

Mississauga Judicial Inquiry

October 3, 2011

On November 11, 2009 Mississauga City Council adopted a Resolution requesting that the Chief Justice of the Superior Court of Justice appoint a judge to conduct an inquiry pursuant to s. 274 of the *Municipal Act*.

The Chief Justice named me to assume the role of Commissioner.

The Terms of Reference required me to make inquiries into two broad factual areas.

Let me briefly address my factual findings. Commission Counsel and I decided to hold the Inquiry in two phases after an appropriate preparation period.

The issues in Phase I concerned the December 2000 Enersource Shareholders Agreement to which the City was a party together with Borealis, then a division of OMERS, the Ontario Municipal Employees Pension Plan.

The issues in Phase II involved land in the City Centre. A company called World Class Developments had approached the co-owners of 8.5 acres of land in the City Centre with a proposal to build a hotel, convention centre and condominiums. The co-owners were Oxford, the real estate arm of OMERS, and AIM, the Alberta Pension Fund. The WCD transaction failed in January 2009. Fortunately, the City of Mississauga acquired the land which it then conveyed to Sheridan College to build the campus which now stands next door. Thereafter there was litigation concerning WCD's claim to a continuing interest in the lands. The Phase II issues consumed far more time than those related to Enersource.

Let me briefly address Phase I.

I found that errors were made in relation to the Enersource transaction. Distilled to its essence, my finding is that the City Manager of the day, David O'Brien, failed to discharge his duty to communicate a significant change in the City's transaction with Borealis to Mayor McCallion and members of Council. At the late stages of negotiation, Borealis secured a veto over major decisions of Enersource. The veto made commercial sense and was, in any event, never used. While Borealis raised the veto issue late in the negotiations, this was consistent with expectations

in commercial dealings between sophisticated parties. I have found that some limited changes to the City's practices should be made, but have not found it necessary to make extensive recommendations in this part of the Report.

I have found it necessary to deal in depth with the issues surrounding the City Centre Land and WCD. The actions of the Mayor in relation to the proposed hotel and convention centre raise significant concerns. I have made my findings with some regret. The Mayor as a public servant has served Mississauga, and indeed Canada, for much of her life.

How did the Mayor find herself in this situation? Mississauga has, for much of its history, seemed not to have a real centre. By default, Square One, which is owned by OMERS and AIM, has served as Mississauga's City Centre. In order to create a real city core, City Council and the Mayor had identified the construction of an upscale hotel and convention centre as an important public project for Mississauga.

In the fall of 2005, Mayor McCallion jump-started negotiations between the co-owners of the City Centre lands and her preferred group which was WCD. The Mayor's son, Peter McCallion, was a participant and owner in WCD from the outset. The Mayor promoted the interests of WCD throughout the events at issue in this Inquiry. Indeed, I have found that the co-owners would not have entered negotiations with WCD absent her intervention. Once the Agreement of Purchase and Sale was signed, the Mayor sought significant commercial concessions. She went to great lengths to keep the deal alive as economic conditions worsened. When the co-owners terminated the deal and litigation ensued, the Mayor again intervened to attempt to have the litigation settled.

The Mayor's actions amounted to both a real and apparent conflict of interest. On any view of the evidence, Peter McCallion stood to gain substantially on the successful completion of the hotel and condominium project. He had, on his own evidence, a potential upside of more than \$10 million. As an investor he stood to gain much more than that. By her own admission, the Mayor knew at the very least that he was the real estate agent for the purchaser. I have found that the Mayor knew that a successful WCD project would have earned her son more money than he would otherwise have earned over the course of many years. I have found that the Mayor

must have known that her son had a financial role much greater than acting simply as the purchaser's agent.

None of the Mayor's private actions on behalf of WCD was known to members of Council, to municipal officials or to the public at the material time.

Given Peter McCallion's pecuniary interest in the transaction, it was improper for the Mayor to repeatedly use her office on behalf of WCD. This finding is supported both by the common law and common sense. With respect, the Mayor ought to have given the WCD project a wide berth. A member of Council cannot promote the financial interests of family members and must avoid any appearance of impropriety. Citizens have a right to expect that a Mayor will act impartially and without favor, as her oath of office requires. It is no answer to say that a public office holder may promote the financial interests of a relative where to do so also promotes the greater good. To accept this proposition would in my view lead over time to the erosion of public trust in municipal government.

As I said at the outset, the Terms of Reference also permitted me to make recommendations for the good governance of Mississauga. I have chosen to do so. I believe this to be the real value of the Inquiry.

In recent years, a great deal of public attention has been devoted to questions surrounding municipal infrastructure in Ontario. Cities age, and increasing sums of money are required to improve and replace the existing infrastructure. I believe that the same might be said of Mississauga's ethical infrastructure. For many years Mississauga had very little in the way of formal rules or officials to enforce them. The *Municipal Conflict of Interest Act* (the "MCIA") contained rules governing conflict of interest, but these were and are inadequate. I have found that substantial legislative reforms are necessary at the Provincial level. I have also proposed changes to the Mississauga Code of Conduct and attempted to define a role for an Integrity Commissioner in Mississauga.

I know that the decision to call this Inquiry was and remains controversial. This Inquiry was, for the most part, an exercise very much like sophisticated commercial litigation. We in the judiciary are keenly aware that commercial litigation conducted by first-class counsel can

quickly become very expensive. It follows that holding an inquiry such as this one, sifting through the thousands of pages of materials which Commission counsel had to triage at the outset, and calling 40 days of evidence, comes with a cost. City Council called this Inquiry knowing that the cost would be in the millions of dollars. There are of course important differences between inquiries and litigation. An inquiry brings with it an important policy layer. It follows that the process of writing my report was different and much more involved than writing a judgment at the end of a forty-day trial. It is my hope that with the assistance of all counsel and with the benefit of the expert evidence heard in this Inquiry, we have created a Report which will be of lasting guidance to Mississauga and to the Province.

I obviously have no view about whether City Council should have called this Inquiry. What I do say in the Report is that if the issues identified by City Council were to be explored, there was no other practical way to explore them. It is simply not practical under the existing MCIA procedure for an ordinary citizen to launch a Court application claiming conflict of interest on the part of an elected official. The downside risk of tens of thousands of dollars in legal costs should the application be found to be unwarranted, acts as far too great a deterrent. There are a great many troubling issues which arise which simply remain unexamined.

As matters stand, only a municipal council is able to resort to the procedure of a judicial inquiry set out in s. 274 of the *Municipal Act*. Such inquiries are rare. Municipal councils do not initially realize that they must be responsible for all of the costs associated with an inquiry. Once that realization hits home, most inquiries die on the vine. I have addressed this difficulty in my recommendations. I believe that it is important that all major municipalities have the ability to create an office of Integrity Commissioner in a way which permits examination of the kinds of matters which we have considered in this Inquiry. The Integrity Commissioner must have sufficient tenure and independence to examine issues surrounding conflict of interest, both informally and formally. An Integrity Commissioner might hold formal hearings as necessary, make findings and impose sanctions.

There is still a role for the MCIA. Having said that, where a member has acted in contravention of the conflict of interest provisions in the Act, removal from office is currently the only

sanction. I believe that lesser sanctions should be made available, for example, suspension of the member, a form of probation or a public reprimand.

I also believe that the scope of the MCIA should be changed so that the rules regulating conduct apply to any meeting attended by a member of Council in his or her official capacity. I pause there to say that the Mayor held the view that provided she declared a conflict of interest in her legislative capacity and refrained from voting at Council or taking part in discussion, she was on safe ground. Certainly, she was correct in her view that the MCIA did not apply to her actions in advocating privately for her son's company. I have found that her actions were nevertheless improper under the application of common law principles. These principles should be codified. The Act should be amended to make it clear that mayors and members of Council are subject to the conflict of interest provisions both in the legislative and executive functions of their office.

I believe that the Mississauga Code should be amended as well. Its language should be strengthened to make clear that members must avoid the improper use of the influence of their office and shall avoid conflicts of interest, both apparent and real. The Code should also make it clear that members of Council shall not extend preferential treatment to any individual or organization in the discharge of their official duties. Preferential treatment would be found to exist if a reasonably well informed person would include that the preferential treatment was advancing a private interest.

I know that members of Council must of course be able to use their influence on behalf of constituents, but I believe that there must be greater transparency surrounding the nature of these dealings.

I also have found that Mississauga should consider whether to create a searchable database containing a list of all declared or known conflicts of interest.

All of these and other measures would have prevented the circumstances which required this Inquiry to have been called. For example, the Mayor could simply have sought advice from the Integrity Commissioner prior to embarking upon her course of dealing with the co-owners of the land. One of the co-owners might have raised the matter with the Integrity Commissioner. There must be a practical and low-cost way of clearing the air in these circumstances.

THE MAYOR'S GALA

Some time after the conclusion of the formal hearings in this Inquiry, I learned that there had been a misunderstanding shared among a number of counsel concerning the nature of benevolent activities undertaken by the Mayor through her Gala and other events.

I believe that these matters required my consideration: the Terms of Reference specifically required me to examine relationships between the Mayor and other individuals and companies identified in the Terms of Reference, including WCD. The principal of WCD, Mr. DeCicco had, together with other participants in the Inquiry, purchased a number of expensive items at the Mayor's Gala. The Gala Fund has supported a variety of community activities through the years. I had thought from the evidence at the Inquiry that the Mayor's Gala was a charitable event as the term is commonly understood, and that those who attended might receive a charitable receipt for portions of their ticket. Media reports later suggested that this was not the case.

My counsel examined a considerable volume of documentation and conducted interviews on issues surrounding the Mayor's benevolent activities. Ultimately questions in this area were resolved by the inclusion of an Agreed Statement of Fact, which is appended to this Report. I note that the Mayor agreed in 2007 to transfer the Gala funds of some \$2.3 million to the Mississauga Community Foundation to be administered at arm's length. A similar arrangement is in place to administer the funds raised through the Mayor's Charity Golf Tournament.

I believe these measures to be appropriate. I have chosen not to make recommendations surrounding the Mayor's benevolent activities. I believe that broader consideration of elected officials lending their support and office to benevolent activities might be considered in the future by City Council, with the assistance of the Integrity Commissioner. For me to have undertaken a proper review of these matters and to make recommendations would have required re-opening the hearings and calling further evidence. In my view, it was not in the public interest to proceed in this way at this time.

We live in an age when the media and ordinary citizens demand increasing transparency and accountability. I believe that the approach taken in the Report to improve Mississauga's ethical infrastructure will serve to promote public trust in municipal institutions.

Let me close by saying this. I had the benefit of having the Mayor appear before me for three days of testimony. She was candid in her testimony about the limits which she thought should be placed on public officials dealing with private business. I have seen first hand the Mayor's careful stewardship of the long term interests of Mississauga. I have every confidence in her leadership abilities. As Council debates whether to adopt all, some or none of my proposals for change, I am hopeful that my recommendations enjoy her personal support.