

**MISSISSAUGA JUDICIAL INQUIRY**

**BEFORE: ASSOCIATE CHIEF  
MR. JUSTICE J. DOUGLAS CUNNINGHAM**

**SUBMISSIONS OF OMERS ADMINISTRATION CORPORATION  
(PHASE I OF THE INQUIRY: ENERSOURCE)**

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**OMERS SUBMISSIONS**

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#### **OMERS SUBMISSIONS**

##### **PART A - OMERS PARTICIPATION IN THE INQUIRY**

###### **OMERS Role in the Inquiry**

1. OMERS acknowledges and respects the City's need to investigate the matters of its good government, practices and public business in accordance with the powers granted to the City under the Municipal Act. OMERS involvement in the Inquiry is limited to those matters where it can appropriately assist the Commissioner.
2. OMERS only legitimate role in the Inquiry is as a witness to explain those aspects of the transactions that impact on or relate to the good government of the municipality or its public business. It is in this capacity that OMERS makes the following submissions and recommendations.

### **Jurisdiction Under the Municipal Act**

3. The jurisdiction for the calling of this Inquiry is derived from section 274(1) of the Municipal Act.
4. Pursuant to section 274(1) of the Municipal Act, a municipality may ask a judge of the Superior Court of Justice to conduct an inquiry to investigate:
  - (a) any supposed breach of trust or other misconduct by municipal representative or a person having a contract with a municipality in relation to the duties or obligations of that person to the municipality;
  - (b) inquire into any matter connected with the good government of the municipality; or
  - (c) inquire into the conduct of any part of the public business of the municipality.
5. Under subsection 274(1)(a), the first requirement is that the conduct being investigated constitutes either a "breach of trust" or "misconduct." OMERS did not owe any trust obligation to the City. Therefore, there can be no allegation or finding of a breach of trust against it. Similarly, any misconduct on the part of a person having a contract with the City must be "in relation to the duties or obligations of that person to the municipality." There is no allegation in the Resolution that OMERS breached any duty or obligation to the City in connection with the Enersource transaction. Therefore there is no issue under subsection 274(1)(a) relating to OMERS.

6. Under subsection 274(1)(b), the focus of the Inquiry is on matters connected with the good government of the municipality. Therefore, if the City's contractual dealings with OMERS are the subject matter of the Inquiry pursuant to this subsection, the only aspects of the dealings that can be relevant are those involving the good government of the municipality.
7. Similarly, under subsection 274(1)(c) the focus of the Inquiry must be on the public business of the municipality. If dealings between the City and OMERS are inquired into under the authority granted by this subsection, the only aspects of those dealings that are relevant are those which involve the public business of the municipality.

#### **PART B - SCOPE OF THE INQUIRY**

8. In accordance with the Terms of Reference for the calling of this Inquiry and the mandatory nature of section 274 of the *Municipal Act*, the Commissioner is bound:

"To inquire into all aspects of the transactions and matters described in the aforesaid recitals, their history and impact on the Corporation of the City of Mississauga as they relate to the good government of the municipality, or the conduct of its public business and to make any recommendations that the Commissioner may deem appropriate and in the public interest as a result of the inquiry."

#### **Exhibit 1 - Resolution 0271-2009 dated November 11, 2009**

9. The recitals found in Exhibit 1 include the following:

WHEREAS Council at its meeting of October 28, 2009 approved Resolution 0234-2009 which contained the terms of reference approved

by Council in making its request for a judicial inquiry to be held into the matters set out in that resolution;

AND WHEREAS for reasons set out in the City Solicitor's report to Council dated November 6, 2009 respecting the judicial inquiry and the potential for litigation, Council wishes to amend and reconfirm as amended Resolution 0234-2009, to amend the terms of reference and clarify that the request for a judicial inquiry should focus on the matters set out herein;

WHEREAS under Section 274 of the *Municipal Act 2001*, a Council of a municipality may, by resolution, request a Judge of the Superior Court of Justice, to investigate and inquire into any supposed breach of trust or other misconduct of a Member of Council, an employee of the Municipality or a person having a contract with the Municipality in relation to the duties or obligations of that person to the Municipality and inquire into or concerning any matter connected with the good government of the Municipality, or the conduct of any part of its public business;

AND WHEREAS any Judge so requested shall make inquiry and shall report the results of the investigation or inquiry to the Council as soon as practicable;

AND WHEREAS the individual referenced is actually the current President and CEO of OMERS, and was also integral to the process by which a negative veto was added to the December 2000 Enersource Shareholders Agreement, to which the City was a party and which was executed by the Mayor, after it was approved by Council and without Council's knowledge of the insertion of the negative veto, which event has never been satisfactorily explained despite several attempts by the Council to obtain this information;

10. The Resolution identifies two transactions between OMERS and the City. The focus of these submissions is the Enersource transaction. There is a lack of precision in the Resolution in identifying the specific aspect of the Enersource transaction that involves the legitimate question involving either the good government of the City or its public business. In fact, some of the recitals to the Resolution suggests OMERS has an obligation to provide information to the City about why it agreed to certain contractual terms involving the Enersource Shareholders' Agreement.
  
11. OMERS makes its submissions as a witness, but also in the capacity as an interested party necessarily fully engaged in the judicial inquiry according to the terms of the resolution and the expectations of the Commission. In that capacity, OMERS as an organization has been materially affected by the proceeding to date, and will continue to be affected until the Inquiry is complete and potentially even after that point, with respect to:
  - (a) The engagement of OMERS senior managers, including its CEO, and other staff in the Inquiry and the related time and effort spent in connection with the Inquiry;
  - (b) Material out of pocket costs for legal and related professional counsel and advice;
  - (c) The impact on OMERS reputation even by the very fact of having been named in the Resolution and made a part of the Inquiry.
  
12. The evidence has disclosed that the Enersource transaction had enormous benefits to the City of Mississauga. All of the advisors and representatives of the City involved in the Enersource transaction testified that it was an excellent deal for the City - Jonathon Toll, William Houston, David O'Brien, Jeffery Singer, and the Mayor.

13. In addition, all of these witnesses plus Mr. Singer agreed that the terms of the Borealis veto were commercially reasonable when it was appreciated that OMERS had a far greater economic contribution and risk than a usual ten percent equity holder. In fact, OMERS bore the risk of owning one hundred percent of Enersource based upon unfettered right of the City to put its shares to OMERS.
14. When the economic interest of OMERS was reduced to a ten percent equity position, it immediately offered to eliminate its veto on reasonable terms. It stated this publicly and backed this up by immediately entering into negotiations to amend the Shareholders' Agreement.
15. These negotiations resulted in an amended agreement which each of the City's outside lawyer, who negotiated the agreement, and the City Solicitor considered fair and reasonable to both parties. This position was supported by all but one City Councillor on the City's negotiating committee.
16. This inquiry, with respect to Enersource, was called despite this background and there being virtually no material before the Council which identified a need for or any justification for this phase of the Inquiry.

#### **PART C – OMERS RELATED FINDINGS**

17. OMERS submits the Commission should find:
  - (a) OMERS acted in a commercially reasonable manner in all its dealings with the City in relation to the Enersource transaction;
  - (b) OMERS acted fairly at all times with the City and treated the City fairly notwithstanding that it was not obligated to do anything other than act in its own self interest as a matter of law; and

- (c) OMERS was responsive and co-operative in its dealings with the City including agreeing to the City's request to modify its governance rights under the Enersource Shareholders' Agreement in 2009 and acting on the City's request when it had no legal obligation to do so.

#### **PART D - OMERS RECOMMENDATIONS**

- 18. In light of the Terms of Reference, the Commissioner is empowered to inquire into the process which led to the making of the Resolutions which instituted this Inquiry to the extent it relates to the good government of the City or the conduct of its public business. OMERS submits that the Commissioner should pay careful attention to the far reaching public interest ramifications arising out of the process behind the calling of the Enersource phase of this Inquiry. OMERS provides its recommendation from the perspective of a party dealing with the City on a commercial matter further to a request for proposals issued by the City and therefore further to the request of the City for its participation. As a consequence, OMERS provides its recommendation in its capacity as a third party to the affairs of the City in which it was requested to participate but also as a party whose reputation is significantly affected by this Inquiry and a party who is otherwise affected as provided for in paragraph 11.
- 19. In all of the circumstances, OMERS submits it is open to the Commissioner to address a number of broad issues around this Judicial Inquiry and generally the process surrounding such Inquiry.
- 20. As the Commissioner in the Ipperwash Inquiry noted:
  - "Invariably, a public inquiry involves groups, individuals, or institutions with legitimate and often competing interests that must be explored. And, although an inquiry is not intended to determine guilt or innocence, or fault or no fault, the actions of individuals or institutions may be questioned and

misconduct may be found. This, and the fact that the investigation is conducted in public, carries with it the possibility that individual or organizational reputations will be at risk. Counsel have a duty to protect and/or advance their clients' interests, and therefore an adversarial element invariably makes its way into the inquisitorial process. Given this reality, it is imperative that the inquiry process include safeguards that uphold the principles of natural justice and procedural fairness."

**Report of the Ipperwash Inquiry Vol. 3 p. 5.**

21. While the practices associated with ensuring the principles of natural justice and procedural fairness within a public inquiry are becoming increasingly known and applied, there is no similar body of learning to guide those involved in the decision to call an inquiry. It is submitted that to a substantial degree the same principles of natural justice and procedural fairness should apply to the decision to call an inquiry with its attendant costs and reputational risks to those that become implicated in the process like OMERS.
22. Parties who are concerned that there is no basis on which to call a judicial inquiry have a limited ability to challenge the process. As Justice Binnie wrote in *Consortium Developments (Clearwater) LTD. v. Sarnia (City)*, [1998] 3 S.C.R. 3 at para. 31,

The conceptual distinctions between legislative validity and the fair inquiry interests of the participants is important. If the municipality had a sufficient grip on the relevant facts to give detailed particulars there might be no need for an inquiry. At the same time, the municipality's lack of knowledge does not license it to trample on the rights of its employees, former employees, persons with whom it has done business, or others. Aspects of procedural fairness, such as the need for particulars, should not defeat an inquiry at the outset unless it is concluded that in the particular circumstances of the case a fair inquiry simply cannot be had based upon the wording of the particular resolution under consideration. Otherwise

the inquiry should be allowed to proceed, and procedural objections dealt with at a later stage when the Commissioner has had an opportunity to consider the fairness issues and deal with them.

23. The implication in this case is that once an inquiry has been called under the *Municipal Act*, there is very little recourse to a party who is made the subject matter of the inquiry, either directly or collaterally as a witness. As the Commissioner is well aware, an application for judicial review is a blunt instrument for parties who seek to submit that there is no basis for the calling of an inquiry.
24. There are no substantial background facts set out in the Amended Resolution calling for the Inquiry in any meaningful way with respect to Enersource. The Amended Resolution simply links the Mississauga Lands matter to the Enersource matter in a single paragraph, with reference to OMERS CEO, and states that the "negative veto" was inserted into the Shareholders' Agreement "without Council's knowledge of the insertion of the negative veto, which event has never been satisfactorily explained despite several attempts by Council to obtain this information" suggesting that Council's lack of knowledge may be the fault of OMERS.
25. The ambiguity of these words leads to the, perhaps unintended, innuendo that OMERS has somehow contributed to the lack of a satisfactory explanation. All of the witnesses at the Inquiry who addressed this issue were clear that OMERS provided complete transparency into its dealings, both at the time the transaction occurred in 2000 and subsequently when called upon to provide information to the City.
26. The events leading to the calling of the Enersource phase of the Inquiry leads OMERS to submit that the Commissioner should consider whether it would be prudent to make recommendations regarding the need to ensure that the substantial decision-making power currently embodied in section 274 of the *Municipal Act* is subject to appropriate controls which are consistent with the real

consequences of calling an inquiry and the reasonable expectations of third parties like OMERS made subject to the Inquiry process.

27. The essential flaw, which the Enersource phase of the Inquiry demonstrates, is that there was no accurate record before City Council when it chose to call the Enersource phase of the Inquiry. It is rare however that any decision-maker exercising a statutory power of decision does so without calling for and identifying an appropriate record on which the decision is based. This is not the fault of the City – the legislation does not call for it and the Chief Justice has no power to ask for it under section 274 of the Act. Once a municipal resolution is passed calling for an inquiry, the Superior Court is obliged to conduct that inquiry on the articulated terms. If the Court has a concern about any aspect of the inquiry, it has no input into the scope of the inquiry or any assessment of the validity of the inquiry.
28. The discipline of assembling a record in the case of Enersource would likely have demonstrated that there was no merit in the Enersource phase of this Inquiry and certainly no merit which would have justified involving OMERS. Even if it was not clear if proper municipal authority had been exercised in granting the Borealis veto, there was no demonstrated harm to the City arising from it and OMERS had agreed that it was no longer necessary.
29. The assembling of a proper record would also allow any person who is the subject of an unwarranted judicial inquiry to be able to assert its position to the Divisional Court in the form of a judicial review application. The Divisional Court would be able to assess the sufficiency of the record.
30. In addition to our recommendations for a record, we submit that the Commissioner may wish to consider whether there is merit in recommending amending the *Municipal Act* to provide the Court with the authority and obligation to perform an assessment function at the outset, based upon the record provided and a defined standard or threshold. This may be accomplished in a number of ways.

31. One approach is a requirement that an application be made to the Court by any municipality seeking to access the Court's resources to appoint a Commissioner. This application would be supported by the record on which the municipality based its decision to call an inquiry and proposed terms of reference. The Court would then be able to consider whether there is a *prima facie* basis for calling an inquiry and whether the terms of reference are appropriate.
32. Another less robust approach is to allow the Court to pose questions or clarifications to the municipality in order to ensure that the Court is not called upon to conduct an inquiry which is either unwarranted, unworkable or unsupported by a detailed written record.
33. Another alternative would be to recognize that municipalities are statutory bodies created by provincial legislation and require a second level of authorization for the calling of a municipal inquiry by either the appropriate Provincial Minister (Municipal Affairs or the Attorney General) or the Lieutenant Governor in Council.
34. The proposed recommendations relate to improvements to the process of calling judicial inquiries as they relate to the good government of the municipality. It is also part of the mandate of the Commissioner to make recommendations that relate to the conduct of the City's public business. The benefits of these arrangements could have significant benefits for both the City and commercial parties dealing with the City such as OMERS.
35. While municipalities and their dealings give rise to a wonderful blend of considerations involving politics, governance and economics, in order to provide an alternative to dealing with issues which arise in the course of the public business of municipalities in a judicial inquiry context, the Commissioner could consider recommending that all municipalities appoint an Integrity Commissioner. An Integrity Commissioner would be able to deal with issues such as conflict of interest and the critical overlap between municipal business and commercial business for municipalities. An Integrity Commissioner would be able to help

bridge the gap between the political arena and the business arena which have the potential, as this Inquiry demonstrates, for substantial miscommunication.

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