PHASE II

City Centre Land and World Class Developments

5 Factual Background

Mississauga is one of Canada's great urban success stories. The city is an amalgamation of several smaller villages and municipalities: Port Credit, Streetsville, Lakeview, Cooksville, Lorne Park, Clarkson, Erindale, Sheridan, Summerville, Dixie, Meadowvale Village, and Malton, as well as the Township of Toronto Gore and Trafalgar. The modern City of Mississauga was created by provincial statute in 1974. Mississauga has grown at a rapid rate compared with most Canadian municipalities, from a population of 250,017 in 1976 to 734,000 in 2010.

Mississauga hosts a thriving economy. More than 60 Fortune 500 companies have a significant presence in the city. Its tax rates have been kept stable, and it has worked hard with the development industry to allow efficient deployment of industrial spaces. The city is also home to Pearson International Airport, which provides it with an important advantage.

The City of Mississauga grew out of farmers' fields. As a merger of smaller towns, Mississauga has had something of a void at its present core and has seemed to lack a centre or a soul. It now has a striking city centre building, featuring a soaring atrium, which was completed in 1987. I take judicial notice that,

in the summer of 2011, Mayor Hazel McCallion formally opened Celebration Square, which will allow thousands of members of the public to listen to concerts, watch films, and skate during the winter season. But for much of its history, an enormous shopping mall, Square One, has, by default, provided Mississauga with its city centre.

The location and importance of Square One provide context for this phase of the Inquiry. First, the mayor emphasized in her evidence that Mississauga required more than a shopping mall for its city core. Businesspeople who travel to Mississauga should be able to hold meetings and stay at first-class hotels in the city rather than spend their nights in Toronto. Groups of all kinds should be able to hold annual general meetings and conventions in Mississauga. Equally important, citizens of Mississauga should not have to drive to downtown Toronto for an evening of entertainment.

Second, Square One and its associated landholdings have been a significant constraint on Mississauga's ability to carry out long-term land-use planning. Quite simply, Mississauga City Council and public servants must have an excellent working relationship with the owners of Square One as development continues in the city centre. The opposite is also true. For the owners of Square One to maximize its value, they must cultivate relationships throughout the city and understand its processes.

The successive owners of Square One have had the benefit of stability in the leadership of Mississauga. Mayor McCallion has been in office since 1978. She is a hands-on, sophisticated politician who understands business.

City Council's Goal of a Five-Star Hotel

In 1977, the first City Hall was built by a private developer on land next to Square One. Since then, there have been many plans to develop the city core. To effect that change, the City of Mississauga must either purchase land or convince private owners to develop the land in accordance with the city's vision.[1]

Like many other postwar North American cities, Mississauga was planned and built with the car in mind. It remained an automobile-oriented environment until 2001, when the city looked to transform the nature of the core and identified the land around Square One as suitable for a more traditional downtown.[2]

The city's current Official Plan* envisages a robust, traditional downtown with mixed-use development consisting of offices, retail development, and housing for a vibrant, pedestrian-friendly city core.[3] To achieve this vision, City Hall, the central library, the central YMCA, the Civic Centre, and the Living Arts Centre are all located in the city core.[4] Edward (Ed) Sajecki, the commissioner of planning and development for the City of Mississauga, testified that, since the early 1990s, the city had hoped for a hotel and convention centre connected to the Living Arts Centre,† which would support the city's long-term vision of a mixed-use, active downtown.[5] It would bring tourists to the core, meet the needs of the business community, make the city an attractive locale for conferences and conventions, and generate substantial property tax revenue for the city.[6]

The Official Plan recognizes a hotel and convention centre as an approved use in the downtown core, a goal that the city has not yet been able to achieve.[7] In June 2005, the city's Economic Development Office solicited more than 30 developers and hoteliers to build an upscale hotel and convention centre adjacent to the Living Arts Centre, to no avail.[8] The World Class Developments (WCD) project on city centre land, the subject of this phase of the Inquiry, was the only proposal for development of a four- or five-star hotel in the city core in keeping with the city's vision.[9]

The Mayor's Vision

The mayor's interest in a four- or five-star hotel was, and is, integral to her vision of enriching the city with a convention centre in the core. Although she would welcome a four- or five-star hotel anywhere in the city core, she envisaged a high-quality hotel connected to the multifaceted Living Arts Centre. The hotel and the Living Arts Centre, connected either underground or overhead and combined with the facilities of the Civic Centre and the central library, could create a medium-sized convention centre in the downtown core to attract conventions to Mississauga.[10]

In the mayor's opinion, the quality of the hotel was important if the city hoped to attract foreign investment and corporate headquarters to the core.

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* The Official Plan is a document prepared under Ontario's *Planning Act*, RSO 1990, c P.13, which determines land-use planning matters for the whole city. Mississauga's present Official Plan came into force in 2003. Testimony of E. Sajecki, Transcript, July 8, 2010, pp. 1410, 1419, 1422.

† It appears that the Living Arts Centre was designed originally to have a hotel connected to it by a pedestrian bridge.

Although Mississauga is home to hundreds of companies, including many Fortune 500 companies, their executives are often accommodated in four- or five-star hotels located elsewhere when they arrive in the city for business.[11]

The mayor has, for a long time, tried to encourage hoteliers to build in the city core, and has attempted to encourage investors from abroad to support this initiative. The mayor informed the Commission that no one ever told her that a four- or five-star hotel was not economically viable in the city centre, but the lack of response to the city's and her efforts indicated that the concept was not readily viable.[12] Despite this fact, she maintained her view that such a development was feasible because Mississauga has continued to grow even during the post-2007 economic downturn.*[13]

Complementary Use Important to City Centre Land Owners

A significant amount of land in the city centre, including the lands adjacent to Square One and the Living Arts Centre (the City Centre Land), is owned jointly by two Canadian pension giants: Ontario Municipal Employees Retirement System (OMERS),† and Alberta Investment Management Corporation (AIM).‡ OMERS and AIM were equal partners and co-tenants of the City Centre Land. Oxford Properties (Oxford), the real estate investment division of OMERS, was responsible for the day-to-day property and development management of this land for both OMERS and AIM. A map of Oxford's Mississauga City Centre Land Holdings was marked as Exhibit 96 in the Inquiry and is attached to this Report as Appendix H.

AIM is a Crown corporation that manages pension and endowment assets for the Province of Alberta.[14] Similarly, OMERS is a large pension plan that deals with investment activities and provides pension services to plan members and employees.[15] Both corporations seek to make prudent commercial investments to benefit their capital pools.[16] Together, OMERS and AIM manage approximately $120 billion in assets. OMERS manages approximately $50

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* The mayor testified that the city continued to issue building permits for office and commercial use during the period of economic downturn. Testimony of H. McCallion, Transcript, September 20, 2010, p. 4824.

† OMERS has four major investment divisions: Borealis Infrastructure, OMERS Capital Markets, OMERS Capital Partners, and Oxford Properties.

‡ 156 Square One Limited is an Ontario numbered corporation that is a subsidiary company of AIM and is managed by private investment managers in Ontario (Hawthorne and Stonecap). For ease of reference in this Report, "AIM" is used to refer to the representatives of AIM: 156 Square One Ltd., Hawthorne, and Stonecap. Testimony of A. Costin, Transcript, July 8, 2010, pp. 1428, 1430; Testimony of M. Dal Bello, Transcript, July 29, 2010, p. 2341; Testimony of L. de Bever, Transcript, September 13, 2010, p. 4307.

billion in assets and must make approximately $4 billion annually to cover its pension obligations,[17] while AIM manages approximately $70 billion in assets.[18]

OMERS and AIM (the co-owners) were aware that the city wanted to develop a traditional downtown core, as opposed to a suburban environment, and knew that the City Centre Land was integral to that development.[19] They understood that it was in their interests to foster and maintain good relations with the mayor and city staff, given the amount of property and assets they owned in Mississauga. They regarded it as "good business" to assist the mayor and the city to achieve their development goals.[20] Not surprisingly, however, they acted primarily to pursue their own commercial interest at all times.[21]

The city knew it had to work closely with the co-owners to achieve its vision for the downtown core.[22] To this end, the mayor had been actively involved in discussions with the co-owners over the years regarding the development of the city core, and the city had formed numerous committees to consider problems and issues associated with its development.*

In 2005, Peter McCallion, Mayor Hazel McCallion's son, approached OMERS as a real estate agent about the possibility of purchasing three parcels of the City Centre Land. The proposal contemplated the development of an upscale hotel and condominiums on the land. The co-owners were aware that a hotel of this kind, next to the Living Arts Centre, was an important goal for the mayor and the city.† For example, the present CEO of OMERS, Michael Nobrega, testified that he had been aware since 2001 that building a hotel in the downtown core was important to the mayor and part of the city's vision for the city centre.[23]

According to the co-owners, the primary consideration regarding the potential sale of the City Centre Land involved the "use" to be made of these lands, with sale price being of secondary importance. The co-owners were only prepared to consider "complementary use" projects with the potential to enhance the long-term value of Square One.[24] For that reason, the co-owners considered it to be in their commercial interests to develop the City Centre Land, rather than leave that land vacant – but only to enhance the value of Square One.[25]

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* Two main problems associated with the city core included cost of the land and road patterns. Testimony of H. McCallion, Transcript, September 20, 2010, pp. 4814, 4815, 4817.

† Testimony of H. McCallion, Transcript, September 20, 2010, p. 4851; Testimony of A. Costin, Transcript, July 8, 2010, pp. 1503–4; Testimony of M. Dal Bello, Transcript, July 29, 2010, p. 2277. Exhibit 591, p. 1, references the fact that the mayor told Paul Haggis of OMERS it was her "dream" for a good hotel to be built there.

Michael Latimer, the CEO of Oxford, testified that, in his opinion, a proposal for a hotel combined with condominiums would provide an excellent use of the City Centre Land owing to the increased value if hotel guests and condominium residents shopped at Square One.* The offer presented by WCD was attractive because it meant someone else was taking the capital risk for a complementary use to their investment.[26]

The co-owners considered the concept of a hotel / convention centre as a stand-alone project to be an uneconomic, high-risk endeavour. To render it economically feasible, they understood the need to have condominiums to subsidize or offset the cost of the hotel.† Condominiums are much easier to finance through presales, generating cash flow immediately as they are sold.[27]

The co-owners were willing to sell the land to WCD as long as the use, price, and other terms were right. The co-owners were aware that no other developers had expressed interest in the land, and they were not pursuing potential buyers.[28] The WCD project was a complementary use, but it also met one of the city's major development goals. Participation in the development would assist the co-owners in dealing with the city on other outstanding and future projects.[29] There was value in the good will that would be earned by assisting the city to realize its planning objectives for the downtown core.[30]

There is no question that, for good reasons, both co-owners wanted to pursue good relations with the mayor. Nevertheless, I find that the overriding consideration of both co-owners regarding the sale of the land was, not surprisingly, to enhance their primary investment, Square One.

World Class Developments

Peter McCallion testified that he has been an active registered real estate agent in the Mississauga area since the mid-1980s and that in recent years he has focused on commercial real estate.‡ Mr. McCallion had no prior experience in

* Testimony of M. Latimer, Transcript, July 28, 2010, p. 2201. Mr. Latimer is currently the executive vice-president and chief investment officer of OMERS, but at the relevant time was the president and CEO of Oxford; see also Testimony of K. Lusk, Transcript, July 26, 2010, pp. 1705–7, and Testimony of L. de Bever, Transcript, September 13, 2010, p. 4305.

† The property owners appreciated that establishing a four-star hotel without condominiums in this location would have been difficult economically for a number of reasons, including the fact that hotels have a maturation period during which the initial return on investment would have been nominal. Testimony of A. Costin, Transcript, July 8, 2010, pp. 1518–19.

‡ Mr. McCallion acknowledged that his real estate licence has been suspended on two occasions since that date: in 2007, for not having completed the necessary continuing education; and in 2009, for non-payment of

putting together a development project. His experience was strictly as a real estate agent, and he therefore needed to bring other individuals with development experience into the project.[31]

Mr. McCallion's interest in developing a hotel / condominium project in the city core dated back to an unsuccessful attempt to secure financing from investors from China for such a deal in 2002.*[32] He testified that approximately two to three years later he was approached by someone who knew investors from Korea who were looking to invest in Canada. Mr. McCallion took his idea to a couple of developers, and one of them put together a package for the potential investors. The Korean investors were not impressed with the package but told Mr. McCallion that they would finance a development team, should he assemble one.[33]

In late 2004, Mr. McCallion approached developer and family friend Murray Cook about the possibility of becoming involved in his hotel / condominium project in the Mississauga city centre.[34] Mr. McCallion knew that Mr. Cook was experienced in development projects, including hotels, and that he had many contacts in the business. Mr. McCallion wanted to bring in Mr. Cook to lend credibility to the project and to negotiate the agreement of purchase and sale (APS) of the City Centre Land with the co-owners. He felt that Mr. Cook would be the ideal person to deal with the co-owners.[35]

At some point in 2005, Mr. Cook made an initial presentation to Oxford representatives regarding the proposal, following which he attended a number of meetings and presented the proposed project to the city. In Mr. Cook's opinion, the hotel was a key factor for everyone throughout the entire process.[36]

Corporate History of WCD

On February 22, 2005, Peter McCallion instructed solicitors to form World Class Developments Incorporated.[37] D. Jared Brown, the incorporating solicitor, and his colleague Joseph Caprara were named as the president and vice-president of World Class Developments Incorporated, respectively, and both were named as directors and officers.[38] Messrs. Brown and Caprara are solicitors with the firm Caprara Brown LLP (Caprara Brown).

By 2006, Mr. McCallion was aware that his potential investors were not

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insurance. Testimony of P. McCallion, Transcript, July 27, 2010, pp. 1793–94.

* Mr. McCallion testified that, before 2002, he had no interest in developing land in the city centre for a hotel. Testimony of P. McCallion, Transcript, July 27, 2010, p. 1798.

prepared to invest in this project until he could confirm he had secured the City Centre Land. Mr. McCallion approached his friend Leo Couprie, an experienced businessman operating a food import/export business, about the project and explained that he was looking for an investor to provide the deposit money for the purchase of the land. Mr. Couprie's understanding was that once the land was secured, Mr. McCallion would find a large developer to take over the project.[39]

Mr. McCallion testified that, by July 2006, it was clear that Mr. Couprie would be investing in World Class Developments Incorporated and, as a result, would replace the solicitors as the sole officer and director of the company. On Mr. McCallion's instruction, Mr. Couprie directed Caprara Brown by email on August 3, 2006, stating that, until World Class Developments Incorporated firmed up a deal with OMERS, the corporation was to remain in his name only, because he was providing the deposit money. He also requested that the corporate address be changed to the one he provided. By email the following day, Mr. Brown confirmed receipt of Mr. Couprie's instructions and assured him that "all existing directors and shareholders (Caprara and myself) will be scrubbed and replaced with you."[40]

On August 9, 2006, to address a printing error on letterhead and business cards, the lawyers changed the name from "World Class Developments Incorporated" to "World Class Developments Limited" and incorporated the changes referred to above.[41]

Although it is odd that the printing error led to the reorganization of the company, Messrs. McCallion and Couprie formally created World Class Developments Limited (WCD) in November 2006. In a letter to Mr. Couprie dated November 20, 2006, Mr. Brown confirmed that, based on Mr. Couprie's and Mr. McCallion's instructions, the corporation had been reorganized through the filing of articles of amendment.[42] Mr. McCallion told his lawyers that the company was Mr. Couprie's company since Mr. Couprie was the person with the money. He and Mr. Couprie instructed the lawyers to change the directors, officers, and shareholders of WCD to reflect Mr. Couprie as the principal of the corporation, a fact confirmed by letter.[43]

Peter McCallion's Interest in WCD

The Terms of Reference require me to make findings as to the relationship among the mayor and various participants in the WCD transaction. I must con-

sequently review in some detail the evidence relating to the nature and extent of Peter McCallion's involvement in WCD. Mr. McCallion held himself out as simply a real estate agent through most of the time period 2005–2009. For the reasons that follow, I find that he was, and knew that he was, a principal of WCD.

According to Mr. McCallion, when he began to promote his proposal for the hotel / condominium development, he was aware he needed both financing and someone to negotiate the agreement.[44] For his efforts, he hoped to receive a commission on the sale of the land.* He also expected to be the listing agent for the sale of approximately 2,500 condominium units on which he anticipated his gross commission to be approximately $10 or $12 million.[45]

Despite having incorporated WCD and having assembled the initial management "team" (Murray Cook, Leo Couprie, and himself), Mr. McCallion maintained that his involvement with WCD was "strictly [as] a real estate agent."[46] He testified that he was never an officer or director of WCD. He did acknowledge to the Commission, however, that, by the time he gave his testimony, he understood that he owned 16 per cent of the equity in WCD.[47]

I do not accept Peter McCallion's testimony. I believe that Mr. McCallion understood at all material times that he had a significant ownership interest in WCD but may not, at all times, have had a precise understanding of the nature of that interest. In his testimony, Mr. McCallion minimized his role. However, a review of Mr. McCallion's association with and conduct on behalf of WCD reveals that he was responsible for a number of important decisions made on behalf of WCD and that he took a number of active steps to further the WCD project. The following facts provide insight into Mr. McCallion's role in WCD.

As noted, Mr. McCallion incorporated WCD. Acting as an agent on behalf of WCD, he presented an offer to OMERS dated March 21, 2005, to purchase the City Centre Land for the development of a hotel.[48] Mr. McCallion acknowledged he was aware of the contents of the offer and had provided instructions with respect to the purchase price offered. The offer was signed by Mr. Brown, the lawyer who had incorporated WCD.[49]

When the potential offshore investors with whom Mr. McCallion had been in contact about this project suggested to him that he put together a team for

* Mr. McCallion testified that he had expected to be paid the usual agent's fee if the transaction proceeded to closing; however, it became apparent that the co-owners were not willing to pay him a commission on the sale of the land. Testimony of P. McCallion, Transcript, July 27, 2010, pp. 1806–7, 1876, 1919–22.

the project, he turned to Murray Cook, a family friend. Mr. Cook was given responsibility for dealing with the co-owners, the approval process, and the process of hiring and working with experts. Mr. McCallion understood that Mr. Cook brought credibility and experience to the project.[50] For his part, Mr. Cook understood that his role was to "run the deal" according to the shareholders' agreement, which gave him control of WCD even though he was a minority shareholder.[51]

Mr. Cook testified that when Mr. McCallion approached him about the project he (Mr. McCallion) informed him that he represented a group of offshore investors who were willing to invest the total equity required for the project. According to Mr. Cook, having an investor group was a huge starting point, especially for hotel projects. Once they started working together, he advised Mr. McCallion regularly on the status of the negotiations with the co-owners so that Mr. McCallion could, in turn, advise his investor group. Mr. Cook testified that his understanding throughout was that Mr. McCallion would receive a fee from the investor group he represented; he always assumed that Mr. McCallion did not have a financial stake in the deal. He learned much later on that Mr. McCallion expected to become the agent for the eventual condominium sales. However, he also clarified that it would have been difficult to bring in other investors if Mr. McCallion was already the predetermined real estate agent for the condominium sales and that it would be unrealistic for such a listing agent to expect more than approximately half a per cent commission on each condominium sale.[52]

Once consultants on land-use issues were hired, Mr. McCallion made a request (unique in Mr. Cook's experience) to attend the consultants' meetings because he wanted to understand how big projects were put together.[53] For that reason, Mr. McCallion attended virtually all the meetings of the various consultants and was even involved in the selection of the architectural team.* Mr. Cook made it clear to everybody, including the co-owners, that Mr. McCallion was present merely as an agent representing the financial backers and that he would be compensated by them.[54]

Mr. McCallion testified that he spoke with Mr. Cook on a regular basis,

* According to Mr. McCallion, he attended consultants' meetings to represent Leo Couprie's interest once Mr. Couprie became an investor in WCD. He would pass on information pertaining to WCD to Mr. Couprie. Testimony of P. McCallion, Transcript, July 27, 2010, pp. 1818–19; Testimony of M. Cook, Transcript, September 15, 2010, p. 4447.

but was not involved in any of the negotiations regarding the APS. Mr. Cook provided him with a copy of the APS, executed on January 31, 2007, in early February 2007.[55]

In 2006, Mr. McCallion encouraged Mr. Couprie to invest in the project. He explained to Mr. Couprie that he had an investor in Korea who would develop the project once the land was secured. Mr. McCallion asked Mr. Couprie to lend him $750,000, and offered Mr. Couprie an additional $750,000 as a return on his investment.[56] A loan agreement between WCD and Leo Couprie, guaranteed by Peter McCallion, was executed on January 29, 2007.[57]

A shareholders' agreement signed February 28, 2007, among WCD, Murray Cook, and Leo Couprie, reflected the fact that Mr. Couprie held 80 per cent of the shares of the corporation and Mr. Cook the remaining 20 per cent of the shares.[58] Mr. McCallion explained that Mr. Cook received a 20 per cent stake in WCD as compensation for his role in negotiating the deal and lending his credibility to the project, and Mr. Couprie held the remaining shares because he had put up the money for the project.[59] As I shall discuss, the 80 per cent interest in WCD held by Mr. Couprie was held for the benefit of Peter McCallion pursuant to a declaration of trust.[60] Certainly by the time that Mr. McCallion signed the declaration of trust on January 29, 2007, he understood that he had a significant interest in WCD and that his interest was disguised, as it was held in trust by Mr. Couprie.

Mr. McCallion testified that he had no involvement in the negotiation of the shareholders' agreement between Mr. Couprie and Mr. Cook.[61]

Mr. McCallion effectively decided who would control WCD, by replacing Mr. Cook with an investor, Tony DeCicco, who assumed day-to-day control over the company. By the summer of 2007, Mr. McCallion believed that Mr. Cook was trying to squeeze Mr. Couprie out of WCD. Mr. McCallion was worried that, if Mr. Cook was successful, he would no longer be the selling agent for the condominiums because Mr. Cook's potential partners would bring their own in-house salespeople. Put another way, Mr. McCallion felt that his ability to earn the commissions he anticipated receiving on the sale of the condominiums would be adversely affected if Mr. Cook brought in new investors.[62]

From Mr. Cook's perspective, it became apparent that Mr. McCallion's original investors were unable or unwilling to invest in the project, and he asked Mr. McCallion to allow him to put together a group of investors. When he learned that Mr. McCallion intended to become the selling agent for the

condominiums, he advised Mr. McCallion that it would be difficult to find an investor if the selling agent had been predetermined, because most investors and developers had teams in place with whom they preferred to work. These firms proposed sophisticated sales strategies. Mr. Cook made it plain to Mr. McCallion that making a project work with a predetermined real estate agent was a non-starter. Mr. Cook testified that he and Mr. McCallion disagreed on this point and that, in the summer of 2007, Mr. McCallion brought his friend Tony DeCicco into WCD.[63]

Tony DeCicco is a businessman experienced in residential subdivision and condominium development. He had no prior experience with a project of this sort or highrise development. I find that the question of who would sell the condominium units became a source of disagreement between Mr. McCallion and Mr. Cook, leading ultimately to Mr. McCallion's decision to replace Mr. Cook with Mr. DeCicco.

Mr. McCallion testified that he had kept Mr. DeCicco informed about what was happening with the WCD project because Mr. DeCicco had considerable means and might ultimately invest in WCD. WCD was not meeting its financial obligations in the hands of Mr. Cook. Mr. McCallion believed that Mr. DeCicco had both the resources to finance the project and the experience to bring it to fruition. Therefore, Mr. McCallion asked Mr. DeCicco to take over the lead and manage WCD – to deal with the co-owners, the consultants, and the city. He testified that he never read the agreement between Landplex (Mr. DeCicco's company) and Mr. Couprie; however, he understood that Mr. Couprie remained a part of WCD. Mr. Couprie's involvement was important to Mr. McCallion because he believed Mr. Couprie would make sure he became the real estate agent for the entire condominium project.[64]

Mr. McCallion demonstrated financial commitment to the project as well. He acknowledged that he *lent* money to WCD to meet its financial obligations to keep the deal alive, and, on occasion, he *received* money from WCD for his personal living expenses. WCD's financial records demonstrate a number of occasions when Mr. McCallion put money into, and received money from, the company.*[65] As he admitted, these were unusual steps for a real estate agent to take.

Mr. McCallion borrowed $50,000 from TACC Group Inc., a construction

* Testimony of P. McCallion, Transcript, July 27, 2010, pp. 1807–8, 1839, 1844; Mr. McCallion testified that he had previously loaned money for a deposit in a real estate transaction.

company, which he deposited into WCD to cover the site plan application fee by the July 31, 2007, deadline. He personally guaranteed this loan on behalf of WCD by signing a promissory note "ASO" ("as signing officer") on July 27, 2007, and testified that he was aware he had signed the document as such.* He admitted that he did not have the authority to sign on behalf of WCD; however, he signed the promissory note in this fashion because WCD needed the money.[66] He knew he did not have the financial means to personally guarantee WCD's debt,[67] but he thought that, by the time the note came due on November 1, 2007, the WCD group would have a financial partner,[68] given his knowledge that Mr. DeCicco was involved in discussions with Mr. Couprie about investing in WCD.[69]

Mr. McCallion testified that, although he remained confident WCD would be able to complete the hotel component of the development project once Mr. DeCicco came on board, he and Mr. DeCicco had concerns about the economy and the timing of construction and knew the hotel could not be completed by the dates specified in the APS. Mr. DeCicco was trying to extend the timing for the construction of the hotel. Mr. McCallion added that he personally approached Michael Kitt of Oxford to request additional time to meet the condition dates imposed under the APS, although he maintained that he was not involved in negotiating the terms of the amending agreement.[70]

In June 2008, a document prepared by Ernst & Young was circulated to market an investment opportunity in WCD's hotel / condominium project.[71] Emilio Bisceglia, a lawyer who had been retained by Mr. DeCicco to act on behalf of WCD (and whom Mr. DeCicco described in testimony as his "partner" in the project),[72] gave direction to Ernst & Young with respect to the circular. The document specifically advertised that three individuals – Tony DeCicco, Peter McCallion, and Murray Cook – were the owners of WCD.[73] Mr. Bisceglia said that Mr. McCallion was described as an owner because, to his knowledge, that was the truth.[74] Mr. McCallion testified that he had not seen this document prior to the Inquiry.[75] I do not accept that.

In sum, Peter McCallion's own actions confirm his ownership interest in WCD and his exercise of influence over the company consistent with that interest.

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* Exhibit 196. He signed as co-signer as well.

Leo Couprie's Role

Leo Couprie's role in these events is significant. In testimony he described the precise nature of the relationship among WCD, Mr. McCallion, and Mr. DeCicco. His evidence reinforces that Mr. McCallion had an ownership interest in WCD. Importantly for the Commission, Mr. Couprie also provided it with an executed declaration of trust, which was witnessed by the mayor and which I will review below.

Leo Couprie first met the mayor and Mr. McCallion on a business trip to China in 2002. Mr. Couprie was there for his own business purposes, while Mr. McCallion was meeting with prospective Chinese investors about building a hotel in the Mississauga city centre.[76]

Mr. McCallion had incorporated WCD before Mr. Couprie became involved in the company. Mr. McCallion approached him about investing in WCD in the summer of 2006 on the basis that an investor group in Korea was prepared to develop the project if Mr. McCallion could assure the investors they would gain title to the property. He understood that Mr. McCallion was looking to him only for deposit money for the property. As noted, Mr. McCallion asked Mr. Couprie to "invest" $750,000, and offered a return of an additional $750,000 on his original investment.[77]

Mr. Couprie was prepared to put up the money as long as it was secured and fully refundable. After receiving verbal legal advice, he gave Mr. McCallion $600,000 of his own money and borrowed an additional $150,000 from friends, for the requested total of $750,000.[78]

The deal was attractive to Mr. Couprie in that it permitted him to double his money, although he knew it would take some time to receive the $1.5 million he was due.[79] The successful completion of the project depended on: (1) closing the deal with OMERS; (2) the developer then building the condominiums and engaging Peter McCallion as the listing agent; and, finally, (3) actually selling the condominiums.[80]

Mr. Couprie explained that he came into the project as a lender, not as a shareholder, and he requested that he be entitled to hold shares as collateral for his money.[81] As already noted, on August 3, 2006, Mr. Couprie instructed the lawyers at Caprara Brown to change the corporate documents to reflect Mr. Couprie as the principal and sole shareholder / director of WCD.[82]

Mr. Couprie testified that he had no experience in land development and did not get involved in the day-to-day business of WCD.[83] He understood that

Mr. McCallion's role was to be his representative in putting the deal together. He further understood that, if the deal came together, Mr. McCallion would try to be appointed the agent for the condominium sales.[84]

On January 29, 2007, a loan agreement between WCD and Leo Couprie was executed wherein Mr. Couprie agreed to lend WCD $750,000 to be used as a down payment, on the provision that he would double his money once a financial partner was found. The loan agreement bore Peter McCallion's signature as guarantor, promising "prompt and full payment of all amounts" to Mr. Couprie.[85] Mr. Couprie knew that Mr. McCallion did not have $1.5 million at the time he guaranteed the loan.[86] The purpose of obtaining the guarantee from Mr. McCallion was to ensure that someone would ultimately pay Mr. Couprie. If the future developer refused to pay Mr. Couprie, Mr. McCallion would pay him from his anticipated commission from the sale of the condominiums. According to Mr. Couprie's understanding of the loan agreement, he was entitled to the total repayment once the company found a financial partner to develop the land.[87]

Mr. McCallion explained that, at the time the loan agreement was signed, Mr. Couprie was given 100 per cent of the shares in WCD because no one other than Mr. Couprie had invested in WCD. For this reason, Mr. Couprie had control of WCD's bank account from January until August 2007, when Landplex (a company controlled by Mr. DeCicco) took it over.[88]

On August 1, 2007, Leo Couprie and Tony DeCicco signed a "Declaration of Trust and Shareholders' Agreement" (the Landplex agreement).[89] The Landplex agreement reflected the fact that Mr. Couprie was the beneficial owner of 80 common shares. He was, however, holding 80 per cent of those shares (64 shares) in trust for Landplex. He held the remaining 20 per cent (16 shares) himself.[90] As I will explain, he held these shares in trust for Peter McCallion.

Murray Cook remained a shareholder with 20 per cent of the shares in WCD.[91] According to Mr. Couprie, the Landplex agreement reflected Mr. DeCicco's involvement and investment in WCD. He testified that Mr. DeCicco was to be an interim partner who would fund the corporation until the WCD group found a developer.[92]

According to Mr. McCallion, Mr. Couprie's interest in the project after signing the agreement was limited to ensuring that he was repaid for his

investment.* He testified that he was not involved in Mr. Couprie's decision to enter into the Landplex agreement; however, he agreed it was best for the corporation.[93] According to Mr. Couprie, Mr. McCallion consented to Mr. Couprie's transfer of 80 per cent of his interest to Landplex.[94]

Mr. Couprie understood that Mr. McCallion's objective in putting the whole deal together was to be the listing agent for the sale of the 2,500 condominium units. It was to be the "crowning glory" of Mr. McCallion's real estate career. Mr. Couprie acknowledged in his testimony that he believed he continued to hold 16 shares in WCD for the benefit of Peter McCallion, and he was prepared to continue to do so until he received his $1.5 million. Oddly, Mr. Couprie testified that he did not hold these shares "in trust" for Peter McCallion but rather held them *for* him,[95] a difference that is not apparent to the Commission.

Declaration of Trust

On January 29, 2007, Mayor Hazel McCallion, Peter McCallion, and Leo Couprie dined together at Pier 4 Storehouse Restaurant in Toronto. At Mr. McCallion's request, the mayor witnessed the signing of two documents by Mr. Couprie and Mr. McCallion: the loan agreement (referred to above), and a declaration of trust.[96] Mr. McCallion signed the declaration of trust as the beneficiary, and Mr. Couprie signed it as the trustee.[97]

The purpose of executing the declaration of trust was to ensure that the financial arrangement involving Mr. Couprie's holding of shares in WCD in trust for Mr. McCallion was documented and understood. As I will elaborate upon, I do not accept the evidence of Mr. Couprie or Mr. McCallion in which they sought to persuade me otherwise. In the final analysis, Mr. McCallion had a beneficial interest in the shares of WCD. It is clear from the very title of the loan agreement that Leo Couprie was lending money to Mr. McCallion – it was Mr. McCallion who was the real investor in WCD. No other conclusion is available on the evidence.

Mr. Couprie understood the declaration of trust to indicate that he was the trustee and that he held 80 per cent of the shares of WCD for the benefit of Mr. McCallion.[98] As trustee, he promised the following:

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* Mr. Couprie's deposit money, $750,000, was repaid. Testimony of P. McCallion, Transcript, July 27, 2010, p. 1917; Testimony of L. Couprie, Transcript, August 17, 2010, pp. 3436–37.

1 that he would not deal with the property in any way except to transfer it to Peter McCallion;
2 that he would account to Peter McCallion for any money he received in connection with holding the property; and
3 that Peter McCallion was to pay him double the amount he had advanced.[99]

Mr. Couprie testified that the declaration of trust represented an accurate statement of this business relationship, although both he and Mr. McCallion took the improbable position that it was prepared for estate purposes should one or both perish on a planned trip to Asia. Mr. Couprie said that when he returned from this trip he simply forgot about the agreement.[100] Mr. McCallion discarded his copy of the agreement.[101]

I accept Mr. Couprie's evidence with respect to his understanding of the content of the document and the fact that it reflected the state of their relationship. I do not accept Mr. Couprie's testimony that the document existed simply for the time frame of the Couprie / McCallion trip to Asia in January–February 2007. If that had been the case, he would not have forgotten about its existence on his return. Mr. Couprie is a reasonably sophisticated businessman who operates a successful company in Canada and abroad. If the trust relationship no longer existed, Mr. Couprie would have taken steps to document and protect his interest in some way. I find that it was always contemplated and understood by Peter McCallion that he was the beneficial owner of shares in WCD.

It is clear from reading the document that Mr. Couprie was holding his shares of WCD in trust and had agreed that he would not dispose of the shares except to transfer them to Mr. McCallion.[102] Mr. McCallion explained that, by the time of the Inquiry, he understood the document created a relationship between him and WCD that went beyond his being a real estate agent, a fact he claimed he did not appreciate at the time. Similarly, Mr. McCallion testified that, until this Inquiry, he did not understand he had guaranteed $1.5 million and had become the beneficial shareholder of most of WCD's shares.[103] This is very difficult to accept.

Mr. Couprie's testimony does not support the conclusion that Mr. McCallion was unaware of his interest in WCD. Mr. Couprie testified that he believed the declaration of trust, which reflected the arrangement wherein he held 80 per cent of the shares for the benefit of Mr. McCallion, was replaced with the new

agreement he signed with Landplex on August 1, 2007. No mention was made of the previous declaration of trust at the time the Landplex agreement was signed, and Mr. Couprie was not aware of any other document that revoked the declaration of trust. Although the Landplex agreement said nothing about an interest being held for Mr. McCallion, Mr. Couprie testified that he and Mr. McCallion had an understanding that Mr. Couprie would give Mr. McCallion his shares once he received his $1.5 million.[104]

OMERS' and AIM's Understanding of Peter McCallion's Interest in WCD

It is clear that those involved in this deal on behalf of OMERS / Oxford* and AIM were aware from the outset that Peter McCallion was connected to WCD. However, a review of the evidence suggests that, during the negotiations and before the signing of the APS, the co-owners believed Mr. McCallion was merely an agent acting on behalf of WCD, based on the materials and information provided to them.

Mr. McCallion knew Michael Nobrega and approached him in early 2005 with his concept of the hotel and convention centre.[105] At that time, Mr. Nobrega was the president and CEO of Borealis Infrastructure, OMERS' infrastructure investing arm. Mr. Nobrega testified that Mr. McCallion was known around town as an agent, and he referred him to Oxford (OMERS' real estate development group).[106] Shortly thereafter, Mr. McCallion, acting as an agent for WCD, presented an offer to OMERS signed by Mr. Brown to purchase three parcels of land adjacent to Square One dated March 21, 2005.† World Class Developments Incorporated was a private corporation and unknown to the co-owners.[107] That offer was not accepted.

It appears that on October 3, 2005, the issue of the potential sale of the City Centre Land came to the attention of Paul Haggis, then president and CEO of OMERS, when Mayor McCallion called to express her displeasure to him that OMERS was not selling the land to her "preferred group."[108] Mr. Haggis suggested that Michael Latimer of Oxford "arrange further meetings with Hazel and her developer."[109] Mr. Latimer responded on October 4, 2005, by reporting that he was attempting to contact Murray Cook.[110] There was no reference to Mr. McCallion as part of the "preferred group" or as developer, although, as

* "OMERS / Oxford" is used to refer collectively to representatives of both OMERS and Oxford.

† Exhibit 148. D. Jared Brown was the lawyer who had incorporated World Class Developments Incorporated the month before.

I have found, Mr. McCallion was involved by that time as a principal of the company.

Mr. Latimer testified that he first learned Mr. McCallion was involved with WCD as its real estate agent in late 2005 or early 2006. He was not concerned about Mr. McCallion having that role. He stated that he received this information primarily from the senior vice-president of Oxford, Ron Peddicord.[111] Mr. Latimer explained that part of the process at OMERS / Oxford involved a review of potential projects by its executive committee. In this case, it reviewed the entire agreement of purchase and sale, including Mr. McCallion's role and whether any commission was payable to Mr. McCallion.* Mr. Latimer testified that OMERS / Oxford was not aware that Mr. McCallion was a shareholder. He said that, if those involved at OMERS / Oxford had appreciated the fact that Mr. McCallion was a shareholder, they would have taken a different view of his involvement.†

On January 18, 2006, Ken Lusk was informed by Oxford that the proposed purchaser was Murray Cook, an individual known to him. At that time, Mr. Lusk was an officer and director of Hawthorne Realty Advisors Inc. (Hawthorne), a Toronto-based asset management firm responsible for managing AIM's real estate interests in the Greater Toronto Area.‡ Mr. Lusk testified that Mr. Cook told him Mr. McCallion was involved in the project as a real estate agent. Mr. Lusk had no particular concern about Mr. McCallion's involvement in this deal as an agent and therefore did not seek any further information about his involvement. He was aware that Mr. McCallion would receive a fee on the successful completion of the transaction, and this fact did not cause him to hesitate in his dealings with the mayor regarding the deal.[112] He was unaware of Mr. McCallion's financial arrangements. In any event, the co-owners were not responsible for any commission to be paid to Mr. McCallion.

Ken Lusk passed on the information that Mr. McCallion had presented the original offer to OMERS in an email to Michael Dal Bello, senior vice-president

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* Testimony of M. Latimer, Transcript, July 28, 2010, pp. 2196, 2237–38. He testified that the result in this case was that the APS made specific reference to the fact that the property owners would not pay out any commission.

† Testimony of M. Latimer, Transcript, July 28, 2010, pp. 2196–97, 2238–40. Mr. Latimer agreed that the fact that Mr. McCallion had an interest in WCD would not have prevented OMERS / Oxford from entering into the transaction, but said they would have wanted absolute clarity on his role.

‡ Testimony of K. Lusk, Transcript, July 26, 2010, pp. 1657, 1662–64. Mr. Coleman took over Mr. Lusk's role at Hawthorne in May 2007, and from May to December 2007 Mr. Lusk continued as a consultant for Hawthorne.

of real estate at AIM, in March 2006.[113] According to what he had been told, Mr. McCallion's interest in the WCD project was limited to acting as an agent for WCD; he was not made aware of any other interests that Mr. McCallion had in the project.[114] In 2008, Mr. Lusk's successor, Craig Coleman, required information about the due diligence performed on WCD at the time the original agreement was signed (January 2007). Mr. Lusk responded in an email as follows:

> Oxford did most of the due diligence because they did not know Murray Cook. I met with Murray and he told me that he owned WCD. He also told me that he would be putting up his own funds for the planning work, legals and the deposits but he would need an investor to pull the deal off. He told me who the possible investors were. Michael was aware of these discussions. I spoke to the Mayor about whether Murray could pull this deal off and she said she thought he could.[115]

Leo de Bever, the chief executive officer of AIM, testified that at the time of the transaction between the co-owners and WCD, he knew of Mr. McCallion's involvement as a real estate agent only. Part of AIM's due diligence was to make inquiries about the shareholders in a given transaction.* Mr. de Bever believed that inquiries were made prior to January 2007 about the specific involvement of the mayor's son in WCD, and AIM was told he was not involved as an owner.[116]

Mr. Dal Bello understood Mr. McCallion was an agent and that he was to be compensated by the purchaser. Had he known that Mr. McCallion was a shareholder in WCD, it was likely the deal would have been a "non-starter" because the "potential perception of conflicts and issues would have been pretty apparent to [them]."[117]

Murray Cook testified that, from early on in his negotiations with the co-owners, he consistently made it clear that Peter McCallion was the agent for the purchasers, was to be compensated by the purchasers, and was present at meetings in this capacity.[118]

Michael Kitt testified that, when he joined Oxford on November 1, 2007, the APS had already been signed.[119] From the outset of his involvement with

* Testimony of L. de Bever, Transcript, September 13, 2010, pp. 4282, 4297, 4300. Mr. de Bever testified that AIM first learns who the shareholders are in a given deal, and then makes a judgment call as to what connections they may have to related parties or related institutions.

this file, he quickly understood there was "some fuzziness" associated with it – he was informed that the mayor was a strong supporter of the hotel development and that her son was "around the file."[120] He never understood Mr. McCallion's actual role in this transaction. Mr. Kitt testified that he spoke to others at Oxford seeking clarification. Although no one confirmed Mr. McCallion's role as an agent in the transaction, they all agreed that they were not paying him a commission. He pointed out that there would have been inquiries into the people behind the scenes at WCD at the time of the original transaction because, in a deal as complicated as this one, the nature and identity of the purchaser were very important considerations.[121]

Michael Nobrega was appointed CEO of OMERS on March 12, 2007.*[122] As of March 2008, he was not aware of Mr. McCallion's true role in the hotel project and he did not know the identity of the principals behind WCD.[123]

It appears that Mr. McCallion was described to the co-owners as an agent in the transaction. Both co-owners accepted that Mr. McCallion was the real estate agent representing WCD in the transaction, and it appears that discussions about his role in WCD at this stage touched only on the fact that his fees would not be the vendors' responsibility.† In the eyes of the co-owners, Mr. McCallion was not a person of influence, and he was not involved in dictating or negotiating the APS.[124]

I find that the only information disclosed to the co-owners about Peter McCallion's role in WCD was that he was its real estate agent. I find that the co-owners understood from Mr. Cook that he (Murray Cook) was the only principal of WCD before the execution of the APS. Mr. Cook was known to AIM. Given that Mr. Lusk gave assurances to OMERS / Oxford about Mr. Cook, the co-owners did not see the need to look further. The co-owners did not seek clarification or question Mr. McCallion's involvement in WCD leading up to the signing of the APS.

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* Prior to this date, Mr. Nobrega was president and CEO of Borealis, and therefore was not involved with this transaction at its outset. Testimony of M. Nobrega, Transcript, August 16, 2010, p. 3102.

† Testimony of M. Kitt, Transcript, August 19, 2010, pp. 4014–15; Exhibit 97, APS article 6.6(a), specifically states that the vendors will not pay any commission fees.

6 The Mayor's Role in the WCD Project

Introduction

According to Mayor McCallion, she understood from the outset that her son Peter was to receive a commission for his work on the WCD project if the vendors agreed to sell the land to WCD.[125] Both her son and Murray Cook, she testified, knew from the outset that, if WCD's site plan application came before city council, she would have to declare a conflict of interest. She made it clear to them she would not get involved in anything to do with the city or in any discussions with city staff with respect to the WCD project.[126]

The mayor testified that she took this position based on her understanding of the *Municipal Conflict of Interest Act* (MCIA).[127] If an application for which a member of a councillor's family is involved "comes before a committee of council or a council meeting … you must declare a conflict and indicate what your conflict is … [and] once it comes to council, you must not influence in any way."[128]

The mayor acknowledged that her son's pecuniary interest in the transaction put her in a position of conflict with the WCD project.[129] In her opinion, the MCIA was "very straightforward" – it did not preclude her from advocating for the WCD project but required only that she declare a conflict when the matter came before a committee of council or a council meeting. The mayor testified she understood the only constraints on her behaviour were those contained in the MCIA.[130]

As a result, the mayor believed she was entitled to intervene on behalf of WCD on the basis that the project was in the city's interests and that she was fulfilling her role as mayor by promoting the desire of city staff. She was reluctant to accept that her son's interest in WCD put her in a real, or even perceived, position of conflict when intervening on behalf of WCD to lend credibility to, to promote, and to support the project.[131]

The following section reviews the mayor's involvement in the negotiations that led up to the execution of the APS on January 31, 2007. A review of the mayor's involvement and her influence over the vendors regarding amendments to the APS and extensions of the condition dates is set out below, in section 8 of this Report.

Steps Taken, October 2005 Onward

The mayor acknowledged that she became involved in the negotiations between WCD and the co-owners first to secure the land, then to reach a final agreement, and finally with respect to extensions to allow WCD more time to try to find an acceptable hotel for the city centre site. She explained that her ambition was to achieve her goal of a vibrant city core, and to that end she involved herself in the negotiations on behalf of the city in order to advance the public interest. The mayor made her concern very clear in her testimony – if the investor was unable to purchase the land and secure it with conditions, the hotel project could not move forward and succeed.[132]

Steps Taken to Secure the Land

The mayor was "excited" when she learned an investor was prepared to purchase the land and start the project, although she knew it would be up to "the efforts they would make" and the "contacts they had" if they were to deliver a hotel next to the Living Arts Centre.[133] Given her passion for the project, she intervened on behalf of the purchaser WCD with each of the co-owners, but principally with OMERS / Oxford, during the negotiations leading up to the signing of the APS.[134] From the outset, the mayor was aware her son was spearheading the project and that he stood to gain financially from its successful completion.

The mayor had met with her son and Murray Cook about WCD at least as early as May 18, 2005, at which time she was aware that Mr. Cook was going to head up WCD.[135] The mayor understood that her son had hired Mr. Cook as a qualified individual who could handle this project.[136] She made it very clear to Mr. McCallion and Mr. Cook that, when the WCD site plan application came before either a committee of council or a council meeting, she would declare a conflict of interest and would not involve herself in any discussions with staff regarding the application. According to the mayor, if WCD was unable to enter into a purchase agreement with OMERS / Oxford, the hotel would not be built.[137] When she was advised by either Mr. Cook or Mr. McCallion that there was a "delay" – OMERS / Oxford had not responded to the WCD offer – the mayor contacted OMERS to follow up on this issue.[138] On October 3, 2005, the mayor spoke with Paul Haggis, then president and CEO of OMERS, to discuss selling the Square One lands to WCD for the hotel project.[139] In an email written by Mr. Haggis the day after his conversation with

the mayor, he described her displeasure that OMERS was not selling the land to "her preferred group." Mr. Haggis did not testify, but his email records that the mayor yelled and threatened that she was "going to the media unless [OMERS] did what she wanted."[140] When asked about this email from Mr. Haggis, the mayor acknowledged the "spirited conversation" but observed that WCD was the *only* group which had come forward and that development of the city core had been a challenge over the years.[141]

The mayor's intervention resulted in Mr. Haggis encouraging Mr. Latimer of Oxford to meet with the mayor and "her developer."[142] Mr. Latimer immediately responded that he was attempting to contact Mr. Cook and would follow up with the mayor after he had done so.[143]

On March 9, 2006, Ken Lusk of Hawthorne updated Mr. Dal Bello of AIM by email after he learned that Paul Brundage (OMERS) was pressuring Mr. Dal Bello to agree to sell the City Centre Land. Mr. Lusk informed Mr. Dal Bello that the mayor had been interested in an upscale hotel and convention centre next to the Living Arts Centre for some time, and that an offer to purchase the hotel site plus two adjacent parcels of land from an unidentified purchaser had been presented by the mayor's son, a real estate agent.[144]

In this email Mr. Lusk stated that, as early as January 2006, the mayor had "stepped up the pressure on OMERS to sell the land" and had met with Mr. Haggis, following which Mr. Haggis "undoubtedly put pressure on Oxford." Shortly thereafter, Mr. Lusk was asked to meet with Ron Peddicord and other representatives of Oxford to discuss the situation.[145] At that meeting, Mr. Lusk informed the Oxford people that AIM might consider selling a portion but not all the City Centre Land for an upscale hotel. In his opinion, an upscale hotel was not viable in that location and would need to be supported by more profitable residential developments on the adjacent land. He knew that Mr. Cook was "representing the purchaser on this deal and [that he was] very close to the mayor."[146]

Mr. Lusk advised Mr. Dal Bello that he had asked Oxford to obtain from Mr. Cook the purchaser's identity, a letter of interest from the hotel company, and a concept drawing of the proposed hotel development. He added that he intended to meet with Mr. Cook, whom he knew, and that he needed this information before making any recommendations to Mr. Dal Bello. He commented that he thought Oxford, too, would be interested in receiving this information before deciding on the sale of the land.[147]

In March 2006, the mayor had lunch with Mr. Lusk. He and the mayor discussed "who AIM was" – namely, the pension arm of the Alberta government. They also discussed the mayor's desire for development around Square One and her concern about the lack of progress. It appeared to Mr. Lusk that the mayor was aware AIM had an interest in the City Centre Land. Mr. Lusk testified that he asked the mayor whether she thought Mr. Cook could pull off the hotel project. The mayor endorsed Mr. Cook. She responded that she believed he had the capability to complete the project.*[148]

The mayor testified that she did not know the details of the negotiations between WCD and Oxford, other than that the deal was not moving as expeditiously as it should and that time was running out. She recalled that Mr. Cook was frustrated and that he suggested she meet with Mr. Lusk to express concern over the delay in concluding the land deal.[149]

Some months later, on October 20, 2006, the mayor called Mr. Lusk. She was upset the transaction was taking so long to complete. She told Mr. Lusk another developer had approached the city about building a hotel in the vicinity, and she was concerned that this possibility could jeopardize the future of a hotel adjacent to the Living Arts Centre.[150] The mayor testified that she impressed upon Mr. Lusk that the sale of the land was taking too long and was delaying the efforts to acquire a hotel. For her part, the mayor did not recall another developer approaching the city about building a hotel in the vicinity, but did recall indicating to both OMERS and Mr. Lusk that development was starting to slow down in Mississauga because of the economic downturn.[151]

Negotiations regarding the APS occurred between May 1, 2006, and the end of January 2007.[152] The APS was signed on January 31, 2007.[153]

Impact of the Mayor's Intervention on the Relationship between the Co-owners

The mayor acknowledged throughout her testimony that she intervened in this transaction to enable the sale of the City Centre Land to WCD. Counsel on behalf of the mayor fairly noted that her interventions were directed to sophisticated institutional investors and involved attempts to persuade them to sell the land in a way which would have assisted the development of the city. The mayor acknowledged that from time to time she has "worked over"

* He added that his opinion of Mr. Cook was not based simply on the fact that the mayor had vouched for Mr. Cook. Testimony of K. Lusk, Transcript, July 26, 2010, p. 1720.

companies doing business in Mississauga to advance the city's interests.[154] This tenacity is part of what has made her an exceptional mayor.

The mayor was familiar with some senior officials at OMERS, most notably CEO Michael Nobrega, and she sought out those she knew to assist with the deal.[155] When she learned of AIM's ownership interest, she sought out Ken Lusk and others at AIM to communicate her concerns.[156] The evidence establishes that the mayor convinced the co-owners to negotiate with WCD regarding the sale of their land despite their concerns regarding the viability of the proposed transaction. Once the deal was in place and the APS had been signed, the mayor continued to involve herself by advancing WCD's requests that the hotel conditions be relaxed and that WCD be given more time to meet its obligations under the APS.

Both co-owners wished to accommodate the mayor by granting the concessions she sought. However, the length of the negotiations and the "back and forth" regarding the terms to secure the hotel became, as described by one counsel, sources of irritation between the co-owners.

The mayor had a much closer relationship with those at OMERS / Oxford than she did with those at AIM.[157] It appears that AIM's representatives were not initially in favour of selling the City Centre Land. However, they were convinced by Oxford, and by May 2006 had agreed to sell, albeit reluctantly, with appropriate conditions in place.[158]

From that point on, the mayor was not only in contact with those at OMERS in relation to the WCD project but also initiated her contact with Ken Lusk.[159] Protracted negotiations regarding the sale extended into January 2007 when the APS was executed. According to an email sent by Mr. Lusk to Ron Peddicord of Oxford on October 12, 2006, AIM representatives had become frustrated with the fact that the negotiations were being held up by the executives at Oxford. He wrote:

> We are now prepared to proceed with the deal but Oxford is not. You should know that, since we are prepared to proceed with the sale on the basis that Murray has agreed to, if the Mayor calls we have no intention of taking a bullet for Oxford. If Oxford is prepared to build the hotel which you suggest as being a possibility in your October 2nd email, we would be prepared to listen to your proposal in this regard.[160]

In March 2008, the mayor reported to OMERS / Oxford executives that Tony DeCicco had taken over the project from Murray Cook. Just as she had previously vouched for Murray Cook as someone she believed could pull off the project,[161] she now vouched for Mr. DeCicco as having the resources to pull it off.[162]

From that time on, WCD attempted to have the hotel conditions in the APS relaxed, if not removed entirely. Removing the hotel conditions was not acceptable to the co-owners, who believed the hotel was critical to the sale of the land. However, they agreed to amend the APS to assist WCD regarding its concerns over the hotel component, given the worsening economic conditions at the time.

On July 9, 2008, during discussions about the amending agreement, AIM representatives requested that Oxford write a letter to the city and to WCD to make it clear they were "very firm on the 4-star hotel requirement" and would not proceed with the transaction without it. John Filipetti, a senior executive at Oxford, understood they wanted this "to be on record to mitigate the mayor / council / press blow-back if [the co-owners] have to terminate the deal."[163] It was apparent that AIM representatives anticipated the project might not come to fruition and were concerned about the mayor's perception of them as a result.

Craig Coleman took over from Ken Lusk at Hawthorne in April 2007.* He testified that, in October 2008, he learned from John Filipetti of Oxford that Mr. McCallion twice proposed a straight sale of the land.[164] On the second occasion, Mr. McCallion presented a WCD business card identifying him as a principal of WCD[165] and said he had spoken to "key people" at the city who were comfortable with a clean sale.[166] Those at AIM inferred from Mr. McCallion's statement that the "key people" meant the mayor, and they decided to wait for confirmation of her position on this issue. Grant Charles of Hawthorne stated in an email to Oxford executives: "[W]e'll wait until you've spoken to 'the key people / person / mom' at the city."† AIM's consultants had become exasperated by the somewhat opaque nature of the dealings with WCD and the mayor. Mr. Coleman testified that, up to this point, he had not been aware of Peter McCallion's involvement in the WCD project.[167]

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* Testimony of C. Coleman, Transcript, August 11, 2010, p. 2819. Mr. Lusk remained involved as a consultant until the end of 2007.

† Exhibit 247. Peter McCallion testified that the "key people" did not mean his mother, but Ed Sajecki. Testimony of P. McCallion, Transcript, July 27, 2010, p. 1945.

Mr. Coleman had two concerns. First, he learned that "Peter McCallion had a WCD business card and purported to be a principal of WCD,"[168] which troubled him given that the mayor was applying ongoing pressure. Second, he understood that Oxford might have been willing to consider Mr. McCallion's proposal for a straight sale of the land. According to Mr. Coleman, this proposal was a "non-starter" for AIM – the hotel requirement was the critical component of the deal from his perspective.[169] AIM representatives wished to maintain a positive relationship with the mayor and had no issue with her promoting the city's vision "as long as that [did] not require [them] to make economic concessions."[170] The deal proposed by WCD at this stage was an economic concession that AIM was not prepared to make. However, Mr. Coleman did not register his concerns with the people at OMERS / Oxford at that time.

By November–December 2008, it was fairly evident to the co-owners that WCD would not be able to satisfy the APS conditions. It is clear from the evidence that those at Oxford, notably Mr. Kitt and Mr. Filipetti,* felt pressured to satisfy the mayor, who had become increasingly involved. By then she had gone over their heads to request concessions for WCD directly from Mr. Nobrega. He stated that he had been "the one on the forefront of receiving all the calls from the Mayor … on these issues," and indicated that by this time he was prepared to involve Leo de Bever, the CEO of AIM, directly to understand the "ambience of the environment."[171]

According to internal correspondence at OMERS / Oxford, the mayor called and said she would like the co-owners to "co-operate" with WCD in these difficult economic times. Consequently, OMERS / Oxford began to consider WCD's requests regarding a straight sale of the land absent the hotel conditions.[172] The mayor testified that, although she did encourage OMERS / Oxford to assist WCD, she was not aware that WCD was seeking waiver of the hotel conditions.[173]

When the mayor sensed that her contacts at OMERS / Oxford either were not agreeing to the concessions she sought or were unable to persuade the co-owner to agree, she had no hesitation in calling AIM directly.[174] Mr. Kitt believed the mayor inferred a division in opinion between those at OMERS / Oxford and those at AIM by October–November 2008. The mayor had been asking him "very direct" questions regarding his and Mr. Nobrega's personal positions,

* John Filipetti did not testify at the Inquiry; however, his emails between October and December 2008 attest to this fact.

Oxford's corporate position, and its co-owner's position. Mr. Kitt believed that because he did not answer these questions the mayor went directly to the co-owners. This appears to have been unhelpful. Mr. Kitt recalled that he did not like the divide and conquer approach and anticipated that the mayor probably picked up that AIM was more concerned about a straight sale.

Mr. Coleman testified that, by December 2, 2008, the mayor had become increasingly involved on behalf of WCD at the same time as Peter McCallion was advancing positions on behalf of the company. This juxtaposition of events made him uncomfortable. He realized that he and those at AIM were not clear about Mr. McCallion's role and they "didn't like the way things were shaping up."[175] He clarified his thoughts on the issue: "[I]f we're getting calls or – indirect pressure from the mayor to relax certain requirements in our agreement with – when her son's on the other side of the table, the optics are not very good."[176]

On December 11, 2008, Mr. Filipetti informed Mr. Coleman of yet another request for an extension. Mr. Coleman's position was that "a deal is a deal," and he did not want to extend it any further.[177] According to Mr. Filipetti's email update to Mr. Kitt, he understood from Mr. Coleman that those at AIM "might" extend for one week, "but [they] think this will just provide one more week for the mayor to pressure [AIM]."[178]

Mr. Coleman's clients at AIM shared his concern over the optics of the deal once they appreciated that Mr. McCallion was a principal in WCD and not just an agent. For Mr. Dal Bello, the possibility that Mr. McCallion might have had a different role in the company made him uncomfortable. He knew there was a difference between being paid a fee and having an equity position in the project, and at that point he believed "[they] were starting to get into a conflict of interest situation."[179]

Mr. de Bever believed the nature of the interest, not the receipt of a financial benefit alone, raised the issue of a potential conflict. Mr. de Bever maintained that, had he known Peter McCallion had an equity interest in WCD, he would not have been prepared to consider the mayor's requests for concessions because of the apparent conflict created by those circumstances. In his opinion, the fact that Mr. McCallion's interest was not disclosed was a serious omission of fact that made it difficult for him to assess the involvement of various players in this transaction.[180]

Those involved on behalf of Oxford felt direct pressure from the mayor,

and they in turn pressured those at AIM to consider a sale of the land without the hotel conditions. AIM representatives were not prepared to accommodate either WCD or its co-owner in this regard, given their position that the hotel provision in the APS was integral to the sale of the land. They understood that the mayor had stepped up the pressure on the co-owners to "co-operate" with WCD, a company in which the mayor's son Peter had recently represented himself as a principal. They were aware that Peter McCallion had (1) suggested a straight sale of the land; (2) presented Tony DeCicco's letter requesting a straight sale; and (3) indicated approval from "key people" at the city for the straight sale.

I concur with Mr. Coleman's view that the optics were not good. As I will discuss in this Report, poor optics can be destructive of public trust in municipal institutions. Indeed, the mayor herself acknowledged there may have been a perception she was attempting to influence the co-owners for the wrong reasons.[181]

The Mayor's Knowledge of Peter McCallion's Interest in WCD

I find, for the reasons that follow, that Mayor McCallion knew Peter McCallion had an interest in the WCD project beyond acting as a mere real estate agent.

Peter McCallion has a close relationship with his mother. He lives a few minutes' walk from her residence, sees her approximately five to six times a week, and drives her to many functions. He told the Inquiry that his relationship with her was such that they spoke regularly, albeit in a general way, about his work projects. Mr. McCallion testified that his mother knew he was involved in the WCD project in some way, but that she did not consider him as anything other than a real estate agent until the Inquiry.[182]

Although his recollection was imprecise, Mr. McCallion believed he would have informed his mother about the potential hotel project at the time he travelled with her to China in 2002. The mayor introduced Peter to potential investors in China during that trip. He admitted that he would have mentioned it to her again when he was in touch with potential investors from Korea a few years later.[183] The mayor knew that Murray Cook was going to head up the project by mid-May 2005, when the three of them met in relation to WCD.[184] Mr. McCallion also acknowledged that he may have discussed the WCD project with the mayor five or six times in 2006, leading up to the signing of the APS.[185]

The mayor could not recall exactly when she learned her son was involved

in the project,[186] but very early on she understood he had formed WCD.[187] She contended that he, along with everyone else in Mississauga, was aware of her desire to see a hotel and convention centre built next to the Living Arts Centre and she thought that he might have felt he could help fulfill her wish, given his involvement in Mississauga real estate.[188]

The mayor testified that, at some point before bringing in Mr. Cook to manage the project, Mr. McCallion told her he had presented an offer to purchase the lands on behalf of an investor, whom she understood to be Leo Couprie.[189] She acknowledged that Mr. McCallion had a financial interest, given his involvement as a real estate agent, and she knew from the outset that he would benefit financially if the land deal was consummated.[190] She testified she was aware that he had brought Mr. Cook in to manage the project. She acknowledged that between May 2005 and September 2006 she attended meetings with her son and Mr. Cook about the WCD project.[191]

The mayor testified she knew from the outset that Mr. Couprie was the investor who put up the money for the project.[192] As she recalled, "finally [Peter] said that he had convinced an investor, Leo Couprie, to invest the money in purchasing the land to proceed with the development of a hotel next to the Living Arts Centre."[193]

Based on the information Peter had given her, the mayor understood him to be a real estate agent representing the investor. She testified she was aware of his role in the project in the following way: she was aware it was his idea to involve Mr. Couprie in the project, although she did not know whether it was Mr. Couprie alone or together with a group of investors. Peter had also told her that he and Mr. Couprie had engaged Mr. Cook to handle the project, which was a good choice in her opinion.*

Mayor McCallion was firm in saying that this was the limit of her knowledge of the matter. She testified that she was never advised by Mr. McCallion or anyone else that he had an equity interest in WCD at any time.[194] He never spoke to her about the specific financial arrangements within WCD, or about WCD's ownership structure.†[195] She made the assumption, given that he was a

* Testimony of H. McCallion, Transcript, September 20, 2010, pp. 4828–29, 4831–32, 4837; September 23, 2010, pp. 5274, 5440–41. The mayor testified that she knew Mr. Couprie as a friend of Peter's who socialized with him.

† Testimony of H. McCallion, Transcript, September 23, 2010, p. 5441. Murray Cook testified that he never discussed with the mayor the financial arrangements he had with Peter McCallion regarding WCD or how Peter was to be compensated. Testimony of M. Cook, Transcript, September 15, 2010, pp. 4493–94.

real estate agent, that he was acting for Mr. Couprie on the deal. She apparently did not ask him anything further about his role. She testified that her understanding of his role did not change between 2006 and 2008. She simply assumed that Mr. McCallion would be entitled to a commission for his efforts when the deal closed.[196]

Leo Couprie agreed that he never had a discussion with the mayor about his role in WCD, nor did he inform her that he was holding shares in trust for her son Peter or that he expected a total return of $1.5 million from his $750,000 loan. He believed the mayor knew he was involved with the project when, at Pier 4 Restaurant, she witnessed their signatures on the declaration of trust and loan agreement. He reiterated that he had not discussed this fact with her. He presumed that Mr. McCallion had informed his mother of the nature of his involvement.[197]

Peter McCallion testified that he did not discuss the APS negotiations with the mayor, and, if he mentioned anything about them to her, it would have been in relation to how long it was taking to negotiate the agreement.*[198] He testified that he was not aware of her involvement in any discussions with OMERS about the project.[199] I do not accept this. In my view, Peter McCallion leaned on his mother whenever he needed assistance.

Witnessing the Signing of the Declaration of Trust and the Loan Agreement

According to Peter McCallion's recollection, the mayor agreed to witness his and Leo Couprie's signatures on two documents, the loan agreement[200] and the declaration of trust,[201] on January 29, 2007, while they were dining together in Toronto.† Mr. McCallion testified that he did not review those documents with the mayor and she did not appear to read them before she signed them as a witness in his presence.[202] Mr. McCallion acknowledged that had his mother read the documents, she would have understood he was potentially making a substantial financial commitment to the company and that he was effectively a shareholder of WCD.[203]

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* Mayor McCallion testified that she never saw or read the APS, although she had been advised it was finalized on January 31, 2007, probably by Murray Cook; she could not recall whether she had discussions with Peter about it. Testimony of H. McCallion, Transcript, September 20, 2010, pp. 4885–86.

† Testimony of P. McCallion, Transcript, July 27, 2010, pp. 1910–11; Testimony of L. Couprie, Transcript, August 17, 2010, pp. 3411–12, 3412–13. According to Mr. Couprie, the occasion was a delayed Christmas dinner. According to Mr. McCallion, the restaurant tended to be dark. Mr. McCallion also testified that Leo Couprie's wife was present, but neither Mr. Couprie nor the mayor recalled Mr. Couprie's wife being at this dinner.

According to the mayor, Mr. McCallion and Mr. Couprie invited her to this dinner because they were leaving for Asia and were interested in any suggestions she might have regarding potential investors and what hotels they should see. She testified she was asked to witness their signatures on two documents and that she did not look at the contents or read the documents, but rather looked at the bottom line and simply witnessed their signatures.[204]

The mayor understood that Mr. McCallion and Mr. Couprie had entered into the trust declaration to protect their interests in the event something happened to them while they were travelling together.[205] She acknowledged, however, that had she read the documents she would have questioned Peter's claim to be Mr. Couprie's agent.[206] She accepted that, had she read even the first two lines of the document entitled "declaration of trust," she would have seen that Mr. Couprie was a trustee and Peter was a beneficiary. She testified, however, that she did not even read the document to that minimal extent.[207] She testified that neither Mr. McCallion nor Mr. Couprie spoke to her about the declaration of trust after it was signed in January 2007.[208]

Mr. Couprie recalled that Mr. McCallion presented the documents to the mayor by explaining they were prepared for estate purposes, since they were travelling together the following day and that they wanted to document "an understanding of the transactions" in case something happened to the airplane. Mr. McCallion did not have any further discussion with his mother about the documents. He simply informed her that they had been prepared for the protection of each of their estates. Mr. Couprie recalled that the mayor paused briefly and either asked him or looked at him to see if it was okay for her to sign the documents, and Mr. Couprie responded that he thought it was fine. He stated that there was no discussion with the mayor about the contents of the documents and he did not know what she knew about them.[209]

Mr. Couprie testified that the mayor signed the two documents within about 30 seconds of each other.[210] By his account the mayor neither looked at nor read the documents prior to signing them, but simply signed them "like an autograph."[211] He testified that he signed as the trustee, Peter McCallion signed as the beneficiary, and the mayor as the witness. Mr. Couprie added that he wrote her name in block capitals below her signature on the trust declaration to make the identity of the witness clear. The mayor did not take copies of the documents with her.[212]

Understanding of the Nature and Extent of Peter McCallion's Interest

The mayor testified that she did not understand *how* the nature of her son's involvement in WCD – whether as principal and shareholder or as agent for WCD – made any difference to the co-owners because either way he would benefit financially. The mayor always assumed that he would receive a commission for his efforts to which he would be entitled when the deal closed. She had declared a conflict of interest at council, given his financial interest. Having said that, she testified that Mr. McCallion did not advise her of the arrangement he made with Mr. Couprie, nor did he advise her that neither the vendor nor the purchaser had agreed to pay him a commission. Peter did not advise her, nor was she otherwise aware, that he hoped to be the listing agent on the subsequent sales of the condominiums.[213]

Peter McCallion testified he told the mayor he was the agent and representative of Mr. Couprie.[214] He did not tell her details such as:

1 the fact that WCD was having difficulty meeting its payment obligations either to the city or to OMERS and that he had made a loan to WCD of $103,500 in the spring of 2007;[215]
2 that he arranged a $50,000 loan through the TACC Group in July 2007 and signed a promissory note to secure the loan;[216] and
3 that he was receiving money from WCD for his living expenses.[217]

Mr. McCallion was content to let the mayor believe Mr. Couprie was the investor throughout and he did not advise her otherwise. He did not tell her how Mr. Cook was going to be compensated or that Mr. Couprie had agreed to transfer 20 per cent of his shares to Mr. Cook. He did not discuss with her the financial arrangements between Mr. DeCicco and WCD.[218]

In her testimony, the mayor told the Inquiry that her son "certainly misinformed" her about his role in WCD, but she did not believe he had done so intentionally.[219] She was never advised by anyone that her son had an equity interest in WCD, and she added that he always told her Mr. Couprie owned 100 per cent of the shares.[220]

I appreciate the mayor's forthrightness in saying that she would have intervened for WCD even if she had known of her son's equity interest in the WCD project. I am nevertheless troubled by the evidence of all parties concerning the meeting at Pier 4 Restaurant, where the mayor witnessed signatures on

the documents setting out the nature of the ownership interests of Peter McCallion and Leo Couprie. At the time of this meeting on January 29, 2007, WCD and its principals had access to lawyers and accountants. Any number of people could have witnessed the signatures on these documents. In my view, it is unfortunate that the mayor was instead chosen to perform this function. I do not accept that the mayor simply signed the documents "like an autograph." Her hesitation while she was looking at the documents and her request of assurance from Mr. Couprie suggest otherwise.

I find that, however brief her review of the documents may have been, Mayor McCallion must have known that her son was involved in the WCD transaction in some substantial way. She had to know he was acting as more than a real estate agent. She knew that the documents she was being asked to sign were business documents (one, Exhibit 190/274, was headed "DECLARATION OF TRUST") and that they bore the signature of her son and Mr. Couprie.* She also knew that Mr. McCallion had formed WCD, and been involved in the WCD transaction for some time, and that Mr. Couprie was an investor in WCD. Given her intention to advocate for the WCD project, she ought to have asked more questions before, or even after, witnessing these signatures.

At the same time, I accept that the mayor was not aware of the precise business arrangement between Peter McCallion and Leo Couprie. She has impressed me as an experienced businesswoman. As she said in her evidence, it was clear Peter did not have the resources to promise Mr. Couprie he would double his money given the amounts at stake. Had she analyzed the contents of the WCD documents closely, I have no doubt the mayor would have voiced concern.

The mayor explained her sheer ignorance of the contents of the trust and corporate documents by saying that people frequently ask her to witness signatures and it is her habit to oblige, given that she had once been a commissioner of oaths.[221] It would not have been a good use of the Commission's time to explore this issue further, but if the mayor routinely follows this practice, it is unwise. Public office holders can be drawn into mischief by placing their signatures on documents without being aware of their contents.

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* In fact, the typed reference under Peter McCallion's signature reads: "Peter McCallion 'the beneficiary.'"

7 Development of a Four- or Five-Star Hotel

Agreement of Purchase and Sale

As I have noted, the mayor advocated for WCD after it initially signed its agreement with the co-owners. The contractual relationship between the parties was fairly complex, and it is necessary to have an understanding of it in order to place the mayor's interventions in their proper context.

The co-owners were not interested initially in selling the land. They were influenced in their decision to sell the land, in part, because they wanted to satisfy the city's desire for an upscale hotel in the city centre. As I have found, the co-owners viewed a hotel as a complementary use for the City Centre Land in relation to Square One. Given that the hotel was the reason for the transaction from their perspective, they needed assurances that it would be built. This resulted in specific conditions in the APS to address their concerns.[222]

The negotiations regarding the APS were protracted. Although there were discussions with respect to extensions of the condition dates and changes to the site plan over time, the sticking points revolved around the conditions required for the transaction to close – assurances that the hotel would be built and that various zoning approvals would be granted.[223] Ultimately, the co-owners' concerns were addressed in the APS by a number of conditions intended to ensure that an appropriate four-star hotel was built which would enhance Square One.

Hotel Conditions in the APS

Abraham (Bram) Costin of McCarthy Tétrault LLP* was responsible for drafting the APS. Mr. Costin assisted the Inquiry greatly by explaining the purpose of the various conditions in the APS from the co-owners' perspective. He drafted a number of specific conditions in the APS to ensure that the right type of hotel would be built, and he included specific terms regarding the ultimate use of the property. The APS was marked as Exhibit 97 in the Inquiry and a copy is attached to this Report as Appendix I.

WCD as purchaser had to meet a number of conditions by specific dates in order to keep the deal alive. The definition of "deposit" referred collectively to the first, second, and any additional deposit to be paid at various times

* Abraham (Bram) Costin is a partner at McCarthy Tétrault LLP in the Real Property and Planning Group. Testimony of A. Costin, Transcript, July 8, 2010, p. 1427.

associated with certain dates. The first deposit was to be paid one business day after execution of the agreement, and the due date of the second deposit was the due diligence date, which was 60 days after the date of the agreement. The first condition date was to be the 120th day after the due diligence date, and by that time there was to be a formal application for site plan approval for the lands, among other things. The second condition date referred to the 180th day after satisfaction of the conditions required on the first condition date.[224]

Article 4.2(e) specified the conditions required by the second condition date:

1 site plan approval;
2 lifting of the H designation;*
3 evidence that the purchaser had entered into a management agreement for the hotel with a four-star or better operator; and
4 severance obtained.[225]

Under article 4.3, the agreement would be terminated and of no further effect whatever if the conditions were not satisfied. Article 4.3 also allowed for extensions of time to satisfy the conditions relating to site plan approval and the H designation, for unavoidable delays including delays caused by referrals to the Ontario Municipal Board (OMB), and for any related court applications. The condition requiring evidence of a hotel management agreement was not subject to an extension.†[226]

Mr. Costin explained that a number of the conditions for the purchaser and the vendor mirrored each other so that, if these conditions were not met, either party could walk away from the agreement. For example, articles 5.1 and 5.2 referred to the vendor's and the purchaser's closing documents and contained a number of reciprocal documents to be delivered by both on closing.[227] Article 6.6(a) required the purchaser to be responsible for any commissions owing to any third party.‡[228] Article 6.6(b) stipulated that the purchaser agreed to enter

* The "H" designation is a term used to signify a holding on land. The holding is to ensure that certain requirements are met before the land is developed, and it must be "lifted" before development takes place.

† There was no extension to the condition regarding evidence of a hotel management agreement because an OMB appeal or other court action was irrelevant to whether WCD had obtained the required agreement. Either WCD could demonstrate that it had such an agreement or it could not.

‡ This condition spells out what Mr. McCallion already knew – that OMERS was not going to pay him any commission regarding this transaction. Testimony of P. McCallion, Transcript, July 27, 2010, p. 1921.

into a binding agreement, on closing, that prohibited various retail uses of the land. Mr. Costin explained that the purpose of this last clause was to ensure generally that the lands would not be used to compete with Square One. The agreement offered protection for the co-owners after closing.[229]

The conditions regarding hotel specifications and the hotel's construction were found in articles 4 and 6. Article 4.1(e)(iii) stipulated that the purchaser was to provide evidence to the vendors that "the Purchaser has entered into a management agreement for the Hotel with a four-star or better operator."[230] Mr. Costin explained that the purpose of this condition was to satisfy the vendors by the second condition date that the purchaser had actually entered into a hotel agreement and, therefore, that the necessary initial step toward developing a hotel on the site had been completed.[231]

Article 6.6(b)(iv) incorporated the vendors' description of the type of hotel they wanted on the land:[232]

> a four star hotel having convention facilities and having no fewer than 200 rooms and to be operated by an international hotel brand and having full service guest amenities including a full service restaurant, a fitness facility and room service on the Hotel Site (the "Hotel") of a type and in a manner to satisfy the conceptual requirements of the City of Mississauga for the city centre area.[233]

Before drafting this clause, Mr. Costin consulted with colleagues at McCarthy Tétrault about the requirements that brand a four-star hotel.[234] He learned there was some subjectivity in the definition. However, it appeared that certain features, such as room service, distinguished four-star from lower-level hotels.* It was necessary to stipulate an international hotel brand to ensure that the hotel would be well known and recognized as a four-star hotel.[235]

The vendors wanted the building of the hotel to be under way before construction began on the condominiums (article 6.6(b)(iv)).[236] Residential condominium construction on Block 29 could not begin until 90 days after the *bona fide* start of the hotel construction, and it could not begin on Block 9 prior to substantial performance of the hotel construction.[237] Construction of the

* Murray Cook testified that star ratings for hotels do not really apply in North America, as the star rating system refers to the *Michelin Guide* in Europe. However, there are general guidelines for better-rated hotels, such as 24-hour service or the size of the rooms. Testimony of M. Cook, Transcript, September 15, 2010, pp. 4447–48; Testimony of A. Costin, Transcript, July 8, 2010, pp. 1434–35, 1436.

hotel was to begin within 18 months of closing, and the hotel was to be completed no later than 30 months after the commencement of construction.[238]

If hotel construction did not begin within 18 months of closing, the vendors could buy back both blocks of land at the purchase price plus 2 per cent per annum.[239] If the hotel had not been substantially constructed within 30 months from the commencement of its construction, the co-owners had the right to cash a letter of credit;[240] and if the hotel was not substantially constructed within 48 months of closing, the co-owners had the right to buy back the hotel site from WCD for $10.[241]

Mr. Costin explained that the rationale for these terms was that a half-built building often is worth much less than the cost of its construction because of the need to find a purchaser prepared to complete construction in the face of numerous construction liens. A vacant site or completed building, he said, is much more attractive than a half-built project shell.[242]

Following the execution of the APS on January 31, 2007, Mr. Costin believed that WCD was working to satisfy the conditions in the ordinary course. The co-owners obtained board approval for the transaction, and, following some title requisitions and other discussions with the purchaser, the due diligence condition was satisfied. The purchaser submitted a site plan to the city, satisfying another condition. Mr. Costin testified that he was not involved in the site plan approval process, but understood the purchaser was working with the vendors to finalize the site plan and other required municipal approvals.[243]

Amending Agreement – Extension Rights

Article 4.5 of the original APS set out the extension rights, some of which WCD had to pay for in order to exercise.*[244] The purchaser was entitled, on two separate occasions, to extend the first condition date for 30 days with notice and a $50,000 extension fee, on each occasion. The extension fees would not be applied to the purchase price on closing. In addition to the above, the purchaser was entitled to one extension of the second condition date by 120 days for a fee of $300,000.[245]

Following the retention of new solicitors in January 2008, WCD exercised its contractual right to the 120-day extension of the first condition date. Shortly thereafter, in February 2008, WCD approached the co-owners, stating that it

* Mr. Costin testified that extension provisions for which the purchaser has to pay are not uncommon.

found the hotel provisions in the APS too onerous.[246] This objection resulted in further extensive negotiations between the vendors and WCD between March and July 31, 2008, over possible amendments to the APS, following which the parties executed an amending agreement.[247]

The negotiations were triggered by a memorandum prepared by WCD's solicitor (and investor) Emilio Bisceglia. Mr. Nobrega of OMERS received the memorandum dated February 28, 2008. It set out WCD's proposed changes to the APS. In the Bisceglia memorandum, WCD requested the following changes:

1 the opportunity to build on Block 29 prior to commencing construction on the hotel;
2 the opportunity to build on the balance of Block 9 prior to completion of the hotel on Block 9;
3 deletion of the time frame to commence construction of the hotel within 18 months of closing and completion of the hotel within 30 months of commencing construction;
4 deletion of the vendors' option to repurchase the property for the purchase price plus interest if the hotel was not commenced within 18 months of closing;
5 deletion of the right of first refusal that gave the vendors the right to buy back the lands if the purchaser attempted to sell them before commencing the hotel; and
6 deletion of the $10 buy-back of the hotel site.[248]

In essence, WCD wanted to remove all conditions relating to the hotel, including the remedies in favour of the vendors ensuring that either the hotel would be built or that they would receive their land back in the event of non-compliance.[249]

By April 2008, global economic conditions had begun to deteriorate, and they continued to decline into the summer. The parties were aware it was more difficult to finance hotels than other types of real estate, and the prevailing economic conditions made it difficult to secure financing for any type of project at that time. It was against this backdrop that Oxford entered into negotiations with WCD to modify the APS. Mr. Costin was instructed by his clients to prepare a draft amending agreement based on correspondence between the parties.[250] The following is a summary of the correspondence:

1 On April 1, 2008, WCD proposed that both the hotel site and the residential component of Block 9 proceed together, which was not an issue for the property owners.[251]
2 On April 23, 2008, Oxford responded by proposing the removal of one of the blocks of land from the deal, concurrent construction of the hotel and condominiums on Block 9, delivery of the letter of credit in the amount of $2.5 million on closing (instead of when hotel construction began) to be held until substantial performance of the hotel, and removal of the $10 repurchase.[252]
3 WCD responded on April 29, 2008, requesting that the time frames relating to the commencement and completion of the hotel be replaced with a positive restrictive covenant; and that all other timing requirements, the delivery of a hotel management agreement, and the rights of first refusal and the buy-back provisions be deleted.[253] These requests were not acceptable to the vendors since a restrictive covenant could not ensure that the hotel was built. A restrictive covenant must be negative (restricting potential use) rather than positive (requiring that the land be devoted to a particular use).[254]
4 On May 8, 2008, Oxford responded to WCD with proposed amendments to section 6.6(b) of the APS dealing with the retail uses and hotel conditions.*

On July 14, 2008, Mr. Costin sent WCD's lawyers a revised amending agreement. He informed them that the vendors were prepared to give the purchaser further extensions if the purchaser agreed with the proposed changes and was prepared to provide the vendors with "written evidence of the hotel investigations and efforts" to secure a four-star hotel operator satisfactory to the vendors.[255] The vendors proposed amending section 4.5 to add three 60-day extensions for $125,000 each. Each extension required proof of progress in obtaining an operator for the hotel. Therefore, at the time of the amending agreement, the vendors still contemplated that the hotel operator condition would be met by the second condition date.[256]

The parties signed the amending agreement on July 31, 2008, which provided for extensions regarding the commencement and completion of hotel

* Testimony of A. Costin, Transcript, July 8, 2010, pp. 1453–55; Exhibit 103. One condition not addressed in the APS was a "no change of control" clause to offer protection to the co-owners should there be a change in control on the purchaser's side. Testimony of M. Dal Bello, Transcript, July 29, 2010, p. 2345.

construction, as well as extensions for WCD to complete the H designation removal process.[257]

The amended APS now imposed the following requirements on WCD:

1 The time frame for starting construction of the hotel was extended from 18 months to 24 months from the closing date.
2 The vendors were entitled to buy back Block 29 at the purchase price plus 2 per cent, instead of buying back all the land, if hotel construction did not commence within 24 months of the closing date.
3 Construction could not begin on Block 29 until the hotel was completed in all material respects.
4 The restrictions on the start of construction on the non-hotel portion of Block 9 were removed.
5 The building of the hotel and condominiums could proceed in tandem.
6 The $2.5 million letter of credit, originally due at the start of the hotel construction, was now due on closing.
7 The $2.5 million would be forfeited if the hotel was not substantially completed within 55 months, instead of within 30 months, after construction began.
8 The buy-back of the non-hotel portion of Block 9 for $10 was deleted.
9 The purchaser was given, as of July 31, 2008, three additional extensions of 60 days each to the second condition date, each with a payment of $125,000.

WCD exercised the first extension on signing the amending agreement on July 31, 2008, paid the $125,000, and delivered a cursory note purporting to be a "hotel update."[258]

On September 24, 2008, Mr. Costin received a letter from WCD's lawyers informing the co-owners that WCD wished to exercise its right to extend the second condition date in accordance with the amending agreement.[259] On September 29, 2008, Mr. Costin responded to WCD's lawyers that the vendors were concerned with the materials submitted regarding the quality of hotel. They were, however, prepared to proceed with the latest extension request and sought confirmation that WCD would keep them informed and would pursue the quality of hotel specified in the APS.[260]

By letter dated October 17, 2008, WCD sought further amendments to the APS owing to what they described as the "economic chaos" and requested that

the co-owners waive the condition requiring evidence of a management agreement with a hotel operator, as well as relief from the purchaser's other covenants including the requirement to provide a $2.5 million letter of credit.[261] On December 2, 2008, WCD contacted Mr. Kitt of Oxford to inform him that it was unlikely WCD could meet the condition to deliver the hotel and requested the vendors waive the hotel conditions entirely and simply sell the land to WCD.[262]

On November 28, 2008, Mr. Costin informed WCD's lawyers that the vendors were prepared to extend the second condition date to December 12, 2008, on the basis that there was some confusion on WCD's part over which extensions had been granted by the vendors. Mr. Costin added that the vendors were not prepared to extend the time for exercising the final 60-day extension of the second condition date beyond December 12, 2008, and expected a more complete report regarding the hotel.[263]

By letter dated January 9, 2009, the vendors advised the purchaser that the APS had been terminated.[264] In total, nine extensions had been granted to WCD, two of which were allowed on the basis of a payment of a $125,000 extension fee each.[265]

Planning Approvals and the City

Site Plan Approval

By the end of January 2008, WCD's plans for the City Centre Land were being scaled back significantly. Mr. DeCicco contacted the city's Planning and Building Department (planning department) to advise that, owing to costs, the anticipated above-ground pedestrian bridge connecting the hotel to the Living Arts Centre was being scrapped and that the size of the convention centre was being changed from 19,000 to 6,000 square feet.[266]

It was clear from WCD's site plan resubmission dated February 26, 2008, that WCD had greatly reduced the scope of its plans for the City Centre Land. Staff in the planning department were concerned about the reduced scope of the project. The city had anticipated a development that would create synergy with the Living Arts Centre. The planning department questioned whether that was possible with a smaller, unconnected facility.[267]

On February 28, 2008, Marilyn Ball, director of the development and design division in the city's planning department, set out the department's concerns regarding the resubmission in a letter to Barry Lyon (of the

consulting company heading the land approvals efforts on behalf of WCD).[268] Specifically, Ms. Ball pointed out that the convention centre was a key component of the proposal and any removal or reduction in size of that component would cause serious concerns for the city. The letter closed with a reminder that the site plan application fee would have to be paid before the site plan was recirculated.[269]

Site plan application fees are intended to cover the operating costs the city incurs in dealing with the site plan application.[270] They are set out on an annual basis through a very broad fees and charges by-law that covers many sets of fees across the city. The amount of the fee is dependent on whether the development is residential or non-residential and on the size of the property in question.[271] The site plan for the City Centre Land began as a master site plan, a general plan providing a context for evaluating the more-detailed site plans or phases of development that follow. A detailed site plan is required for the city building official to issue a conditional building permit.[272]

The WCD project was a complex one involving eight or nine buildings. A hotel was to be constructed initially, followed by eight condominiums. The project covered a large portion of downtown Mississauga,[273] and therefore a master site plan was initially perceived to be appropriate. Application fees were not typically charged on master site plan applications.[274]

Although there was no formal mechanism to recoup money for the efforts invested by city staff before the approval of the detailed site plans, it was thought, given the scale of the WCD project, that some initial fees should be charged. Commissioner of Planning and Development Ed Sajecki, Marilyn Ball, and Ben Phillips, a development planner, discussed what would be appropriate in the circumstances. They decided that 10 per cent of the overall application fee would be reasonable. Accordingly, when WCD submitted its master site plan application on July 31, 2007, it paid $52,000 toward the site plan application fee and $3,250 for the lifting of the H designation.[275]

As discussed below, this initial fee was the only payment WCD made toward the site plan application fee, notwithstanding the considerable work undertaken by city staff to make the WCD project ready to meet various deadlines.

Dealings of City Staff with WCD

Increase in Development Charges

Regional development charges are fees levied by municipal governments to support infrastructure (such as water supply facilities, water treatment plants, regional roads, and police services). Under the *Development Charges Act, 1997*, development charges by-laws expire every five years, at which point they must be reviewed.[276] In 2007, a review of the development charges for the Region of Peel resulted in an increase.[277] On September 14, 2007, Mr. Sajecki received a letter from the Region of Peel advising that new regional development charges were being instituted and asking for a list of all site plan applications in progress at the time.[278]

Regional development charges are due at the time the building permit is issued. In the past, the new development charges by-laws would have immediate application to any site plan applications for which development charges were due after the passing of the new by-law. However, in 2007, the Region of Peel was considering the cost of adding transition provisions to the development charges by-laws. The transition provisions would allow existing applications to be grandfathered into the old regime so that the lower development charges would apply.[279]

In a letter to the Region of Peel dated September 19, 2007, Mr. Sajecki advised that, under the Official Plan, the City of Mississauga included an urban growth centre. On that basis, development projects in that centre should be eligible for grandfathering. The WCD project was specifically referred to in Mr. Sajecki's letter as one of the site plan applications for the urban growth centre.[280]

For an application to be grandfathered into the old regime:

1 the site plan application had to have been submitted before October 4, 2007;
2 the building permit application had to have been submitted by February 1, 2008; and
3 the building permit had to have been issued under the application by May 1, 2008.

The Region of Peel inquired whether the WCD site plan application would likely qualify to be grandfathered into the old regime. Ms. Ball responded that,

since WCD would not be submitting a detailed site plan until the spring of 2008, the master site plan submitted by WCD would not be sufficient for a building permit to be issued. It was, therefore, unlikely to fulfill the conditions.[281] A question then arose as to whether WCD's site plan application was eligible for the transition provisions of the development charges by-law. If so, WCD would be eligible for the earlier development charges at a savings of roughly $9 million.[282]

In January 2008, John Zingaro, who was at the time an assistant city solicitor for the City of Mississauga, was asked to advise whether WCD's site plan application qualified for the transition provisions. At that time, only the October 4, 2007, deadline had passed. Mr. Zingaro concluded that WCD's application would qualify, provided it could be considered a site plan application under the *Planning Act*,[283] since it had been submitted before October 4, 2007. After meeting with staff and lawyers in the planning department, Mr. Zingaro concluded that WCD's site plan application was detailed enough to qualify as a site plan under the *Planning Act*. Consequently, WCD's site plan application was eligible for the transition provisions of the development charges by-law.[284]

WCD and Application Fees

Mr. Zingaro's conclusion meant that WCD was entitled to pay the lesser Peel development charges, but it also meant that WCD's site plan application fee was due and payable.[285] As noted above, by February 28, 2008, WCD had not made any payment on the application fee other than the 10 per cent payment made at the time it submitted its initial site plan application.

In a letter dated March 25, 2008, Barry Lyon advised city staff that a "first installment" of the site plan application fee (in the amount of $220,335.42) would be provided to the city "in the near future."[286] Scott Walker, of N. Barry Lyon Consultants Ltd., testified that this letter would have been approved by WCD before being sent. Although Mr. Walker testified this letter was sent to provide comfort to the city that the fee would be paid, to his knowledge the site plan application fee was never paid. He never received a response from WCD as to why it had not been paid.[287]

Mr. DeCicco admitted that he had no intention of paying the fee. He did not convey this to WCD's consultants.[288]

Actions of City Staff

One of the subsidiary issues in this Inquiry is why and how it came about that city staff continued to work on the WCD project, notwithstanding the fact that WCD's site plan application fee was never paid. For the reasons that follow, I find that the decision to continue work on the WCD project was an independent decision of the city staff and was not the result of influence by Peter McCallion or the mayor, nor was it taken because staff felt influenced by Mr. McCallion's relationship with WCD.

Ed Sajecki testified that there were three reasons why the city continued to work on the WCD project despite the fact that the application fee had not been paid. First, the city had been given assurances by WCD's well-regarded consultants, N. Barry Lyon Consultants Ltd., that the fees would be paid. Second, the city was under a tight timeline to meet the April city council date for lifting of the H designation. Third, because the Region of Peel development charges were increasing so significantly, the city expected that a great volume of applications would try to make it under the deadline to be grandfathered into the old regime.[289]

Ms. Ball testified that she made the decision in consultation with Mr. Sajecki and Mr. Phillips to recirculate WCD's site plan application despite the fact that the application fee had not been paid.[290] She testified, as did Mr. Sajecki, that her reason for doing so was to ensure that city staff were not scrambling at the eleventh hour to prepare the application for the lifting of the H designation that was scheduled to be before council on April 23, 2008.[291]

The testimony of Ms. Ball and Mr. Sajecki has persuaded me that the decision to continue work on the WCD project was not the result of the exercise of influence by the mayor or Mr. McCallion. It was a decision made out of concern for the interests of the city.[292] However, the fact that WCD did not pay the application fee put city staff in a difficult position, given the mayor's promotion of the project. It is obvious that Mr. DeCicco took advantage of the good faith of city staff. I find it was most unfortunate that he relied on the excellent reputation of Mr. Lyon and the trust of city staff to avoid paying fees.

Failure to Lift the H Designation

The H designation, a term used to signify a holding on land, must be "lifted" before development takes place. For the H to be lifted, a development agreement and servicing agreement with the city must be executed. The matter then

proceeds to the Planning and Development Committee of council and, finally, to city council for the actual lifting of the H designation. Council must approve the development and servicing agreement and must authorize the lifting of the H before development may proceed on the site.[293]

The WCD project was put on the council agenda for lifting of the H designation on April 23 and again on April 30, 2008. It was removed from the agenda at the last minute on both occasions owing to WCD's failure to pay various outstanding fees, which included the site plan application fees. As well, WCD had failed to execute the necessary agreements.[294]

On April 29, when it became evident that WCD was not going to meet the requirements for lifting the H for the second time, Mary Ellen Bench, the city solicitor, wrote a letter to WCD's then solicitors setting out the city's position and identifying the various outstanding issues that would likely prevent the lifting of the H the next day.[295] After the end of April 2008, the WCD project remained dormant. WCD never succeeded in having the H designation lifted.

The Mayor and City Staff

I find there is no evidence that the mayor interacted with city staff about the WCD project before the termination of the agreement of purchase and sale. Ms. Ball contacted the mayor's office in the early days of the project to propose a briefing, but the mayor declined the offer without providing any reason.[296]

There was no evidence before me that the mayor had any involvement with city staff with respect to WCD's site plan application fees, or with the planning department's decision to process the application notwithstanding the non-payment of fees. As noted, this decision was made by Mr. Sajecki and Ms. Ball to avoid having city staff rush to prepare the application to lift the H designation in April 2008.

WCD's Financial and Other Difficulties

Throughout the project, WCD struggled to meet its financial obligations. By the time the deal unravelled, WCD was indebted to various lawyers, consultants, and contractors. Many invoices remained outstanding at the time of the Inquiry.

Tony DeCicco and WCD

Approximately 10 years before the events relevant to this Inquiry, Tony DeCicco met Peter McCallion through Mr. McCallion's involvement as a real estate agent and the two men had become friends. Mr. DeCicco became acquainted with the mayor independently through his generous contributions to charity galas and his participation in golf tournaments.*

In the spring of 2007, Mr. McCallion called Mr. DeCicco and told him he was looking for investors for a building project in the city centre of Mississauga. Mr. McCallion told Mr. DeCicco that Murray Cook was involved. Mr. DeCicco subsequently attended a lunch with Mr. McCallion and Mr. Cook in Woodbridge, along with Emilio Bisceglia. He was told WCD was looking for investors who would not be involved in the day-to-day operation of the project. Mr. DeCicco said he would consider the proposition and get back to them, but ultimately decided that he did not want to invest in the WCD project unless he could have a hand in its management.[297]

In late July 2007, Mr. DeCicco met with Mr. McCallion at Mr. DeCicco's driving range. Mr. McCallion told him that there were problems with funding for the WCD project. In these circumstances, he would accept Mr. DeCicco's involvement in the day-to-day management if Mr. Cook was content with that arrangement. Mr. DeCicco asked to review the paperwork and to meet with Murray Cook.[298]

The decision to bring Mr. DeCicco into the WCD project came as a total surprise to Mr. Cook. The project was going well at the time in Mr. Cook's view. Mr. Cook had completed successful highrise developments and he had access to potential investors. From the day that Mr. DeCicco joined the project, Mr. Cook felt he was no longer the one making the decisions. Mr. DeCicco immediately began making changes to the project.[299] Mr. Cook did not feel comfortable with Mr. DeCicco.[300]

Meeting the Hotel Conditions

As I have found, the co-owners and the mayor shared the goal of having a hotel and convention centre at the city core. For the mayor, it represented a major step toward a cohesive downtown.[301] For the co-owners, it was a complementary use to Square One.[302] I accept that the mayor thought the WCD project

* Not all these events were organized by charitable organizations.

was in the public interest. She was steadfast in her desire to see the project proceed. She intervened repeatedly with the co-owners to seek relief from the requirements of the APS, including suspension of the hotel requirement in circumstances when her son also stood to benefit.

The APS was drafted with specific conditions involving the building of the hotel to ensure that WCD could not buy the land without building a hotel. It will be recalled that article 6.6(b)(iv) of the APS defined "hotel" as a four-star hotel having convention facilities and having no fewer than 200 rooms operated by an international hotel brand with full-service guest amenities, a full-service restaurant, a fitness facility, and room service.[303]

Meeting the hotel requirement was not so easy. As Mr. Cook testified, hotel deals are inherently difficult and require long-term investors. A hotel study conducted at the beginning of the WCD project revealed that a five-star hotel was not tenable at the site, but that a four-star hotel might be possible.[304] However, Mr. DeCicco learned through his many meetings with various individuals in the hotel industry that no one was interested in running even a four-star hotel on the Mississauga City Centre Land.[305]

Mr. DeCicco's testimony regarding the difficulty of building a four-star hotel at the city centre site was corroborated by the testimony of Suresh (Steve) Gupta.[306] Mr. Gupta is CEO of Easton's Group of Hotels, a company that develops and manages hotels. He has been in the hotel management business for 22 years.[307] Mr. DeCicco approached Mr. Gupta in January 2008 about developing a four-star hotel on the Mississauga city centre site.[308] However, Mr. Gupta did not believe a four-star hotel was viable in that location.[309]

In Mr. Gupta's view, a four-star hotel required 24-hour room and concierge service, as well as a large lobby. Mr. Gupta testified that the $270–$300 per night room rates required to sustain such a facility could not, in his opinion, be achieved, given the less expensive hotels in the vicinity and the proximity of other four-star hotels both near the airport and in downtown Toronto. However, Mr. Gupta suggested to Mr. DeCicco that a hotel which offered most of the four-star amenities, but did not include breakfast room service and 24-hour concierge service, might be viable at the city centre site. Mr. Gupta proposed this option to Mr. DeCicco as one that was "second best" or "three-and-a-half stars."[310]

Mr. DeCicco approached Mr. Gupta twice to determine whether Easton's might purchase and develop the land for the hotel. Mr. Gupta believed the

purchase price proposed by Mr. DeCicco for the severed land was too high and declined both offers.[311] Nevertheless, Mr. DeCicco and Mr. Gupta continued to discuss the possibility of Mr. Gupta managing a hotel built by Mr. DeCicco on the site.[312] Mr. DeCicco arranged a tour of one of Mr. Gupta's hotels, which took place on March 19, 2008.[313] Peter McCallion, Ed Sajecki, Marilyn Ball, and the mayor toured the Marriott Residence Inn on Wellington Street West in downtown Toronto. Mr. Gupta believed this hotel represented a good example of the level of hotel which would be viable on the City Centre Land.[314]

Although the mayor seemed happy with the hotel at the conclusion of the tour, Mr. Gupta learned from Mr. DeCicco a few days later that she had hoped for something more elegant and upscale for the city centre.[315] The mayor confirmed that the hotel showcased by Mr. Gupta on March 19, 2008 "in no way met what [she] had envisioned for a hotel in the city core."[316]

Mr. DeCicco's efforts to get a hotel on the City Centre Land were at a standstill and he sought to have the hotel conditions waived. The vendors were, understandably, not keen to do so. Nevertheless, John Filipetti of Oxford consulted with Mr. Sajecki regarding what the city's reaction would be if the hotel conditions were removed. Mr. Sajecki advised that, if the hotel conditions were removed, the city would seek an amendment to the Official Plan to require a hotel at the site.[317]

Although the vendors provided WCD a number of extensions with respect to the hotel conditions, they ultimately required some written evidence of WCD's efforts to secure a four-star or better hotel operator for the site before any further extensions would be granted.[318] It was in this context that Mr. DeCicco asked Mr. Gupta for a letter confirming that he had been involved in negotiations to manage a hotel for WCD. Mr. Gupta and Mr. DeCicco ultimately signed three documents on December 15, 2008. First, they signed a letter confirming negotiations between WCD and Easton's Group as follows:

> We confirm that our companies have entered a Management Agreement for a four star hotel having convention facilities and having no fewer than 200 rooms and to be operated by an international hotel brand and having full service guest amenities including a full service restaurant, a fitness facility and room service on the Hotel Site (the "Hotel").[319]

Second, Mr. Gupta and Mr. DeCicco executed a management agreement which Mr. Gupta described as containing the usual industry terms.[320] However, given that there was no assurance of when or if the hotel would be built, Mr. Gupta asked that a provision be added to allow for termination of the agreement on seven days' notice.[321] A third document (the "side letter") was therefore drafted by WCD's lawyer, Mr. Bisceglia, which read as follows:

> Further to our discussions and negotiation over the last year, we confirm the following:
>
> 1. The parties are not obligated to take any steps with respect to the terms and conditions of the Management Agreement executed between ourselves dated December 15, 2008 until the transaction between World Class Developments Limited and Omers Realty Management Corp. closes, or such further and other date as the parties may agree in writing.
> 2. Either party shall have the option to terminate the Management Agreement by providing one week's written notice. Upon delivery of the Notice of Termination, both parties will be released of all of their obligations under the Management Agreement.[322]

The first letter, confirming negotiations between WCD and Easton's Group, was provided to the vendors, but the management agreement and side letter were not. The vendors understandably regarded the letter confirming negotiations between WCD and Easton's Group as amounting to weak evidence and asked for better written evidence by January 9, 2009, as to the international hotel brand. They also sought evidence that the operator was a four-star or better operator. Finally, the vendors requested a signed management agreement.[323]

In response to this request, WCD obtained a further letter from Mr. Gupta advising that he had spoken with Marriott and that the company had agreed to allow Easton's Group to apply for a franchise to carry a Marriott flag at the city centre site.[324]

WCD, through its solicitors, advised that there was no requirement in the APS that it provide a signed management agreement. The vendors were not satisfied with this response and ultimately terminated the APS on January 9, 2009.[325]

It is of note that the side letter was never produced to the vendors, and its existence was not known to anyone other than Mr. Gupta and WCD until

considerable evidence had been given in this Inquiry.

As I will review below, there was litigation between WCD and OMERS after the APS was terminated in January 2009. Although the management agreement was produced as part of each of Mr. DeCicco's and Mr. Gupta's affidavits in WCD's counter-application against the vendors, the side letter was not attached to either affidavit. Mr. DeCicco and Mr. Bisceglia testified that the failure to include the side letter as part of Mr. Gupta's and Mr. DeCicco's affidavits was simply an oversight. The side letter ought to have been produced in the previous litigation. It clearly undermined the strength of the management agreement, which effectively became meaningless. Had the vendors been made aware of the side letter it is likely that the APS would have been terminated on December 15, 2008. Furthermore, had the side letter formed a part of Mr. DeCicco's or Mr. Gupta's affidavits, the litigation settlement would likely have been quite different.

8 The Mayor's Involvement in Negotiations between WCD and the Vendors

The evidence relating to the mayor's direct involvement in encouraging the co-owners to sell the land to WCD has been covered above, in section 6. This section considers the mayor's involvement on behalf of WCD in the negotiations that led first to amendments to the APS, followed by additional extensions regarding the condition dates, up to January 9, 2009, when she acknowledged and accepted the fact that the deal had terminated.

It is clear from the evidence that the mayor played an active role in requesting and securing extensions on behalf of WCD regarding the hotel conditions set out in the APS. In fact, the evidence reveals that it was the mayor, and not WCD, who almost single-handedly promoted the project and kept the deal alive through 2008. As the evidence indicates, the vendors were prepared to acquiesce to her requests until it became apparent that WCD was unable, or unwilling, to fulfill the hotel conditions.

The Mayor and the Conditional Period in the Agreement of Purchase and Sale

The Amending Agreement

The mayor acknowledged that, up to the signing of the amending agreement in 2008, she intervened several times on WCD's behalf to request extensions to allow WCD more time to secure a hotel. She testified that these interventions were always at the request of Mr. Cook or Mr. DeCicco, and never at her son Peter's request.[326] As I have observed, this evidence is difficult to accept.

On March 27, 2008, the mayor met with Michael Nobrega, John Filipetti, and Michael Kitt at OMERS' offices to discuss the WCD project. From Mr. Nobrega's perspective, the purpose of the meeting was to introduce the mayor to the "team," especially to Mr. Kitt, who was new to Oxford and the file.* Mr. Nobrega testified that, given his position as CEO of OMERS, he was too busy to deal with the WCD transaction. Mr. Kitt became primarily responsible for it in the spring of 2008.[327] Mr. Nobrega testified that whenever the mayor contacted him about the WCD transaction he directed the question to Mr. Kitt and asked him to follow up with the mayor.[328]

Among other things discussed at the March 27, 2008, meeting, the mayor conveyed the message that she believed a four- or five-star hotel, along with the amenities of a convention centre, were fundamental key assets to the city centre, and she wanted to see the development happen.[329] Mr. Filipetti attended the meeting, and, in an email to his colleague Ron Peddicord, he reported that the mayor informed them that Tony DeCicco was now part of WCD. Mr. Filipetti wrote that they had not heard from Mr. DeCicco directly, "[o]nly through the Mayor," and the mayor indicated that she believed Mr. DeCicco had significant financial resources.[330] Mr. Filipetti stated that he explained to the mayor "the importance of the clauses relative to the city's goal of a hotel," and confirmed to Mr. Peddicord that OMERS "did not give on any of [the hotel provisions]."[331]

Mr. Kitt understood from the mayor's comments at the March 27, 2008, meeting that she "vouched" for Mr. DeCicco. He was new to the file and questioned the others about how there could be a new principal 14 months into the transaction. He testified that there was "embarrassment and concern" among the co-owners because the APS, as originally executed, did not have a clause

* Testimony of M. Nobrega, Transcript, August 16, 2010, p. 3101. This was Mr. Kitt's first meeting with Mayor McCallion. Testimony of M. Kitt, Transcript, August 19, 2010, p. 4002.

requiring consent when a new owner took control of WCD as purchaser. WCD remained the purchasing company throughout, but the introduction of Tony DeCicco represented a change of control.*[332]

In Mr. Kitt's opinion, the people at WCD took advantage of this fact and maintained throughout that they were not required to divulge the identity of the principals of WCD.

Mr. Kitt testified that he found it odd to deal with a purchaser in this way and characterized the negotiations as "very distant," with WCD materializing more as a corporate entity, almost a shell, rather than as a group of individuals. He would have expected regular meetings, face-to-face interaction, and direct negotiations with a principal on a deal this complicated. In fact, he met with Mr. DeCicco only twice over the course of the year.[333]

Mr. Kitt received a copy of the February 28, 2008, Bisceglia memo, and he and Mr. Filipetti compared it with the original APS.[334] As noted, the memo described proposed amendments to the APS which contemplated the removal of many, if not all, of the conditions relating to the purchaser's obligations to satisfy the hotel conditions.[335]

Mr. Kitt spoke with Mr. DeCicco on March 31, 2008. Mr. DeCicco reiterated his concerns regarding timing and the structure of the APS.†[336] Mr. Kitt was uncomfortable with the nature of their meeting because he had just come from a meeting with the mayor, who had stressed the importance of the hotel. Mr. DeCicco, a new principal of WCD not known to anyone at OMERS / Oxford, was now asking for significant changes to the APS. Mr. Kitt knew that the mayor wanted a hotel and had vouched for Mr. DeCicco's ability to bring the hotel project to fruition. Mr. DeCicco, however, was now expressing a desire to remove the conditions relating to the hotel entirely.‡[337]

In his email to Craig Coleman of Hawthorne on April 1, 2008, Mr. Filipetti provided an update following the March 27, 2008, meeting with the mayor. He informed Mr. Coleman that Mr. Cook's role had been taken over by Mr. DeCicco, who was "apparently" known to the mayor. The mayor believed he had the resources to complete the project. Mr. Filipetti wrote that their first contact with the new principal came "indirectly via the City" in the form

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* Mr. Kitt testified that a change in the key person was unusual and went beyond a corporate change in control.

† This meeting was the first time Mr. Kitt met with Mr. DeCicco. Their second meeting occurred in December 2008, when Mr. Kitt advised Mr. DeCicco that the deal had terminated.

‡ See Exhibit 99 (Mr. DeCicco's follow-up letter to Mr. Kitt regarding his proposed changes to the APS).

of a memo stating that virtually all the APS conditions regarding the hotel were making the project difficult to finance.[338] He indicated that Oxford had responded to WCD, also "via the City," that the conditions represented the essence of the deal and that they would not be changed. He went on to say that, after this meeting, Mr. Kitt spoke with Mr. DeCicco, following which Mr. DeCicco sent a letter proposing more modest amendments to the (APS). Mr. Filipetti reported that legal counsel were reviewing the proposed amendments, and he hoped to discuss the proposal with Mr. Coleman before responding to Mr. DeCicco.[339]

The mayor acted as the conduit to deliver information regarding the change of key personnel. It is also apparent from the references in Mr. Filipetti's emails that the mayor had requested concessions regarding the hotel conditions on behalf of WCD at this meeting.[340] Mr. Filipetti's references to receiving the memo "via the City" and to not giving in on any of the hotel provisions lead me to the conclusion that the negotiating demands within the Bisceglia memo were advanced by the mayor at the meeting on March 27, 2008. I find that the mayor sought to negotiate amendments to the APS on behalf of WCD at this meeting and subsequently.

Mr. Kitt reported to Mr. Nobrega in an email dated April 29, 2008, that he had informed the mayor of their "compromise position." The vendors would allow the hotel and condominiums to be developed at the same time on the south site and would keep the north site in the deal. The mayor seemed pleased with this position.*[341] Mr. Kitt testified that he did not usually report to Mr. Nobrega; however, in this situation he informed Mr. Nobrega of his exchange with the mayor for the following reasons: (1) the process leading to the vendors' compromise position had been initiated in Mr. Nobrega's office at the March 27, 2008, meeting; (2) Mr. Nobrega and the mayor enjoyed a very good relationship; and (3) Mr. Nobrega had asked Mr. Kitt to keep him apprised of the situation.[342]

On April 30, 2008, Mr. Nobrega thanked Mr. Kitt, as the mayor had informed him that Mr. Kitt had been very helpful the previous day. Mr. Kitt responded by informing Mr. Nobrega that he too had spoken with the mayor again and agreed to meet with Peter McCallion at her request.[343] Mr. Kitt testified that the mayor set up the meeting and advised Mr. Kitt where and

* Some of the changes contemplated by the vendor came out of Mr. DeCicco's April 1, 2008, letter (Exhibit 99).

when to attend.*[344] Her involvement made some sense because Mr. Kitt had no existing relationship with Mr. McCallion. On May 13, 2008, he met with the mayor. They were joined by Mr. McCallion halfway through the meeting.[345]

Although his email on the subject (discussed below) suggests otherwise, Mr. Kitt testified that he did not regard the May 13, 2008, meeting as a negotiating session. He informed the mayor, and Mr. McCallion once he arrived, of the terms that had been offered to the purchaser previously, which included a six-month extension regarding the hotel. The mayor reiterated her position on the importance of a hotel. Nevertheless, when Mr. McCallion arrived he requested, and was denied, even more time to complete the conditions in the APS. It is significant that Mr. McCallion made his request in the presence of his mother.[346] Following this meeting, Mr. Kitt reported in an email to Mr. Filipetti that they had reached an agreement: "[b]asically, our letter plus an additional six months to start and finish the hotel."[347] It is also significant that Mr. Kitt described the meeting as coming to a resolution, rather than one that simply allowed for information sharing. Indeed, if that was all that was required, a meeting would not have been necessary.

On May 20, 2008, Mr. Kitt reported to Mr. Nobrega that they were in good shape with respect to the hotel project. He had met with the mayor the previous week "and resolved the final issues." Mr. Nobrega responded that he had seen the mayor recently, and she reiterated how "very pleased she was with how you [Mr. Kitt] were handling things with her."[348]

Mr. Kitt testified that, on July 4, 2008, the mayor spoke to him and requested six additional months for WCD to satisfy the various conditions in the APS. This concession extended the time for satisfaction of the hotel conditions, the site plan approval, and the lifting of the H designation.[349]

In an email dated July 9, 2008, to Michael Latimer, the CEO of Oxford, Mr. Kitt noted that the call from the mayor had come "via Michael Nobrega."[350] By this he meant that "Michael [Nobrega] had the mayor on the line" and had transferred the call to him. This elevated the priority of the discussion in Mr. Kitt's mind.[351] Mr. Kitt informed Mr. Latimer that the co-owners were onside with the extension, and he proposed to offer WCD three 60-day extensions at a $125,000 non-refundable fee per extension, subject to satisfactory evidence

* Mr. Kitt testified that he had no prior contact with Peter McCallion.

of hotel investigations to date. He concluded that he would recommend the extension, and would like to inform the mayor "today."[352]

Mr. Kitt commented in his email that "the actual developer did not call."[353] He testified that, although it was unusual to receive a request from the mayor instead of from Mr. DeCicco or Mr. McCallion, he was not surprised in this case. It was consistent with what had been occurring since March 27, 2008. He concluded that "Tony DeCicco and WCD were using the mayor as an effective communication tool to … advance negotiation positions."[354]

In an email dated July 8, 2008, Mr. Nobrega thanked Mr. Kitt for following up with the mayor:

> [T]hanks for responding to Hazel while on your vacation; she appreciates it and I suspect that she will add you to her very small group of people whom she would turn to for advice …[355]

The mayor acknowledged that Mr. DeCicco and WCD had asked for her involvement to get this extension, which was no small concession. She testified she went to Mr. Nobrega to request the extension because he was the head of OMERS. As well, they sat together on the Enersource board.*[356]

The mayor contended that her purpose in intervening on behalf of WCD was to pursue the city's interests and that, because of economic conditions, her focus was to provide WCD with a little more time to secure a hotel deal. She acknowledged she pushed the co-owners to give WCD the extension, while at the same time she made it clear to Mr. DeCicco that, if he were to receive the extension, he needed to supply "real evidence" that there was hope of securing a hotel.[357]

Mr. Kitt was scheduled to speak with the mayor again on July 11, 2008. In preparation for their conversation, Mr. Kitt asked Mr. Filipetti when they had last heard anything regarding the hotel, to which Mr. Filipetti reported there had been "zero communication."[358] He reported that city staff had not heard from WCD or their consultants for months, and that WCD had not paid the substantial municipal charges and fees relating to the site plan.[359]

In his evidence, Mr. Kitt noted that the credibility of the purchaser was of serious concern to the co-owners at this point. They were concerned about the

* She testified, however, that there was no connection between the fact that they both sat on the same board and her decision to approach him in relation to the extensions.

lack of communication on a number of fronts, about the city process slowing down, and about the purchaser's ability to satisfy the hotel conditions in the APS.[360] After many internal discussions at OMERS / Oxford, and discussions with AIM, the co-owners agreed to give WCD three additional 60-day extensions that would cost WCD a non-refundable extension fee of $125,000 for each one, with the extensions subject to satisfactory evidence of hotel investigations performed to date.*[361] Although the extension fees were substantial, Mr. Kitt explained this was necessary to convey to WCD that it had to present a viable project. When Mr. Kitt spoke with the mayor on July 11, 2008, he defended the co-owners' position and pointed out their concerns regarding the lack of communication and the persistent questions surrounding the ability of WCD to deliver a hotel. Nevertheless, he conceded that the economy was in turmoil.[362]

Negotiations between the co-owners and WCD resulted in an amending agreement to the APS, signed on July 31, 2008.[363]

The Mayor's Involvement in the Extensions

The mayor agreed that she "definitely" intervened with the co-owners on behalf of WCD in the fall of 2008 to request that the agreement be extended to allow WCD more time to find a hotel operator.[364] Mr. DeCicco acknowledged that he spoke to the mayor 17 times during November 2008 because he thought she could help him gain more time to fulfill the APS conditions.[365] Mr. Kitt confirmed that the mayor involved herself "numerous times" to request that the co-owners be fair and reasonable, and to impress on them that, although it was a difficult economy, the vision for the hotel remained sound and she wanted it to happen.[366]

On October 17, 2008, Mr. DeCicco wrote to Mr. Kitt at Oxford to request further amendments. Mr. DeCicco requested that the co-owners waive the hotel conditions in the APS, including evidence of a hotel management agreement and any restrictive covenants regarding the use of the land.[367] The mayor testified that Mr. DeCicco never informed her of this request, and she was not aware that WCD had proposed a straight sale of the land.†[368]

On October 24, 2008, Mr. Filipetti of OMERS / Oxford wrote to Grant

* Mr. Kitt explained that, because of their concerns, they focused on three extensions of 60 days each as referred to above, instead of one six-month extension period.

† She testified that she was not aware of this letter. Mr. DeCicco testified that he never discussed his proposal of a clean sale with the mayor because her agenda was the achievement of the hotel, and he acknowledged that he may have misled her by the lack of information he provided to her.

Charles and Craig Coleman of Hawthorne confirming that he and others from Oxford had met with Mr. McCallion the previous day and that Mr. McCallion had provided them with a letter from Mr. DeCicco outlining WCD's request to drop the hotel conditions from the APS.*[369] Mr. Filipetti advised that Mr. McCallion told them he had spoken to "key people" at the city who were "apparently ok" with the restrictions being removed. Mr. Filipetti indicated that OMERS / Oxford would pursue a straight sale if the co-owners agreed on the change of position.[370] As I have noted, this entreaty was not well received on the AIM side of the table.[371]

That same day, Mr. Filipetti emailed Mr. Kitt to report on his discussion with Mr. Charles regarding AIM's perspective on WCD's request to drop the hotel conditions. Given that AIM wanted Oxford to talk to the city to understand the city's view, Mr. Filipetti enquired whether he should contact Mr. Sajecki or whether Mr. Kitt would prefer to speak with the mayor.[372] Mr. Kitt replied that Mr. Filipetti should inform WCD of AIM's position, as well as call Mr. Sajecki. Mr. Kitt intended to follow up with the mayor the following week.†[373] On October 27, 2008, Mr. Charles of Hawthorne wrote to colleague Dean Hansen about this issue, stating that "[n]o one at Oxford has yet spoken to the city to take the pulse of the mayor or the planning staff."[374]

Mr. Nobrega wrote to Mr. Kitt on November 16, 2008, to confirm that he had spoken to the mayor approximately two weeks earlier and that she had mentioned a "land transaction with the City" that required the co-owners to sign off, but that AIM was raising objections. According to Mr. Nobrega, the mayor informed him she was prepared to speak to the chair of AIM. She intended to "pressure AIM" to take a "second but considered look at the City's request" to relax the hotel conditions temporarily.[375] Mr. Nobrega advised the mayor that he wished to speak with Mr. Kitt before she called the chair of AIM. On November 17, 2008, Mr. Kitt responded by informing Mr. Nobrega that he had "just finished a nice conversation" with the mayor and that she and Mr. Kitt agreed to let the land deal run its course through to January 2009. He reminded Mr. Nobrega that the land deal referred to was the revised WCD deal.

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* This was Mr. McCallion's second request directly to Mr. Kitt and others at OMERS / Oxford. On October 9, 2008, Mr. McCallion came into Oxford's offices and asked Mr. Kitt and Mr. Filipetti to consider a straight sale of the land, removing all the hotel conditions. Testimony of M. Kitt, Transcript, August 19, 2010, p. 4032.

† Mr. Kitt testified that he could not recall whether he called the mayor as he suggested. Testimony of M. Kitt, Transcript, August 19, 2010, p. 4040.

He explained that, if necessary, they would revisit the transaction in January 2009.[376]

On November 20, 2008, at approximately 10:30 p.m., Mr. Nobrega informed Mr. Kitt that the mayor had made a plea to "give Tony (?) some slack on some deposit due [that day]. Could you provide a week until you and I get a chance to talk." Mr. Kitt responded at approximately 1:15 a.m. on November 21, 2008: "We are good on our side. We'll need to talk to our co-owner. Consider it done."[377] Mr. Nobrega left a message for the mayor first thing that morning indicating he had received her message from the previous evening, and that she was to "consider it done … Not a problem."[378]

WCD decided not to exercise the extension on November 21, 2008. From Mr. Kitt's perspective, instead of paying for the extension, WCD was trying to plead that times were tough. The company could not find a hotel, and it wanted to change the deal to a straight sale of the land in any event.[379] OMERS / Oxford granted WCD an additional three weeks' extension from the original exercise date of November 21, 2008, to December 12, 2008, without any further extension fee. At that time the APS would expire if WCD had not fulfilled the conditions required by the APS.[380]

On November 28, 2008, Bram Costin of McCarthy Tétrault wrote to WCD's lawyer and advised that the vendors had agreed to the extension of the second condition date to December 12, 2008.[381] Mr. Filipetti, who was copied on Mr. Costin's email, wrote to Mr. Kitt to say he had not been made aware they had agreed to a further one-week extension, and he requested that Mr. Kitt inform him of "any further contact between WCD / the mayor / Nobrega" of which he was aware. Mr. Kitt responded that he was not aware of the extension, but was aware that the mayor and Mr. Nobrega had spoken over the weekend.[382]

It appeared to those at AIM that Mr. Filipetti had agreed to a further one-week extension without their approval.* Grant Charles advised that the AIM representatives should have been consulted, and he questioned WCD's rationale.[383] According to Mr. Coleman, the deal was coming to an end because WCD could not live up to the hotel requirements, and AIM did not want to see it dragged out. Therefore, AIM executives were concerned when the lawyers acting for the co-owners granted the extension without informing them.[384]

I have heard the testimony of the mayor and Mr. Nobrega, each of whom

* Exhibit 364. This appears to be an extension agreed to between the mayor and Michael Nobrega. See Exhibit 470.

described the mayor's role simply as a conduit for information between the parties. I do not accept that her role was so limited. The mayor engaged in negotiations on behalf of WCD with Mr. Nobrega. It appears that she turned to Mr. Nobrega first when she wanted concessions on behalf of WCD. The contemporaneous evidence from the emails and phone calls alone supports this. Mr. Nobrega requested that he be kept informed about the project, and throughout 2008 he attempted to appease the mayor, who was advocating for WCD. According to his evidence, he had been at the forefront of receiving all the calls from the mayor on these issues to the extent that, by early December 2008, he was prepared to involve Leo de Bever of AIM to understand the "ambiance of the environment."[385] Although he had delegated the day-to-day details of the transaction to Mr. Kitt and others at Oxford, I find that Mr. Nobrega was directly involved with important decisions made in this transaction.

In his update email to Mr. Nobrega on December 2, 2008, Mr. Kitt advised Mr. Nobrega that the purchasers had contacted him and advised that "[t]hey do not feel they can meet a key condition of the sale, that being the delivery of a hotel. They would like us to waive this condition and simply sell them the land. Hazel would like us to co-operate."[386] He forwarded the email to Mr. Filipetti, who responded that the mayor had spoken to him to express her fear that they would terminate the deal in "difficult economic conditions that make it impossible to live up to the hotel timelines."[387] He reported that the mayor said she was aware she could not obtain a quality hotel at this time, but that she wanted a deal in place to enable the hotel development to go forward when conditions improved. She queried whether AIM was holding things up, to which Mr. Filipetti replied that the co-owners made decisions on a consensus basis. He advised the mayor that they "had Tony's request and were having urgent discussions with [their] co-owners."[388] He concluded his update by reporting that the mayor wanted a meeting with Mr. Nobrega, Mr. Kitt, and Mr. DeCicco "as soon as possible," and, if not possible, she wanted them to extend the hotel condition date again.[389]

Mr. Kitt suggested that the co-owners provide another week's extension to Mr. DeCicco, which would give the co-owners time to determine their position. He asked Mr. Filipetti to let the mayor know they were doing their best under the circumstances, and advised that he would call the mayor himself as well.[390] Mr. Filipetti responded that he had sent AIM an update about his call with the mayor wherein he proposed the one-week extension. He stated that

he was "pushing the clean sale with [AIM]."[391] Mr. Kitt told Mr. Filipetti that he had updated Mr. Nobrega by telephone earlier that afternoon.[392]

Later on December 2, 2008, Mr. Filipetti reported in an email to Mr. Charles and Mr. Coleman at Hawthorne that the mayor would be calling and that she would be looking for the co-owners to relax the APS conditions owing to "economic conditions."[393] He suggested that the mayor "may try to 'divide and conquer' and she surely [knew] people on both [their] boards."[394] Mr. Filipetti added that Mr. Kitt supported selling the land outright for the original purchase price plus an additional $2.5 million, and asked AIM to consider this proposal.[395] The mayor called again on the afternoon of December 2, 2008, to reiterate her position that the hotel conditions be relaxed temporarily.[396]

I find that Mr. Filipetti felt pressured to acquiesce to the mayor's requests to relax the conditions in the APS, and felt compelled to persuade AIM to agree to do the same.

The following morning, December 3, 2008, Mr. Filipetti informed Mr. Kitt that AIM had agreed to the one-week extension.[397] When Mr. Filipetti suggested a meeting with the mayor to discuss the request for temporary relaxation of the hotel conditions, Mr. Kitt responded that it wasn't necessary to meet with her until they heard from AIM. If AIM agreed to the straight sale of the land being proposed, the sale process would begin, and, if not, the mayor would "get involved."[398] Following this exchange with Mr. Filipetti, Mr. Kitt returned the mayor's call and left a message stating that the one-week extension had been granted.[399]

Mr. Coleman responded to Mr. Filipetti's update by seeking clarification of the nature of Mr. McCallion's interest in the transaction.[400] He testified that his clients were not clear about Mr. McCallion's role. They heard that Mr. McCallion had "[popped] up as a principal in the project" around the end of October, and now that the mayor was involved they did not like the way things were shaping up.[401] Mr. Coleman was clearly concerned. If Mr. McCallion was a principal and not an agent, and the mayor was, at the same time, applying pressure on them to relax certain requirements in the agreement, "the optics [were] not very good."[402]

Michael Dal Bello testified that he and Mr. Coleman spoke about Mr. McCallion's interest in the project, given the fact that Mr. McCallion appeared to be increasingly involved in discussions. He testified that Mr. Coleman was

uncomfortable about what Mr. McCallion's role might be, and he asked Mr. Coleman to seek clarification.[403]

On December 11, 2008, John Filipetti informed Mr. Kitt that Mr. DeCicco had called, and when Mr. Filipetti reiterated the position of the co-owners, Mr. DeCicco stated he did not understand why they wanted him to fail. He said he had $2–$3 million invested and could not walk away.[404] Mr. Filipetti replied that Mr. DeCicco could exercise the extension on December 12, 2008, if the three conditions required by that date were met.*[405] Mr. Kitt set up a meeting with the mayor for the following week because it was important to him, and in the best interest of the co-owners, that they tell the mayor they were not moving forward with the transaction.[406]

Mr. Filipetti prepared an "update memo" for Mr. Kitt, Mr. Nobrega, and Mr. Latimer on December 11, 2008, regarding the sale of the City Centre Land and the current positions of the parties. The memo reviewed the facts to date:

1 December 12, 2008, was the conditional date by which WCD was to have fulfilled three specific conditions as per the APS.
2 This date had been extended from the November 21, 2008, conditional date by three weeks with no fee, and could be extended by another 60 days with payment of a $125,000 non-refundable extension fee and report detailing WCD's negotiations to secure a hotel.
3 The APS would expire on December 12, 2008, without payment and a report by WCD at that time.
4 As of December 11, 2008, it appeared that WCD had not fulfilled any of the three required conditions.
5 There were discussions with WCD about a possible further no-fee extension; however, co-owner AIM did not agree and no further extension had been granted.
6 The 60-day extension period referred to above was the third 60-day extension period added to the APS via the amending agreement on July 31, 2008, which also extended the deadline to commence hotel construction following closing by six months.[407]

* Mr. DeCicco did not reply to Mr. Filipetti's suggestion, and WCD did not exercise its final extension.

Mr. Filipetti went on to say: "At the request of the mayor and WCD as represented by Mr. DeCicco, we undertook to persuade our co-owner, AIM, that a 'clean sale' could be orchestrated to Square One's advantage."[408]

When questioned at the Inquiry about this statement, the mayor testified that it was "incorrect" and "absolutely false." She "did not at any time to anybody" request the owners waive the hotel conditions.[409] The mayor testified that, had she known of the proposal for a clean sale of the land, she would have been very upset because her condition for the sale of the land was a four- or five-star hotel, a fact known from the outset by OMERS, Tony DeCicco, Murray Cook, and her son Peter. At the same time, the mayor wanted at all costs to ensure that the land was preserved for a hotel.[410] I conclude that the mayor might have supported a clean sale provided the requirement to build a hotel on the land in the future was preserved. As I have noted, this could not be achieved by a restrictive covenant, or, as the mayor acknowledged in her evidence, by an Official Plan amendment.

Mr. DeCicco testified that he may have misled the mayor by not informing her that he was seeking a straight sale on behalf of WCD.[411] Mr. Coleman testified that the mayor's position on the straight sale was "a bit grey" – there were emails in which she acknowledged that she couldn't get the hotel, but others suggested that she was prepared to wait for the hotel to be built – "it was a bit of both but it wasn't very clear."[412]

Mr. Kitt understood from the mayor after speaking with her on December 11, 2008, that she intended to contact Mr. Dal Bello of AIM directly to explain why she wanted the deal to proceed.[413] Mr. Filipetti emailed Mr. Coleman of Hawthorne later that day to inform him that "[the mayor] [was] calling everyone" and that Mr. Coleman might want to advise Mr. Dal Bello.[414] Mr. Coleman responded that calling Mr. Dal Bello would not be a great idea, to which Mr. Filipetti replied, "[T]here's no telling what she will do."[415] Mr. Coleman alerted Mr. Dal Bello that the mayor might call. Thereafter, the mayor left four telephone messages.[416]

On December 12, 2008, Mr. Kitt acknowledged in an email to Mr. Nobrega and Mr. Latimer that the deal to sell the City Centre Land to WCD would likely "lapse" by the following week and said that he did not agree with this outcome.[417] In Mr. Kitt's opinion, the only way to save the deal was to waive certain conditions. The co-owners were not agreeable to this position. For his part, Mr. Kitt was not convinced the purchaser had the funds to close the deal.[418]

Although Mr. Kitt had reservations about the purchasers, he wrote in an email that he had nevertheless hoped to extend the current deal to January 31, 2009. He had hoped, he said, to achieve a resolution which, although a straight sale, would lead to future hotel construction.[419] However, AIM was not onside.[420] I note that Mr. Kitt appears to have been unaware of the limitations on the city's ability to require the building of a hotel.

Mr. Kitt kept Mr. Nobrega apprised of the issues relating to the deal at this stage because he wanted him to be aware that the deal had reached a critical phase, and that, although this fact would not come as a surprise to the mayor, she would not be happy with the outcome.[421] He agreed that the general message he attempted to convey to Mr. Nobrega concerned "damage control." He wanted Mr. Nobrega to know that he was working on this issue as it related to the mayor.[422]

In his response to Mr. Kitt, on December 14, 2008, Mr. Nobrega offered to call Leo de Bever, CEO of AIM, to request another 60 days to continue negotiations with WCD and the city.[423] I regard Mr. Kitt's email reply to Mr. Nobrega as significant. In my view it reflects OMERS' / Oxford's recognition of the need to "play ball" with the mayor. Mr. Kitt noted that he was having lunch with the mayor the next day and added the following in his email:

> The important thing is to maintain our relationship with the City and we have done this to date. I don't trust the buyer, and there is no doubt they are using Hazel in this process, but it is difficult to tell her that, especially with her son involved.[424]

Mr. Kitt testified that the reference to his lack of trust regarding the buyer was based on "a series of decisions and behaviours" by the purchaser over the course of the entire year that caused him to lose faith in the principals of WCD.[425] Ultimately, he did not believe that WCD was going to close.[426] At the Inquiry he testified that his reference to "using" the mayor was based on his perception that the purchaser was using the mayor as a "negotiating tool" to put pressure on the vendors to accommodate WCD's negotiating position.[427] In Mr. Kitt's view, the mayor's involvement in the transaction went beyond making it clear that she wanted a hotel. It went "more directly to WCD being the people that could pull this off."[428] I understand Mr. Kitt's email in its ordinary sense: Mr. DeCicco and WCD had used the mayor and her office for their own

personal ends. As Mr. DeCicco conceded, this put the mayor in an awkward position.

Mr. Dal Bello spoke with the mayor on December 15, 2008. She expressed her frustration that AIM's representatives were not prepared to allow the deal to move forward.[429] He testified that the mayor referred to AIM's representatives as "not being good corporate citizens, not working to build the City." He reminded her that AIM had agreed to sell the land on the basis that a hotel would be built. They were not now looking to make changes to the agreement.[430] The mayor wanted to meet the people from AIM, and a meeting was arranged for early January.[431]

Later on that day, December 15, 2008, Mr. Kitt met with the mayor and Mr. DeCicco at the Old Barber House Restaurant in Mississauga for what he characterized as a "good faith meeting" to inform them both that the deal was going to end, despite the fact that WCD had until December 19, 2008, to fulfill the conditions.[432] When Mr. DeCicco asked why the vendors were not prepared to proceed with the deal, Mr. Kitt explained that the principal reason was that WCD was not moving along with the hotel conditions.[433]

Mr. Kitt did not expect WCD to meet the hotel conditions, among other conditions, and he interpreted WCD's decision not to exercise the final extension as support for this conclusion.*[434] Mr. Kitt testified, however, that early in the meeting Mr. DeCicco produced a letter dated December 15, 2008. He presented it as proof that WCD had entered into a hotel management agreement with Easton's Management Group.[435] Mr. Kitt testified that the letter did not reassure him. He questioned why Mr. DeCicco had not shared the letter with the co-owners, and he found the date to be somewhat "convenient."[436]

Mr. Kitt had promised AIM he would ask the mayor to ensure that her son was no longer involved in this transaction. He testified that, at this point, the nature of Peter McCallion's involvement was AIM's concern, not his concern, because he was focused on the termination of the transaction. As far as he was aware, Mr. McCallion had not been involved after October 23, 2008.[437] He could not remember precisely what he asked the mayor, but recalled her "animated" response that Peter was "off the file," a fact which he relayed to AIM the following day.[438] Mr. DeCicco maintained that this issue was discussed with him when the mayor was out of the room.[439] However, Mr. Kitt reiterated that

* Mr. Kitt testified that he understood why they would not want to put up another $125,000 if they knew they were unable to satisfy the condition.

he tried to express to the mayor that it would be best if Mr. McCallion was not involved in this deal anymore, a comment that led the mayor to provide her assurance that Peter was "off the file."[440]

The mayor testified that she remembered attending this meeting with Mr. DeCicco at the request of Mr. Kitt. Mr. Kitt made it clear to Mr. DeCicco that the deal was going to die because Mr. DeCicco had not provided any concrete evidence that he had been able to secure a hotel.[441] However, she had no recollection of any discussion regarding her son's involvement in WCD.[442] She testified that Michael Kitt never raised this issue with her, and he was emphatic she never told him Peter was "off the file," an expression she claimed not to understand.[443]

The mayor testified that she did not recall Peter's name coming up during this discussion, nor did she recall any expression of concern from Mr. Kitt at any time with respect to Mr. McCallion's involvement.[444] She testified that had the issue of Peter's involvement been raised at this juncture, it would have been "kind of late" given that the vendors were aware he was involved from the outset.[445]

I accept Mr. Kitt's recollection of his conversation with the mayor regarding Peter McCallion's involvement and her reply that Peter was "off the file," as it was recorded in the notes of Dean Hansen of AIM.[446] These notes recorded what was said in a conference call almost immediately after Mr. Kitt's meeting with the mayor, and they persuade me that his version of the conversation should be preferred.

Mr. Kitt testified that the mayor wanted an opportunity to discuss the co-owners' decision with AIM directly. For that reason, the co-owners agreed to one further extension to January 9, 2009, to get through the holiday period. However, this further extension did not reflect a change in the co-owners' position.[447] The mayor asked for a meeting with the co-owners because she could see the deal was going to die. She had learned that OMERS / Oxford needed AIM's approval for any transaction in relation to the City Centre Land.[448] The mayor testified that at the meeting, which occurred on January 12, 2009, after the deal with WCD had terminated, she expressed her desire that the co-owners preserve that land for a hotel regardless of who the developer might be.[449]

The Practical Effect of the Mayor's Role

I conclude that, but for the mayor's involvement, the co-owners would never have granted as many extensions to the conditions in the APS as they did. These extensions were significant commercial concessions.

Mr. Kitt testified that he tried to minimize his conversations with the mayor because he was uncomfortable with the "overall dynamic" of the negotiations. He explained that he "prefer[red] the arena of a purchaser / vendor direct discussion versus different dynamics that [he] didn't quite understand" when dealing with the specific terms of an agreement, without "having different points of ... entry into the discussions."[450]

Mr. Kitt acknowledged that by October 2008, when Peter McCallion appeared at Oxford's offices to request that the co-owners consider a straight sale and forgo all the hotel conditions, he was not surprised since "at this stage nothing was surprising about this transaction, everything was curious."[451] He testified that, in his view, regardless of the precise role Mr. McCallion played, as an agent or as a principal, his involvement made Mr. Kitt uncomfortable.[452]

Mr. Kitt was candid about the pressure he felt regarding a one-week extension he recommended to the co-owners on November 21, 2008. The recommendation was made at the request of the mayor through Mr. Nobrega.* He testified that "at that point" he "was in trying-to-keep-the-peace mode." The deadline for WCD to put up additional money to extend the deal was approaching, and he "could feel the ... pressure directly and indirectly increasing on the mayor's side." She was becoming more involved again through Mr. Nobrega, who had, in an email dated November 20, 2008, sought a concession in favour of "Tony."[453] It was clear to Mr. Kitt that Mr. DeCicco again used the mayor as an advocate to buy him some time, with the result that both the mayor and Mr. Nobrega became involved.[454] At this juncture there were "significant external people to deal with." He had as well to be mindful of the co-owners' interests and needed to make the right decision.[455]

By December 2008, the mayor's interventions had become a real irritant for AIM. When WCD sought yet another extension, Mr. Filipetti wrote in an email that AIM might agree to extend for one week, "but they think this will just provide one more week for the mayor to pressure us."[456] Mr. Filipetti wrote a memo dated December 11, 2008, regarding the status of the sale of the land. He

* The mayor's request concerned the deposit money due on November 21, 2008.

summarized AIM's decision not to proceed with a clean sale of the land saying, "AIM [does] not want to tie any concessions from the City to this deals [*sic*] because of the potential unfavorable optics in their view. They are also uncomfortable with the involvement of Peter McCallion as an apparent principal of WCD."[457]

Mr. Coleman explained AIM had first become concerned about the nature of Mr. McCallion's interest on October 8, 2008. He learned at that time that Mr. McCallion had requested a meeting with Mr. Filipetti the following day.[458] Up to that point Mr. Coleman had not been aware of Mr. McCallion's involvement in the WCD project.[459] He was advised on October 24, 2008, that Mr. McCallion had met with Mr. Filipetti a second time. At that meeting, Mr. McCallion suggested that WCD might agree to an increased purchase price for the land if the hotel conditions were dropped entirely. For Mr. Coleman, these meetings raised two concerns: (1) he had been advised by Mr. Filipetti "that Peter McCallion had a WCD business card and purported to be a principal of WCD";[460] and (2) he understood that Oxford was willing to consider a straight sale, which was in his view a "non-starter" because the hotel requirement was the critical component of the deal.[461]

This situation made Mr. Coleman uncomfortable. He realized that he and his colleagues at AIM did not understand Mr. McCallion's role and they did "not like the way things were shaping up."[462] He clarified his thoughts on the issue: "[I]f we're getting calls or – indirect pressure from the mayor to relax certain requirements in our agreement with – when her son's on the other side of the table, the optics are not very good."[463]

It is likely that the WCD transaction would not have seen the light of day had Mr. McCallion been transparent about his ownership interest from the outset. At the Inquiry, Mr. McCallion admitted that he was a principal of WCD. Leo de Bever, the CEO of AIM, stated that had he known that the mayor was promoting WCD and seeking concessions from the co-owners when her son was an owner of the company, he would have been concerned.[464] At the very least, "conflicting objectives" might be at play. He added it was a matter of "good corporate governance that when there are overlapping interests that you start digging a little deeper and start making sure that there is no conflict."[465]

Mr. de Bever explained that Mr. McCallion's involvement might not have precluded AIM from entering into the APS. It would, however, have prompted those at AIM to take a much harder look at the project and his involvement to

determine whether the city's interests were aligned with WCD's interests to the extent that the project could stand on its own.*[466]

Mr. de Bever maintained that had he known Peter McCallion had an equity interest, he would not have been prepared to consider the mayor's requests for concessions because of the apparent conflict created. The fact that Mr. McCallion's interest was not disclosed from the outset was a serious omission that made it difficult for him to assess the involvement of various players in this transaction.[467]

The mayor involved herself in the WCD transaction throughout. She encouraged the co-owners to enter the deal with WCD. She provided assurances regarding Tony DeCicco's capabilities. She negotiated extensions. She worked with Michael Kitt of Oxford to achieve the extensions she required, and, when she wanted something to be done immediately, she went directly to Michael Nobrega, CEO of OMERS, with her request. When it became apparent to all parties that Mr. DeCicco could not fulfill the conditions in the APS concerning a four-star hotel, the mayor applied pressure on the co-owners to provide extensions, to relax or waive conditions, and ultimately to close the transaction in the absence of those requirements.

Based on the testimony and exhibits consisting of emails, telephone calls, and notes, it is clear that, when the mayor requested a concession in the agreement, OMERS and Oxford representatives were prepared to grant it. Understandably, they did not share with AIM each and every contact they had with the mayor. However, I find that OMERS and Oxford representatives acceded to the pressure the mayor put on them by virtue of her constant communication regarding WCD, and they went out of their way to acquiesce to her requests. AIM was not subject to direct pressure from the mayor to the same extent and therefore was, at times, at a loss to understand OMERS' / Oxford's recommendations regarding concessions.

I find that the mayor knowingly used her relationship with OMERS and her public office to influence the co-owners to agree to concessions throughout this period. She knew that her son Peter stood to gain financially if the deal succeeded, and, although his interests alone may not have prompted her intervention with the co-owners, the exercise of this influence put her in a position of conflict, both real and apparent.

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* He testified that he had interpreted "a lot of the pressure that was coming [their] way" to be the result of the mayor's long-standing desire for an upscale hotel near the Living Arts Centre. Testimony of L. de Bever, Transcript, September 13, 2010, p. 4305.

The co-owners were aware at the outset that the mayor's son stood to gain financially, but understood him to be acting as agent. Both co-owners were content that Peter McCallion act as agent, to be compensated by the purchaser. I have taken note of the business reality that the co-owners needed to have an excellent relationship with the mayor given the extent of their other interests in Mississauga. The evidence reveals that no one from OMERS / Oxford or AIM wanted to confront the mayor directly about issues surrounding Peter McCallion's role in WCD.

It is clear, from the documented exchanges between the co-owners, that the fact the mayor was advocating for concessions was a significant factor influencing their consideration of each concession. It also became a source of tension between the co-owners.

9 The Optics of Peter McCallion's Interest in WCD

Senior Managers of OMERS / Oxford

As I have noted earlier in this Report, the mayor intervened repeatedly throughout the WCD project.[468] Indeed, as I will review, she indirectly exerted pressure on OMERS to settle the outstanding litigation with WCD in 2009.[469]

The mayor expected major pension funds such as OMERS to have business policies governing their interactions with elected officials, and she did "not think a call from any mayor or any member of council or from anybody would deter them from fulfilling a business transaction based on their policy."[470] She assumed "the pension fund would not make a bad decision on [its own] behalf."[471] This contention ignores the strength of the mayor's personality and the extent of her influence. The mayor's intervention on behalf of WCD placed senior managers at OMERS / Oxford and AIM in an uncomfortable position[472] where they could not easily discuss Peter McCallion's involvement in WCD directly with her.[473]

As I have noted, Mr. DeCicco freely admitted in his evidence that his own repeated interventions with the mayor had put her in an awkward position.[474] I was struck by the unwillingness of Mr. Nobrega to make any similar concessions in his evidence.

Neither of the vendors ever advised the mayor that they were uncomfortable with her involvement in negotiations concerning WCD,[475] and the mayor

expected they would have done so if such a concern existed.[476] However, it would have been difficult for these senior managers to voice their uneasiness with the mayor directly.[477] It is also unclear what effect, if any, an expression of concern would have had. It would appear that the mayor is unshakable in her pursuit of the public good as she perceives it.

Unfortunately, there was no effective alternative mechanism by which the senior managers could have raised their concerns. Ideally, senior OMERS / Oxford managers might have advised the mayor of their discomfort about her requests for concessions for WCD. However, the mayor is a powerful personality, and these would not have been easy conversations. Raising the issue with the mayor would not, in any event, have ameliorated her conflict of interest.

Actions of OMERS / Oxford in Response to Pressure from the Mayor

In her testimony, the mayor acknowledged that she was involved in negotiations between WCD and the co-owners regarding the final APS and then in obtaining concessions to allow more time for WCD to find an acceptable hotel for the site.[478] The mayor stated that she "encouraged OMERS to extend the agreement to give … WCD the opportunity to seek a hotel …"[479]

I find that the mayor should not have requested a meeting between her son and Oxford in May 2008. Doing so was inconsistent with the requirements of her public office. The fact that the mayor injected herself into negotiations by attending the meeting in person and discussing the terms of a concession in favour of WCD only made the situation worse. Under the circumstances, Oxford felt compelled to negotiate with Mr. McCallion to maintain good relations with the mayor. Significant concessions were given to WCD as a result of the mayor's actions.

There was nothing unlawful about an executive attending a meeting convened by the mayor for her son. However, as discussed previously, the CEO of OMERS facilitated the May 2008 meeting with the mayor and Mr. McCallion when he knew that the latter had a pecuniary interest in the WCD transaction. With the benefit of hindsight, it might have been better had Mr. Nobrega declined to orchestrate this meeting.

OMERS' / Oxford's Knowledge of Peter McCallion's Role in WCD

Information sharing between the co-owners left much to be desired, and AIM was often unaware of the activities of OMERS / Oxford. In particular, there was a notable delay before OMERS / Oxford notified AIM of WCD's original offer to buy the City Centre Land, and later AIM was not told that OMERS had settled the litigation with WCD in 2009.[480] Nor, as I will review, was AIM consulted on the final amount of the litigation settlement in 2009.

Although the Terms of Reference do not require me to do so, I find that those at OMERS / Oxford did not intentionally obscure Mr. McCallion's true role in WCD. They were unaware of his true role until very late in the piece. In the circumstances, it is unlikely AIM would have learned much earlier of Mr. McCallion's role in WCD even if information had been shared in a timely fashion by those at OMERS / Oxford.

AIM's Knowledge of Peter McCallion's Role in WCD

AIM initially believed that Peter McCallion was an agent working for WCD.[481] The evidence reveals that, when it seemed apparent that Mr. McCallion was more than an agent, in October 2008,[482] AIM representatives began to discuss their unease over the WCD transaction among themselves. Given their consistent position, originally shared by their co-owner – that a quality hotel was a necessary condition of the APS – they began to question why their co-owner was repeatedly pressing them to agree to remove the hotel requirement. It appears that they felt pressured to consent to WCD's requests to appease the mayor, and their discomfort grew once their perception of Mr. McCallion's involvement changed.[483]

10 Other Matters

There are two subsidiary matters which I find it convenient to address at this point in the Report.

Declaration of Conflict of Interest at Council

Prior to this Inquiry, it came to light that the minutes of the May 21, 2008, city council meeting reflected that Mayor McCallion had declared a conflict

that day with respect to WCD, when in fact a review of the video footage of the meeting revealed that no such declaration was made.[484] The reason for this discrepancy became an issue in this Inquiry.

City Council Meeting, April 23, 2008

On April 23, 2008, WCD's application for the removal of the H designation over the City Centre Land was scheduled to be addressed by city council.[485] WCD's application was listed as Corporate Report R-7. The April 23, 2008, minutes state that "Mayor Hazel McCallion declared Conflict of Interest with respect to Corporate Report R-7 by virtue of her son being involved with the World Class Developments application."[486] WCD's application at the April 23, 2008, meeting was deferred to a subsequent council meeting, scheduled for May 21, 2008, because the company did not have all the agreements in place to support its application.[487]

City Council Meeting, May 21, 2008

On May 21, 2008, WCD's application for the removal of the H designation was scheduled to be addressed by city council once again. The minutes from the May 21, 2008, council meeting state that "Mayor Hazel McCallion declared Conflict of Interest with respect to the above Corporate Report by virtue of her son being involved with the World Class Developments application."[488] The matter was not addressed by council that day. Mr. Sajecki advised council that WCD was still working on its application and requested that it again be deferred to a later date.[489]

The video recording of the May 21, 2008, council meeting showed that Mayor McCallion did not in fact declare a conflict with respect to WCD's application for the removal of the H designation.[490] Shalini Alleluia, who was the city's legislative coordinator at the time, did not recall why the May 21, 2008, meeting minutes recorded that the mayor had declared a conflict regarding the WCD matter when in fact she did not. Ms. Alleluia provided a number of possible explanations for the error in the minutes:

1 the mayor's written comments in her agenda may have been copied into the minutes;
2 Ms. Alleluia may have copied the declaration from her own notes;

3 the mayor may have mentioned it to Ms. Alleluia before the council meeting; or
4 Ms. Alleluia may have simply recorded the declaration because she expected the mayor to make it.[491]

In September 2009, Ms. Alleluia was approached by her supervisors, including the city clerk, Crystal Greer, when it was discovered that the mayor had not declared a conflict as recorded in the May 21, 2008, minutes.[492]

The city clerk's office conducted an investigation into the matter. On September 28, 2009, Brenda Breault, the city commissioner of corporate services and treasurer, issued a corporate report recommending that council amend the minutes by removing the reference to the mayor's declaration of conflict of interest.[493] In the wake of this discovery, a new procedure was established requiring the city clerk or deputy clerk to review the draft minutes to ensure that declarations of conflict of interest had been properly recorded, and that declarations of conflict of interest were recorded at the point in the minutes where they were declared in addition to the beginning of the minutes. It is not clear whether the city clerk or deputy clerk now reviews the video recordings of council meetings to verify that declarations of conflict of interest are recorded correctly in the minutes.[494]

That corporate report also advised that the Office of the City Clerk would conduct a comprehensive review of its minute-taking practices.[495]

I accept the evidence of Ms. Alleluia that she was never asked by the mayor or any councillor to either insert or delete anything from council minutes.[496] The mayor had declared a conflict of interest on a prior occasion, and I accept that she simply forgot to do so on May 21, 2008, when the matter was deferred and was only briefly before council.

The Mayor's Involvement in WCD's Internal Affairs

It was common ground in the evidence before me that, in addition to her interactions with the co-owners regarding the WCD project, the mayor met at various times with Murray Cook and Tony DeCicco. At the outset of the WCD project, the mayor met with Mr. Cook on two occasions to express to him the importance of the hotel to the city and her frustration at the slow rate at which the co-owners were proceeding with a land purchase agreement.[497]

Her involvement continued throughout the life of the WCD project.

Numerous documents entered as exhibits reflect the mayor's involvement in resolving matters between Mr. DeCicco and Mr. Cook after Mr. DeCicco joined the WCD project. Mr. DeCicco was concerned that Mr. Cook had the ability, through the put and call agreement, to exit WCD at any time. Mr. DeCicco wanted the put and call agreement terminated, and the following evidence suggests that he used the mayor to assist him in negotiating with Mr. Cook:

1 On October 26, 2007, Mr. DeCicco left a voicemail message for the mayor advising that "Emilio [Bisceglia] will fax that agreement to your home today by 3:00 p.m." and asking the mayor to set up a meeting with Murray Cook.[498] Mr. DeCicco and Mr. Cook testified that a meeting did take place at which the mayor attempted to mediate the dispute.[499]
2 Subsequent to the meeting, Mr. DeCicco left the mayor a further message asking whether she had "considered getting Murray to sign …"[500] (referring to the termination of the put and call).[501] Mr. DeCicco testified that he believed the mayor had some moral suasion with Mr. Cook and could therefore get him to sign the agreement.[502]

Mr. DeCicco maintained that he involved the mayor because of her effectiveness as a negotiator and not because of her son's involvement in the deal.[503] Although Mr. DeCicco testified that the mayor's involvement did not go beyond the one meeting she arranged at which she attempted to mediate between them, numerous other telephone messages from Mr. DeCicco suggest he kept the mayor apprised of every development in regard to the dispute with Mr. Cook. On December 21, 2007, Mr. DeCicco left a message for the mayor, asking her to call him at her earliest convenience:

> I'd like to speak with you regarding Murray Cook. We received a letter from his lawyer stating that we haven't got the authority to do things. I suggested to Peter that it would be good if we meet tomorrow.[504]

On May 22, 2008, Mr. DeCicco appeared to be returning a call from the mayor:

> I'm sorry I didn't get back to you sooner. I was in a meeting all morning and we just finished. I'm going into a 1:30 meeting now. I got your message. I think we

> should get together. There's a lot happening with Murray that we need to speak about. We can get together tonight anytime at your convenience. I'll be busy over the next few days, but I'll obviously make time for you. Let me know if you're available tonight. I'm giving Peter a call to see what his schedule is like.[505]

At one point Mr. DeCicco requested that the mayor arrange a meeting to resolve the differences between him and Mr. Cook. The purpose of the meeting, which occurred at the mayor's house, was, according to him, to try to find a way forward.[506] Ultimately, Mr. Cook was not comfortable working with Mr. DeCicco and he suspected that Mr. DeCicco was equally uncomfortable with him.[507] Mr. DeCicco thought that Mr. Cook had not contributed financially. However, Mr. Cook had secured the put and call agreement,[508] an arrangement that was quite advantageous to him.[509]

11 Termination of the Agreement of Purchase and Sale

On July 9, 2009, the co-owners commenced an application in the Ontario Superior Court of Justice (Commercial List) to confirm that the agreement of purchase and sale (APS) with WCD had been terminated on January 9, 2009, and that WCD had no further rights pursuant to that agreement.[510]

On August 28, 2009, WCD filed a counter-application against the vendors seeking, among other things, a declaration that the APS between the vendors and WCD remained in effect.[511] In its counter-application, WCD sought only monetary relief and did not seek anything that would tie up the City Centre Land, such as an injunction to prevent title from being transferred or a certificate of pending litigation. In support of the counter-application, Tony DeCicco, Steve Gupta, and Peter McCallion swore affidavits.[512]

As discussed below, the litigation was ultimately settled for a payment of $4 million by the vendors in September 2009.[513] AIM was not consulted by the OMERS group before the latter agreed to settle the litigation with WCD for $4 million.[514] On September 11, 2009, AIM learned through its consultants that Mr. McCallion was in fact still involved in WCD at the time of the settlement.[515] I find that AIM's earlier suspicions about Mr. McCallion's actual role in WCD were not confirmed until after a settlement was concluded in litigation between WCD and OMERS and AIM.

Sheridan College's Interest in the City Centre Land

The mayor had advocated for some time for another post-secondary institution in the city.[516] Sheridan College (Sheridan) had proposed a Mississauga campus a few years earlier, and nothing had come of it.[517] In 2009 Sheridan requested significant financial support from the city in exchange for a Mississauga campus. Instead of providing the requested funds, the city decided to purchase the now-vacant City Centre Land and lease it to Sheridan at a nominal rate.[518]

On July 20, 2009, an agreement of purchase and sale was signed between the co-owners as vendors and the city as purchaser.[519] The terms of the agreement of purchase and sale provided for the city to pay a sum of roughly $14 million in exchange for the City Centre Land, with a closing date of September 17, 2009. The agreement of purchase and sale between the vendors and the city was conditional on the city being satisfied by September 17, 2009, that WCD had no claim for title to the land.[520]

Out of concern for potential claims arising from the terminated agreement with WCD, the city and Sheridan College entered into an indemnification and hold harmless agreement (the indemnification agreement) with the co-owners.[521] The indemnification agreement provided that the co-owners would assume all responsibility for defending any action brought by WCD, and, in the event that the city or Sheridan chose to retain independent counsel in that regard, the co-owners would reimburse the city or Sheridan, or both, for all reasonable legal costs incurred up to a maximum aggregate amount of $500,000.[522]

As further protection, the city entered into a release agreement with Sheridan whereby Sheridan acknowledged the potential of a claim by WCD and released the city, including elected officials and staff, from any and all claims including damages, losses, costs, fees, disbursements, loss of revenue or profits, and loss of infrastructure stimulus fund (ISF) monies as a result.[523] On September 8, 2009, City Solicitor Mary Ellen Bench recommended to city council that the city proceed to close the transaction with the co-owners on September 17, 2009.[524] Ms. Bench testified that her recommendation was based on the "sufficiently strong indemnity" combined with the fact that, in her opinion, WCD "was after cash; they weren't after the property."*[525]

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* Exhibit 327, p. 4, sets out in greater detail why Ms. Bench recommended proceeding with the transaction

In her Report to Council of September 8, 2009, recommending that the city proceed with the APS with the co-owners, the city solicitor referred to the outstanding litigation between the co-owners and WCD in relation to the same land and noted that, in support of its counter-application, WCD relied on the following:

> evidence provided through affidavits of two of its principals, namely Peter McCallion and Tony DeCicco, as well as an affidavit from Steve Gupta, of the Easton's Group of Hotels Inc. These affidavits reference meetings with City staff and Mayor McCallion to discuss the hotel. Again, there are no allegations or suggestions of impropriety on the part of the City, its staff or elected officials, in the materials filed by WCD.[526]

This report was likely the first time that most members of city council became aware of Peter McCallion's interest in WCD. Indeed, the city solicitor became aware of Mr. McCallion's interest only when she personally reviewed his affidavit on the counter-application.[527]

Peter McCallion's Interest in WCD Revealed

The affidavit of Peter McCallion sworn August 24, 2009 (the August 24 affidavit) is, in many ways, the seed that sprouted this Inquiry.[528] In paragraph 1, Mr. McCallion states: "I am one of the principals of World Class Developments." The August 24 affidavit was initially drafted by the legal firm of Paliare Roland Rosenberg Rothstein LLP (Paliare Roland) on Mr. McCallion's behalf.[529] However, Emilio Bisceglia reviewed the draft with Mr. McCallion and made changes at his request.[530] I find that Mr. McCallion was chosen as an affiant because his evidence would put pressure on the co-owners (or at least OMERS) to resolve the litigation, particularly given the inclusion of paragraphs in other affidavits describing meetings with the mayor.

Mr. McCallion requested several revisions to the first draft of the August 24 affidavit, none of which dealt with the statement that he was a principal of WCD.[531] When Mr. Bisceglia asked Mr. McCallion to come to his office to swear the affidavit, Mr. McCallion advised by email:

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to purchase the land from the co-owners.

I will be in Monday after Tony and My Mother have a chance to discuss it.[532]

In his evidence, Mr. McCallion testified that he mentioned to the mayor that he was swearing an affidavit, but did not discuss the contents of the affidavit with her before swearing it.[533]

In the context of negotiations between the city and the co-owners with respect to the Sheridan deal, the materials underlying the counter-application – including Mr. McCallion's affidavit – came to the attention of the city solicitor. Ms. Bench was surprised that Mr. McCallion had an ownership interest in WCD and thought it her duty to bring this information to the attention of council.[534] In her Report to Council, dated September 8, 2009, Ms. Bench revealed Mr. McCallion's interest in WCD.[535]

Peter McCallion told the Inquiry that, sometime after the September 8, 2009, Report to Council, the mayor called him to ask why he had referred to himself as a "principal."[536] Mr. McCallion claimed he did not believe he was a principal of WCD and had simply overlooked this statement in his affidavit.[537] Mr. McCallion advised Mr. Bisceglia's office that the statement in the affidavit needed to be changed.[538] Mr. Bisceglia was concerned about the requested change. He instructed his staff not to commission the affidavit because he knew that Mr. McCallion was indeed a principal of WCD.[539] It will be recalled that Mr. Bisceglia was not only the company lawyer, but also an investor in WCD.

It appears the second affidavit, which purported to "delete" the statement in Mr. McCallion's previous affidavit that he was a principal of WCD, was drafted by Mr. Bisceglia's staff prior to his instructions that such an affidavit should not be commissioned.[540] Mr. McCallion ultimately took the second affidavit to the mayor's personal solicitors, the firm of Danson Schwarz Recht LLP. It was to be sworn on September 11, 2009.[541]

Sometime thereafter, Ms. Bench received Mr. McCallion's second affidavit, which deleted the statement that he was a principal of WCD. The affidavit was sent to her by fax, without a covering letter or any explanation.[542]

A *third* affidavit was sworn on September 15, 2009.[543] This affidavit stated that Peter McCallion was not a principal of WCD. Mr. McCallion testified that he swore the third affidavit on the advice of his mother, who felt the second affidavit was not sufficiently clear.[544] By contrast, Mayor McCallion testified she had never seen or heard about the third affidavit.[545]

I have found that Peter McCallion was a principal in WCD. I have also found

that he knew he was a principal in WCD. I further find that he ought not to have sworn his second and third affidavits, which suggested otherwise. I accept Mr. McCallion's evidence that he swore the third affidavit at the instance of his mother. Although I do not believe that Mayor McCallion knew of the precise interest Mr. McCallion held in WCD, it is unfortunate that she urged him to change his sworn testimony without ensuring that all the facts were available.

The Settlement

David O'Brien as Emissary of the Mayor

The APS was terminated on January 9, 2009. On April 30, 2009, Michael Kitt, on behalf of OMERS / Oxford, sent a letter to Mr. DeCicco indicating that the co-owners were in negotiation with another potential purchaser for the City Centre Land.[546] In July 2009, Mr. DeCicco received a call from Mr. McCallion indicating that David O'Brien wanted to meet with him to discuss the possibility of a settlement.[547]

Peter McCallion made this telephone call after the TACC (Developments) golf tournament in July 2009. At the tournament dinner, the mayor raised with Mr. O'Brien her concerns about difficulties in closing the Sheridan deal.[548] Her main concern, according to Mr. O'Brien, related to contamination that had been found on the City Centre Land. She also was worried that the outstanding litigation between WCD and the co-owners might have an impact on the deal.[549] The mayor suggested that Mr. O'Brien become familiar with the issues.[550] Later that same evening, Mr. O'Brien suggested to Mr. McCallion that they meet so that Mr. McCallion could explain "the issues that were going on vis-à-vis WCD and Oxford."[551]

Mr. O'Brien insisted in his testimony that the mayor had not explicitly asked him to become involved in the resolution of the WCD litigation.[552] Not much turns on this position. The mayor and Mr. O'Brien had worked closely together over a number of years. I find that whatever the mayor said at the golf tournament dinner, Mr. O'Brien understood that he was to do what he could to resolve the litigation, and thereafter began to do so.[553]

Mayor McCallion denied asking Mr. O'Brien to negotiate a settlement with WCD.[554] For his part, Mr. DeCicco testified that he was advised by the mayor in July that it was important the WCD matter be settled so that the Sheridan deal could move forward.[555] In any event, on July 16, 2009, Mr. O'Brien met with Mr. DeCicco and Mr. McCallion at a Sunset Grill in Mississauga to discuss

settlement of WCD's litigation with OMERS.*[556] Mr. O'Brien told Mr. DeCicco that WCD had no case, but Mr. DeCicco was adamant that WCD held a legitimate interest in the land and declined to discuss settlement.[557] Mr. O'Brien later told Mary Ellen Bench, the city solicitor, that this meeting was at the mayor's request.[558]

David O'Brien as Emissary of OMERS

On September 7, 2009, Michael Nobrega met with Mr. O'Brien before a meeting of the OMERS investment committee.[559] Mr. Nobrega asked Mr. O'Brien to explore with Mr. DeCicco a range for possible settlement with WCD.[560] Mr. Nobrega testified that he had concerns regarding OMERS' liability pursuant to the indemnification agreement with the city.[561]

Although it is not central to the task of the Inquiry, I have difficulty accepting that this concern was the reason for Mr. Nobrega's intervention in the WCD litigation. Mr. Nobrega explained his intention in the following way. He said he thought the Sheridan / WCD issue had the potential to harm OMERS' reputation, and for that reason he had to become involved.[562] He elaborated that OMERS had ongoing relationships with the principal infrastructure players (namely, the federal and provincial governments) and that in these circumstances he "had a duty of care" to report that, by terminating the WCD deal, the co-owners had "double-sold" the land – namely, to WCD and to the city.[563] On his review of the agreements, he concluded that the indemnification agreement which the co-owners had executed in favour of the city resulted in open-ended liability for the co-owners in favour of the city and Sheridan.[564]

I appreciate that Mr. Nobrega is not legally trained. He is a chartered accountant.[565] On my review of the agreements, I conclude that the indemnity exposed the co-owners to no such liability beyond the damages being sought by WCD. It is significant that Michael Kitt accepted this interpretation when asked about it during his testimony.[566] Mr. Nobrega went on to explain that, if there was litigation that prompted a claim under the indemnification agreement, the public servants involved in infrastructure funding – if advised of the "double sale" issue – might cut off funding.[567] In those circumstances, as envisaged by Mr. Nobrega, OMERS could be liable.

It appears that none of the lawyers involved in the situation (Borden Ladner

* According to Mr. DeCicco, Mr. O'Brien informed him that he sat on the OMERS board and he wanted to talk about the possibility of settling the litigation.

Gervais LLP acting on behalf of Sheridan; Thornton Grout Finnigan LLP on behalf of OMERS; or City Solicitor Ms. Bench) thought there was any legal risk arising from the indemnification agreement.[568] One assumes any lawyer consulted by Infrastructure Ontario would have reached a similar conclusion. Mr. Nobrega believed there was, nevertheless, a business risk which was apparently completely divorced from any notion of legal risk.[569] I find that Mr. Nobrega was quite aware of the political dimensions of the WCD counterclaim.

On August 27, 2009, Mr. O'Brien emailed Michael Nobrega the following message:

> Can we talk sometime today. Hazel called me concerning the Oxford issue with Mississauga. She is quite concerned. Could be political issues.[570]

By this point, Mr. O'Brien had seen the affidavit sworn by Mr. McCallion where he described himself as a principal of WCD.[571]

Mr. Nobrega contended that the "political issues" Mr. O'Brien was referring to centred on the ability to preserve the Sheridan deal in light of the contamination issue.[572] I am satisfied, based on my review of Mr. O'Brien's evidence, that his email related to the WCD litigation. Mr. O'Brien quite accurately anticipated that the exposure of Peter McCallion as a principal of WCD would raise political issues. In my view, Mr. Nobrega also recognized that, whatever legal risks there might have been, the WCD litigation had the potential of becoming much messier once Mr. McCallion's interest in WCD had been disclosed. Mr. Nobrega testified that, based on prior experience, he was "not a great friend of litigation,"[573] and I can well understand that he would have wanted to extract the co-owners from a prospectively messy piece of commercial litigation. Of course, by resolving the WCD litigation quickly, there was also a good chance that the mayor's position would be protected, and that she would not be criticized.

Although I do not accept his evidence in every respect, Mr. O'Brien did impress me as having a deft ability to resolve complex and difficult issues. Mayor McCallion deployed him to sort out the WCD litigation. Mr. Nobrega employed him for the same reason, and it seems likely he was aware of Mr. O'Brien's retainer on behalf of the mayor. I do not accept Mr. Nobrega's evidence that he was unaware Mr. O'Brien had previously acted as an emissary of the mayor in relation to WCD,[574] although I appreciate that Mr. Nobrega

was not focused on this aspect of the matter. In any event, a second meeting took place involving Mr. O'Brien, Mr. DeCicco, and Mr. McCallion on September 10, 2009, at the Delta Meadowvale Hotel in Mississauga.[575]

According to Mr. O'Brien, Mr. DeCicco's first offer to settle at this meeting was $10 million, at which point Mr. O'Brien feigned leaving the meeting since it appeared to him that Mr. DeCicco would not present a "serious" position.[576] Mr. DeCicco periodically left the meeting to consult with a partner, whom I am satisfied was Emilio Bisceglia.[577] By all accounts, Mr. McCallion was silent throughout the meeting.[578]

After a couple of hours' negotiation, the meeting ended without resolution.*[579] About half an hour later, Mr. DeCicco called Mr. O'Brien to suggest that an offer of $5 million would be acceptable.[580] Mr. O'Brien said he had $3 million in his mind, the amount originally expended by WCD for the project. After brief further negotiations they agreed on $4 million.[581] Mr. O'Brien then advised Mr. Nobrega that $4 million was the best he could do.[582] Although Mr. DeCicco's testimony differed as to how the negotiations proceeded, both sides agree the ultimate settlement was $4 million. Mr. Bisceglia served a formal offer to settle on behalf of WCD on September 11, 2009, for $4 million.[583]

The evidence was clear that Peter McCallion did not receive any of the $4 million settlement.[584] He was not, however, the only investor who was not repaid. John Di Poce, a prominent businessman and at the time a friend of Tony DeCicco, invested $992,753 in WCD,[585] which included a payment of $392,753.71 for WCD's outstanding bills when he exited the deal at the end of April 2008.[586] Apparently, Mr. Di Poce has received nothing for this investment.[587] It is indeed curious that Mr. Di Poce was required to pay such a substantial sum, in addition to his initial investment, in order to withdraw from WCD as an investor, and unfortunate that he did not receive any of the $4 million settlement from Mr. DeCicco.

In fact, all the equity partners except Mr. McCallion and Mr. Di Poce were repaid.[588] Mr. Bisceglia received his and his family's entire investment ($61,000).[589] Mr. DeCicco and his companies received approximately $2.2 million.[590] Mr. Couprie was repaid his initial $750,000 investment in three installments.[591] Mr. Couprie did not receive the additional $750,000 he was to receive when WCD found a developer.[592]

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* According to Mr. DeCicco, they agreed on $4 million at this settlement meeting, contingent on Mr. O'Brien receiving final approval. Testimony of T. DeCicco, Transcript, August 18, 2010, pp. 3913–14.

Phase II – Analysis

12 Conflict of Interest

The Common Law Framework

As I found in my July 8, 2010, ruling on the meaning of "conflict of interest" (see Appendix J), the *Municipal Conflict of Interest Act* (MCIA)[593] does not constitute a complete codification of the law governing conflicts of interest for members of municipal councils. The common law also applies. The MCIA is restricted to the pecuniary interests of members of council in the deliberative and legislative contexts, but the common law is much broader and recognizes conflicts of interest involving non-pecuniary interests.

The MCIA provides members of municipal council only with the following guidance for avoiding conflicts of interest:

> 5(1) Where a member, either on his or her own behalf or while acting for, by, with or through another, has any pecuniary interest, direct or indirect, in any matter and is present at a meeting of the council or local board at which the matter is the subject of consideration, the member,
>
> a) shall, prior to any consideration of the matter at the meeting, disclose the interest and the general nature thereof;
> b) shall not take part in the discussion of, or vote on any question in respect of the matter; and
> c) shall not attempt in any way whether before, during or after the meeting to influence the voting on any such question.[594]

The Inquiry heard from a panel of experts in the field of municipal conflict of interest, composed of Professor David Mullan, Dr. Greg Levine, and Dean Lorne Sossin. Their discussion and commentary proved helpful to my consideration of the issues.

Conflicts of interest at common law are not restricted to the personal interests of members of council, and may even extend beyond to the interests of close family members. Professor Mullan provided the following useful overview of the common law of conflict of interest in his expert report prepared for this Inquiry:[595]

> In *Watson*,[596] Shaw J. of the British Columbia Supreme Court had reached back to a 1904 Ontario judgment to support the proposition that, at common law,

conflict of interest was not confined to pecuniary interests: *L'Abbé v Blind River (Village)*:

> There may be a direct monetary interest, or an interest capable of being measured pecuniarily, and in such case that a bias exists is presumed. But there may be also substantial interest other than pecuniary, and then the question arises, on all the circumstances, as to whether there is a real likelihood of bias – a reasonable probability that the interested person is likely to be biased with regard to the matter at hand.[597]

Writing also in the context of bias, Sopinka J., in *Old St. Boniface Residents' Assn. v Winnipeg (City)*, recognized the existence of a common law conception of conflict of interest ranging beyond pecuniary interests:

> It is not part of the job description that municipal councillors be personally interested in matters that come before them beyond the interest they have in common with other citizens in the municipality. Where such an interest is found, both **at common law** and by statute, a member of Council is disqualified if the interest is so related to the exercise of public duty that a reasonably well-informed person would conclude that the interest might influence the exercise of that duty. This is commonly referred to as conflict of interest [emphasis added].[598]

Optics are important. It is essential to consider how a reasonable person would view the actions of the municipal councillor. As Commissioner Jeffrey Oliphant put it so well in his 2010 Report:

> Public office holders ultimately owe their position to the public, whose business they are conducting. Ensuring they do not prefer their private interests at the expense of their public duties is a fundamental objective of ethics standards.[599]

As far back as 1904, in *L'Abbé v Blind River (Village)*, [1904], Boyd J, writing for the Divisional Court, stated:

> 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 anal-

> ogy 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 [emphasis added].[600]

As I explained in my July 8, 2010, Ruling on Conflict of Interest, the most important words in the above paragraph are "deal," "gain," and "or appear to gain," and I stressed the importance of optics.[601]

This broader approach to conflict of interest has also been recognized as the prevailing standard by previous commissions of inquiry, including those conducted by Commissioners Denise Bellamy and W.D. Parker.[602] As identified in the Parker Commission, there are various manifestations of conflict of interest. A conflict of interest may be real or apparent.[603]

> A real conflict of interest has three prerequisites: (1) the existence of a private interest (2) that is known to the public office holder; and (3) that has a nexus with his or her public duties and responsibilities that is sufficient to influence the exercise of those duties and responsibilities.[604]

An apparent conflict of interest arises when a reasonably well-informed person could reasonably conclude, as a result of the surrounding circumstances, that the public official must have known about the connection of his or her involvement with a matter of private interest.[605]

I accept Professor Mullan's view that

> the common law of conflict of interest certainly provides a basis for an examination of whether the specific facts of the Mayor of Mississauga's engagement with third parties and officials within the City in relation to a potential contract in which her son had a pecuniary interest amounted to legally inappropriate behaviour or involvement.*[606]

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* As Professor Mullan notes, however, there is no free-standing cause of action for violating the common law conflict of interest standards. The common law deals only with conflicts of interest on the part of elected officials within the framework of specific causes of action.

The expert panel agreed that it is not the existence of a conflict of interest which is the issue but, rather, what the official in a position of conflict of interest does in the face of the conflict.[607] The following analysis considers whether Mayor McCallion had a conflict of interest having regard to common law principles of conflict of interest and, if so, whether her conduct in the face of that conflict of interest was appropriate.

Did the Mayor Face a Conflict of Interest?

I find that Hazel McCallion had a real conflict of interest. Her son Peter McCallion stood to gain financially from his involvement with WCD. The mayor knew her son had a financial interest in WCD. In the face of that conflict, the mayor used her influence as mayor to further the interests of WCD. Regardless of her motivation for doing so, I find that her behaviour was inappropriate.

The Mayor's Knowledge of Peter McCallion's Interest in WCD

In 2005, Peter McCallion first told his mother he had established World Class Developments. He informed her he was acting for an investor to purchase lands in the Mississauga city centre on which a hotel would be built.[608] He told her he had submitted a purchase offer to OMERS.[609] Based on the information provided by Mr. McCallion, the mayor believed her son was acting as a real estate agent for WCD[610] and that he was responsible for bringing Murray Cook into the project.[611] In 2006, the mayor learned from Mr. McCallion that Leo Couprie had invested in WCD.[612] At that point she believed Mr. Couprie owned all the shares of WCD.[613] The mayor testified she was not aware then whether Peter was simply the listing agent for the land deal, the agent for the condominiums to be developed by WCD, or both.[614]

On January 29, 2007, at Pier 4 Storehouse Restaurant in Toronto, the mayor witnessed the signatures of Mr. McCallion and Mr. Couprie on the declaration of trust and the loan agreement.[615] In her testimony at the Inquiry, the mayor insisted she did not read either document and that they were described to her as agreements to protect her son's and Mr. Couprie's interests in the event that something happened to them while they were travelling abroad.[616] As I have previously found, even a cursory glance at these documents would have made

it clear to the mayor that Mr. McCallion had a beneficial interest in WCD.*

It is of no moment whether it was only Murray Cook and Tony DeCicco, rather than Mr. McCallion himself, who asked the mayor to intervene on behalf of WCD to obtain concessions from the vendors,[617] or that Mr. McCallion did not personally ask the mayor to assist in settling the dispute between WCD and the co-owners.[618] The mayor well knew that, if the WCD deal were concluded, Mr. McCallion would benefit, even if only as a real estate agent.[619] I find that a real conflict of interest existed as a result of Peter McCallion's pecuniary interest in WCD, which was known to the mayor from the outset.

I find that Peter McCallion never fully disclosed his equity interest in WCD to Mayor McCallion.[620] However, in her testimony the mayor acknowledged that she asked the vendors to give special consideration to WCD, a company in which I have found she knew her son had a pecuniary interest of some kind.[621]

The Mayor's Approach to a Conflict of Interest

In Mayor McCallion's view, she was required to declare a conflict only if WCD's development application ever went before a committee of council or a council meeting. She also believed she should not discuss the matter with city staff.[622] In her testimony, the mayor explained that, in her opinion, the MCIA "clearly states that you should not get involved after you've declared a conflict in trying to influence staff or councillors."[623] However, the mayor did not believe that she was precluded from advocating for the WCD project outside city council because, in doing so, she was simply fulfilling her role as mayor.[624] The project was for the good of the city.[625] Accordingly, it caused her no concern that her son was involved when she sought concessions from the vendors.[626]

The mayor simply accepted that Peter McCallion had a pecuniary interest in relation to WCD,[627] whether he was WCD's real estate agent or a principal.[628] To her, the only difference lay in the content of her declaration of conflict at council.[629] Had she been aware of Mr. McCallion's ownership interest in WCD, the mayor would simply have specified that fact at city council as the reason for her declared conflict.[630]

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* Mayor McCallion agreed in her testimony that had she read the documents she would have understood the extent of her son's position in the company. Testimony of H. McCallion, Transcript, September 21, 2010, p. 5121.

The mayor believed she needed to be concerned about the conflict of interest only to the extent that the WCD transaction came before city council.[631] She did not believe she was at all restricted in her actions before the matter was reviewed by council.[632] However, she did concede there may have been a perception that she was attempting to influence the vendors for the wrong reasons.[633]

Commission counsel tested the mayor's opinion by offering a hypothetical situation in which the mayor herself held an equity interest, asking whether the mayor could promote her own project.[634] In the mayor's view, as long as she declared a conflict of interest at city council and did not influence the municipal legislative process with respect to the development, nothing would have prevented her from personally investing in a development project and then using her status as an elected official to promote the development and obtain concessions from other parties.[635]

Although the mayor testified that she would never put herself in such a situation, I confess that I find her initial response revealing. I find Mayor McCallion's narrow view of her duties in the face of a conflict of interest troubling.

The mayor's position throughout the Inquiry was that her conduct in the face of the conflict of interest posed by her son's pecuniary interest in WCD should be assessed only with regard to the provisions of the *Municipal Conflict of Interest Act*.[636] I find the mayor was mistaken in this belief. Specifically, I find that whether the mayor's conduct was appropriate in the face of the real conflict of interest must be assessed with regard not only to the MCIA, but also to the common law of conflict of interest.[637]

13 Appropriate Action Given Conflict of Interest

The Mayor and Due Diligence

Should the mayor have conducted some due diligence concerning WCD? A mayor or other elected official cannot be expected to know of every pecuniary interest held by relatives that might create a conflict of interest.* That said, a mayor

* The City of Toronto *Code of Conduct for Members of Council*, p. 7, and the City of Mississauga Code of Conduct, p. 9, draw attention to the fact that there may be circumstances in which a friend's pecuniary interest may be relevant in determining a conflict.

has an obligation to make reasonable inquiries when there is reason to believe a relative's involvement may place the mayor in a real or apparent conflict of interest.

Even accepting Mayor McCallion's testimony that she did not know of Peter McCallion's beneficial interest after witnessing the declaration of trust and the loan agreement (*evidence which I do not accept*), she was certainly put on notice that her son might have an interest in WCD when, in the summer of 2009, she read his sworn affidavit in which he stated that he was a principal of WCD.[638] Sworn evidence must be treated seriously not only in our courts but also in our other public institutions and in broader society. From that point forward, a reasonable person would have expected the mayor to have conducted due diligence to determine the exact nature of her son's interest in WCD.

In her testimony, the mayor admitted it would not be appropriate for her to get involved in a business transaction when she did not have a sufficient understanding of the details of the transaction.[639] The mayor was adamant that her actions were motivated by a desire to advance the city's interests.[640] As the mayor said, she has "worked over" many developers through the years without asking for personal favours.[641] I take note of the mayor's important concession that it might have appeared she was seeking concessions on behalf of her son's company and not for the City of Mississauga.[642] The *appearance* that the mayor was acting in the interests of her relative is one of my real concerns in this Inquiry.

I have already found that the mayor knew her son had an interest in WCD. Even if Mayor McCallion was misled by her son as to the degree of that interest, she knew he stood to benefit financially if the WCD transaction was successfully completed and she should have made further inquiries of her son to learn the real nature of his interest before advocating on WCD's behalf.

The Mayor and Council

Should the mayor have advised council of the steps that she was taking? The development of a hotel and convention centre was a public goal of Mississauga. In these circumstances I find that the mayor should have been more transparent about her intervention on behalf of World Class Developments. City council does not appear to have been aware of the mayor's private interventions on WCD's behalf. The mayor did not believe that WCD's negotiations for the purchase of the land had anything to do with city council.[643] I appreciate that

there was no formal mechanism in place for the mayor to advise city council of her conflict of interest in the exercise of her executive decisions at the time. Nevertheless, I find that the mayor should have identified and disclosed to council the nature and extent of her son's interest in WCD.

As discussed below, given her knowledge of her son's interest, the mayor should not have intervened as she did on WCD's behalf. However, having already intervened on WCD's behalf, she should, at the very least, have disclosed the extent of her intervention.

The Mayor and the Vendors

Would the vendors have entered into the agreement of purchase and sale without the mayor's intervention? There is considerable evidence that the mayor frequently intervened with the vendors in relation to WCD.

It is unlikely that the co-owners would have considered selling the land to WCD at the outset of these events had it not been for the mayor's involvement. The mayor intervened as early as October 2005 to encourage OMERS / Oxford to meet with Mr. Cook regarding the sale of the city centre site to WCD.[644] This was little more than a shell company whose principals were unknown to the vendors. The mayor pressed for OMERS to consider WCD's offer to purchase the lands before the involvement of its first significant investor, Leo Couprie. As a first step in its development project, WCD needed to secure the land "to be able to go out and attract a hotel next to the Living Arts Centre."[645] The mayor made first contact with OMERS and introduced Murray Cook on behalf of WCD – before Mr. Cook had even contacted OMERS.

In the initial days, Mr. Cook kept the mayor apprised of the project.[646] The mayor acknowledged in her testimony that she "stepped up the pressure on OMERS to sell" to WCD in 2006, when the momentum for the deal was lagging.[647]

Although the mayor testified that it was Mr. McCallion who recruited Mr. DeCicco to WCD, contemporaneous correspondence between the vendors suggests that the mayor assured the vendors of Mr. DeCicco's financial resources and ability to follow through on the deal.[648]

I accept that the mayor's interest in the WCD project was driven principally by her desire for a four- or five-star hotel in Mississauga and not simply by a desire to assist her son. However, the fact that the mayor may not have acted primarily to further her son's pecuniary interests does not end the conflict of interest analysis, nor does it take into account questions surrounding apparent

conflicts of interest. The mayor should have been more wary of using her influence where her son stood to gain financially from the transaction.

The Mayor and World Class Developments

Should the mayor have declined to be involved in the WCD matter altogether (aside from declaring a conflict of interest)? In this case, the mayor actively promoted WCD's interests at many different stages of the transaction when she knew that her son had a pecuniary interest in WCD. In pushing for the interests of WCD, and by extension Peter McCallion, the mayor acted in the face of a clear conflict of interest and used the influence of her office, albeit outside her legislative role. It is no answer for the mayor to say this was done for the benefit of the City of Mississauga when her son stood to make millions of dollars if the deal were concluded.

I find that, once Mayor McCallion learned her son had a pecuniary interest in WCD (which she knew from the outset), she should have refused any involvement in the project. Given the options available to her, the mayor's only actions in relation to WCD should have been:

1 to identify and disclose the nature and extent of her son's interest in WCD;
2 to declare a conflict of interest before any consideration of the WCD matter by city council, a committee of council, or a local board; and
3 to take no further role in promoting the WCD project.

14 David O'Brien, City Officials, and Conflict of Interest

David O'Brien's Many Hats

The Terms of Reference require me to "inquire into whether any existing or *former* elected or administrative representatives of … the City of Mississauga had a direct or indirect personal economic interest, or other conflict of interest."[649] David O'Brien was a former administrative representative of the city during his involvement in events considered in Phase II of the Inquiry. I find that he faced a conflict of interest while making inquiries on behalf of the mayor and by negotiating with World Class Developments. Mr. O'Brien was a former Mississauga city manager and a trustee of the mayor's family trust.[650] He was

also a former member of the board of Sheridan College as well as a current member of the OMERS board of directors.[651] Mr. O'Brien owed a fiduciary duty to OMERS, and also owed fiduciary duties to the mayor's children, including Peter McCallion. He had owed a fiduciary duty to the city in the past as its most senior public servant.

Because of her relationship with Mr. O'Brien and the fact that he was on the OMERS board, the mayor expected him to resolve any problems she brought to his attention without him ever reporting back to her.[652] When Mr. O'Brien sought to resolve the outstanding litigation between WCD and the vendors at the mayor's instance,[653] the city had an indemnity agreement with the vendors so that it would not be responsible for the payment of any settlement funds to WCD.[654] On the one hand, OMERS wanted to settle the litigation for as little money as possible. On the other hand, the mayor and the city wanted the litigation resolved and had no concern about the amount of money paid to WCD.[655]

The mayor testified that her desire to put an end to the litigation was motivated by her concern that the litigation might have an impact on the Sheridan College deal.[656] I find Mayor McCallion was undoubtedly also concerned about the "political issues"[657] that could arise from litigation involving a company in which her son was a principal. All these competing factors put Mr. O'Brien in an impossible position.

Appropriate Action in the Circumstances

What should Mr. O'Brien have done in the face of this conflict? Quite simply, he should have declined to assist the mayor with the WCD matter when she first raised the issue with him in discussions on July 7, 2009, at the TACC (Developments) golf tournament.[658] It was not appropriate for Mr. O'Brien to meet with Tony DeCicco and Peter McCallion[659] after the mayor requested that he inform himself of WCD's concerns[660] and the problems the city solicitor, Mary Ellen Bench, was facing in getting clear title to the land for the Sheridan College deal.[661] Further, Mr. O'Brien should not have participated in the negotiation of the litigation settlement involving WCD.

City Staff and Conflict of Interest

Did city staff face a conflict of interest in dealing with World Class Developments? Members of city staff had extensive involvement with WCD in determining the

appropriate development charges and site plan application fees. In all of this, staff exercised a fair degree of discretion. City staff did not act in the presence of a conflict of interest in any of these matters. City staff did not stand to benefit financially and provided no preferential treatment to WCD. The decision qualifying WCD's site plan application for the transition provisions of the development charges by-law and the decision that work should continue on the WCD project despite its non-payment of the site plan application fee were both reached independently for good reasons articulated in evidence before me. Staff made these decisions free from the mayor's influence. Similarly, the lifting of the H designation occurred within the legislative arena, where the mayor quite properly had refused to get involved.

The conflict of interest faced by the mayor cannot be imputed to city staff. City staff were unaware of the mayor's advocacy on behalf of WCD with the co-owners. Indeed, there was no adequate mechanism in place to alert city staff that a councillor faced a conflict of interest.

Appropriate Action for City Officials

What should city officials have done in the face of the mayor's conflict of interest? The city should establish a standard procedure to follow when a member of council has a conflict of interest. In the circumstances being examined in this Inquiry, however, I have found that the members of city staff were not influenced by the mayor or by Peter McCallion in their conduct. Once city officials were aware of the mayor's conflict of interest, whether as a result of the mayor's declaration of the conflict at council or otherwise, they should have taken steps to insulate the mayor from any involvement in the administrative decision-making process relating to WCD. Ms. Bench's notes of her call with Mr. O'Brien on September 5, 2009 reflect that she in fact took steps to achieve this result.[662]

Impact of the Conflicts of Interest

Impact on the Vendors

I find that Mayor McCallion's involvement in the WCD project created risk and uncertainty for the vendors which ultimately led to unnecessary costs. But for the mayor's involvement, the agreement of purchase and sale between the vendors and WCD likely would not have been executed, and the numerous

extensions of time requirements in the APS would not have been provided. I find it was the mayor's continued involvement that led to the settlement of the litigation. Without the mayor's intervention, on a balance of probabilities, it is unlikely Mr. Nobrega would have become involved, and, ultimately, the settlement payment would not have been made to WCD.

Going forward, large institutional investors like the co-owners may well approach development projects promoted by municipalities more cautiously. They likely will cause increased transaction costs through greater due diligence. Should this outcome occur it would be, on balance, positive.

Necessity for the Inquiry

Given the limited options available to address serious concerns about conflicts of interest at the municipal level, calling this Inquiry was the only effective option to examine the facts, short of an individual Mississauga elector bringing an application under the MCIA. The cost of this Inquiry to residents of Mississauga is significant and should not be discounted.

Recommendations for Phase II

An effective municipal accountability regime requires a culture of accountability that pervades municipal government. That culture of accountability cannot simply be imposed top-down through legislation; it requires strong leadership from various municipal stakeholders. A balance must be struck that provides consistency, predictability, coherence, fairness, and transparency, as well as sufficient flexibility.

In this section I consider the existing framework of accountability for conflict of interest in Mississauga and Ontario and make recommendations regarding amendments to the *Municipal Conflict of Interest Act* and the Mississauga Code of Conduct. I also make recommendations in regard to strengthening the office of the integrity commissioner. Finally, I suggest other measures that may prevent circumstances such as those arising in this Inquiry. I suggest a practice of providing comfort letters to aid third parties in negotiating with the city, the introduction of a lobbyist code of conduct, and amendments to the *Municipal Councillor's Guide*.

Existing Framework of Accountability

The *Municipal Act, 2001*

The current statutory framework under Part V.1 of the *Municipal Act, 2001*, SO 2001, c 25, allows municipalities to create an accountability regime responsive to the needs of the community. To meet their needs, municipalities may choose from a range of options available in Part V.1 of the *Municipal Act, 2001*.

At one end of the spectrum, municipalities may implement an extensive accountability regime including a municipal code of conduct, an integrity commissioner, a lobbyist registry, an ombudsman, an auditor general, and an open meetings commissioner. At the other end of the spectrum, municipalities may prefer a less complex and less expensive approach to accountability and transparency that does not include any of these options. Although the flexibility permitted under Part V.1 of the *Municipal Act, 2001*, recognizes the diversity of needs in municipalities across the province, it has the potential of establishing highly divergent standards of accountability and transparency.

The *Municipal Conflict of Interest Act*

The activities of those in public office should be animated by public purposes. The municipal accountability regime should take into account all the different hats that can be worn by municipal politicians. The *Municipal Conflict of Interest Act* is an integral part of that regime. It is aimed at fostering accountability, transparency, and public confidence in Ontario's elected municipal officials. However, the municipal accountability regime, which includes the MCIA, has not kept pace with the evolution of the *Municipal Act, 2001*.[663] The MCIA, as it currently exists, is inadequate regarding the kinds of mischief it addresses and the range of available sanctions. The recommended amendments to the MCIA set out below are aimed at advancing the public interest and the democratic foundations of municipal government.

The MCIA has a number of shortcomings. First, it is enforced by a formal application to the Ontario Superior Court of Justice, which requires a complaint by an "elector." The costs of such an application can be prohibitive for a citizen of ordinary means. Second, the sanctions available under the MCIA are severe – loss of office, disqualification from standing for office, and restitution where the member of council has profited financially from the

conflict. Broadly speaking, the quasi-penal nature of the MCIA is outdated and out of step with the modern municipal accountability regime.[664] The MCIA lacks more nuanced remedies.

Third, the MCIA is limited in its reach to deliberative and legislative work where a direct or indirect pecuniary interest exists. Section 5 of the MCIA requires members of council to disclose any direct or indirect pecuniary interest and its general nature. Their obligations are to recuse themselves from any discussion of or vote in respect of the matter, and to refrain from any attempt to influence the vote on the matter or any aspect of it.[665] However, the MCIA is silent with respect to the executive and administrative functions of members of council, which consume far more of the time of mayors and members of executive committees.

As the mayor acknowledged in her testimony, the MCIA is a "blunt instrument" that can be used for "all kinds of motives."[666] However, it can also be an important tool that prevents municipal politicians from using their public office inappropriately to promote their private economic interests and those of their close relatives. The expense required for an elector to bring an application in court pursuant to the MCIA is unfortunate, but court procedures also allow for greater procedural safeguards for the member of municipal council. Judges of the Superior Court of Justice should continue to have responsibility for removing municipal politicians from office under the MCIA.[667]

Recommended amendments to the MCIA are provided below.

Municipal Codes of Conduct

Municipal codes of conduct can help to regulate the conflicts of interest of members of municipal council in a more targeted and flexible manner than can provincial statutes such as the MCIA. This specificity and flexibility are particularly important given the evolution of municipalities such as Mississauga. Clear overarching principles should be combined with as many targeted rules as may be appropriate in the municipality.

The statutory authority for municipalities to adopt codes of conduct for members of council is found in section 223.2(1) of the *Municipal Act, 2001*. That section states that the municipality has the authority to "establish codes of conduct for members of the council of the municipality and of local boards of the municipality." Part V.1 of the *Municipal Act, 2001*, does not explicitly address the relationship between a municipality's code of conduct and the provisions

of the MCIA. However, the MCIA does not occupy the entire legislative field of conflict of interest, or even that concerning pecuniary interests. Thus, there is no legal impediment to the inclusion of conflict of interest provisions in a municipal code of conduct.[668]

Municipal codes of conduct can allow for enforcement outside the court system and without the associated costs.[669] The sanctions available under municipal codes of conduct can also be more varied and less severe than under the MCIA.[670]

Ontario municipalities can adopt codes of conduct covering the same pecuniary conflicts of interest of members of council and local boards as the MCIA, while allowing for more flexible enforcement mechanisms and sanctions. Municipal codes of conduct can go significantly further than the MCIA and be tailored to the types of relationships and circumstances that reflect the needs of the municipality.

I find that the Court of Appeal for Ontario's recent statement at paragraph 14 of *Ruffolo v Jackson*, [2010] OJ No. 2840, 267 OAC 381 (CA) – that "[t]he MCIA provides a complete code for dealing with the possibility of conflict of interest by municipal politicians, including providing full procedural rights" – should be read as applying only to the remedies available under the MCIA. The Court of Appeal for Ontario did not intend to make a blanket statement precluding municipal codes of conduct from considering conflicts of interest as a subject area.[671]

Regardless of the existence of municipal codes of conduct, however, the MCIA's complaint process remains, and an integrity commissioner should not take jurisdiction in a matter already before the court under the MCIA.[672] An application to court should not proceed concurrently with an investigation by the integrity commissioner.

The Mississauga Code of Conduct

On September 20, 2010, Mississauga adopted a draft Code of Conduct (the Mississauga Code)[673] that applies to the mayor and all members of council and which is aimed at improving the accountability of elected municipal officials. The Mississauga Code's effective date is December 1, 2010, and it was reviewed by council on April 6, 2011, at a General Committee meeting. Ms. Bench, the city solicitor, advised at the meeting that a further review of the Mississauga Code would take place after the release of this Report.[674]

On its face, the Mississauga Code recognizes conflicts of interest which extend beyond pecuniary interests and the formal legislative arena. The preamble of the Mississauga Code provides:

> And whereas ethics and integrity are at the core of public confidence in government and in the political process, and elected officials are expected to perform their duties in office and arrange their private affairs in a manner that promotes public confidence, avoids the improper use of influence of their office and conflicts of interests, **both apparent and real** and the need to uphold both the letter **and the spirit of the law** including policies adopted by Council [emphasis added].

Rule No. 1 of the Mississauga Code provides several more detailed prohibitions. Notably, Rule No. 1(b) of the Mississauga Code prohibits both apparent and real conflicts of interest:

> Members of Council should be committed to performing their functions with integrity and to avoiding the improper use of the influence of their office, and **conflicts of interest, both apparent and real**. Members of Council shall not extend in the discharge of their official duties, preferential treatment to Family Members, organizations or groups in which they or their Family Members have a direct or indirect pecuniary interest [emphasis added].

This ban on apparent conflicts of interest with respect to preferential treatment given to family members is commendable and highly relevant to the issues in this Inquiry. The clear prohibition of both apparent and real conflicts of interest provides an important mechanism for increasing accountability and enhancing public perception and confidence in elected officials.

The Mississauga Code clearly applies to members of city council in their day-to-day official activities, and it explicitly prohibits preferential treatment being given to family members (Rule No. 1(b)), the improper use of influence (Rule No. 7), and having an interest in a contract with the city (Rule No. 1(d)).[675]

Rule No. 1 provides a general prohibition on conflicts of interest, followed by specific examples. I adopt the interpretation of Professor Mullan that

> the inclusion of a general prohibition on conflicts of interest as a prelude to the specific examples is not to be read as limited by the more specific provisions that follow. In other words, if the common law would regard certain activities, involvements or relationships as giving rise to conflict of interest, the general provision would cover that, even if the later provisions in the *Code* do not specifically refer to such a conflict.[676]

As discussed below, I also adopt Professor Mullan's recommendation that the Mississauga Code be amended to clarify this point. He writes:

> Indeed, there is one reason in particular why it is important to establish that the general provision with respect to conflict of interest is not limited by the specific instances that follow in Rule 1. They do not cover the entire spectrum of conduct and involvements that amounts to problematic conflicts of interest. Thus, for example, the provision on preferential treatment in para. (b) is restricted to family members or organizations or groups in which family members have a direct or indirect pecuniary interest. This is potentially under-inclusive in at least two ways. Giving preferential treatment to close personal friends or business partners may well be equally indefensible, as may giving preferential treatment to not for profit organizations to which family members, friends and business partners have a substantial commitment.[677]

The Mississauga Code covers a wider array of circumstances than the MCIA or the City of Toronto's *Code of Conduct for Members of Council*.[678] In my view, the Mississauga Code is a welcome development that helps to clarify matters through examples of prohibited conduct for municipally elected officials. There are, however, aspects of the Mississauga Code that could be more clearly drafted.

Specific recommendations for the improvement of the Mississauga Code are provided in Recommendations 15, 16, and 17.

Integrity Commissioner

The integrity commissioner falls into a specialty ombudsman system as envisaged in the *Municipal Act, 2001*.[679] The main function of the office of the integrity commissioner is to bring transparency and consistency to the municipal accountability regime.[680] A municipal integrity commis-

sioner is responsible for receiving, investigating, and reporting to council on formal and informal complaints about members of council, and for determining whether there has been a violation of a municipality's code of conduct.[681] An integrity commissioner can also advise members of council and local boards to help maintain a high standard of ethical behaviour in municipal government and even help teach both the public and municipal officials about the accountability regime.[682] An integrity commissioner may also be required to provide a regular report to city council or to report on discrete issues as they arise and provide a buffer between third parties and municipal officials, so that complaints do not need to be made directly to elected officials. Overall, an integrity commissioner can provide important oversight of and direction to municipal officials, particularly when a well-drafted municipal code of conduct is in force.

The statutory authority for municipalities to appoint an integrity commissioner is found in section 223.3(1) of the *Municipal Act, 2001*. That section provides that the integrity commissioner is

> responsible for performing in an independent manner the functions assigned by the municipality with respect to, (a) the application of the code of conduct for members of council and the code of conduct for members of local boards or of either of them; (b) the application of any procedures, rules and policies of the municipality and local boards governing the ethical behaviour of members of council and of local boards or of either of them.

Section 223.4 of the *Municipal Act, 2001*, also allows the integrity commissioner to convert an investigation into an inquiry, which is an important middle ground between a regular investigation by the integrity commissioner and a full judicial inquiry. By converting an investigation into an inquiry, the integrity commissioner can exercise powers under the *Public Inquiries Act* to obtain information.

If an inquiry is conducted and the integrity commissioner finds that a member of council has contravened the municipal code of conduct, then council may issue a reprimand or suspend the salary of the member for up to 90 days, although the availability of a wider range of sanctions remains unclear. However, there is no clear source of funding for such an inquiry, so funding likely would have to be voted on by council or otherwise provided.[683] It is

unfortunate that the Ontario legislature did not identify a source of funding for inquiries conducted pursuant to section 223.4 of the *Municipal Act, 2001*.

Section 223.5 of the *Municipal Act, 2001*, provides a statutory duty of confidentiality for the integrity commissioner. Notably, subsection 223.5(3) also provides a statutory exemption from the application of the *Municipal Freedom of Information and Protection of Privacy Act*, RSO 1990, c M.56.

The integrity commissioner's reporting function is codified in section 223.6 of the *Municipal Act, 2001*, which allows the integrity commissioner to summarize advice provided, but prevents the disclosure of confidential information that could identify the person concerned. Since it would frustrate the purpose of integrity commissioners if municipal councils could completely disregard the reports they table, subsection 223.6(3) of the *Municipal Act, 2001*, requires all reports tabled by an integrity commissioner to be made public.[684]

Section 223.8 of the *Municipal Act, 2001*, provides that where, during the course of an investigation, the integrity commissioner determines there are grounds for believing a contravention of another Act has occurred, the integrity commissioner must "immediately refer the matter to the appropriate authorities and suspend the inquiry until any resulting police investigation and charges have been finally disposed of." The suspension of the integrity commissioner's investigation must be reported to municipal council. The effect of this provision should be to prevent an integrity commissioner from dealing with a conflict of interest complaint that is the subject of court proceedings under the MCIA. However, the lack of an "appropriate authority" causes confusion; section 223.8 does not create an immediate statutory obligation to suspend proceedings and does not otherwise regulate the course of any integrity commissioner investigation.[685]

In 2004, the City of Toronto became the first municipality in Canada to create the office of integrity commissioner.[686] The recent appointment of an interim integrity commissioner in Mississauga was a useful development, and one that gives practical effect to the rules contained in the Mississauga Code.

Lobbyist Registry

As with all governance regimes, the dissemination of information plays a critical role in municipalities. The Bellamy *Report* describes "lobbying as a potentially helpful practice that should be carefully controlled."[687] Municipalities have the power to establish and maintain a lobbyist registry pursuant to sec-

tion 223.9 of the *Municipal Act, 2001*. Section 223.11 of the *Municipal Act, 2001*, also allows a municipality to appoint a registrar for the lobbyist registry. To date, no municipality in Ontario has created a lobbyist registry under section 223.9 of the *Municipal Act, 2001*.*

Given the size of the City of Mississauga and the existence of other measures that can be taken to improve accountability and transparency, the city should not establish a lobbyist registry at this time. In my opinion, it would be premature for the city to create a lobbyist registry. My concern is that it would be a disproportionate response to the issues of accountability and transparency in the circumstances, particularly given the significant costs involved. The financial cost to the City of Toronto for its lobbyist registry has been significant, with the 2009 budget for the office being just under $1 million.[688] The effectiveness of the City of Toronto's lobbyist registry is still unclear.

My specific recommendations arising out of Phase II of the Inquiry follow below.

Recommended Amendments to the *Municipal Act, 2001*

The wording of section 223.3 of the *Municipal Act, 2001*, appears to place responsibility for maintaining his or her own impartiality entirely on the integrity commissioner. This assignment of responsibility is wholly unsatisfactory.[689]

recommendation 5

I recommend that additional statutory safeguards be added to the office of the integrity commissioner in the *Municipal Act, 2001*, including

(a) a minimum term of appointment to provide security of tenure; and
(b) a requirement that municipalities indemnify the integrity commissioner.

~

* The City of Toronto established a lobbyist registry; however, it was done pursuant to a statutory requirement found in section 165 of the *City of Toronto Act*, SO 2006, c 11 Sched. A.

Section 223.8 of the *Municipal Act, 2001*, should also be amended to prevent conflict between an investigation by an integrity commissioner and a court.

recommendation 6

I recommend that section 223.8 of the *Municipal Act, 2001*, be amended to require explicitly that an integrity commissioner suspend his or her investigation or proceedings relating to a matter which is the subject of proceedings before a court of competent jurisdiction. This recommendation mirrors my advice relating to the content of the Mississauga Code of Conduct.

~

Recommended Amendments to the *Municipal Conflict of Interest Act*

The *Municipal Conflict of Interest Act* (MCIA) should be amended to resemble the *Members' Integrity Act, 1994*.[690] The amended Act should not displace the ability of municipalities to create codes of conduct that are flexible and tailored to their individual needs. Further, it may also be useful to integrate the MCIA with the *Municipal Elections Act, 1996*.[691] The following are my recommendations as to how the MCIA could be improved through amendment.

Create a Preamble

Adding a preamble to the *Municipal Conflict of Interest Act* setting out broad overarching principles would assist members of council to understand their role in promoting public confidence in municipal government.

RECOMMENDATION 7

I recommend that a preamble be added to the *Municipal Conflict of Interest Act* setting out broad overarching principles. It would be appropriate to include a preamble similar to the one found in the *Members' Integrity Act, 1994*, which provides as follows:

> It is desirable to provide greater certainty in the reconciliation of the private interests and public duties of members of the Legislative Assembly, recognizing the following principles:
>
> 1. The Assembly as a whole can represent the people of Ontario most effectively if its members have experience and knowledge in relation to many aspects of life in Ontario and if they can continue to be active in their own communities, whether in business, in the practice of a profession or otherwise.
> 2. Members' duty to represent their constituents includes broadly representing their constituents' interests in the Assembly and to the Government of Ontario.
> 3. Members are expected to perform their duties of office and arrange their private affairs in a manner that promotes public confidence in the integrity of each member, maintains the Assembly's dignity and justifies the respect in which society holds the Assembly and its members.
> 4. Members are expected to act with integrity and impartiality that will bear the closest scrutiny.

~

Clarify Scope of Act

Remoteness

I agree with Mayor McCallion that the *Municipal Conflict of Interest Act* should not go so far as to prevent the relatives of municipal politicians from being involved in business developments or providing municipal services within the same municipality.[692] That restriction would be a significant disincentive for individuals to run for municipal office, and it could hinder valuable economic activity. Amendments to the MCIA should not effectively bar the relatives of municipal politicians from living in, working with, or conducting business in the same municipality. I hasten to add that I do not regard any of my proposed

recommendations or findings as likely to bring about that result.

Subsection 4(k) of the MCIA already recognizes that the pecuniary interests covered under the Act are subject to a remoteness limitation. It provides that section 5 of the MCIA does not apply to a pecuniary interest "which is so remote or insignificant in its nature that it cannot reasonably be regarded as likely to influence the member."

The "de minimis" provision was tested in *Lastman v Ontario*, [2000] OJ No. 269, 47 OR (3d) 177 (SCJ) [*Lastman*], where, as a result of a city council decision in which Toronto Mayor Mel Lastman participated, legal proceedings were initiated against the Toronto Police Association in relation to the association's True Blue Campaign.* The Toronto Police Association retained Goodman Philips and Vineberg LLP, the law firm in which the mayor's son Dale Lastman was a partner. By virtue of section 5 of the MCIA, the mayor had a deemed pecuniary interest as a result of this fact.

Winkler J (as he then was) applied the test set out by MacKenzie J in *Whiteley v Schurr*,[693] with respect to subsection 4(k) of the MCIA:

> Would a reasonable elector, being apprised of all the circumstances, be more likely than not to regard the interest of the councillor as likely to influence that councillor's action and decision on the question? In answering the question set out in such test, such elector might consider whether there was any present or prospective financial benefit or detriment financial or otherwise, that could result depending on the manner in which the member disposed of the subject matter before him or her.[694]

Winkler J concluded that the presumptive pecuniary interest deemed to exist in section 3 of the MCIA was "so remote or insignificant in its nature that it cannot reasonably be regarded as likely to [have] influence[d] Mel Lastman."[695]

Thus, the MCIA explicitly recognizes that a conflict will not be found where the benefit to the member's relative is too remote. For this reason, there is no rational concern about the ability of close relatives of municipal politicians to earn a living in the same municipality.

---

* Mayor Lastman was also a member of the Toronto Police Services Board and participated in the deliberations that resulted in instructions to commence legal proceedings against the association.

Knowledge of the Elected Officials

In her testimony, the mayor suggested it was unfair for the *Municipal Conflict of Interest Act* to apply in situations where the elected official has no knowledge of the situation underlying the conflict of interest.[696] However, pursuant to section 3 of the MCIA, "the pecuniary interest, direct or indirect, of a parent or the spouse or any child of the member shall, **if known to the member**, be deemed to be also the pecuniary interest of the member" [emphasis added].

Section 3 of the MCIA already provides a clear defence for elected municipal officials where they do not have knowledge of the underlying conflict. The knowledge aspect of section 3 of the MCIA provides fairness, given the severity of the sanctions required under the MCIA, and should remain a fundamental aspect of the MCIA unless the provisions regarding sanctions are significantly amended.

Clarify Who Is Captured by the MCIA

Section 5 of the *Municipal Conflict of Interest Act* requires a member present at a council or board meeting where a matter in which the member has *any* pecuniary interest is considered, to disclose any direct or indirect pecuniary interest and its general nature. Accordingly, the member must recuse himself or herself from any discussion of or vote on the matter and refrain from any attempt to influence the vote on the matter or any aspect of it.

The current wording of the MCIA may be interpreted to mean that only members and some of their relatives are caught. This interpretation is undesirable because it results in arbitrary line-drawing exercises that do not address the mischief targeted by the MCIA.

RECOMMENDATION 8

I recommend that a statement be added within the *Municipal Conflict of Interest Act* (MCIA) to the effect that the interests of spouses, parents, children, siblings, and other relatives are deemed also to be the interests of the member. This addition would strengthen the MCIA.

~

Beyond Pecuniary Interests

Situations may arise where factors other than a financial interest inappropriately influence an elected official's participation in a matter.

Much of the problem with respect to conflicts of interest is the *appearance* of impropriety. However, the apparent conflict of interest standard would go too far in the context of the MCIA given the serious sanctions that can be imposed by a judge under that statute. Fairness requires that the member have knowledge of the interest for the MCIA to be engaged. In an ideal conflict of interest regime, apparent conflicts of interest would be caught and dealt with under other, more flexible processes (such as members' codes of conduct or the functioning of an integrity commissioner). If lesser sanctions, as discussed below, are introduced into the MCIA, adoption of an apparent standard (which would engage some of the lesser sanctions) should be reconsidered.

RECOMMENDATION 9

I recommend that the *Municipal Conflict of Interest Act* (MCIA) be extended to include private interests more broadly. The MCIA currently applies only to a "pecuniary interest."

(a) Depending on the scope of amendments to the MCIA, the wording "pecuniary interest" should be replaced with "private interest," although such a change would likely require an explicit materiality threshold, so that insignificant private interests are not caught.

(b) This extension of what constitutes a conflict of interest should be accomplished through the inclusion of a provision similar to section 5 of the *Members' Integrity Act, 1994*. Section 5 of the *Members' Integrity Act, 1994*, provides that:

> This Act does not prohibit the activities in which members of the Assembly normally engage on behalf of constituents in accordance with Ontario parliamentary convention.

~

Clarify Types of Meetings Captured by the MCIA

The MCIA should apply to matters beyond the deliberative and legislative functions of municipal council. Subsection 5(1) of the MCIA, which requires a member of council with a pecuniary interest in a matter raised at a meeting or for a vote to declare a conflict, should be clarified and amended in this regard. Clear guidelines are essential in deciding what meetings are caught by the sweep of the MCIA. Also, the MCIA should be read as requiring the member not only to declare a conflict of interest, but to specify the nature and extent of the interest.

RECOMMENDATION 10

Although some courts have already found that section 5 of the *Municipal Conflict of Interest Act* applies to committee meetings,* the statute should be amended so that it clearly applies to all meetings attended by members of council in their official capacities. These would include meetings to promote developments said to be in the city's interest.

~

The Need for Lesser Sanctions

Remedies occupying a middle ground between disqualification and a formal reprimand are needed in the MCIA.[697] To balance the recommended extension of conflicts covered by the MCIA and municipal codes of conduct, a broader range of sanctions should be made available.

As it currently stands, the sanctions available under the MCIA are draconian. If a judge determines that a member of council has not followed the proper protocol with respect to a conflict of interest, subsection 10(1) of the MCIA *requires* that the judge (a) shall declare the seat of the member of council vacant; (b) may disqualify the member from municipal office for several years; and (c) may require restitution if there has been personal financial gain. Subsection 10(3) prevents the judge from imposing the less severe penalty of suspension. The usefulness of the statutory restitutionary remedies available under the MCIA should also be considered.[698] Civil actions cover most situations where municipal politicians receive improper financial benefits. The

* *Jaffary v Greaves*, [2008] OJ No 2300 (SCJ); *Sims v Fratesi*, [1996] OJ No 4488 (Gen Div).

MCIA should not be construed as precluding civil actions for restitutionary recovery.

RECOMMENDATION 11

I recommend that the existing sanctions in the *Municipal Conflict of Interest Act* (MCIA) remain in place. However, none should be mandatory, and lesser sanctions should be made available. More specifically, I recommend that:

(a) Subsection 10(3) be repealed, and the following lesser sanctions be made available where a judge finds contravention of the MCIA:
- suspension of the member for a period of up to 120 days;
- a form of probation of the member, with oversight by the integrity commissioner or auditor;
- removal from membership of a committee of council;
- removal as chair of a committee of council;
- a reprimand publicly administered by the judge; and
- a formal apology by the member.

(b) Section 13 of the MCIA dealing with remedies be amended to provide only for declaring a seat vacant.

~

I observe that should the available sanctions under the *Municipal Conflict of Interest Act* be broadened, section 15, which provides that the MCIA prevails over other conflicting statutory provisions, might be repealed.

Standing to Pursue Claims

It would be helpful to simplify the procedure for pursuing a claim under the MCIA. However, it is not advisable to lessen any of the procedural protections that currently exist under the MCIA, such as a hearing in front of an impartial and independent judge.[699]

RECOMMENDATION 12

I recommend that electors continue to be able to bring applications under the *Municipal Conflict of Interest Act* (MCIA), and that individuals or organizations demonstrably acting in the public interest be able to bring such applications.

The mischief addressed by the MCIA is of such gravity that section 9 should be amended to allow the Attorney General to bring applications as well.

~

The MCIA and the Integrity Commissioner

The powers of integrity commissioners are already recognized in the *Municipal Act, 2001*, but not in the *Municipal Conflict of Interest Act*.

RECOMMENDATION 13

I recommend that the *Municipal Conflict of Interest Act* (MCIA) be amended to recognize the role of the integrity commissioner to investigate and to report on matters covered by the MCIA.

~

Coordination with Municipal Codes of Conduct

It is quite apparent to me that careful consideration must be given to how the *Municipal Conflict of Interest Act* and any given municipal code of conduct are going to mesh. I believe it necessary that the MCIA be given clear primacy but that the limits of the Act be specified.

RECOMMENDATION 14

I recommend that the *Municipal Conflict of Interest Act* be amended to include a provision stating explicitly that nothing in the Act prevents a member of council from making submissions regarding a finding in a report by the integrity commissioner or regarding the imposition of a penalty under a municipal code of conduct. It is important that members of council be afforded procedural fairness under municipal codes of conduct.

~

The Mississauga Code of Conduct

The circumstances at issue in this Inquiry highlight some of the ways in which the draft Mississauga Code of Conduct could be strengthened. As it currently exists, the Mississauga Code is useful for many reasons, not the least of which is that the vast majority of electors cannot afford to bring an application pursuant to the MCIA. The Mississauga Code of Conduct also provides a relatively flexible common framework for all members of council to follow. They can turn to the Mississauga Code of Conduct and to the integrity commissioner for guidance before placing themselves into situations where a real or apparent conflict of interest arises. These recommendations in regard to the Mississauga Code of Conduct may have application as a model for other municipalities.

Preamble

The focus of the Mississauga Code should be on the spirit, principles, and goals underlying its creation, and it is not intended to be strictly interpreted.[700]

RECOMMENDATION 15

I recommend that the preamble to the Mississauga Code be revised to clearly identify the values which underlie it and the mischief the scheme is set up to address. It may be counterproductive for the city to adopt a strict rules-based approach to the Code. Instead, the Mississauga Code should set out strong value statements, followed by a small number of general rules and more detailed commentary about those rules.

~

Changes to the Conflict Rules

The inclusion of the apparent conflict standard in the Mississauga Code is laudable. I am in favour of including a definition of an "apparent conflict of interest" and recommend below, with necessary minor revisions, the inclusion of the following definition found in subsection 2(2) of the British Columbia *Members' Conflict of Interest Act*, RSBC 1996, c 287:[701]

> For the purposes of this Act, a member has an apparent conflict of interest if there is a reasonable perception, which a reasonably well informed person could

> properly have, that the member's ability to exercise an official power or perform an official duty or function must have been affected by his or her private interest.

For clarity, under the heading "Framework and Interpretation," the Mississauga Code should state that Rule No. 1 is to be treated as a stand-alone rule under which complaints can be made.[702] At present, Rule No. 1(b) of the draft code states that

> Members of Council should be committed to performing their functions with integrity and to avoiding the improper use of the influence of their office, and conflicts of interest, both apparent and real. Members of Council shall not extend in the discharge of their official duties, preferential treatment to Family Members, organizations or groups in which they or their Family Members have a direct or indirect pecuniary interest.

The wording of Rule No. 1(b) should be strengthened. As it stands, the prohibition against real and apparent conflicts of interest in Rule No. 1(b) might be construed narrowly as having application only with respect to preferential treatment given to family members in relation to pecuniary interests. City council should amend the Mississauga Code to clarify the status of the ban against both real and apparent conflicts of interest in a separate stand-alone prohibition and should also extend the ban beyond pecuniary interests and family members.[703]

Recommendation 16

I recommend that the Mississauga Code be amended by replacing Rule No. 1(b) with the two following stand-alone rules:

> Members of Council should be committed to performing their functions with integrity. Members **shall avoid** the improper use of the influence of their office and **shall avoid** conflicts of interest, both apparent and real [emphasis added].

> Members of Council shall not extend in the discharge of their official duties preferential treatment **to any individual or organization if a reasonably well-informed person would conclude that the preferential treatment was advancing a private interest** [emphasis added].

~

recommendation 17

I recommend that Mississauga City Council include a commentary following these two stand-alone rules:

> For greater clarity, this Code does not prohibit members of Council from properly using their influence on behalf of constituents.

I adopt the recommendation of Professor David Mullan that, instead of taking the form of stand-alone rules, Rules No. 1(d), (e), (f), and (g) of the Mississauga Code should form a commentary following the new Rule No. 1(b). That way, they will clearly fall under the statement in the "Framework and Interpretation" section of the Mississauga Code, which provides that "[c]ommentary and examples used in this Code of Conduct are illustrative and not exhaustive."

~

Integrity Commissioner

The Mississauga Code currently provides in the commentary to Rule No. 1(b) that

> Members of Council are governed by the *Municipal Conflict of Interest Act* and the provisions of that statute take precedence over any authority given to the Integrity Commissioner to receive or investigate complaints regarding alleged contraventions under the *Municipal Conflict of Interest Act*.

recommendation 18

I recommend that the Mississauga Code clarify further that the *Municipal Conflict of Interest Act* (MCIA) takes precedence over the Mississauga Code only when an actual complaint is made under the MCIA involving the very same matter.

~

RECOMMENDATION 19

I recommend that the Mississauga Code contain a provision requiring the integrity commissioner to suspend his or her own investigation or proceedings when a proceeding under the *Municipal Conflict of Interest Act* (MCIA) has been commenced with respect to the same matter, until the process under the MCIA has been completed.

~

Improper Use of Influence, Gifts, and Benefits

Rule No. 7 of the Mississauga Code is clear and concise. This prohibition on improper use of influence is particularly important because it goes beyond the existence of a conflict of interest and it captures what is done in the face of the conflict. It specifically targets improper actions. However, Rule No. 2 of the Mississauga Code, which addresses gifts and benefits, is less clear.

RECOMMENDATION 20

Rule No. 2 of the Mississauga Code, which addresses the permissibility of a councillor accepting gifts and benefits, contains a fairly detailed list of exceptions. I recommend that, instead of setting out such a list, an overarching principle be articulated in the Mississauga Code: No inappropriate gifts are allowed "that would to a reasonable member of the public appear to be in gratitude for influence, to induce influence, or otherwise to go beyond the necessary and appropriate public functions involved." The simplicity of such a rule is attractive, and it could be supplemented with a detailed commentary, as well as future "cases" decided by the integrity commissioner.

~

RECOMMENDATION 21

I recommend that the commentary to Rule No. 7 of the Mississauga Code be expanded to say that members of council cannot make submissions to a municipal adjudicative body, such as a licensing tribunal, on behalf of a member of their ward.*

~

* Lorne Sossin aptly pointed out that the current wording of the rule is not clear on this point; Transcript of Expert Panel, December 15, 2010, pp. 5711–12.

Lobbyists

The Mississauga Code, should clearly address lobbying. Although I do not recommend that Mississauga create a lobbyist registry because of the expense involved,* the Mississauga Code could be amended to provide guidelines for how municipal politicians should deal with lobbyists, particularly in the context of development issues. I note that Surrey, British Columbia, has adopted such an approach.[704] This approach would provide a relatively low-cost measure to address concerns about lobbying and commercial development in the municipality.

Recommendation 22

I recommend that the Mississauga Code be amended to include clear guidelines setting out how municipal politicians may deal with lobbyists.

~

Procedural Fairness

As noted in Recommendation 14, the MCIA should include a provision which explicitly states that nothing in the MCIA prevents a member of council from making submissions regarding a finding in a report of the integrity commissioner or regarding the imposition of a penalty under a municipal code of conduct. Members of council should be afforded procedural fairness, particularly where they are concerned that a report critical of them may be adopted or that a penalty may be imposed as a matter of political expediency. Specifically, a member of a municipal council should have the opportunity to respond at council to a damning report or to a recommendation that a penalty be imposed under a municipal code of conduct.

* D. Mullan, Transcript of Expert Panel, December 16, 2010, p. 5950. The associated compliance costs for the municipality and the lobbyists should be limited.

RECOMMENDATION 23

To improve transparency and procedural fairness, I recommend:

(a) that the procedure for making a complaint be set out in the Mississauga Code. In the interest of independence, complaints made under the Mississauga Code should be submitted directly to the integrity commissioner instead of through the civic administration; and

(b) that the current Rule No. 18 of the Mississauga Code be revised to recognize explicitly the need to hear from a member before a critical report is adopted or a penalty is imposed by city council.

~

Sanctions

Municipal codes of conduct primarily enhance accountability through greater transparency. The inclusion of a range of sanctions in the Mississauga Code may be appropriate so long as they are used responsibly and only in appropriate cases.[705] However, in light of concerns about the adequacy of procedural fairness safeguards and the use of sanctions for an improper purpose, it may be preferable to remove severe sanctions such as suspension from the Mississauga Code altogether, and incorporate into the Mississauga Code some of the lesser sanctions discussed in Recommendation 11 which might be found in an amended *Municipal Conflict of Interest Act*.[706]

Office of the Integrity Commissioner

Even the most well-intentioned municipal code of conduct and legislative enactments governing elected municipal officials will not be effective without a proper enforcement regime. An integrity commissioner can play a vital role in this regard. The creation of a permanent office of integrity commissioner in Mississauga, responsible for receiving, investigating, and reporting on formal and informal complaints, would be of great assistance.

The potential for a conflict of interest is inherent in the office of an integrity commissioner. A conflict of interest may develop as a result of the overlapping roles of the integrity commissioner in giving advice to councillors, investigating councillors, and recommending sanctions when councillors violate the

municipal code of conduct.[707] However, concerns about this potential for a conflict of interest should not be overstated.

To enhance impartiality, the integrity commissioner should not be an employee of the municipality. An integrity commissioner should not only be independent from municipal council but also be seen to be independent. The appointment process for the integrity commissioner should be fair and transparent. The integrity commissioner's tenure should also be fixed in length, non-renewable, and reasonably long.[708] A term of five to seven years – arranged on a part-time or half-time basis, depending on the size of the municipality – would be appropriate. The remuneration of the integrity commissioner should also be fixed at a reasonable level to avoid concerns about undue influence.

The office of the integrity commissioner can also direct outreach, provide education, and perform an important advisory function. One of the most important roles for a municipal integrity commissioner is to provide advice to and conduct outreach seminars with elected officials and municipal staff. In many ways, such advisory and educational functions are more effective than its complaints function is at shaping commercial practices and the private sector's interactions with municipal politicians. Resources permitting, the integrity commissioner should also conduct educational outreach work with the public and, in particular, the development industry so that it understands the municipal accountability regime.[709]

It has been suggested that the integrity commissioner's advisory role should be extended to third parties, for example those involved in municipal procurement processes. In my view, it would not be advisable for the integrity commissioner to provide formal advice to third parties because of the heightened risk of a conflict of interest developing. In addition, third-party commercial developers might try to download their due diligence onto municipal integrity commissioners[710] or might seek legal advice from integrity commissioners rather than city solicitors.[711] The provision of advice to third parties could quickly become very expensive and effectively set up circumstances for complaints. Third parties should engage lawyers and other professionals to provide them with advice.

The integrity commissioner should report publicly on complaints received, as well as advice provided. In the interest of encouraging members of council and municipal staff to seek advice from the integrity commissioner, the names of those requesting advice from the integrity commissioner should be removed from the published version of any such report.[712]

Mississauga is large enough to have its own integrity commissioner.[713] However, as an alternative to the appointment of a separate integrity commissioner in each municipality, it would be helpful, particularly to smaller municipalities, for there to be a roster of integrity commissioners who can deal with issues in a region of the province or across the entire province. Mayor McCallion sensibly suggested that a roster of integrity commissioners should be engaged by the Association of Municipalities of Ontario and made available to any municipality in Ontario, as needed.[714]

I am attracted to the conclusion that, had there been an integrity commissioner acting in Mississauga in this particular case, his or her services might have been accessed in such a way as to have avoided the necessity for this Inquiry. First, education and outreach might have made it clear to Mayor McCallion and others involved that there was a real conflict of interest relating to the mayor's involvement on behalf of WCD, and, in the face of that conflict, she ought not to have acted to further WCD's interests. Second, the ability of an integrity commissioner to investigate and report on the conduct of a municipal official in the face of a conflict of interest, and to advise city staff and the mayor, might have avoided the need for an Inquiry altogether.

Should Mississauga decide to create the office of integrity commissioner, it would be incumbent on the mayor and members of council to avail themselves of its services.

RECOMMENDATION 24

I recommend that the City of Mississauga create a permanent office of integrity commissioner responsible for receiving, investigating, and reporting on formal and informal complaints.

~

RECOMMENDATION 25

I recommend that the Ontario legislature require that, where a municipality has created the office of integrity commissioner, the municipality be required to identify a source for funding in the event an inquiry is called by the integrity commissioner.

~

recommendation 26

I recommend that a roster of potential integrity commissioners be created and funded through the Association of Municipalities of Ontario. These individuals would be available to provide assistance, on an on-call basis, to municipalities not having an integrity commissioner.

~

Lobbyists

As noted, I do not recommend that Mississauga create a lobbyist registry because of the expense involved.* However, the creation of a clear and straightforward lobbyist code of conduct could help increase transparency for commercial developers and other third parties that deal with the municipality.[715]

recommendation 27

I recommend that Mississauga create a concise lobbyist code of conduct, and that the integrity commissioner be given responsibility for overseeing the lobbyist code and educating third parties about it.

~

Additional Considerations

In addition to the above recommendations, I make the following observations about other steps that might be taken to prevent the circumstances giving rise to this Inquiry.

Publication of All Known Conflicts of Interest

I invite the city clerk's office to consider the feasibility of creating a searchable database containing a list of all declared or known conflicts of interest, which could be posted on the city's website.[716] Capturing all declared conflicts of interest so that they are readily accessible by third parties could be an

* D. Mullan, Transcript of Expert Panel, December 16, 2010, p. 5950. The associated compliance costs for the municipality and the lobbyists should be limited.

extremely useful endeavour so long as it is done in a cost-effective manner. It would increase transparency and accountability at a relatively minimal cost to taxpayers. Should this proposal be found to be feasible in Mississauga, it might be adopted by other municipalities.

Comfort Letters

Third parties should have an efficient mechanism to determine whether a known conflict of interest exists. Municipalities could issue "comfort letters"* to third parties in a commercial transaction to enhance municipal accountability and transparency.[717] In this scenario, third parties could write to the municipality and ask if there were any known or declared conflicts of interest or findings of improper influence made in relation to a transaction. Providing comfort letters could be implemented as a best practice when the municipality is a party to a transaction and when there are particular concerns about commercial transactions between private parties.

In the case of Mississauga, comfort letters could be provided by the city solicitor or the city clerk, and would in some cases involve input from the integrity commissioner. There might be a concern that, by issuing comfort letters, the city could expose itself to liability,[718] but that should be tempered by the level of investigation undertaken by the municipality and the inclusion of plain language limitation of liability clauses. Providing comfort letters to private entities would not be an onerous process since it would not require rigorous investigation or due diligence – and it may very well prevent circumstances such as those which have led to this Inquiry.

The *Municipal Councillor's Guide*

The *Municipal Councillor's Guide*, published by Ontario's Ministry of Municipal Affairs and Housing, contains an unduly restricted view of conflicts of interest affecting municipal politicians.[719] As previously discussed, the MCIA is not a complete code in respect of the conflicts of interest of municipal politicians. The *Municipal Councillor's Guide* should be amended to reflect a broader view of conflicts of interest, such as that described in this Report.

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* A comfort letter in this context refers to a letter written by the city to give assurance to the party involved in business dealings with it that there are no known conflicts of interest which could call into question the integrity of the transaction.

Effect of Such Reforms in This Case

The following is a brief analysis of the effects of the suggested reforms in the circumstances of this case.

On the Mayor

A broader view of conflict of interest and improper use of influence would have had a great impact. An awareness that conflicts of interest might arise outside the legislative arena might have led the mayor to be much more cautious in her dealings with WCD and the co-owners.

The mayor's ability to obtain advice from an integrity commissioner about her situation and what actions she could take would have been extremely helpful to her. She might have taken her concerns about Peter McCallion's involvement in WCD to an integrity commissioner at the outset – long before the matter came before municipal council – and thereby defused any criticism of her involvement in the WCD project or its aftermath. Receiving binding advice from the integrity commissioner can be an effective protection for municipal councillors, since they can respond to criticism by saying they have already addressed a real or apparent conflict of interest with the integrity commissioner.[720]

It is preferable that conflicts and potential conflicts be identified and considered early. However, that desire does not mean municipal politicians must immediately declare every potential conflict. The timing of such declarations will turn on the facts and circumstances at issue, and will require members of council to exercise their best judgment.

The implementation of an enhanced municipal accountability regime in Mississauga will require an adjustment period. Strong leadership from Mayor McCallion and other elected officials will be necessary to ensure its success.

On David O'Brien

As with the mayor, a broader view of conflict of interest and improper use of influence might have had a significant impact on Mr. O'Brien's actions. For instance, if the MCIA had deemed Mr. O'Brien's interest also to be that of the mayor, considering their close relationship, I expect it would have given him pause and might have prevented altogether his taking action on behalf of the mayor in July–October 2009.

On City Staff

The creation of a public database of known conflicts of interest would have enabled all city staff to determine easily whether their actions were somehow exacerbating the mayor's conflict of interest. A comprehensive municipal code of conduct would also have helped them to understand the proper boundaries of the mayor's involvement with the WCD project.

On City Council

The availability of a comprehensive municipal code of conduct and an integrity commissioner would have provided all members of city council with much needed guidance about their roles and responsibilities.

On the Vendors

The vendors, particularly AIM, certainly had concerns at various points regarding the involvement of the mayor and Peter McCallion in the WCD project.[721] The existence of an integrity commissioner would have provided the vendors with an effective mechanism to register their concerns confidentially about the involvement of Mayor McCallion and her son in the WCD project. The provision of a comfort letter from the city would also have assisted the vendors in gaining a better understanding of the WCD transaction, as long as the mayor's knowledge of the conflict had been passed on to others at the city.