

SPECIAL MEETING OF 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 CATHERINE FRASER (CHAIRPERSON);
CHIEF JUSTICE FINCH; ASSOCIATE CHIEF JUSTICE DOHM;
CHIEF JUSTICE GREEN; CHIEF JUSTICE MATHESON;
ASSOCIATE CHIEF JUSTICE D. SMITH; CHIEF JUSTICE KENNEDY;
CHIEF JUSTICE MACDONALD; CHIEF JUSTICE D. SMITH;
CHIEF JUSTICE DRAPEAU; ASSOCIATE CHIEF JUSTICE WERY;
CHIEF JUSTICE ROBERT; CHIEF JUSTICE WACHOWICH;
CHIEF JUSTICE WITTMANN; CHIEF JUSTICE KLEBUC; CHIEF JUSTICE
LAING; CHIEF JUSTICE MONNIN; CHIEF JUSTICE MERCIER;
CHIEF JUSTICE RIP, CHIEF JUSTICE ROSSITER
and CHIEF JUSTICE BROWNE**

at the Sheraton Gateway Hotel, Terminal 3
Alpine Rooms I and II, Toronto, Ontario
on Monday, July 21, 2008 at 10: a.m.

APPEARANCES:

Douglas Hunt, Q.C.
Andrew Burns

For the Canadian Judicial Council

Paul Cavalluzzo
Fay Faraday

for The Honourable Theodore Matlow

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Toronto, Ontario

1
2 --- Upon commencing on Monday, July 21, 2008
3 at 9:30 a.m.

4 MR. SABOURIN: Good morning,
5 everyone.

6 Please be seated. There will be a
7 few minutes to get organized before the actual
8 meeting begins.

9 Thank you.

10 --- All judges enter meeting room and get seated.

11 MR. SABOURIN: The meeting is
12 about to begin. If I could, at this time, we will
13 ask cameras and other recording equipment to be
14 turned off. If anyone has a cell phone or PDA or
15 other gadget, you are invited to turn them off at
16 this time.

17 I will now turn over the meeting
18 to the chairperson.

19 THE CHAIR: Thank you very much,
20 Mr. Sabourin. Good morning, ladies and gentlemen.
21 My name is Catherine Fraser and I am the Chief
22 Justice of Alberta. In accordance with the
23 operating procedures of the Canadian Judicial
24 Council, I am the designated chairperson for this
25 special meeting of the Council.

1 With me are 20 members of Council,
2 and they are designated to hear this matter in
3 accordance with our by-laws and procedures.

4 Last year, the Council created an
5 Inquiry Committee to investigate the conduct of the
6 Honourable Ted Matlow. The Inquiry Committee held
7 hearings and has now presented a report in which
8 they conclude that a recommendation should be made
9 that Justice Matlow be removed from office.

10 This meeting of the Council has
11 been convened to hear from Justice Matlow, and his
12 lawyer and from independent counsel in this case.

13 A request has been made on Justice
14 Matlow's behalf that the Council defer its
15 proceedings while an application for judicial
16 review is being considered by the Federal Court.

17 Before deciding whether or not it
18 would be appropriate to stay the Council's
19 proceedings, we wish to hear from Justice Matlow
20 and his lawyer, and from independent counsel.

21 We will be hearing arguments on
22 the request deferral, as well as observations on
23 the substance of the report of the Inquiry
24 Committee.

25 Justice Matlow and his counsel

1 will have a maximum of one hour and 15 minutes to
2 make oral presentations. Independent counsel will
3 have a maximum of one hour.

4 A further 15 minutes will be
5 allocated to counsel for Justice Matlow to respond,
6 as needed.

7 These time limits, this is
8 something we often say will be rigorously applied,
9 but of course we always allow ourselves some
10 latitude to extend time as needed. There will be a
11 three-minute warning if presentations near the
12 maximum amount of time.

13 In terms of questions to
14 facilitate the expeditious hearing of this matter,
15 we propose to adjourn after we hear initially from
16 Justice Matlow and his counsel, Mr. Cavalluzzo, to
17 decide on the questions, if any, that we wish to
18 explore further.

19 And so at that time we will be
20 having an adjournment of probably 20 minutes, at
21 least, to decide on the questions. Then we will
22 return and, after we've heard from Mr. Hunt, the
23 same process will be followed.

24 We're ready to begin, and I would
25 now invite the Honourable Justice Matlow to make a

1 brief oral statement, should he wish to do so.

2 ORAL STATEMENT BY JUSTICE MATLOW:

3 JUSTICE MATLOW: Chief Justice
4 Fraser, members of the Canadian Judicial Council,
5 this is one of the saddest and most frightening
6 days of my life.

7 I have lived with this sadness and
8 with fear and humiliation for more than
9 two-and-one-half years now. These proceedings and
10 the possible consequences for me have been present
11 in my mind every hour of every day and have
12 affected every aspect of my life.

13 I am aware that today I am a step
14 closer to perhaps being removed from the bench.
15 Most importantly, I am sad because these
16 proceedings have caused embarrassment to the
17 administration of justice.

18 I was appointed to the bench in
19 October 1981 nearly 27 years ago. Until these
20 proceedings began in January 2006, there was never
21 a day when I was not proud to be a judge and happy
22 to be able to spend my life as one.

23 Being a judge provided me with a
24 unique opportunity to be of public service, and, at
25 the same time, to enjoy the intellectual challenges

1 that the law provides.

2 I often remarked that I felt
3 fortunate to be able to earn my living by doing
4 something that I would gladly do without being
5 paid.

6 My vocation was the centre of my
7 life. I worked late hours and on weekends, and
8 when I became a supernumerary judge, I continued
9 with the same routine for some time, even though I
10 was entitled to work less.

11 In some small way, I hope that I
12 have made some contribution to the administration
13 of justice and the rule of law.

14 Because of these proceedings, I
15 have been prohibited from working as a judge since
16 the beginning of April 2007. Those 16 months have
17 been, without question, among the most difficult of
18 my life.

19 The most important thing that I
20 want to say to you is that I always strive to be
21 honest and that I do not lie. I have been
22 committed to these principles for as long as I can
23 remember. Everything that I said in my evidence
24 before the Inquiry Committee was truthful and
25 accurate, to the best of my ability. So is

1 everything that I am saying to you today.

2 I have not distorted or denied
3 anything that I did. I am prepared to accept the
4 consequences of my conduct, exactly as it occurred.

5 I would like to deal briefly with
6 the Thelma Project. When I was engaged in opposing
7 the Thelma Project, I acted honestly in everything
8 I did. I assure you that there was absolutely
9 nothing criminal, corrupt or immoral about what I
10 did.

11 I then believed that I was acting
12 in accordance with all applicable judicial, ethical
13 principles, including the advisory opinion of the
14 municipal democracy, which I read and considered
15 carefully.

16 Although some of my actions were
17 carried out impulsively, my general approach was
18 thoughtful and deliberate. My actions were carried
19 out openly for all to see. They were often
20 reported in the news media.

21 I made absolutely no effort to
22 conceal what I was doing. I believed that I was
23 entitled to do what I thought was necessary and
24 appropriate, as circumstances warranted, to protect
25 my personal interests relating to my home, the

1 interests of my local neighbourhood and the
2 interests of the entire city.

3 I believed that I was acting both
4 as a good judge and as a good citizen.

5 I believed that certain public
6 officials had engaged in misconduct by acting
7 beyond the authority conferred upon them by the
8 city council.

9 The documentation, the surrounding
10 facts and a legal opinion given by a respected
11 municipal law lawyer, the concurrence of many
12 members of city council and a conversation that I
13 had with the city's auditor general all supported
14 my view.

15 My opposition to the Thelma
16 Project was non-controversial in the community. It
17 was supported by everyone. It was supported by
18 everyone I spoke to. It was supported by my local
19 councillor, the councillor for the adjacent ward,
20 by many other councillors and by the previous
21 mayor, as well.

22 It was not my original intention
23 to oppose the Thelma Project in concert with other
24 neighbours. That evolved only because my
25 neighbours also opposed the Thelma Project and all

1 of us believed that we were more likely to succeed
2 if we acted together. That is why we chose to
3 identify ourselves as the "friends of the village".

4 In reality, we were simply a small
5 ad hoc group of neighbours who had only one
6 objective in common.

7 Although I sought the intervention
8 of politicians, as I believe I was entitled to do,
9 I did not engage in politics.

10 By early 2004, all of us knew that
11 we had lost the battle when city council
12 retroactively approved the development. That was
13 when we all gave up our efforts to stop the Thelma
14 Project and the "friends of the village" was
15 disbanded.

16 I was then resolved to face what I
17 believed was the inevitable construction of the
18 development. That inevitable, however, did not
19 occur. The city, the Toronto Parking Authority and
20 the developer subsequently cancelled their
21 agreements, and the Thelma Project did not proceed
22 any further.

23 The parking lot on which it was
24 intended to be constructed remains today as a
25 parking lot, just as it was before.

1 That is all I want to say about
2 the Thelma Project, and I now wish to turn,
3 briefly, to the St. Clair streetcar case.

4 It was never alleged, even by the
5 complainant in her initial complaint, that I had
6 ever committed a crime or some other corrupt or
7 immoral act. Indeed, she did not even allege that
8 I was ever guilty of actual bias against the city
9 in any of my rulings.

10 Her complaint was only that I had
11 created a reasonable apprehension of bias by
12 sitting on the St. Clair streetcar line case,
13 because of what she claimed was the similarity of
14 issues between that case and the Thelma Project.

15 When I read the material filed by
16 counsel for the first time, on the day before the
17 hearing of that case in October 2005, I concluded
18 that the case had nothing whatsoever to do with the
19 facts or issues involving the Thelma Project.

20 The two central issues raised were
21 whether the Toronto Official Plan prohibited the
22 type of streetcar line that the city proposed to
23 build on St. Clair Avenue, and whether an adequate
24 environmental assessment had been carried out; and
25 neither of those issues related, in any way, to the

1 Thelma Project. By then, the Thelma Project had
2 already passed into history.

3 Moreover, I had, by then, sat on
4 five cases in which the city was a party, with no
5 objection from the city concerning my past conduct
6 in opposing the Thelma project.

7 I, therefore, exercised my
8 judicial discretion, as I was required to do,
9 honestly and in accordance with the law to the best
10 of my ability, and I concluded that there was no
11 reason why I should disqualify myself from sitting
12 on the St. Clair streetcar line case.

13 I have already acknowledged that
14 my decision in October 2005 to contact John Barber
15 of the Globe and Mail was an error in judgment. It
16 was prompted by the recent release of the Bellamy
17 Commission report, in which the Commission found
18 the conduct, on the part of city employees, that
19 was virtually identical to the conduct that I had
20 alleged.

21 This contact was not intended to
22 be part of a scheme to gain retribution from the
23 city. Rather, it was a reflection of my honest
24 belief that it would be in the best interests of
25 the city to have this conduct exposed.

1 The decision made by the panel of
2 the Divisional Court, in which I participated, was
3 a unanimous decision, and the decisions of the
4 other two panel members were made without any
5 influence from me. Both of these facts were
6 acknowledged in the agreed statement of facts
7 placed before the Inquiry Committee.

8 By the time that the St. Clair
9 streetcar line case later came again before another
10 panel of the Divisional Court, and the project was
11 allowed to proceed, the City's Official Plan had
12 been amended and the obstacles to the project,
13 which led us to stop the project, had been removed.

14 In conclusion, I am now painfully
15 aware that the Inquiry Committee determined that I
16 made many errors and engaged in various forms of
17 inappropriate conduct.

18 I have already acknowledged some
19 of my errors of judgment and apologized for them.
20 For any other errors I made and for any
21 inappropriate conduct I engaged in, I apologize
22 before you without reservation.

23 I am particularly sorry for any
24 embarrassment that I have caused to the
25 administration of justice. I wish that I had acted

1 morning, I propose to follow the following
2 procedure. I first want to deal with the
3 application for a stay or a deferral. I will then
4 move on to an overview of our legal submissions,
5 and you have an extensive written factum or
6 submissions before you, and I will refer to those
7 periodically, because I want to highlight the
8 submissions.

9 Obviously we do not have time at
10 this meeting this morning to take you through them,
11 but I would like to highlight what we believe are
12 the important parts or portions of those written
13 submissions.

14 Now, as I said, I want to
15 initially stay with our application for a stay or a
16 deferral. We're asking this Council to defer any
17 decision until such time as the application for a
18 judicial review is finally disposed of.

19 That application for a judicial
20 review can be found in, as you know, the book of
21 evidence at tab 11, if you have an opportunity to
22 review that, but the grounds for the application
23 can be found at paragraph 9 of our written
24 submissions.

25 Now, as I say, we submit that in

1 the written submissions and in paragraphs 9 and 10
2 of the written submissions, you will see we deal
3 with the argument for a stay, and, I'm sorry,
4 paragraph 8, I believe, that has the grounds for
5 the judicial review application.

6 Now, the grounds for a stay,
7 obviously, this is very basic. The first ground
8 is: Is there an issue to be tried? I assume the
9 same principles will apply before you as before you
10 in the court. And there seems to be no issue in
11 that, in respect of myself and independent counsel.

12 So that the fighting grounds, so
13 to speak, are the second and third criteria; that
14 is: Is there irreparable harm to Justice Matlow by
15 you proceeding? And, indeed, the third point is:
16 What is the balance of convenience?

17 So let's just go immediately to
18 the second point; that is, irreparable harm. As
19 you know, irreparable harm has been defined many
20 ways in the cases, but, for the most part, it is
21 where an injustice, where an injustice would be
22 done to an applicant if the body proceeds without a
23 true hearing on the judicial review application.

24 And, obviously, we feel that the
25 language in some of the cases that Justice Matlow

1 will -- certainly can't be compensated for damages
2 if you proceed. And the main reason why we submit
3 that you should not proceed is in the decision of
4 the Inquiry Committee itself, and they talk about
5 the importance of that report in respect of your
6 decision as the ultimate decision maker in respect
7 of the Council, being the ultimate decision maker
8 in terms of a recommendation to the Minister.

9 What we say is that if there is
10 any reliance or, indeed, influence of that report
11 on your ultimate decision, and you have relied or
12 are influenced by a tainted or flawed report, we
13 submit that your decision itself as a Council will
14 be tainted.

15 My friend has suggested, in his
16 factum or written submissions, that our application
17 for a judicial review is premature, because this is
18 one seamless procedure. We have the Investigative
19 Committee, and then we have the Council itself and
20 that it is premature at this time to question the
21 Investigative Committee.

22 We have forwarded to you last week
23 some cases, and certainly from Brown and Evans,
24 which suggests that an Investigative Committee,
25 such as the Investigative Committee under this

1 procedure, can be judicially reviewed if that
2 Investigative Committee acts unfairly or acts
3 beyond its mandate by exceeding its jurisdiction,
4 even though its decision is not legally binding.

5 We have given you Brown and Evans.
6 There is a very good quote there in the recent
7 Supreme Court case -- it's not that recent, 1987 --
8 in the Irvine case. So that what we say is that
9 when we have an Investigative Committee report,
10 which itself recognizes its importance -- as it
11 says in paragraph 8 that you, as the Council, can
12 only make recommendations based upon its findings,
13 based upon its findings, before a recommendation is
14 made.

15 We say, as well, that another
16 factor which makes this case somewhat different
17 than other investigative cases is that the
18 investigation report has been published, unlike the
19 case in the Supreme Court in Irvine.

20 This is a situation when an
21 investigative report has been extensively
22 published, where Justice Matlow's reputation is
23 already on the line through its decisions, and so
24 we think that that is another important factor
25 which suggests that a stay should be granted

1 because of the irreparable harm.

2 So that there are two, really two,
3 criteria which cases have looked at in this kind of
4 situation where stays have been granted.

5 We make both of them. The first
6 is where the investigative body is an integral part
7 of the ultimate process, and we submit that
8 certainly in respect of the Canadian Judicial
9 Council, the report of the Investigative Committee
10 is crucial. And this is one disciplinary process
11 where the Council ultimately has to rely upon the
12 findings and recommendations of the Investigative
13 Committee.

14 And the other situation, and we
15 make this, as well, in our respectful submission,
16 is that where the report has devastating
17 consequences because of its findings, conclusions
18 and recommendations -- and we certainly submit that
19 the report has devastating consequences not only on
20 Justice Matlow's reputation, but on Justice
21 Matlow's right to continue with what he calls his
22 vocation, or, basically, using the words of the
23 cases, to continue on with his judicial office.

24 There are two other points that I
25 would raise in respect of irreparable harm, and

1 that is that this meeting -- and that is what it is
2 called -- is really not the kind of forum where
3 full oral argument can be made in respect of the
4 application for judicial review.

5 As you can see from the
6 application, there are many important grounds which
7 are raised and at this kind of meeting -- and this
8 isn't being critical of you or critical of the
9 process. That's the process that we're faced with,
10 but it's not the nature of this meeting to fully
11 argue an application for judicial review.

12 The other point I would raise is
13 that we respectfully submit that it would be unfair
14 to have Justice Matlow's allegations of unfairness
15 heard by the Council, since the Investigative
16 Committee is a delegate of the Council created to
17 look at the situation and to make findings and
18 recommendations.

19 We submit, respectfully, that
20 these are -- obviously the three judicial members
21 of the Investigative Committee are members of this
22 Council and that Justice Matlow is entitled to have
23 an independent review of his application for
24 judicial review by a judge who is completely
25 removed from this situation and the Council itself.

1 Now, that brings us, Chief Justice
2 and members of the Council, to the balance of
3 convenience, and we submit that the balance of
4 convenience lies in favour of Justice Matlow.

5 First of all, we submit that there
6 is irreparable harm if a deferral or a stay is not
7 ordered, and we say, in contrast, the harm, if any,
8 resulting from the granting of a stay would be
9 minimal or certainly less than that suffered by
10 Justice Matlow.

11 A stay in this case would simply
12 further the status quo; that is, Justice Matlow
13 would not be sitting as a judge, and has not been
14 sitting as a judge, since April of 2007 when this
15 matter was referred to the Council. So that it
16 would just be preserving the status quo, since he
17 is not currently sitting.

18 There is no -- in our respectful
19 submission, any urgency in the public interest to
20 have this matter decided before the application for
21 judicial review has been heard by the courts.

22 Obviously, from a public interest
23 perspective, it would be good to have this matter
24 closed from the public's perspective and, indeed,
25 perhaps the parties' perspective, but the fact is

1 that that is clearly outweighed by the irreparable
2 harm which would be caused to Justice Matlow if we
3 do proceed or if the Council does proceed to hear
4 the matter before the judicial review.

5 So those would be my submissions
6 on the stay. Now I would like to move, and I know
7 time is running, any time -- I have been in the
8 Supreme Court many times. Any time the
9 three-minute whistle comes, just put the red light
10 on and I know where I am.

11 So in respect of the overview of
12 the legal submissions, Chief Justice and members of
13 the Council, I want to present them in the
14 following way. First of all, I want to deal with
15 what I call the penalty of removal.

16 I think that, respectfully, even
17 accepting the findings of the Investigative
18 Committee, that the penalty of removal is
19 disproportionate. It is just not just and
20 appropriate in all of the circumstances.

21 Then I want to move into an
22 overview of all of our legal submissions, which I
23 can -- I will do in the time allotted to me.

24 Now, dealing with the first point,
25 and that is -- and in accordance with the

1 directions at the beginning, Chief Justice, I will
2 be making certain observations in respect of the
3 report, not extensively, but I will be referring to
4 my factum. I hope you have that with you so I can
5 take that -- expedite the matter by taking you
6 through that as quickly as we can.

7 Now, coming to the question of
8 removal, really, the ultimate issue in this
9 investigation is whether public confidence has been
10 undermined such that it renders Judge Matlow
11 incapable of executing his judicial office. That's
12 the wording of the legislation and that's the
13 wording of the cases.

14 We submit that this test calls for
15 the Council to look at all of the relevant
16 circumstances in making this determination. Like
17 other professional cases, it is important to look
18 at the whole person in making such an important
19 determination, what the cases call professional
20 capital punishment. You take, in my respectful
21 submission, the good with the bad.

22 In my view, the independent
23 committee's decision appears to singularly focus on
24 the misconduct without giving due weight to the
25 mitigating circumstances, and because of that, in

1 my view, the committee made serious errors of law.

2 Now, let's look at public
3 confidence. The ultimate issue, once again, is,
4 first of all, whether public confidence was
5 undermined and, if so, what impact it has on Judge
6 Matlow's ability to carry on as a judge.

7 I agree with my friend,
8 independent counsel, that the essential purpose of
9 this proceeding is for the public, to protect the
10 administration of justice. It is not for judges.
11 It is not for lawyers. We are here to protect the
12 public.

13 However, obviously, because of the
14 serious consequences for judges in this process, a
15 high degree or a high standard of fairness is
16 required.

17 Now, we submit that very important
18 relevant evidence of this public confidence is
19 found in the local community in which this local
20 dispute arose, and we say that, for example, using
21 analogous areas of the law. When we're talking
22 about the reasonable person or we are talking about
23 a reasonable apprehension of bias, we always use
24 the standard of the informed person, a person who
25 is likely to be aware of the circumstances giving

1 rise to the issue.

2 We submit that there was evidence;
3 there was evidence of the local community's public
4 confidence and whether that public confidence was
5 lessened as a result or impaired as a result of
6 Justice Matlow's conduct.

7 We say that this evidence was
8 either rejected or discarded by the Inquiry
9 Committee. The evidence before the committee
10 disclosed that despite knowing of his involvement
11 in opposing the Thelma Project, the community had
12 respect and confidence for Justice Matlow.

13 Moreover, there was evidence that
14 their respect for the judiciary was enhanced by his
15 engagement with his local labours in this local
16 dispute. And what I am talking about here, there
17 was evidence of Mr. Lieberman, who is a retired
18 lawyer and he assisted with the friends on that
19 dispute, and that can be found in the book of
20 evidence at tab 7, page 138. I don't have time to
21 refer you to it, but you will see his evidence in
22 that regard.

23 As well, there was the evidence of
24 a local neighbor, who is not a lawyer, Ms. Collard,
25 and that can be found at tab 8, pages 187 through

1 188, and talked about how her respect for the
2 judiciary grew as a result of the engagement of
3 Justice Matlow.

4 I am going to take you, as well,
5 to a recent statement of Chief Justice McLachlin of
6 the Supreme Court in respect of the engagement of
7 judges with their local communities.

8 The evidence, as well, in terms of
9 the local community was that the local area
10 newspaper, the community newspaper, at the end of
11 the year and in reference to Justice Matlow,
12 singled him out as someone who made a positive
13 difference to the community, and that can be found,
14 once again, in the book of evidence, tab 5C.

15 So here we have the community
16 saying, This person made a difference to our
17 community.

18 Now, I don't know how you can say
19 that the people with the knowledge -- that is,
20 people knowing what was going on in respect of the
21 Thelma Project, which occurred in a small --
22 obviously to the neighbours, it's not small, but it
23 is a local dispute in a huge metropolitan area.

24 Now, the final point on this
25 public confidence of the local community is that

1 the committee also refused to accept into evidence
2 a community statement signed by many people who
3 were directly involved in the Thelma Project and
4 their views, the expressed community views, on
5 Justice Matlow, and that was not accepted.

6 Now, my friend makes the point
7 that, Well, the Investigative Committee is not an
8 adjudicative party. Well, if that's the case, then
9 surely, surely, the Investigative Committee should
10 be accepting as much information as possible when
11 someone's vocation is on the line, at least accept
12 it, look at it, and then give whatever weight is
13 appropriate.

14 Now, I would like to move on,
15 Chief Justice and members of the Council, to
16 another area of public confidence, and that is the
17 evidence of his peers. And the committee, in my
18 respectful submission, erred by assigning no weight
19 to numerous letters from the judicial community and
20 the legal profession regarding his integrity and
21 character.

22 You will see that the committee,
23 in its decision at paragraphs 32 and 33, found that
24 it would discount these letters after both counsel
25 agreed to its admission, and they said, On

1 reconsideration, we feel that there is nothing
2 relevant in these letters.

3 I wish they would have told me
4 that at the time so that I could have made
5 submissions on that. Then they went ahead and they
6 rejected the letters basically on the basis that
7 there was nothing in them relating to judicial
8 conduct or whether Justice Matlow would be capable
9 of being judged, which was the very issue before
10 them.

11 And in these cases, when we file
12 letters, we ensure that the person filing the
13 letter doesn't comment on the issue before the
14 committee, and that was the reason why they
15 rejected it.

16 In fact, when you review the
17 letters, you will see that there are portions
18 redacted, and those portions that are redacted deal
19 with those points, because counsel and I didn't
20 think it was appropriate to put those comments
21 before the committee.

22 In any event, they were rejected.
23 And I just want to read two points, quite apart
24 from the natural justice situation and quite apart
25 from the fact that these letters, which deal with

1 his integrity, his honesty, his conscientiousness,
2 commitment, and so on, would be relevant to
3 questions of credibility, and questions of
4 credibility became important to the committee.

5 So they're relevant to that, too.
6 But just on the basis of the kind of man he is,
7 just let me read two letters to you. There are
8 many there. It's from the book of evidence at tab
9 5, one from a judge and one from a lawyer.

10 The first one is the third letter
11 written in respect of the judge's lawyers. And
12 this is from justice Sidney Lederman of the Ontario
13 Superior Court, who you probably know from Sopinka
14 and Lederman on Evidence.

15 He says:

16 "I have known Justice Matlow
17 for many years, both
18 professionally as a judge and
19 socially. Professionally, I
20 sat on a panel of the
21 Divisional Court in which he
22 served as president. At all
23 times, he was patient with
24 and respectful of counsel,
25 and himself represented

1 litigants alike. He took his
2 responsibilities very
3 seriously. On all of those
4 occasions he was very
5 thoughtful, highly competent
6 judge who served the public
7 interest well. On a personal
8 level, I have found Justice
9 Matlow to have an admirable
10 social conscience and that
11 seems to pervade his entire
12 life ethic."

13 If you look at the evidence in our
14 factum, you will see that before he became a judge,
15 when he was a lawyer, he was very crucial in
16 working for the abolition of capital punishment in
17 this country. It was important, in terms of
18 protecting Soviet Refusniks. These are the kinds
19 of qualities which I think would be important for a
20 judge.

21 Then he concludes in the final
22 paragraph -- that is, Justice Lederman:

23 "I am fully aware of the
24 allegations of judicial
25 misconduct that have been

1 made against Justice Matlow,
2 but they do not detract from
3 my belief that Justice Matlow
4 is a man of integrity and
5 fairness and a good judge."

6 The other letter is the very
7 -- one you reviewed -- is the very last letter in
8 tab 5. It's from a lawyer. It's from obviously
9 Edward Greenspan, who, as you know, is one of our
10 criminal lawyers in Toronto. And Mr. Greenspan
11 says:

12 "I have appeared before
13 Justice Matlow and I have
14 always found him to be a
15 person of integrity. He is
16 scrupulously honest, ethical,
17 fair-minded and highly
18 principled. Justice Matlow
19 has personal rectitude. He
20 has an excellent reputation
21 for acting appropriately. He
22 is independent-minded and
23 brings great credit to the
24 court."

25 So that these are just a flavour

1 of some of the comments made by his peers, which
2 were discounted by the Inquiry Committee.

3 Quite apart from being a lawyer,
4 just as a citizen, I would think that any person
5 whose profession is on the line would at least be
6 able to bring forward the comments of his or her
7 peers in support of their position.

8 Another important piece of
9 evidence, or information -- this is not evidence --
10 that was not before the committee, that is before
11 you because it occurred after, is that, I submit
12 respectfully, that significantly the two city
13 councillors who chaired and vice-chaired the
14 Toronto Transit Commission, which is the city
15 agency that was involved in the St. Clair streetcar
16 case, when they saw the decision of the committee
17 recommending removal, wrote a letter on their own
18 to the Toronto Star and said that removal was far
19 too excessive.

20 Let me just read what those
21 councillors said. It can be found -- you have it
22 in the book of evidence at tab 5F.

23 By the way, Chief Justice, I
24 should have introduced my colleague. Ms. Faraday
25 is with me today.

1 bench. Ending an otherwise
2 distinguished career serves
3 no one and would be an
4 excessive punishment."

5 They go on to say the right thing
6 -- I won't read that to you, but you can read it
7 yourself, and obviously they're suggesting what
8 would be more appropriate, obviously, which is for
9 you.

10 Why I say that is important to you
11 is that that is what we're talking about: Has the
12 public confidence been impaired to such an extent
13 that it makes Justice Matlow incapable of being a
14 judge?

15 This isn't just the views of the
16 local community. This is the views of a broader
17 community in Toronto, indeed the persons involved,
18 directly involved, in the St. Clair streetcar case.

19 Now, the other factors, members of
20 the Council, which I think are very important, just
21 the personal factors that aren't referred to, the
22 fact that he has been on the bench since 1981,
23 without incident; as a labour lawyer, we talked
24 about this -- or professional lawyer. We talked
25 about this as being the first offence. Obviously,

1 there are certain offences like theft, and so on
2 and so forth, which may give rise to removal in
3 spite of the good qualities of the person involved,
4 but we submit that there are a lot of personal
5 factors here which we have set out in the factum
6 itself of his contributions not only to the bench,
7 but his contributions as being the editor of a very
8 important litigation journal in this province, the
9 Advocates Quarterly, and so on and so forth.

10 So in conclusion on this point --
11 and to me this is really the guts of my
12 presentation to you today, but I am now just going
13 to give you an overview of the legal submissions --
14 and that is that it is important, it is very
15 important, in any kind of case -- I don't care if
16 you're a lawyer, you're a postal worker or you're a
17 judge -- we're all Canadians, and that is that when
18 our vocation is on the line, surely, surely, we
19 take into account the good with the bad.

20 People make mistakes. No doubt
21 Justice Matlow made mistakes in this case, but
22 let's look beyond the mistakes. Let's look at his
23 contributions to society before those mistakes were
24 made, and then let's look at the whole person and
25 make the decision which you think is appropriate in

1 the circumstances.

2 Now, in terms of my legal
3 submissions, and if I start this, I think I have
4 till 10:45, is that correct?

5 Thank you.

6 Now, perhaps if you had the
7 written submissions in front of you, I will just
8 take you through the observations that we make,
9 starting initially with the Charter of Rights.

10 If you don't have them in front of
11 you, I will refer to the paragraph numbers so that
12 at the appropriate time you can refer to it.

13 Dealing first with the Charter of
14 Rights issue, what we say is that the -- I am
15 dealing now with the role in the Thelma Project,
16 because if you look at the findings by the
17 committee, you will see that the committee makes
18 five -- excuse me, nine recommendations and
19 findings in their decision.

20 Just let me give you the
21 paragraph. It's in paragraph 205 of the decision.
22 You will see that under the conclusion, part nine,
23 conclusions and recommendations, that there are, in
24 effect, nine findings or conclusions, and you will
25 see the first five of them, the first five of them,

1 deal with his role in Thelma.

2 THE CHAIR: Mr. Cavalluzzo, I'm
3 just going to ask, if you would mind, we're going
4 to wait. We have just lost a member momentarily,
5 so I think that probably we should just wait for a
6 few minutes for his return.

7 MR. CAVALLUZZO: I'm sorry, I
8 didn't realize someone had gone.

9 THE CHAIR: Okay, thanks.

10 MR. CAVALLUZZO: I wonder if you
11 could assist me. Mechanically I'm not very good.
12 Is there a way you can turn the light on this? I
13 wonder if anyone is responsible for this lectern?
14 Thank you, sir.

15 That's better. Thank you.

16 THE CHAIR: You're lucky you have
17 at least got a light. We don't. I have the same
18 issue.

19 MR. CAVALLUZZO: I think we're
20 getting younger.

21 --- Justice Drapeau returns to hearing room.

22 THE CHAIR: Okay, thank you so
23 much for your indulgence, Mr. Cavalluzzo. You were
24 just beginning your legal submissions, then, so we
25 will let you pick up at that point.

1 MR. CAVALLUZZO: Thank you, Chief
2 Justice.

3 I want to begin with the Charter,
4 and that commences at page 50 of the factum at
5 paragraph 99.

6 I am going to be -- it is going to
7 be a very quick overview, but there are going to be
8 a number of factors that I will say are relevant to
9 the Charter issue, but these are also factors which
10 I think are important in determining what is --
11 whether removal is warranted in the circumstances.

12 So at paragraph 100, and the next
13 page at the top of page 51, we say that obviously
14 this legislation, the Judges Act, must be
15 interpreted in line with the Charter of Rights, and
16 obviously what disabled or misconduct or being
17 incompatible with the due execution of the office
18 must be interpreted in light of the Charter.

19 As you know from reading my
20 submissions, we're talking about section 2(b),
21 which is expression, and section 2(d), which is
22 association. We say that all of the things, you
23 know, banding together with neighbours, meeting
24 with politicians, making speeches, these are all
25 important aspects of expression and association,

1 even if one takes a leadership role.

2 Starting at paragraph 105, we give
3 our analysis on freedom of expression. This is the
4 Edmonton Journal case. This is nothing new and I
5 am not going to spend any time on it.

6 In respect of freedom of
7 association, we give the analytical framework for
8 finding a breach of section 2(d) or freedom of
9 association starting at paragraph 109.

10 In terms of what we say are the
11 important errors or observations we make with
12 respect to the report, let me just read you
13 paragraph 111, and this is, in effect, our
14 position.

15 We submit that the Inquiry
16 Committee erred in law and exceeded its
17 jurisdiction by failing to apply the
18 well-established Charter analysis set out to
19 address an issue under 2(b) or (d), which would be
20 contravened by imposing restrictions on a judge's
21 freedom to participate in the local affairs of his
22 community.

23 The Inquiry Committee erred by
24 ruling that the Charter rights were not engaged,
25 because it viewed any restrictions on 2(b) or 2(d)

1 to be part of the "normal duties" of a judge which
2 are voluntarily accepted upon accepting the
3 appointment of judicial office.

4 This approach is directly contrary
5 to the established Charter law. In particular, the
6 Inquiry Committee erred by failing to give 2(b) and
7 2(d) their broad interpretation, and, in effect, by
8 instead reading down the scope of 2(b) and 2(d)
9 protection rather than addressing the merits of the
10 restrictions under section 1.

11 We also refer to the analysis
12 under section 1, at paragraphs 114 and 115, and we
13 say that the committee, respectfully, looked at the
14 question the wrong way. What they did, contrary to
15 the admonitions of Chief Justice Dickson, is they
16 looked at restrictions on speech upfront, rather
17 than saying, This is speech, or this is expression;
18 now let's go to section 1 to see if there's minimal
19 impairment, and so on and so forth.

20 We say in paragraph 115 the
21 section 1 analysis must be conducted contextually.
22 The section 1 inquiry, by its very nature, is a
23 fact-specific inquiry which looks at the particular
24 circumstances in which the Charter values are
25 pressing -- and substantial values and pressing and

1 substantial objectives are the intention.

2 "For this reason, the Supreme
3 Court has repeatedly
4 indicated that section 1 must
5 be analysed by means of a
6 sensitive case-oriented
7 approach, having regard to
8 the factual and social
9 context of the particular
10 case."

11 Then in paragraph 115, we go on to
12 say that they didn't follow this very important
13 approach. We submit that the committee erred in
14 law and jurisdiction by failing to conduct the
15 appropriate analysis under section 1 of its report:

16 "In its report, the Inquiry
17 Committee's full
18 consideration of this issue
19 was to state that 'to the
20 extent that there may be
21 limitations on a judge's
22 speech or association off the
23 bench, they are justified in
24 a free and democratic society
25 to ensure the preservation of

1 come home at night, and line
2 up in airports when they go
3 on vacation. Insofar as
4 their humanness may be a
5 distraction, as Tolstoy
6 suggests, judges must strive
7 to overcome it. But the
8 benefits of judges being
9 human beings greatly outweigh
10 the detriments. Judges deal
11 with human problems. They
12 must be able to relate to
13 these problems to understand
14 them. We would not want a
15 robot for a judge even if we
16 could fine one. We would
17 worry that the robot would be
18 unable to understand the
19 human condition, the basic
20 requirement for being a
21 judge."

22 Now, we go on, and -- since time
23 is running, you will see that we go on and talk
24 about the judicial ethics, the trends in terms of
25 the judicial evolution of speech, the expanded

1 recognition of judicial engagement in the
2 community. In paragraph 124, it just leaves you
3 with our former Chief Justice Roy McMurtry. He was
4 totally engaged in the community, totally engaged,
5 in terms of fighting for youth and integration,
6 more integration in the trades and whatnot. There
7 is a panoply of activities.

8 When he retired, he was referred
9 to in the city as a model citizen, even though the
10 kind of engagement that Chief Justice McMurty was
11 involved in, a model citizen. That speaks to what
12 Chief Justice McLachlin said about more engagement
13 of judges today in their communities.

14 At page 64, we talk about the
15 ethical principles and of course the ethics, the
16 ethical guidelines, are just a prescriptive code of
17 conduct. As Justice Gonthier said, they strive for
18 perfection. It is not a prescribed code of
19 conduct. They are prescriptive in nature.

20 As Justice Gonthier said, they
21 strive for perfection or aim for perfection, and
22 that statement from the Ruffo case can be found at
23 66, page 66.

24 In terms of the concept of
25 judicial impartiality, once again, Chief Justice

1 Chief Justice McLachlin, paragraph 137, page 69,
2 talks about the new role of judges in contemporary
3 society and says:

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

1 with great circumspection."

2 Then she goes on, on the next
3 page, to talk about how that has changed, and
4 clearly there is emerging controversy as to the
5 scope of the role judges can play in their
6 communities, in terms of speech and association.

7 She concludes that there is no
8 consensus. This is at paragraph 138, at page 70:

9 "There is no consensus on the
10 appropriate role for judges."

11 She says:

12 "Needless to say, there is a
13 spectrum of opinion on the
14 issue. What seems clear,
15 however, is that, over the
16 last twenty or so years, the
17 entire spectrum has shifted
18 in favour of a greater
19 williness on the part of
20 judges to speak out. This
21 shift is a reflection of the
22 changing role of the
23 judiciary, and perhaps a
24 reflection of the fact that
25 our democracies are becoming

1 more participatory, with
2 citizens taking a more active
3 interest in the way social
4 policy is made."

5 Then on the next paragraph, we
6 talk about controversial areas where judges have
7 spoken out. Indeed, this Council has spoken out in
8 respect of what some people view to be
9 controversial areas, such as the appointment
10 process to the Supreme Court of Canada or the
11 composition of the advisory committees.

12 Indeed, there has been editorial
13 comment on that, but, once again, I am not talking
14 about the rightness or wrongness of that.

15 I am just showing, attempting to
16 show, that the evolution of speech is expanding in
17 favour of judges speaking out, and, at the same
18 time, that there is no consensus on the scope of
19 what their protection is in terms of the Charter.

20 In 141, we -- this statement will
21 give you an example about how far we have come. In
22 paragraph 141, at page 72, we talk about a
23 statement made by an Ontario judge recently, the
24 Court of Appeal, about the propriety of the Indian
25 Act compared with -- and he compared it to the

1 former apartheid regime in South Africa.

2 Why I raise that is because, if we
3 go back to the Berger case back many years ago,
4 that is exactly the reason why Justice Berger was
5 disciplined. He was disciplined because he talked
6 about at the time of the Charter of Rights that
7 aboriginal right were not protected in the Charter,
8 and, as a result of that, the Chief Justice at the
9 time criticized him, and then a complaint was made.

10 The only other portion that I want
11 to refer to in terms of the Charter of Rights, in
12 terms of the factum, is that we're dealing with a
13 judge's private life, and I would just refer to
14 page 74 to the ethical principles themselves, which
15 say the judges of course have private lives and
16 should enjoy as much as possible the rights and
17 freedoms of citizens, generally.

18 That is a very, very important
19 point.

20 Now, let me come to the relevant
21 factors which I think are important not only to the
22 Charter issue, but also to the issue of the
23 propriety of the penalty.

24 First of all, in this case we have
25 Justice Matlow, a private citizen, dealing with a

1 local dispute along with his neighbours. It wasn't
2 partisan politics. It was a one issue. This isn't
3 about an election. It's not about a political
4 party. It is a one-issue event, which affected the
5 neighbours on that small street, Thelma, and the
6 area around it.

7 He did not act surreptitiously.
8 He wasn't trying to hide his conduct, like other
9 cases, and it was not a deliberate flouting of the
10 rules, because what he did, the evidence shows, is
11 that he looked at the ethical guidelines and he saw
12 that portion on municipal democracy that said a
13 judge may have a local dispute.

14 He also looked at the recent
15 articles by Justice Sopinka and Chief Justice
16 McLachlin before he acted. So it is not a
17 deliberate flouting. He thought what he was doing
18 was in line with the ethical guidelines and the way
19 judges should conduct themselves.

20 Other factors which I think are
21 important is that it was a local dispute, as he
22 said, in a large metropolitan area. Virtual
23 unanimity in respect of the dispute, and his fight
24 wasn't with the city. Many city people supported
25 their position, including the former mayor. It

1 wasn't as if it's the City of Toronto. It was, as
2 he said there, he thought he saw misconduct
3 conducted by officials, two officials of the city.

4 I leave you with the question:
5 What is a judge to do when they see official
6 misconduct, which is supported by a legal opinion?

7 If a judge doesn't come forward in
8 that situation, do you expect any of his or her
9 fellow citizens will come forward? Surely, the
10 manner of coming forward obviously is relevant, but
11 surely when you see official misconduct, in terms
12 of the rule of law, perhaps a judge has a
13 responsibility.

14 In terms of the intemperate
15 language, clearly, clearly -- and he admitted that
16 he was angry, frustrated at times, and so on, and,
17 in retrospect, the language was excessive in
18 certain circumstances. He admitted to that under
19 oath, but, once again, look at -- he was acting
20 honestly. He thought he was doing the right thing
21 and he was working with his neighbours on what they
22 viewed to be a very, very important dispute.

23 The other important part of this
24 case is that this is speech outside of the
25 courtroom, and that's an important issue. It is an

1 important legal issue, which I don't have time to
2 address, but where should we be more focussed, on
3 statements made by the judge in court -- and we
4 have seen some of the cases there's discriminatory
5 conduct -- or should we be more interested in what
6 judges do outside the courtroom?

7 What does the public view are the
8 differences here? Should we be more -- should we
9 scrutinize more their statements inside court
10 rather than outside when they're acting as private
11 citizens? And I would respectfully submit, yes.

12 So, in conclusion, we submit that
13 all of these factors, in my respectful submission,
14 demonstrate that we're dealing with very important
15 Charter freedoms of expression and association and
16 that Justice Matlow's conduct should be viewed in
17 that light.

18 The importance, though, I say to
19 you is you don't have to say, Yeah, that's
20 protected by freedom of expression. In my
21 respectful submission, what you should say is, You
22 know what? There is a lack of consensus, there is
23 a lack of consensus on what the appropriate level
24 of speech and association is, in that Justice
25 Matlow was acting in good faith honestly thought

1 that he was acting appropriately, and certainly, as
2 he said in his statement, if you find that he was
3 acting inappropriately in light of the guidelines,
4 and so on, he has apologized for that and certainly
5 in the future will not engage in this kind of local
6 engagement of conduct.

7 I would like to move on now, and I
8 am going to be a little quicker now in light of the
9 time. The second area is what I call the recusal
10 issue, and that is that in the last three -- the
11 last four findings -- the last three deal with
12 Justice Matlow sitting on the streetcar Divisional
13 Court panel, and the fourth one deals with him
14 sitting on any City of Toronto cases before the SOS
15 situation came up.

16 So I want to deal first with
17 sitting on the panel, the SOS panel. You will see
18 that there are several findings. One is sitting on
19 the panel. Another is not preemptively moving to
20 avoid sitting on the panel. Another is disclosure,
21 disclosing his interest to either his colleagues on
22 the panel or counsel for the city.

23 What you will see in the factum
24 itself on this issue is that questions of recusal
25 are beyond the jurisdiction of this Council. If

1 you read with me, and if we go to paragraph 84,
2 this is the Boilard decision or the Boilard
3 inquiry, it is stated:

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 of the kinds of
10 misconduct, or failure or
11 incompatibility in due
12 execution of the office,
13 contemplated by clauses
14 65(2) (b), (c) or (d) of the
15 Judges Act --"

16 Then we underline:

17 "-- nor can the circumstances
18 leading up to such a decision
19 do so. Exercise of a
20 judicial discretion is at the
21 heart of judicial
22 independence --"

23 And then in the MacKeigan case, et
24 cetera, et cetera. Then on the next page we refer
25 to the Canadian Judicial Council ethical

1 guidelines, the advisory opinion in 2004:

2 "The committee wishes to
3 emphasize that recusal
4 decisions and the reasons for
5 them are judicial decisions
6 rather than matters of
7 judicial conduct and are
8 dealt with by the judge in
9 open court and thus subject
10 to appellate review."

11 And so on and so forth.

12 What we say in this regard is that
13 whether you are talking about preemptively avoiding
14 sitting on a panel because of bias, whether you are
15 talking about disclosing interest to the parties or
16 to your colleagues, the fact is that the same
17 decision is made as on a recusal motion.

18 If it was a formal recusal motion,
19 counsel would say, We think there is a reasonable
20 apprehension of bias, and, therefore, you should
21 not sit. The decision that has to be made by the
22 judge is whether there is a reasonable apprehension
23 of bias.

24 Well, I submit to you the very
25 same decision has to be made in terms of

1 preemptively avoiding sitting, because you would
2 have to say, Is there a reasonable apprehension of
3 bias? If there is, I will avoid sitting, or should
4 I disclose an interest to counsel?

5 You would only disclose interest
6 to counsel or your colleagues if there was a
7 reasonable apprehension of bias.

8 So I submit that it is the same
9 decision as on a recusal motion. We all agree that
10 on a recusal motion, recusal decision is a matter
11 of discretion that is beyond the jurisdiction of
12 this Council, because of the Boilard case, and so
13 on.

14 I submit that the same is true,
15 that the fact that no formal recusal motion was
16 made until afterwards, the fact is the same process
17 of decision-making is made, whether it is a formal
18 motion or whether, through your own mind, you say,
19 I have looked at the issues; there is a reasonable
20 apprehension of bias; therefore, I will avoid
21 sitting, I will disclose an interest.

22 It is not the timing of the
23 decision, in my respectful submission, which should
24 be determinative. It is the quality or the
25 essential character of the decision, and we submit,

1 expected of a judge,
2 concludes that a reasonable,
3 fair-minded and informed
4 person could not make a
5 plausible argument in favour
6 of disqualification."

7 So they recommend disclosure even
8 when the judge makes that determination that there
9 is no reasonable apprehension of bias.

10 But the guidelines, you will see
11 the ethical guidelines at page 49, say exactly the
12 opposite. In light of the time, I don't --

13 I will refer that to you in my
14 reply, but you will see, at pages 48 and 49 of the
15 ethical guidelines, it says in that circumstance
16 when the judge makes the determination, when the
17 judge makes the determination that there is no, in
18 his mind, reasonable apprehension of bias, that he
19 shouldn't disclose that to counsel, because you put
20 counsel in a very difficult position; because, in
21 effect, you're saying to counsel, I don't see there
22 is a reasonable apprehension of bias. What do you
23 guys or you lawyers think?

24 Yes, it is at tab 5(D) of the book
25 of evidence. You will see in the very same

1 circumstances that the committee says you should
2 disclose it. The guidelines say, Don't disclose
3 it. It's at pages 48 and 49.

4 Now, the other aspect which I
5 think is important, which we refer to in the
6 factum, and that is that the committee has come up
7 with a new test for this. Up to this point in
8 time, the law was it's a subjective decision by the
9 judge, and they find subjectively that Justice
10 Matlow made the decision that there was no
11 reasonable apprehension of bias.

12 They apply an objective test, and
13 they say "when viewed objectively", and that is new
14 law and, I submit, beyond the -- it's an error of
15 law.

16 They also create a positive
17 disclosure duty, which they even say there is no
18 law in this area, but certainly that's new, as
19 well.

20 Finally, the other findings is
21 there is a blanket ruling. This is in paragraph 5
22 of their findings. They said he should never have
23 sat on a City of Toronto case up to that point in
24 time, which it was completely new. They amended
25 the particulars themselves.

1 And certainly as far as that
2 decision is concerned or finding about the blanket
3 ruling on the City of Toronto, obviously I rely
4 upon all of the jurisdictional arguments I have
5 made in respect of the SOS panel in terms of the
6 recusal law, but, in addition, we say they have
7 made an error because, in effect, they have raised
8 these matters on their own in December of 2007, and
9 we submit that they raised it on their own without
10 jurisdiction.

11 It wasn't part of the city
12 complaint, initially. No party raised it at any
13 time in the five cases that Justice Matlow sat on.
14 He sat on these cases without objection. By the
15 way, four of the five cases the city won.

16 In October of 2005, on the
17 streetcar application, the concerns of this city
18 weren't that he shouldn't have sat on all of these
19 cases. The concerns of the city was the similarity
20 in its issues between the SOS application and the
21 Thelma Project.

22 Throughout this lengthy process,
23 it was never raised. We had a panel that was
24 appointed to look at whether there should be
25 further action on the complaint. It wasn't raised

1 there. This thing went to the council, as you
2 know. It wasn't raised by the council, and it went
3 back to the appointment of an investigation
4 committee.

5 So throughout this lengthy
6 process, there has been no reference to this. Just
7 from a natural justice point of view, how can you,
8 years after the fact, say you shouldn't have sat on
9 those five cases, when a party directly
10 responsible, the city, which is a very
11 sophisticated litigant, doesn't raise the issue? I
12 submit that that was beyond the jurisdiction.

13 We point out, as well, to errors
14 in the evidence, which I will not share with you,
15 because it is in the written submissions, but just
16 let me in my closing, once again, put it to you as
17 strongly as I possibly can.

18 Quite apart from all of the legal
19 issues, which are very interesting, are very
20 challenging and so on and so forth, let's look at
21 this case from a human perspective.

22 We have had a judge who has sat on
23 the bench without incident since 1981, who views
24 this as his vocation, who has done and made huge
25 contributions to the judiciary and before he came

1 on to the judiciary, who is viewed in his community
2 as being a model citizen because of what he did.
3 Maybe he went -- you will find he went too far, and
4 that's fine, but let's look at the whole person.

5 Let's look at the good with the
6 bad. Did this man make a contribution? Will he
7 learn his lesson? And he has told you that this
8 morning, that whatever you say he will comply with;
9 but let's be proportionate in terms of responding
10 to what he did.

11 This wasn't a crime. This wasn't
12 discriminatory conduct. This wasn't racist
13 conduct. This wasn't theft. This wasn't all of
14 the other myriad of issues we might have.

15 This was a situation where he
16 thought he was acting appropriately with his
17 neighbours, and he fought city hall and
18 unfortunately he finds himself in the position he
19 is in today.

20 In conclusion, Chief Justice and
21 members of the Council, the penalty of removal is
22 far out of proportion, in my respectful submission,
23 to the conduct in question.

24 Thank you for your attention and
25 thank you for your courtesy.

1 THE CHAIR: Thank you very much,
2 Mr. Cavalluzzo, to you and Ms. Faraday for your
3 submissions and for your well-prepared written
4 submissions, as well. We will adjourn now until
5 11:15, I am told is appropriate, and so that's the
6 time we will return.

7 --- Recess at 10:53 a.m.

8 --- Upon resuming at 11:25 a.m.

9 JUSTICE DOHM: I think you should
10 be seated.

11 THE CHAIR: Thank you so much for
12 your indulgence, counsel.

13 Mr. Cavalluzzo, we may very well
14 have some questions to ask you, but we thought, on
15 reflection, that we would wait until we have heard
16 the submissions from Mr. Hunt, and then, after
17 that, perhaps we would be better able to focus our
18 questions. So thank you.

19 Mr. Hunt.

20 SUBMISSIONS BY MR. HUNT:

21 MR. HUNT: Thank you, Chief
22 Justice.

23 If I might, just before I deal
24 with the issues raised by my friend, say a few
25 words about the role of independent counsel, we

1 have set it out in our factum in paragraphs 1
2 through 5, but as you will well be aware, the role
3 of independent counsel is set out in the by-laws,
4 in section 3.

5 It is to present the case to the
6 Inquiry Committee, and that is said to include
7 making submissions with respect to questions of
8 procedure and law.

9 As well, in the by-laws, the
10 manner in which this role is to be fulfilled is set
11 out, and it involves acting impartially and in
12 accordance with the public interest.

13 That is how we have attempted to
14 perform our duties throughout the Inquiry Committee
15 stage.

16 Now, what does that mean?
17 Essentially, in our view, it means that we are not
18 here before you or the Inquiry Committee to take a
19 position and seek a particular result. That is an
20 issue as between the Council and Justice Matlow.

21 But we are here to make sure that
22 you are aware of the issues and evidence that may
23 touch on the issues.

24 In addition, we are to conduct our
25 -- discharge our functions in accordance with the

1 public interest. We have set out, at paragraph 8,
2 what we believe to be the public interest that is
3 engaged at this stage of the investigation.

4 The first aspect relates to the
5 motion or the application before you for deferment,
6 which I will address in a moment, but we view the
7 role of independent counsel to be one to protect
8 the public interest in an expeditious completion of
9 the investigation process, such that the public's
10 confidence and views in the administration of
11 justice will be fostered and maintained.

12 The second aspect of the public
13 interest we envision is engaged at this stage is
14 assisting this Council in its consideration of the
15 Inquiry Committee report in light of the
16 submissions made on behalf of Justice Matlow,
17 again, to achieve the end that the public's
18 confidence and view of the administration of
19 justice will be fostered and maintained.

20 So against that background, I
21 would move to the question of deferment.

22 We have dealt with this in our
23 factum, beginning in paragraphs 21 and through 28.
24 You will find that at page 8. But, in essence,
25 what we suggest that the Council consider is the

1 unique nature of the process that is outlined in
2 the by-laws pursuant to the Judges Act that this
3 Council is now involved in.

4 It is a single administrative
5 process, in our submission to you, that is
6 contemplated by the Judges Act and the by-laws.

7 Absent exceptional circumstances,
8 we suggest it ought not to be amenable to being
9 bifurcated by judicial review until the process is
10 completed.

11 The Inquiry Committee was not the
12 final arbiter on the issues that were before it.
13 It was there to present a recommendation to this
14 Council, which you are here to consider.

15 It is instructive that the by-laws
16 that set up this procedure, which are appended to
17 our factum at tab B, contemplate that even this
18 process that we are engaged in here this morning
19 may not be the final step in the investigation
20 process. By-law 12 says that if, after your
21 consideration of the report, assisted by the
22 submissions of Justice Matlow and independent
23 counsel, you feel that there is any aspect of the
24 Inquiry Committee's report that is unclear or
25 incomplete, and that a clarification would be

1 appropriate or that a supplementary inquiry be
2 undertaken, then you may refer all or part of this
3 matter in question back to the Inquiry Committee
4 with specific directions.

5 That, in my submission, sets this
6 procedure separate and apart from all of those that
7 are referred to in the cases that you have been
8 cited by my friend.

9 The Cosgrove case, Cosgrove versus
10 the Canadian Judicial Council, which is mentioned
11 by my friend and which we have referred to in our
12 factum at paragraph 22, is a case where judicial
13 review was taken, but it is very different, in that
14 it was a judicial review taken on constitutional
15 grounds, which, if it had been successful, would
16 have put an end to the proceedings, and that is not
17 this case.

18 So, in summary, we say it is
19 premature to defer the matter, to bifurcate the
20 proceedings, complicate it by further
21 determinations to be made, followed by delay.

22 In this case, there is an
23 alternative remedy available, and that is what is
24 unfolding here this morning. Submissions are made
25 to you by Justice Matlow in response to the Inquiry

1 Committee report. You are entitled to consider
2 those submissions and determine whether you accept
3 the Inquiry Committee report, or whether you feel
4 it is sufficient, or whether you feel it needs to
5 address issues in a more particular way.

6 So on this point, it is our
7 submission that the public interest is better
8 served by ensuring that the investigation process,
9 which is contemplated by the by-laws to be a single
10 process, is completed before there is a review
11 taken to determine whether it has complied with
12 procedural fairness and natural justice.

13 Now, in respect of the substantive
14 complaints that have been made, our factum at page
15 13 and paragraph 34 attempts to group the
16 complaints into four discrete areas, and I think we
17 have covered all of the issues that have been
18 raised by Mr. Cavalluzzo.

19 The first is the penalty is too
20 severe. I would like to leave that until the end.

21 The second is where the Inquiry
22 Committee, in essence, committed an error in law by
23 failing to appropriately apply Charter
24 considerations in respect of the allegations made
25 against Justice Matlow and in respect of his

1 Charter rights of freedom of speech and freedom of
2 association.

3 On this point, you will find our
4 submissions contained in paragraphs 37 to 44 at
5 pages 14 to 17. Let me say at the outset that it
6 was acknowledged by the Inquiry Committee on day 1,
7 during the evidence of Mr. Lieberman, that the
8 Inquiry Committee was not concerned with the mere
9 involvement of Justice Matlow in resisting the
10 efforts that were being made in the Thelma Road
11 Project. They were not concerned about the detail
12 of the dispute, and they were not concerned about
13 the fact that Justice Matlow involved himself in
14 it.

15 What they were concerned about,
16 they indicated -- and they did this in urging both
17 counsel to deal with the appropriate issues. They
18 were concerned with the conduct of Justice Matlow
19 once he had entered into the dispute.

20 Now, it is our submission that
21 this case does not engage the Charter
22 considerations and the Oaks test considerations
23 that my friend has urged upon you.

24 The Inquiry Committee found that
25 to be the case, and we suggest that they did so

1 correctly.

2 At paragraph 100 of my friend's
3 factum, he suggests it is section 65(2) of the
4 Judges Act that is really the springboard for the
5 Charter analysis and the Oaks analysis that has --
6 he has put forward.

7 Section 65(2), as you are well
8 aware, of the Judges Act sets out the conditions
9 that must exist before a recommendation would be
10 made for the removal of a judge from office.

11 65(2) refers to the Council having
12 determined that a judge has become incapacitated or
13 disabled by reason of infirmity, misconduct,
14 failing in the due execution of the office, or
15 having been placed by their conduct in a position
16 incompatible with the execution of that office.

17 In my submission, section 65(2)
18 doesn't seek to limit any Charter rights. 65(2)
19 merely sets out the conditions that must be found
20 to support a recommendation for removal. It
21 doesn't seek to limit any freedoms.

22 What limits freedoms of expression
23 and association is the test for judicial
24 misconduct, the test that has been formulated in a
25 number of cases by the Supreme Court of Canada:

1 Therrien, Moreau-Berube and Ruffo being the
2 principal ones.

3 It is that test, which you are
4 well aware of, which my friend has referred to and
5 which is referred to on numerous occasions in both
6 factums. It is the application of that test to the
7 conduct, acknowledging, as it does, that there is
8 different ethical requirements for the conduct of a
9 judge than for citizens, generally, and that those
10 different ethical requirements impose limitations
11 on expression and association.

12 In my submission, what one does
13 not undertake is an Oaks-type analysis of the test
14 formulated by the Supreme Court of Canada in
15 determining what amounts to judicial misconduct.

16 You may come to the conclusion
17 that the Inquiry Committee misapplied the test,
18 didn't understand the test, but that is very
19 different from suggesting that an Oaks analysis be
20 undertaken to determine whether that test was
21 appropriately applied.

22 Now, the nature of the test -- and
23 I would refer you to paragraphs 41 to 44 of our
24 factum -- sets a very high threshold before a judge
25 can be found to have been guilty of judicial

1 misconduct.

2 It is noted that it is there, the
3 high threshold is there, to protect the integrity
4 of the judiciary as a whole and the rule of law in
5 Canada as a democratic society.

6 The test is such, in my submission
7 to you, that it incorporates the limits placed on a
8 judge's freedom of expression and association as a
9 function of the office of judge.

10 The essence of our submission on
11 this would be found at paragraph 43.

12 Now, it is worth some note that
13 this issue was before the Inquiry Committee, and
14 while the committee rejected the notion that this
15 was a Charter issue, that the Charter was engaged,
16 it obviously undertook a consideration of the
17 issue, because it concluded that to the extent
18 there were any limitations placed on Justice
19 Matlow's Charter rights, freedom of expression and
20 association, having regard to the context of the
21 case, they were justified in a free and democratic
22 society in order to ensure the preservation of the
23 impartiality and independence and integrity of the
24 judiciary.

25 So I submit that you can move past

1 the issue of whether or not this is a Charter case
2 and you can deal with what the Inquiry Committee
3 did as a question of the application of the test,
4 as enunciated by the Supreme Court of Canada.

5 Now, the next aspect of my
6 friend's argument is the errors committed by the
7 Inquiry Committee with respect to the issue of
8 ethical rules and guidelines and judicial
9 discretion.

10 You will find our submissions on
11 this at paragraphs 45 to 54 of independent
12 counsel's factum, and that is at pages 17 to 22.

13 You will note, from having read
14 the Inquiry Committee report, that the committee
15 distinguished between two issues. One was
16 Council's jurisdiction in assessing conduct as a
17 matter of ethical duties, and they distinguished
18 that from the exercise of judicial discretion of
19 judges in respect of matters of legal principle.

20 In our submission, that was, in
21 the circumstances of this case, the appropriate way
22 to look at the questions -- the question of the
23 conduct of Justice Matlow.

24 The Inquiry Committee's report was
25 guided by the principles of the Supreme Court of

1 Canada set out in the Ruffo case, which we refer to
2 at paragraph 48, which is that the role of the
3 Council is remedial, in that it relates to the
4 judiciary, rather than the judge affected by a
5 sanction.

6 And so the role of Council is not
7 to punish a judge for misconduct, but, rather, to
8 determine what the appropriate sanction is in order
9 to restore and preserve the integrity of the whole
10 judiciary.

11 It is well established that there
12 are ethical duties that apply to judges that differ
13 from those that apply to citizens who aren't
14 judges.

15 At paragraph 49, we refer you to,
16 again, the Supreme Court of Canada's judgment in
17 Therrien, where Justice Gonthier provides a
18 clarification of the duties. I am not going to --
19 the passage that is critical is set out there at
20 pages 19 and 20.

21 I am not going to read it to you,
22 but to summarize it, Justice Gonthier makes a
23 number of points: One, the uniqueness of the
24 judicial function; secondly, that the judge is the
25 pillar of the entire justice system; thirdly, the

1 judges, when they swear their oath, they take on
2 the obligation to serve the ideals of justice and
3 truth, and not just to serve them, but to embody
4 them; that the personal qualities and conduct and
5 image of a judge affects those of the judicial
6 system as a whole and it affects the confidence
7 that the public will put in the judicial system as
8 a whole; and that the public will demand virtually
9 irreproachable conduct from those who are
10 performing the judicial function, and that means it
11 will at least demand that judges must be and give
12 the appearance of being an example of impartiality,
13 independence and integrity.

14 It is noted that what is demanded
15 is far above what is demanded of fellow citizens.

16 Now, judges accept this
17 responsibility and the limitations that go with it
18 when they swear their oath of office, and the
19 ethical duties, as you are well aware, don't depend
20 on a formalized code, but they are a requirement of
21 the judicial function itself.

22 The ethical -- the objective of
23 judicial ethics is the preservation of the judicial
24 function.

25 The comments of the Federal Court

1 of Appeal in the Cosgrove case, at paragraph 51,
2 which are highlighted there, I would commend to
3 your attention where the Court says:

4 "It is equally important to
5 remember that protections for
6 judicial tenure were not
7 created for the benefit of
8 the judges, but for the
9 benefit of the judge.

10 "An appropriate regime for
11 the review of judicial
12 conduct is essential to
13 maintain public confidence in
14 the judiciary."

15 Now, in my friend's submissions,
16 he questions only the jurisdiction of this Council
17 on the basis of an infringement on Justice Matlow's
18 judicial independence.

19 In my submission to you, that
20 fails to recognize the essential jurisdiction of
21 this Council to determine if certain conduct might
22 threaten the integrity of the judiciary as a whole.

23 In that regard, I would note the
24 reference at paragraph 53 in the re Ruffo case, a
25 decision of the Quebec Court of Appeal, that says:

1 "Through the disciplinary
2 process which permits
3 inquiries concerning judges,
4 judges may be represented or
5 their removal recommended if
6 their conduct is likely to
7 threaten the integrity of the
8 judiciary as a whole."

9 So judicial independence, the
10 grounds on which my friend criticizes the Inquiry
11 Committee report, is only one component of the
12 standard by which the conduct must be assessed.

13 The next issue that my friend
14 raises we call the conflict disclosure complaint,
15 and you will find our response to that at
16 paragraphs 55 to 65 of the factum.

17 This complaint centres around the
18 alleged error of the Inquiry Committee in placing a
19 positive duty or obligation to disclose information
20 in respect to his communications with Mr. Barber of
21 the Globe and Mail, or his earlier involvement with
22 the Thelma Road Project, either to his judicial
23 colleagues or to the parties in the SOS
24 application.

25 This is in part related, I would

1 submit, to my friend's argument on the
2 jurisdictional issue.

3 Now, the Inquiry Committee was
4 well aware and noted the fact that the Canadian
5 Judicial Council's Ethical Principles For Judges
6 was advisory, only, and not to be treated as a code
7 of conduct.

8 The Inquiry Committee addressed
9 the question of a judge's duty to disclose, not as
10 a matter of discretion, but as a matter of judicial
11 ethics.

12 At paragraphs 145 and 146 of the
13 Inquiry Committee report, which we have excerpted
14 and set out at paragraph 59, you will find their
15 recognition of this.

16 My friend read part of this to
17 you, but in the second paragraph that we have
18 excerpted, half way down, the committee says:

19 "The Inquiry Committee
20 cannot, however, go so far as
21 to state that in such
22 circumstances there is a
23 positive duty to disclose,
24 but there can be no doubt
25 that a clear ethical duty to

1 disclose exists where the
2 circumstances are such --"

3 And here I note the very high
4 nature of the test they employed:

5 "-- where the circumstances
6 are such that it would be
7 impossible for a judge,
8 acting with the objectivity
9 expected of a judge, to avoid
10 concluding that a reasonable,
11 fair-minded and informed
12 person would have a reasoned
13 suspicion of a conflict
14 between a judge's personal
15 interest and a judge's duty."

16 Now, in our submission, the case
17 before you can be distinguished from the Boilard
18 Council decision, in as much as that decision dealt
19 with a judge's decision to recuse himself during a
20 trial and to abandon the conduct of the trial.

21 You may find it to be of limited
22 assistance in this case, since it didn't deal with
23 the conduct of a judge prior to the commencement of
24 a trial, and so too with respect to the opinion of
25 the advisory committee on judicial ethics in 2004,

1 prevent any violation and
2 maintain the public's
3 confidence in judicial
4 institutions. It goes
5 without saying that the same
6 legislative response is not
7 required for these two
8 separate concepts."

9 So it is our submission to you
10 that there was no error in the Inquiry Committee's
11 decision to make the distinction between judicial
12 discretion as it relates to legal matters on the
13 one hand, and judicial ethics on the other hand,
14 and that it was the appropriate way to analyze this
15 situation.

16 My friend then addresses a number
17 of complaints about the report, which really break
18 into two different categories. Our submissions on
19 his complaints globally are found at paragraphs 66
20 to 89, which are pages 27 to 37.

21 The two issues into which these
22 complaints might be broken down, first, is whether
23 the Council is confined to consider only the
24 Inquiry Committee report, which is his submission.

25 We refer to this as the scope

1 consideration issue, which you will find at 68 and
2 69.

3 The second is the report
4 sufficiency issue, which begins at paragraph 70.
5 This assumes that if the Council is so confined,
6 then -- referring only to the Inquiry Committee
7 report -- then is the report sufficient? In
8 criticizing the report's sufficiency, my friend
9 raises six separate grounds of complaint, which are
10 each dealt with in turn.

11 But if I could go first to the
12 issue of the scope of this Council's consideration,
13 it is our submission that you are not confined to
14 considering only the Inquiry Committee report in
15 exercising your mandate.

16 It is open to you, should you
17 choose to do so, to consider the entire record that
18 was before the Inquiry Committee, including the
19 exhibits that were filed, the transcript of those
20 proceedings, which you have, bearing in mind that
21 it is open to you, as we looked at a few moments
22 ago, to send this matter back to the Inquiry
23 Committee seeking clarification or supplementary
24 investigation on any point that you are not
25 satisfied has been completely addressed.

1 My friend indicates that there was
2 evidence that was inappropriately excluded or
3 evidence that wasn't gathered by the Inquiry
4 Committee.

5 Well, two points in respect of
6 that. The evidence is before you that my friend
7 says was not properly considered and it's open to
8 you to consider it.

9 It is also open to you to send the
10 matter back to the Inquiry Committee asking them to
11 consider evidence that they didn't consider,
12 rejecting their conclusion that it was not relevant
13 to the issue and asking for their report on that.

14 It is clear, under the provisions
15 of the Judges Act, that it is this Council that has
16 the primary jurisdiction in respect of
17 investigations under the Act. The Inquiry
18 Committee is simply a means to assist the Council
19 to discharge its functions.

20 As I noted earlier, it is this
21 mechanism of the Council's ability to remit matters
22 back to the Inquiry Committee that distinguishes
23 this Council from all others, and it allows the
24 work of the Council to be efficiently and
25 expeditiously achieved.

1 Now, the sufficiency of the
2 report, our response to this begins at paragraph
3 70, and, at paragraph 70, we set out the six
4 specific complaints that are made in Justice
5 Matlow's submission.

6 If I could touch on each one,
7 briefly, the first is the evidence exclusion
8 complaint. Numerous, numerous letters of support
9 were submitted. You have them. You can look at
10 them. You can make the assessment yourself.

11 The letters are, you will see, for
12 the most part anecdotal. They refer to personal
13 opinions. They're not the sort of letters that
14 would be admitted as being relevant in another type
15 of hearing because of their personal and anecdotal
16 nature.

17 It was for that reason that, I
18 would submit, the Inquiry Committee attached only
19 very specific and limited weight to them, and that
20 was, as stated by the Inquiry Committee, that a
21 number -- numerous judges and lawyers held a high
22 opinion of Judge Matlow.

23 But as you will read them, you
24 will see they don't relate to the issues of the
25 specific conduct nor of how that conduct should be

1 assessed.

2 My friend points to two
3 councillors who have written to the Star in
4 response to their assessment of the Inquiry
5 Committee report, Councillors Mehevic and Moscoe.

6 It is not without significance
7 that both of them were involved in the issues
8 around the Thelma Road dispute. Mehevic was
9 opposed to it. He was the councillor for the area
10 directly to the west. Moscoe was the head of the
11 TTC that was putting through the TTC right-of-way
12 in the SOS application.

13 So you will want to consider the
14 extent to which the opinions of two councillors,
15 both of whom had interests of one sort or another
16 in either the Thelma Road or SOS application, weigh
17 on the question of whether or not the public
18 confidence in the integrity and impartiality of the
19 judiciary has been affected by the conduct.

20 There was a community statement
21 which was submitted and rejected, and you will have
22 that to look at. The community statement was
23 drafted by Mr. Lieberman. Mr. Lieberman was the
24 first witness in the case and he gave detailed
25 evidence about the Thelma Road dispute, about his

1 involvement with Judge Matlow, about Judge Matlow's
2 involvement with the politicians and others in the
3 context of this.

4 The letter was then circulated
5 amongst neighbours who were affected by the issue
6 of the Thelma Road dispute who signed it, and it
7 was then tendered as an exhibit as evidence of
8 community respect for, admiration of Justice
9 Matlow.

10 Again, you will have it to
11 consider and you will have to weigh whether or not
12 that does add, in any significant way, to the issue
13 that has to be determined when it is an issue of
14 the public confidence in the administration of
15 justice, as opposed to an issue of the local
16 community view of Justice Matlow, all of whom were
17 involved in the issue themselves.

18 In our submission, you may find,
19 in both cases, the letters of support and the
20 community support letter, that they, strictly
21 speaking, as matters of evidence, were inadmissible
22 and, in any event, would be of extremely limited
23 use in making an assessment about conduct and its
24 relationship to public confidence.

25 Then my friend suggests there were

1 unsupported findings, and we deal with these in
2 paragraphs 80 through 83. Particularly in
3 paragraph 82, we address the issue that was before
4 the committee.

5 My friend's submission is really
6 that the committee rejected the uncontradicted
7 evidence of Justice Matlow, that he contacted the
8 Globe and Mail on October 2nd, 2005 because of the
9 report, called the Bellamy report, which had been
10 released in about mid September of 2005, and not
11 because he was aware that he was going to be
12 setting on the SOS application later that week.

13 The second complaint made by my
14 friend is that the Inquiry Committee declined to
15 accept Justice Matlow's evidence he didn't know he
16 would be sitting on the SOS application until
17 Monday the 3rd of October.

18 With respect to both of these
19 issues, full consideration of this evidence is set
20 out in the Inquiry Committee's report.

21 The conclusions that they came to
22 about his evidence on these two points has to be
23 viewed in the context of all of the findings that
24 they have made about what occurred during the week
25 preceding the SOS application.

1 The committee found it difficult
2 to accept Justice Matlow's explanation that he
3 delivered documents to the office of the Globe and
4 Mail the day before he sat on the SOS application,
5 because, as he put it in his evidence, it was too
6 late to get out of that mess.

7 They found it difficult to accept,
8 because, as they indicate, it is inconsistent with
9 the email that he sent to Mr. Barber on the 5th of
10 October, which you will have and can look at, in
11 which Barber was being invited to engage in further
12 contact with Justice Matlow so that he could
13 explain the Thelma Road dispute.

14 Now, it is true that the registrar
15 of the Divisional Court was unable to say with
16 certainty whether she had talked to Justice Matlow
17 or any of the judges, in advance of scheduling them
18 to sit on that case, to see whether they were
19 available.

20 The issue really arose because her
21 email to the Court, all three members, was sent on
22 the Friday, which was September 30th, indicating
23 that they would be sitting on the SOS application,
24 and it was Justice Matlow's evidence he didn't see
25 that until the Monday or the Tuesday, perhaps,

1 although, I think what caused the Inquiry Committee
2 some question -- to have some question on this was
3 Justice Matlow in his evidence seemed to recall
4 getting a communication from the registrar seeing
5 whether he was available or would be available,
6 which was not consistent with the email sent on the
7 30th of September, which was an email advising
8 that, "you will be sitting on this".

9 In any event, I think the point
10 that was the most important point out of all of
11 that, that the Inquiry Committee deals with, is
12 that on the 5th of October, whatever happened on
13 the 2nd and the 3rd and the 4th, on the 5th of
14 October when he drove in his car to the office of
15 the Globe and Mail, went up to the mail room with a
16 dossier of documents on the Thelma Road dispute for
17 Mr. Barber, Justice Matlow knew that the next day
18 he would be sitting on the SOS application.

19 It was also of significance to the
20 Inquiry Committee on this point that even after the
21 events of the recusal motion in October, Justice
22 Matlow went back to the Globe and Mail in January
23 of 2006, again on his recollection, bringing his
24 documents on the Thelma Road dispute to discuss the
25 issue with the editorial board.

1 It is our submission that to the
2 extent the committee found that by October 5th
3 Justice Matlow was well aware of what was going to
4 happen the next day, those events are well
5 substantiated on the facts that were before the
6 committee.

7 My friend complains about judicial
8 discretion, which I think I have addressed earlier
9 in the context of the distinction drawn by the
10 Inquiry Committee between judicial ethics on the
11 one hand and discretion in legal matters on the
12 other.

13 My friend complains that there was
14 an expansion of the investigation complaint, which
15 was not warranted, and we addressed that between
16 paragraphs 85 and 87.

17 Now, in this respect, I would say
18 this. It is clear from the complaint that as late
19 as October 19th of 2005, the city believed that
20 Justice Matlow had given up any activism he had
21 with respect to the Thelma Road issue and that that
22 had ended a year earlier.

23 It was not aware that Justice
24 Matlow had interacted with Mr. Barber beginning on
25 October 2nd and culminating in the delivery of

1 documents to him on October 5th. They didn't learn
2 about that until after the 19th of October, until
3 after Mr. Barber wrote an article about it.

4 Now, in the complaint which you
5 have, there is in the appendix to the complaint --
6 and this complaint was sent on January 30th of 2006
7 to the Canadian Judicial Council. There is a
8 complaint letter, and then an appendix to it.

9 In the appendix, at page 9, the
10 City Solicitor, who signed the complaint, says the
11 following:

12 "Nonetheless, I remain
13 concerned of the allegations
14 that Justice Matlow has
15 publicly made against the
16 City and, as well, the effect
17 that these proceedings may
18 have on any further matters
19 before him, given his obvious
20 suspicion of and perceived
21 animosity towards the City.
22 In my view, such conduct and
23 his public exposition of it
24 has jeopardized the
25 perception of the

1 administration of justice."

2 It was Justice Matlow himself, in
3 a submission to the Council on July 13th of 2006,
4 who stated that he had, during the period between
5 2002 and 2004, sat on five separate cases in which
6 the City of Toronto was a party to the litigation.

7 The inquiry panel said, We've
8 considered Justice Matlow's submissions. Indeed,
9 the Council considered the submissions in ordering
10 an inquiry panel. It is our submission that it is
11 not accurate to say that the city's concern about
12 the fact that Justice Matlow had harboured
13 animosity towards the City was part of their
14 complaint. And part of their complaint, during the
15 time -- part of their complaint, and he sat on
16 these cases during the time when the city didn't
17 know that he was still harbouring the animosity
18 that came to the fore in October of 2005.

19 So our submission on this point
20 is, yes, it was before the committee. Sorry,
21 before -- in the complaint before the Council, the
22 city's concern about the views that Justice Matlow
23 was holding, but they weren't at that point made
24 public.

25 My friend then refers to evidence

1 of the public confidence. What I submit to you you
2 have to look at very carefully here is: What is
3 the public that is being referred to in the test
4 that's to be applied?

5 It's not the local public in an
6 area where a judge lives or where an incident took
7 place. It's the public that is amenable to the
8 jurisdiction of that judge. Justice Matlow sits on
9 the Superior Court of Ontario. It is the public,
10 in a much broader sense. That is the public that
11 has to be considered in terms of whether or not
12 confidence is there, or not there.

13 To the extent that those within
14 the local jurisdiction, be they local citizens or
15 local press, who were all affected in one way or
16 another by the dispute in which he participated, it
17 is for you to decide, but you may decide that that
18 is not helpful in coming to the conclusions that
19 you have to come to with respect to the application
20 of the test,

21 Now, I said I would come back to
22 the issue of the penalty is too severe. I just
23 want to make a few remarks about that.

24 At paragraphs 35 and 36, we say,
25 Look, it's not our role to seek a particular result

1 here. I make no submission to you about what
2 conclusions you ought to reach.

3 You will want to consider, though,
4 whether the justifications and excuses that have
5 been advanced for his conduct by Justice Matlow are
6 relevant and to what extent they're relevant in
7 assessing what the appropriate disposition must be
8 in order to restore and to preserve public
9 confidence in the integrity of the judicial system.

10 But in assessing whether to
11 recommend removal, there are a number of pieces of
12 evidence that are either agreed to or in the
13 evidence which you can look at individually, or
14 cumulatively, that I think -- I commend to you it
15 is important to do this.

16 Now, in referring to some of these
17 items of evidence, I am not suggesting how you will
18 conclude on the import of them, and I am making no
19 submission to you about what the appropriate
20 conclusion might be.

21 I think you will want to consider
22 the number of occasions and over what period of
23 time the conduct that is impugned took place.

24 I think you will want to look at
25 the evidence of Justice Matlow as it relates to the

1 confidence that he had in his own subjective
2 assessment of the propriety of his conduct. You
3 will find that at pages 261 and 262 of the
4 transcript.

5 You will want to look at his
6 position on not seeking advice from the Judicial
7 Advisory Committee, the mechanism set up to provide
8 it, and why he didn't feel that was an appropriate
9 step. That's at pages 267 to 70 and pages 274 of
10 his evidence.

11 You will want to assess his
12 conclusion that, on thinking about it, he decided
13 that other judges wouldn't do what he was going to
14 do, but that he didn't have to govern himself on
15 the basis of how other judges would react. And
16 that's at page 275, lines 23 to 24.

17 You will want to consider his
18 comments on the one advisory opinion that he found
19 dealing with judges' entry into the municipal
20 field, where a judge had written to see whether it
21 was all right for him to complain about a local
22 situation, and he was told it was appropriate to
23 write, but as long as he did this not on judicial
24 letterhead, et cetera.

25 Justice Matlow's comments, the

1 absurdity that he found in allowing the
2 conservative approach of the judge who sought that
3 opinion to govern his own conduct, and that you
4 will find at page 277.

5 You will want to consider the
6 conclusions that he drew that the community would
7 admire what he was doing, at page 278, lines 8 to
8 25. Again, the question of the community becomes
9 important, because the community he was referring
10 to was the community in which he lived.

11 You will want to consider the many
12 points at which he could have abandoned his course
13 of conduct, which he acknowledges at pages 283, but
14 chose not to.

15 You will want to consider that he
16 realized that people he was communicating with in
17 the course of this dispute knew that he was a judge
18 and he knew that that was the fact, and that's at
19 page 284; that he intentionally referred to himself
20 as a judge in legal proceedings that he
21 participated in, that is the OMB proceeding, and
22 felt that this was important that he identify
23 himself as a judge.

24 You will want to consider the
25 views that he states at page 290 and 291 that he

1 cannot separate his identity as a judge from that
2 of his identity as a private citizen; and, at 295,
3 that he still believes in the things that he said,
4 although he wishes the language he chose had been
5 more tempered.

6 You will want to consider that at
7 no time before his evidence in January of this year
8 did he acknowledge to the Judicial Council any
9 errors in judgment, and you will want to look at
10 that in the context of his statement that he made
11 today, which I think you will find is more contrite
12 than it was in January.

13 You will want to consider the
14 evidence that even after the recusal motion in
15 October of 2005, he could not let this go. He
16 went, again, to the Globe and Mail in January of
17 2006 with this Thelma dossier, and acknowledged, at
18 page 319 and 20, that he still has a problem with
19 the legal department and the City of Toronto and
20 what they did.

21 In fact, his two regrets were
22 Barber, that he got involved with him, and that he
23 sat on the SOS case, but no regrets about Thelma
24 Road, other than his choice of language.

25 Now, the mandated approach is a

1 remedial one, is from the perspective of the
2 restoration of public confidence in the judiciary
3 as a whole. You must assess what is necessary in
4 light of the cumulative effect of the conduct.

5 Perhaps most importantly, what is
6 the remedial action necessary to address and repair
7 the public confidence that you may find has been
8 undermined by the specter of a judge, on the day
9 before he sits on a case with a major litigant,
10 attending at the Globe and Mail with a dossier of
11 documents and an intention to generate negative
12 publicity against that litigant.

13 Now, it may be that that -- you
14 will conclude the Inquiry Committee was too severe
15 in its approach, but the decision is yours and the
16 decision must be based on what you consider
17 necessary to restore public confidence in the
18 integrity of the judiciary that has been eroded as
19 a result of this conduct.

20 Thank you.

21 THE CHAIR: Thank you for your
22 submissions, Mr. Hunt. Timing wise, it is now
23 almost 12:30, so I think would we will take a break
24 now. I think we will adjourn at this time for 20
25 minutes and reconvene at that time to ask any

1 questions that we have decided are appropriate in
2 the circumstances, and I am just going to -- before
3 I make that final decision, just one moment.

4 Timing wise, perhaps the better
5 way to do it is hear the reply from Mr. Cavalluzzo
6 now, and then to adjourn -- if that is okay with
7 you, Mr. Cavalluzzo, and then to adjourn for lunch,
8 and then reconvene at a set time to explore any
9 questions we have arising out of all of the
10 submissions.

11 MR. CAVALLUZZO: Well, I can
12 proceed right now with my reply, which probably
13 will be less than 15 minutes, but my client needs a
14 two-minute break, if that is possible.

15 THE CHAIR: Okay, sure.

16 MR. CAVALLUZZO: If we can just
17 stay here.

18 --- (Off the record)

19 MR. HUNT: With the Council's
20 leave, I will correct one misstatement. The
21 community statement, which was rejected, apparently
22 is not in the record as some of the other material
23 is.

24 So there is a community statement
25 which we have, but I don't think you will find it

1 in your material, and there is nothing, of course,
2 that prevents you from asking for it, should you
3 decide you wish it. Thank you.

4 THE CHAIR: Thank you.

5 Mr. Cavalluzzo.

6 REPLY SUBMISSIONS BY MR. CAVALLUZZO:

7 MR. CAVALLUZZO: Chief Justice, I
8 have copies of that community statement. If you
9 would like it, I can file it.

10 THE CHAIR: I think we should have
11 it, if you do have copies available.

12 MR. CAVALLUZZO: Chief Justice, I
13 will be less than 15 minutes, but let me proceed by
14 dealing with the latter part of my friend's
15 submissions, and that is the points he raises in
16 respect of penalty.

17 He asked you to take into account
18 the length of time that this transpired, and it is
19 true it did go over a couple of years, but the fact
20 is that between 2002 to 2004, which Justice Matlow
21 was fighting the Thelma dispute, the city was
22 totally aware of his conduct, said nothing, didn't
23 object to it.

24 His colleagues on the bench were
25 aware of it, obviously not to the extent that

1 -- every step of the thing, but certainly were
2 aware of his conduct; no comments or criticisms.
3 So that's the context in which you have to look at
4 the length of time.

5 My friend said that he didn't seek
6 an opinion from the Judicial Council, but, once
7 again, what he did do, he looked at the website and
8 he read articles. What else would you expect a
9 lawyer or a judge to do in those circumstances?

10 My friend said that he testified
11 that he acted in a way that other judges wouldn't
12 have. Well, as Mr. Greenspan said, he's a very
13 independent-minded individual, but if you advised
14 him that what he did was inappropriate, he will
15 hear your advice and your ruling.

16 My friend said that -- talked
17 about his comments on municipal democracy, and he
18 read that in the advisory opinion. But what is
19 important in that regard is that the Investigative
20 Committee in its report seems to suggest that that
21 advisory opinion guides judges and that they
22 shouldn't be litigants before the courts.

23 You will read that portion of the
24 report and you will see that that's, with respect,
25 just not the case. In, for example, Ontario there

1 is a protocol that says, if you are a litigant and
2 your family is a litigant, seek direction, and
3 that's exactly what he did. He sought the
4 direction of the Chief Justice and the Regional
5 Chief Justice.

6 As far as his regrets before the
7 committee, what you have are the regrets he made
8 today, and it is a very difficult circumstance.
9 When you are before an Investigative Committee or
10 any kind of tribunal, when you're a professional,
11 and you think what you did appropriate, it is hard
12 to say, Oh, by the way, everything I did was
13 inappropriate.

14 Of course he did express regrets,
15 and certainly the regret that you heard -- the
16 regrets or apology you heard today is the one that
17 you should rely upon.

18 Now, in terms of the stay or the
19 deferment question, I think the issue has clearly
20 been joined. We are certainly of the view that
21 irreparable harm will be caused and certainly the
22 public interest, expressed by my friend, in no way
23 matches the irreparable harm that would be suffered
24 by Justice Matlow.

25 As far as the Charter issue is

1 concerned, we are clearly joined on that issue.

2 I suggest that my friend has it
3 the other way around, and that is that what we have
4 to do is say: Does this conduct or expression in
5 question, is it protected activity under the
6 Charter? If the answer is "yes", then you go to
7 section 1.

8 And in terms of impairment of
9 independence and impartiality, that's the question.
10 Section 1 on the Oaks case says that you have to
11 look upon the restrictions in a minimal way; that
12 is: What is necessary in order to preserve
13 judicial independence and impartiality in light of
14 his conduct? And that's respectfully the analysis
15 that was not done by the Investigative Committee.
16 That's what Oaks calls for.

17 You don't start with the
18 restriction. You start with the freedom, and then
19 you look at the restriction in a minimal way.

20 My friend then goes on to say that
21 the role of this Council is to protect the
22 judiciary and not protect the judge, and that is
23 the same as any professional college. Of course
24 the Law Society has a disciplinary process to
25 protect the public, and the same is true here.

1 That doesn't mean you don't take
2 into account the whole person. Once again, the
3 question that you have is: In light of everything,
4 is Justice Matlow capable of performing his job as
5 judge in the future?

6 What the Boilard case stands for,
7 once again, the issue is joined there. We disagree
8 strongly with what my friend suggests.

9 What we say is it is not whether
10 the decision is taken during the trial on a recusal
11 motion. The question is: What is the nature and
12 quality of the decision to be made if it relates to
13 your judicial discretion, by asking yourself, Is
14 there a reasonable apprehension of bias? And
15 that's the key question that you have, not the
16 timing of it, not whether it happened before the
17 trial or after the trial, or at any time.

18 It's the quality of the decision
19 that is necessary in order to protect that
20 discretion.

21 Then my friend suggests that,
22 well, this is a one -- it's one integrated process
23 of discipline, and, therefore, you shouldn't
24 bifurcate it. Well, we have supplied you with the
25 cases as far as that's concerned.

1 Then he says, well, there's a
2 provision in section 12 of the by-laws that you can
3 send this matter back to the IC for clarification
4 when the committee's report is unclear and
5 incomplete.

6 Well, respectfully, we don't say
7 the committee's report is unclear and incomplete.
8 We say that there are serious errors of
9 jurisdiction and natural justice, and no Superior
10 Court on an application for judicial review would
11 send this matter back to the same committee where
12 the allegation is that serious errors of fairness,
13 in particular, were made.

14 My friend then says, as far as the
15 letters are concerned, the letters from judges and
16 lawyers, they were just dismissed because they
17 weren't relevant, and so on and so forth.

18 Well, I just ask you to read
19 paragraph 34 of the decision, because that's what
20 the committee says. They say they don't relate to
21 misconduct. They don't relate to incapability, the
22 very issues that are before you, and that's why
23 they were excluded, and that's why we excluded
24 those comments, before them, that we think it is
25 obviously relevant for a number of reasons,

1 particularly to credibility.

2 The penalty, I didn't want to get
3 into the detail, but my friend left you with the
4 idea that the committee didn't necessarily agree
5 with Judge Matlow as to when he knew he was going
6 to be on the SOS panel in light of his
7 communications with Mr. Barber.

8 Well, quite apart from the
9 submissions that have been made, what is important
10 for you to be aware of is his sworn evidence was
11 that email came on Friday. He had left early to
12 play tennis. But, most importantly, most
13 importantly, the two other judges on the panel,
14 Justices Greer and Macdonald, both stated, and it
15 is uncontradicted, that they didn't realize that
16 they were on the SOS panel until Tuesday, October
17 4th.

18 Justice Matlow said that he became
19 aware either Monday the 3rd, or Tuesday the 4th.
20 So that the two other judges independently came to
21 the same -- or were of the same view.

22 Now, in terms of this issue of him
23 not sitting on any city cases, I certainly rely on
24 my submissions, and certainly the portion read to
25 you by my friend relates to the future.

1 At no time -- and if you review
2 the whole record -- at no time did anyone from the
3 city say he shouldn't have sat on those five cases,
4 and the proof of the pudding is that we went into
5 this hearing with independent counsel, and several
6 other steps before then, with no one raising that
7 particular issue.

8 Finally, my friend has made
9 submissions on public confidence, and we just
10 reiterate the evidence that you have before you is,
11 in my view, the informed community, and obviously
12 all of Ontario is part of the jurisdiction, but
13 what we do have is the informed community, the
14 local people. We have the two municipal
15 councillors and we don't have, in my respectful
16 submission, any other evidence, other than the
17 evidence of the City Solicitor, who is one of the
18 officials being criticized.

19 So I think that the informed
20 public is very important; obviously not
21 determinative, but certainly something that you
22 should take into account in your full assessment.

23 Now, unless you have any
24 questions, those would complete our submissions in
25 reply.

1 THE CHAIR: Thank you again for
2 your submissions, Mr. Cavalluzzo, and I think that
3 we have made another change of plans here.

4 Given the timing constraints now
5 and some logistical issues, what we propose to do
6 is we're going to adjourn for 15 minutes and we
7 will decide what, if any, questions we wish to put
8 to both of you.

9 We will conclude those questions
10 and your submissions, and then at that stage we
11 will be adjourning the proceedings.

12 MR. CAVALLUZZO: Thank you.

13 THE CHAIR: And you will then be
14 free to leave and we will proceed with our
15 deliberations. Thank you.

16 MR. CAVALLUZZO: Thank you.

17 --- Recess at 12:45 p.m.

18 --- Upon resuming at 1:05 p.m.

19 JUSTICE RIP: Be seated, please.

20 THE CHAIR: Thank you, counsel,
21 for giving us that time to consider questions.

22 We have three or four areas we
23 wanted to explore, and if I can perhaps begin this
24 way. I assume, from the submissions that we have
25 heard today, that you would agree that we, as the

1 Council, can cure any errors -- errors, if any, of
2 the Inquiry Committee and act accordingly?

3 If I am right, I would just ask
4 perhaps independent counsel first whether you agree
5 with that approach.

6 MR. HUNT: Yes, completely.

7 THE CHAIR: Thank you. Mr.
8 Cavalluzzo, are you in agreement with that
9 proposition?

10 MR. CAVALLUZZO: Yes.

11 THE CHAIR: All right. While I
12 have you there, then, I will move to the second
13 question, again, just to clarify what we assume you
14 would both agree with, but we are not asking you to
15 agree if you don't.

16 On the issue of findings that have
17 been made by the Inquiry Committee, are we to
18 assume that you would agree that we, as a Council,
19 have the jurisdiction to find -- make findings that
20 might be inconsistent with those?

21 In other words, can we reverse,
22 correct, alter findings that have been made by the
23 Inquiry Committee if we do not agree with them?

24 MR. CAVALLUZZO: Yes. If you have
25 material before you, Chief Justice, which you feel

1 persuades you that a finding should be overturned,
2 yes, I would agree.

3 THE CHAIR: You do agree. Thank
4 you, Mr. Cavalluzzo. And, again, Mr. Hunt, if I
5 could just ask you to confirm that?

6 MR. HUNT: Yes.

7 THE CHAIR: You do, as well.
8 Thank you. That is helpful to us in understanding
9 some of the issues we might need to grapple with.

10 Mr. Cavalluzzo, a question for
11 you. You have focussed on the fact that the
12 Inquiry Committee addressed the conduct of Justice
13 Matlow in five earlier cases involving the City of
14 Toronto.

15 You have suggested that, in doing
16 so, your client has been treated unfairly and that
17 his position has been prejudiced by reason of the
18 complaint being expanded to include those five
19 cases.

20 MR. CAVALLUZZO: That's correct.

21 THE CHAIR: Assuming for the
22 moment that the Inquiry Committee had the
23 jurisdiction to expand the complaint, as it did, to
24 include the five cases that he sat on previously,
25 can you tell us what prejudice, if any, arose

1 because of the consideration of those five cases?

2 In other words, you assert in your
3 written submissions, as I recall, that you didn't
4 have an opportunity to get into the sort of factual
5 underpinnings, as it were, of the five. Were you
6 not able to lead evidence on that? Did you try
7 to --

8 MR. CAVALLUZZO: Well, when that
9 issue came up, one of the things we said was that
10 there were, you know, for each particular case,
11 there were underlying circumstances that you should
12 get into.

13 My recollection is the indication
14 I got from the Inquiry Committee is they weren't
15 really interested in the circumstances underlying
16 each of these particular applications.

17 They were aware that, for example,
18 the one case dealt with an insurance case. Another
19 case dealt with this, and so on. They were aware,
20 I think, generally, what the case was about, but,
21 in my respectful submission, they certainly weren't
22 aware of the underlying circumstances in respect of
23 each case for which discretion had to be exercised.

24 The indication to me was they
25 didn't want to hear the underlying circumstances.

1 THE CHAIR: But you knew the
2 amended complaint included the five cases. That
3 had been given to your client, and you were aware
4 of that?

5 MR. CAVALLUZZO: Oh, yes, that was
6 given to our client in December 4th, 2007.

7 THE CHAIR: So you knew there was
8 jeopardy on that front, potentially?

9 MR. CAVALLUZZO: Yes.

10 THE CHAIR: So what you're saying
11 is -- did you actually say, Look, I want to lead
12 evidence on this, and someone indicated, No, you
13 are not going to be at liberty to do so?

14 MR. CAVALLUZZO: I don't feel
15 confident answering that until I refer to the
16 transcript, but my recollection of it was that I
17 said that all of the underlying circumstances are
18 relevant and you should look into it, and the
19 indication I got from the committee was they
20 weren't interested. It wasn't necessary to go into
21 all of the underlying circumstances.

22 I can confirm that. I can confirm
23 that this afternoon by an email to Mr. Sabourin
24 perhaps, and he can transfer that information to
25 you. I'm sorry, I can't answer it directly, but I

1 would prefer to look at the transcript first.

2 THE CHAIR: What you're saying is,
3 when the issue came up, you might have led evidence
4 on this, but you thought that their indication was
5 they weren't interested in the circumstances, and
6 so that was effectively foreclosed, in your mind,
7 as an option?

8 MR. CAVALLUZZO: That's correct,
9 because at the beginning of the hearing in January,
10 beginning of the hearing in January, we made
11 submissions as to whether there was jurisdiction to
12 expand the complaint, so to speak, to add that
13 allegation, and that was the week of the hearing.

14 Now, once again, that's my
15 recollection, and I can't be more specific than
16 that.

17 THE CHAIR: All right. Well, I
18 think that clarifies, at least in part, what has
19 happened.

20 Another question for you, Mr.
21 Cavalluzzo. By the way, I should ask, Mr. Hunt, do
22 you have anything to say on this question we were
23 just exploring before we move on?

24 MR. HUNT: No. I think it would
25 be preferable if we could check the transcript.

1 There definitely was a discussion about this, and I
2 believe it was on January 8th at the opening of the
3 inquiry.

4 My recollection is that the
5 Inquiry Committee were seeking to assure counsel
6 that they weren't interested in getting into the
7 details of the five cases, but more the fact that
8 Justice Matlow sat on the cases.

9 I think we should check the
10 transcript and confirm with Mr. Sabourin later this
11 afternoon.

12 THE CHAIR: I believe that would
13 be helpful to do that. I take it what their
14 position was the circumstances are essentially
15 irrelevant. The fact is he ought not to have sat
16 on the five cases.

17 MR. HUNT: I believe that is what
18 the nature of their communication was.

19 THE CHAIR: Okay. Then if I could
20 ask one other question. At paragraph -- in your
21 factum, Mr. Cavalluzzo, you state that while the
22 conduct at issue may warrant discussion,
23 counselling and/or reprimand, it is not such as
24 warrants Justice Matlow's removal from judicial
25 office.

1 Can I ask if you could elaborate
2 on what you submit would be an appropriate
3 alternate sanction if Council -- that's a big "if"
4 -- eventually decides that a sanction as opposed to
5 removal from office is warranted?

6 MR. CAVALLUZZO: Well, in other
7 contexts, I would submit if the Council was of the
8 view that removal is not appropriate or
9 disproportionate, then there are things, such as
10 counselling, such as apologies, such as findings
11 that he shouldn't have acted the way he did.

12 However, in light of all of the
13 circumstances, we feel that removal is too severe.
14 However, you know, that is, in effect, a
15 counselling, and if you demand an apology for his
16 conduct, I think that would be appropriate, as
17 well.

18 Obviously I don't know if the
19 Council has other sanctions in mind, but I don't
20 really think there are. For example, in respect of
21 professional or employment law, labour relations,
22 there is something called a suspension. I don't
23 think you want to get into that, because there is
24 no statutory authority for it.

25 But in terms of your

1 responsibility for the judiciary, if you feel that
2 something is warranted, I think that counselling, a
3 finding against him and perhaps an apology, if --

4 THE CHAIR: Were Council to
5 consider your suggestion favourably that the
6 sanction imposed by the Inquiry Committee is
7 disproportionate, is it your position that that is
8 something that should be dealt with by this
9 Council, or should the matter be referred back to
10 the Inquiry Committee for it to consider it, in
11 light of what evidence and/or options might be put
12 to the Inquiry Committee?

13 MR. CAVALLUZZO: You know what?
14 If you find that it is disproportionate, I think
15 you are in a position to make a determination as to
16 what the appropriate response should be.

17 You have all of the information
18 before you, and a little more information,
19 actually, than the independent committee does, but
20 I would think that you are in as good a position as
21 they on that front.

22 THE CHAIR: Thank you. Perhaps I
23 could ask Mr. Hunt the same question, then.

24 MR. HUNT: Yes. If I could deal
25 with the latter part first, this Council has the

1 final word on the issue. The purpose or one of the
2 purposes of the Inquiry Committee was to conduct
3 the investigation and to provide you with their
4 view on whether or not a recommendation was
5 warranted.

6 I think it is perhaps more in
7 keeping with the scheme of the process -- given
8 that you have the power to remit back to the
9 Inquiry Committee for clarification, for further
10 investigation and comment, I think it is more in
11 keeping with the Inquiry Committee to remit the
12 matter back and ask their view on it, bearing in
13 mind that it will come back to this Council and
14 that you will have the final say on it.

15 THE CHAIR: Okay, all right.
16 Thank you so much.

17 MR. CAVALLUZZO: I don't like to
18 prolong this, but just in response to my friend's
19 last statement as to whether you should remit it
20 back, you already have the Inquiry Committee's view
21 on what should happen, and I would think it might
22 be unfair to send it back to the same body to, in
23 effect, reverse themselves.

24 So, once again, I think that you
25 are in a position to make that determination rather

1 than the committee.

2 Thank you.

3 THE CHAIR: Maybe I could ask one
4 question, Mr. Cavalluzzo. You mentioned about
5 taking into account the whole person in making any
6 recommendation, and do we base our decision -- are
7 we entitled to look at any matters of public
8 record? Are we limited to what's in the record
9 here before us?

10 MR. CAVALLUZZO: Certainly,
11 obviously, you are entitled to look at everything
12 that is before you, but if you are going to look at
13 anything in the "public record", I would just like
14 the opportunity to be able to make submissions on
15 it, just so that we're prepared to understand what
16 you are interested in.

17 My friend has found, I think, the
18 transcript reference.

19 THE CHAIR: Thank you. Mr. Hunt.

20 MR. HUNT: Yes, thank you, Chief
21 Justice.

22 If I might, on the issue of the
23 five cases, I think you will find reference to this
24 on Tuesday, January 8th of the transcript beginning
25 at page -- well, I think the relevant portion

1 begins at page 16 and goes over to the decision on
2 page 27.

3 In the course of giving its
4 decision, the Inquiry Committee, the Chair says,
5 and I am quoting page 27, line 7:

6 "I should incidentally advise
7 you, Mr. Cavalluzzo, that you
8 need have no concern about
9 addressing specifically the
10 five other cases involving
11 the City of Toronto prior to
12 the SOS matter. In those
13 circumstances the committee
14 will consider argument
15 related to the four items --"

16 So the committee was advising Mr.
17 Cavalluzzo, attempting to put him at ease, that
18 while they wanted to consider the issue of Justice
19 Matlow having sat on five matters, they weren't
20 interested in the details of any of those matters.

21 THE CHAIR: Thank you.

22 Well, I believe that that, then,
23 concludes the hearing for today, and thank you so
24 much for your submissions. The written and oral
25 ones have been very helpful to us, and so we would

I HEREBY CERTIFY THAT I have, to the best of my skill and ability, accurately recorded by Shorthand and transcribed therefrom, the foregoing proceeding.

Teresa Forbes, CSR, Computer-Aided Transcription
