6 their decision to retroactively approve --

7 MR. CAVALLUZZO: That is the rule
8 of law, but the fact is that they still felt that
9 up to that point in time, people were acting
10 without authority.

11 As Mr. Lieberman said, what
12 happened was that they were circling the wagons and
13 protecting their staff. But that did not take away
14 the perceived injustice that had occurred to them.

15 Justice Matlow wants me to advise
16 you that the similarity was that the officials in
17 the Bellamy report were acting outside their
18 authorization, just as his community felt that in
19 the Thelma situation, they were also acting outside
20 their authorization.

21 If there are no further questions,
22 I would like to thank all of you for your patience
23 and your attention.

24 THE CHAIR: Thank you very much,
25 Mr. Cavalluzzo. Mr. Hunt, did you wish to reply?

1 THE CHAIR: Yes, briefly, if I
2 might, Chief Justice.

3 Firstly, I would like to direct
4 some comments to the test Mr. Cavalluzzo has put
5 forward, and which is set out in Paragraph 5 of his
6 factum, and which he referred to a number of times,
7 being "conduct that could reasonably be expected to
8 shock the conscience and confidence of the public."

9 That language comes from a 1990
10 report of an inquiry committee, which is at Tab 1
11 of my friend's materials. The issue there is that
12 that test has never been adopted by the Supreme
13 Court of Canada, nor any other court.

14 To be fair, the members of that
15 inquiry did not have the advantage of the judgments
16 in the cases where the tests have evolved from.

17 The efforts to distill the
18 teachings of those cases that you may find of
19 assistance are those in the Douglas case, the
20 decision of the Ontario Judicial Council that
21 looked at the case of Baldwin, which was an Ontario
22 Judicial Council case chaired by Associate Chief
23 Justice O'Connor, where they dealt with what the
24 Supreme Court of Canada had said, and then the
25 Evans case, which was chaired by Madam Justice

1 Charon. Those cases are dealt with in Douglas,
2 which I have referred to.

3 I think the principle is that
4 there is no requirement of shocking the public
5 conscience, or shaking the public's confidence; the
6 tests are very carefully set out.

7 My friend has referred to out-of-
8 court conduct by others, most notably former Chief
9 Justice McMurtry, for which he was hailed as a
10 model citizen because of his community activity.

11 I would simply suggest that the
12 Commission is going to have to assess whether the
13 conduct complained of in this case bears any
14 resemblance to the out-of-court community conduct
15 of former Chief Justice McMurtry, or anyone else my
16 friend has referred to.

17 Simply because other judges have
18 engaged in community activities outside of the
19 court does not put the stamp of approval on all
20 out-of-court activity by judges.

21 My friend has urged that so long
22 as an interpretation of the ethical guidelines is
23 made honestly and in good faith, then it ought not
24 to attract attention simply because the members of
25 this panel might take a different view.

1 What I would suggest is that you
2 will have to determine not just whether an
3 interpretation was taken honestly and in good
4 faith, but also what is the reasonable
5 interpretation to take and that the subjective view
6 is not the determinative view, as we have seen.

7 My friend referred to the evidence
8 to Justice Matlow in that he relied on his
9 readings, including the Sopinka article, which I
10 have read carefully, as I am sure you have. I
11 would just suggest that the committee will have to
12 consider whether anything in the Sopinka article,
13 and indeed any of the other articles that have been
14 referred to, really support the conduct of Justice
15 Matlow that he undertook based on those articles.

16 My friend has put forward this
17 case as being a boundaries case, and the lack of a
18 clear boundary here.

19 What I would suggest the committee
20 might consider is whether conduct, if it goes so
21 far beyond a place where any reasonable line would
22 be drawn, then it goes beyond a boundary case. You
23 may find that the conduct in this case does go
24 farther than where a reasonable line might be drawn
25 in terms of boundaries.

1 My friend urged upon you the fact
2 that Justice Matlow did not exhibit any willingness
3 or intention to violate judicial ethics or the rule
4 of law.

5 I would suggest that the committee
6 will want to consider not just whether there was an
7 intention to violate judicial ethics, but whether
8 the evidence showed the lack of regard for the
9 restraints that the ethical duties imposed upon
10 him.

11 Did he do reasonable things that
12 one would have expected a judge might do to show
13 that he was aware of the ethical constraints upon
14 him? That might be a question that the committee
15 will want to consider.

16 My friend has urged on you, in
17 respect of Justice Matlow's language, that it is a
18 factor in his favour that he speaks colloquially
19 and bluntly.

20 I would suggest that the committee
21 will want to consider whether the fact that one
22 speaks colloquially or bluntly excuses one from the
23 consequences of the use of colloquial or blunt
24 language.

25 The language of a judge is central

1 to a consideration of the ethical restraints,
2 particularly with respect to integrity and
3 impartiality.

4 My friend has referred to the
5 Bellamy report, and how it prompted the visit to
6 the Globe & Mail on October 5.

7 In considering what might have
8 been the motivation, the committee might also
9 consider the second visit to the Globe & Mail in
10 January 2006, which Justice Matlow indicated was
11 done because he didn't like the article that was
12 written about him in October, and wanted to correct
13 the fact that they had said he had dissented on the
14 recusal motion, when he had not actually dissented.

15 For that reason, he was able to
16 arrange a one-hour meeting with two senior editors,
17 to which he took his Thelma papers.

18 And you may want to consider
19 whether the reason he set up that kind of meeting
20 in reaction to an article that had a particular
21 point in it that he didn't like was because he
22 thought it benefitted him to do that, and that may
23 shed some light on the question of what motivated
24 the visit to the Globe & Mail on October 5.

25 My friend suggests that what

1 happened here is really an error in judgment -- a
2 number of errors in judgment, I suppose. The
3 committee may want to consider whether really every
4 case of judicial misconduct doesn't involve an
5 error in judgment at some point.

6 But it is where the conduct goes
7 far beyond where any reasonable line would be drawn
8 that it ceases to be a borderline case.

9 You may find, as you consider the
10 conduct of Justice Matlow on October 5, when he
11 went down to the Globe & Mail office and left an
12 envelope for Mr. Barber, was that conduct of such
13 an extreme nature that failure to disclose that
14 goes beyond a mere error in judgment and crosses
15 into conduct that implicates the integrity and
16 impartiality and independence by the judge, or the
17 judiciary generally.

18 Subject to any questions, those
19 are my final submissions.

20 THE CHAIR: Thank you, Mr. Hunt,
21 we have no questions.

22 Gentlemen, this concludes the
23 inquiry and I thank both of you very much for the
24 detailed and orderly presentation that each of you
25 have made.

1 You have provided the committee
2 with the fullest possible information in relation
3 to this matter, and indeed the information we need
4 to discharge our responsibility.

5 The panel will take this matter
6 under consideration, and will render its advice to
7 the judicial council in due course.

8 --- Whereupon the hearing was concluded
9 at 2:54 p.m.