



City of Mississauga Judicial Inquiry

The Honourable J. Douglas Cunningham, Commissioner

Decision of Commissioner Cunningham

Motion by Mississauga News Re: Affidavit and Cross-Examination of Peter McCallion

Peter McCallion is named in the Terms of Reference for this Inquiry, which seeks, *inter alia*, to unravel the business dealings that Mr. McCallion had with the City of Mississauga. The Inquiry raises serious issues, and Mr. McCallion applied for a recommendation that he be provided with funding for his legal costs as he confronts these issues. On May 17, I recommended that City Council grant that funding.

My recommendation was based in part on the affidavit sworn by Mr. McCallion regarding his ability to pay for legal counsel, and on the cross-examination conducted by Mr. McDowell. Consistent with my ruling on March 4, the affidavit and cross-examination transcript were provided to me, but were otherwise confidential.

Counsel for *Mississauga News* now seeks access to the affidavit and the transcript. For the reasons set out below, I decline to reverse my earlier decision. The affidavit and transcript shall remain confidential.

Legal Framework

Under s. 34 of the *Rules* of this Inquiry, I have the authority to keep Mr. McCallion's affidavit and transcript confidential. Indeed, this is precisely the type of "intimate financial" information that s. 34 is intended to protect. I agree with counsel for *Mississauga News* that I am bound by principles known as the *Dagenais-Mentuck* test in exercising this discretion.¹ The test applies to all discretionary orders that limit freedom of the press in relation to legal proceedings.

In accordance with the *Dagenais-Mentuck* test, evidence can be withheld from the public where:

- (1) it is necessary in order to prevent a serious risk to an important interest; and
- (2) the salutary effects of the confidentiality order outweigh its deleterious effects, including the effects on the right to free expression.

Necessity

With respect to part one of the test, a confidentiality order is necessary where there is a real and substantial risk to the public interest if confidentiality is not maintained, and there are no reasonable alternatives that would preserve the interest at stake. In my view, there is a

¹ See *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522.

significant public interest in ensuring that this Inquiry process is fair to all those who are compelled to participate. Few people would willingly open their personal, professional or financial dealings to public scrutiny, and I must ensure that those who involuntarily find themselves in that situation are treated with the utmost fairness. A failure to do so will undermine public confidence in the Inquiry. It will also make municipalities hesitant to utilize the public inquiry process where it might be appropriate in the future.

Mr. McCallion did not volunteer to be part of this Inquiry, and public confidence in the process would be undermined if he were forced to disclose his personal finances in order to receive assistance needed to represent his interests. Even absent specific evidence, I can take judicial notice of the fact that an individual's privacy is impaired if all available information about his or her personal finances and assets is released to the public.

Counsel for *Mississauga News* suggests that only if the public can scrutinize every participant at every stage can it be assured that the process is fair. In my view, the opposite is true: the public will have confidence in a process that differentiates between the subject matter of the inquiry and peripheral issues. Relevant issues must be fully aired; marginal matters should be protected.

In this case, Mr. McCallion's business dealings regarding the Mississauga City Centre are properly the subject matter of this Inquiry, and will be explored fully in his testimony. His ability to pay for counsel as he prepares for that testimony is not relevant. The public will trust that my counsel and I complied with our legal and ethical obligations in reviewing and testing Mr. McCallion's affidavit before making a recommendation to Council. The details of that evidence and its testing need not be aired in public. In this regard, there is no reasonable alternative to keeping the affidavit and transcript confidential.

Proportionality

Turning to part two of the test, maintaining confidentiality over the affidavit and transcript will protect Mr. McCallion's intimate financial information, while building public confidence in the process. The only deleterious effect is that the public will not have access to Mr. McCallion's evidence about his role in the transactions covered by the Terms of Reference until he testifies before the Inquiry. This repercussion is of little significance. The evidence will come out when the public has a proper context for it, and at a time when Mr. McCallion may be cross-examined by all counsel. The truth-seeking purpose of the inquiry will be better served by waiting until that point.

Conclusion

I therefore affirm my earlier decision. Mr. McCallion's affidavit and the transcript of the cross-examination on that affidavit should remain confidential. The motion by Mississauga News is denied.

Cunningham, A.C.J.O. (Commissioner)
May 26, 2010