July 8, 2010

Pursuant to a resolution dated November 11, 2009, Mississauga City Council, having earlier voted to request a Judicial Inquiry under the *Municipal Act*, amended earlier Terms of Reference in order to clarify its request for the Inquiry.

As a result, as Commissioner, I have been given a mandate as follows:

1. To investigate and inquire into all relevant circumstances pertaining to the various transactions and matters referred to in the recitals to this resolution, including the relevant facts pertaining to the various transactions at the relevant time, the basis of and reasons for making the recommendations for entering into the subject transactions and the basis of the decisions taken in respect of the subject transactions;

2. To investigate and inquire into the relationships, if any, between the existing and former elected and administrative representatives of the City of Mississauga and the existing and former principals and representations of WCD, OMERS and its affiliate companies at all relevant times in the context of the

transactions and matters described in the recitals to this resolution; and,

3. To investigate and inquire into whether any existing or former elected or administrative representatives of the Corporation of the City of Mississauga had a direct or indirect personal economic interest, or other conflict of interest or misconduct that might have influenced their actions in any of the subject transactions or matters described in the recitals to this resolution.

Counsel for Mayor McCallion, supported by counsel for Peter McCallion, on the eve of having witnesses called on the second phase of the Inquiry, has raised the issue of what standard I am to apply when considering the conduct of the Mayor and as well her son.

In other words, asking that procedural fairness be maintained, counsel for the Mayor submits that any reference to the term “conflict of interest” must be gauged in accordance with the only standard in place at the time, namely the *Municipal Conflict of Interest Act* (MCIA). To do

otherwise, counsel submits, would be to move the goal posts and apply a standard not in place when the matters at issue occurred. Simply put, she would have to face new rules that would be applied to past conduct.

In her very thoughtful submissions, Ms McIntyre says that procedural fairness requires advance notice of the standard of conduct to be applied by me in any consideration of the evidence, and points to a number of authorities in support of her position, including the report of Justice Jeffrey Oliphant in the Mulroney-Schreiber Inquiry, as well as the comments of O'Keefe J. in *Stevens v. Canada (Attorney General)* where Commissioner Parker was chastised for drafting and utilizing his own definitions of real and apparent conflict of interest.

Ms McIntyre argues that my mandate is much more restrictive than that which governed Justice Oliphant, pointing to the third branch of the Resolution which calls upon me to determine, as she puts it, whether there was a conflict of interest or misconduct. I fully recognize that I have no authority or jurisdiction to make findings of criminal or

civil liability. That is not the purpose of this Inquiry, nor, I am persuaded, was it ever the intention of Council.

The overarching purpose of this Inquiry is to look not only to the past, but to the future in a broad consideration of the good government of the Municipality. It may be that, after hearing all of the evidence, I will make recommendations having to do with the future conduct of the public business of the Municipality. I may not. That will entirely depend upon how the evidence unfolds.

It should be noted, at this point, that the Council, prior to voting to request a judicial inquiry, had the benefit of two legal opinions from two outside law firms. Both opinions, for the most part, found no conflict of interest with respect to either of the transactions at the issue by staff, Council or the Mayor, using the MCIA as the test of a conflict of interest. Ms McIntyre suggests that all this Inquiry is about is to provide a third opinion. I disagree. Not only would this be a terribly expensive way of obtaining yet another opinion, it is not what Council requires of me in carrying out the mandate I have been given. I am not constrained in my considerations of conflict of interest to that which is

set out in the MCIA. Rather, the Terms of Reference I have been given to conduct this investigation were made deliberately broad, not only to permit me to investigate specifically all relevant circumstances pertaining to the two transactions at issue, but also to investigate and inquire into whether any elected official or staff representative had a direct or personal economic interest, or other conflict of interest or misconduct that might have influenced their actions in the two transactions at issue. Clearly, in my view, very broad Terms of Reference.

Needless to say, I am not entitled to draw my own Terms of Reference, nor do I intend to. Much like the Sarnia Inquiry, which was considered by the Supreme Court of Canada in *Consortium Developments (Clearwater) Ltd. V. Sarnia (City),* [1998] 3 S.C.R. 3, I am to consider, in part, relationships between the existing and former elected and administrative representatives of the City and existing and former principals and representatives of WCD, OMERS and any affiliated companies. In doing so, I intend to fulfill the third prong of the mandate provided to me. If, as I say, at the end of the day, after making my findings of fact, I deem it necessary or helpful, I will make recommendations to the Municipality as to how the good government

of the City could be better achieved. If Council had intended that I only measure any issue of conflict of interest against the MCIA, it would have so requested. It did not.

What then of conflict of interest and the standard to be applied. Counsel for the City, Mr. Lax, argues that no definition is required, while Commission Counsel suggests I can employ commonly held definitions of conflict of interest. Clearly, there is much in the common law that is of assistance. *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City),* [1990] 3 S.C.R. 1170 is instructive. While Sopinka J. writing for the majority, was alive to the fact that elections may be fought on issues ultimately coming before Council, he distinguishes between partiality by reasons of pre-judgment on the one hand and by reason of personal interest on the other. As he writes in paragraph 55:

> It is apparent from the facts of this case, for example, that some degree of pre-judgment is inherent in the role of a councillor. That is not the case in respect of interest. There is nothing inherent in the hybrid functions, political, legislative or otherwise, of municipal councillors that would make it mandatory or desirable to excuse them from the requirement that they refrain

> from dealing with matters in respect of which they have a personal or other interest. It is not part of the job description that municipal councillors be personally interested in matters that come before them beyond the interest that they have in common with the other citizens in the municipality. Where such an interest is found, both at common law and by statute, a reasonably well-informed person would conclude that the interest might influence the exercise of that duty. This is commonly referred to as a conflict of interest. [page 197] See Re Blustein and Borough of North York, [1967] 1 O.R. 604 (H.C.); Re Moll and Fisher (1979), 23 O.R. (2d) 609 (Div. Ct.); Committee for Justice and Liberty v. National Energy Board, supra; and Valente v. The Queen, [1985] 2 S.C.R. 673.

In *Moll v. Fisher et al.,* [1979] O.J. No. 4113, Robins J. wrote at paragraph 10:

> This enactment, like all conflict-of-interest rules, is based on the moral principle, long embodied by our jurisprudence, that no man can serve two masters. It recognizes the fact that the judgment of even the most well-meaning men and women may be impaired when their personal financial interests are affected. Public office is a trust conferred by public authority for public purpose. And

> the Act, by its broad proscription, enjoins holders of public offices within its ambit from any participation in matters in which their economic self-interest may be in conflict with their public duty. The public's confidence in its elected representatives demands no less.

As long ago as 1904, in *L'Abbe v. Blind River (Village)* 1904 CarswellOnt. 87, 3 O.W.R. 162 (Div. Ct.), Boyd J., writing for the Divisional Court, stated at paragraph 11:

> The High Court of Parliament was not only a legislative but a judicial body. It combined legislative capacity and judicial power; and it would seem that the analogy of cases as to judges and magistrates strongly applies to the fiduciary conduct of municipal councillors. The member of a council stands as trustee for the local community, and he is not so to vote or deal as to gain or appear to gain private advantage out of matters over which he, as one of the council, has supervision for the benefit of the public. The councillor should not be able to invoke the political or legislative character of his act to secure immunity from control, if the taint of personal interest sufficiently appears therein.

The important words I take from that paragraph are “deal”, “gain” and “or “appear to gain”. Members of City Council are entrusted by those who elect them to act in the public interest. Optics are important. In other words, members of a municipal council must conduct themselves in such a way as to avoid any reasonable apprehension that their personal interest could in any way influence their elected responsibility. Suffice it to say that members of Council (and staff) are not to use their office to promote private interests, whether their own or those of relatives or friends. They must be unbiased in the exercise of their duties. That is not only the common law, but the common sense standard by which the conduct of municipal representatives ought to be judged.

So for these reasons, I see no need to more precisely define conflict of interest before embarking upon the evidentiary stage. No one at the end of the Inquiry should feel as though a standard any different than that which existed at the relevant times was being imposed. I agree with Ms McIntyre that it would be unfair to use the proposed Mississauga conduct or any other municipal guidelines. There is no reason to do so. As Commissioner Oliphant put it so well:

> Public office holders ultimately owe their position to the public, whose business they are conducting. Ensuring that they do not prefer their private interests at the expense of their public duties is a fundamental objective of ethics standards.

It must always be an objective test: what should a reasonable person have done in similar circumstances?

One final note, When Mayor McCallion swore her oath or declaration of office yet again on December 4, 2006, she agreed *inter alia* to "…truly, faithfully and impartially exercise this office…" She did not simply say she would abide by the *Municipal Conflict of Interest Act*.