

**MISSISSAUGA JUDICIAL INQUIRY
City Council Resolution 0271-2009**

CLOSING SUBMISSIONS OF PETER McCALLION

Introduction

1. On November 11, 2009, the City of Mississauga (the "City") adopted Resolution 0271-2009 (the "Terms of Reference"), authorizing a judicial inquiry for the purposes of inquiring into a variety of business transactions involving the City, including a proposed land transaction between OMERS, 156 Square One Ltd.¹ (collectively the "Vendors") and World Class Developments Limited ("WCD"). The Terms of Reference authorize the Commissioner to inquire into Peter McCallion's role in WCD and his involvement in the negotiations regarding the proposed land deal with the Vendors. Mr. McCallion is the only person other than an elected official to whom repeated reference is made in the Terms of Reference.

2. On December 14, 2009, Mr. McCallion received standing to participate fully in all aspects of the Inquiry, relating to his business and reputational interests. Mr. McCallion submitted to interviews by Commission Counsel on April 23, July 13 and 15, 2010, and testified at the Inquiry on July 27 and 28, 2010. In addition, his counsel have had the opportunity to cross-examine other witnesses.

¹ Throughout these submissions, we refer to OMERS' partner as AIMco.

3. Mr. McCallion's participation in the Inquiry has not been without its challenges. As a result of decisions taken by Mississauga's City Council, Mr. McCallion has had to bring two motions to obtain adequate funding for legal representation. Despite the Commissioner's urging that having put Mr. McCallion's business dealings at the heart of this Inquiry, the City should recognize that Mr. McCallion required legal counsel to assist him in responding to the legal and evidentiary issues confronting him, City Council attempted to limit Mr. McCallion's ability to participate by severely limiting funding for his legal representation.

4. The following submissions on behalf of Mr. McCallion relate to only the portion of the Inquiry relevant to his business and reputational interests. Mr. McCallion has left it to other parties more appropriately situated to propose recommendations to the Commissioner regarding conflicts of interest, municipal codes of conduct and the benefits of an integrity commissioner. Mr. McCallion therefore limits his submissions to the following:
 - (a) In **Part 1**, Mr. McCallion sets out a detailed summary of the evidence and what reasonable conclusions can be drawn from that evidence.

 - (b) In **Part 2**, Mr. McCallion provides his proposals for changes to the *Municipal Act*, so that judges required to conduct inquiries of this nature are equipped with greater powers to ensure procedural fairness for individuals participating in the process.

5. While Mr. McCallion proposes no other recommendations, his silence should not be construed as support for recommendations that would detrimentally impact on the ability of private citizens ability to conduct business in any municipality of their choosing.

Part I

Overview

6. As is set out below, since 2002, Mr. McCallion was actively involved in efforts to develop land within Mississauga's City Centre for the purposes of a hotel, convention centre, and condominium complex.
7. Although these efforts were consistent with the Mayor's plans for developing Mississauga's City Centre, Mr. McCallion did not seek preferential treatment or special favours in pursuing his efforts. WCD received no preferential treatment from any elected or unelected City officials.
8. Mr. McCallion's primary role in the project was at the "front end": he assembled a team with the project management expertise and financial resources necessary to bring the project to fruition.
9. In exchange for his efforts, Mr. McCallion expected to be the real estate agent for any future condominium development on the lands. Mr. McCallion's intention was never to be an equity owner of WCD, and Mr. McCallion's honest belief was that he never had an ownership interest in WCD or in any part of the project.

Background

10. Mr. McCallion has been a real estate agent working in the GTA for over 25 years. His work has included conducting real estate transactions in Mississauga. Mr. McCallion's status as a real estate agent was well known among City Staff.

Examination-in-chief of Peter McCallion ("McCallion Chief"), July 27, 2010, at p. 1794; Cross-Examination of Edward Sajecki ("Sajecki Cross"), August 10, 2010, at p. 2787; Cross-Examination of Marilyn Ball ("Ball Cross"), August 19, 2010, at p. 4229; Cross-Examination of Janice Baker, September 15, 2010, at p. 4622.

11. Since approximately 2002, Mr. McCallion was interested in developing a hotel, conference centre and condominium complex on the Vendors' Land² in Mississauga's City Centre.

Examination-in-chief of Peter McCallion ("McCallion Chief"), July 27, 2010, at p. 1978.

12. In or about late 2002, Mr. McCallion was approached by Lee Shim, a Canadian-Chinese businessman who, together with a number of other Chinese investors, was interested in developing a hotel complex in Mississauga.

Examination-in-chief of Peter McCallion ("McCallion Chief"), July 27, 2010, at p. 1801.

13. Based on his involvement in Mississauga real estate for a number of years and given what he knew to be the City's interest in developing a hotel in Mississauga's City Centre, Mr. McCallion identified the Vendors' Land as a possible site for the hotel, convention centre and condominium complex. At that time, Mr. McCallion understood that the Vendors' Land was owned by OMERS. Mr. McCallion now understands that the Vendors' Land was jointly owned by OMERS and its partner, AIMco.

² The "Vendors' Land" is the parcel of land identified as Blocks 9 and 29 of Plan 43M-1010 in the City centre, adjacent to the Mississauga Living Arts Centre: See Agreement of Purchase and Sale dated January 31, 2007 - Exhibit 97.

McCallion Chief, July 27, 2010, at pp. 1797, 1894.

14. At Mr. Shim's request, Mr. McCallion accompanied him on a business trip to China, where Mr. McCallion spoke with a number of the other investors about the possibility of developing a hotel complex on the Vendors' Land. The discussion with the investors took place over dinner and lasted no more than five minutes. Following his trip to China with Mr. Shim, Mr. McCallion heard nothing further from him or the other potential investors about the Vendors' Land.

McCallion Chief, July 27, 2010, at pp. 1801-02; Cross-Examination of Leo Couprie ("Couprie Cross"), August 17, 2010, at p. 3472.

15. In or around late 2004, Gary Atchison put Mr. McCallion into contact with a number of Korean investors who were interested in investing money in Canada through development projects. Mr. McCallion never met with the investors directly. He was advised that the Korean investors liked the idea of developing the Vendors' Land, and so he attempted to arrange for the investors to partner with a developer. Mr. McCallion testified that he approached two or three developers and asked them to prepare a development proposal. The only developer to do so was Moldenhauer, who sent the Korean investors a two or three page proposal. The Korean investors did not like the proposal prepared by Moldenhauer, and instead asked Mr. McCallion to put together a development team. Mr. McCallion had no further contact with these investors.

McCallion Chief, July 27, 2010, at pp. 1803-04; cross-examination of Peter McCallion ("McCallion Cross"), July 27, 2010, at p. 1894.

16. In 2005, Mr. McCallion approached OMERS through their property manager Oxford Property Group ("Oxford") with his rough proposal to acquire the

Vendors' Land and develop it accordingly. At the time, his proposal was not accepted.

McCallion Cross, July 27, 2010, at pp. 1899-1900.

Mr. McCallion's Role in Incorporating WCD and Assembling the Team

17. As he testified, while Mr. McCallion has experience as a real estate agent and familiarity with property in Mississauga, he recognized that in order to successfully purchase and develop the Vendors' Land, he would have to put together a team of individuals with the necessary resources and experience. Simply put, Mr. McCallion understood his role as assembling the team necessary to carry out the project.

McCallion Chief, July 27, 2010, at pp. 1805-06; Couprie Cross, August 17, 2010, at p. 3478

18. On February 22, 2005, Mr. McCallion arranged for World Class Developments Inc. to be incorporated. On August 9, 2006 the name was changed to World Class Developments Limited to address a printing error on WCD business cards and letterhead. The company was incorporated by the law firm of Caprara Brown.

McCallion Chief, July 27, 2010, at pp. 1805-06; McCallion Cross, July 28, 2010, at p. 2024; Exhibit 187

19. Since its original incorporation date, Mr. McCallion has never been an officer or director of WCD. Leo Couprie was, and continues to be, the president and sole director of WCD. At the time of incorporation, WCD's incorporating counsel,

Joseph Caprara and Jared Brown, were also listed as the company's directors.

Leo Couprie's home address is listed as the company's registered office.

McCallion Chief, July 27, 2010, at p. 1810; McCallion Cross, July 28, 2010, at pp. 2058-60; Examination-in-chief of Leo Couprie ("Couprie Chief"), August 17, 2010, at pp. 3408-09.

20. Although Mr. McCallion understood that his mother shared the same vision for developing the Vendors' Land as he did, he wanted to be the one responsible for bringing the project together on his own. As discussed further below, the evidence demonstrates that Mr. McCallion did not seek any special or favourable treatment from any elected or unelected City official, nor did WCD receive any such treatment.

McCallion Chief, July 27, 2010, at pp. 1804-06; Couprie Cross, August 17, 2010, at p. 3478.

21. In exchange for his efforts, Mr. McCallion expected to potentially gain in the long-term from being the real estate agent for any future condominium development. Mr. McCallion also initially believed he might be paid a commission on the sale of the Vendors' Land, but recognized at an early stage that the Vendors were not amenable to this arrangement.

McCallion Chief, July 27, 2010, at p. 1807; McCallion Cross, July 27, 2010, at pp. 1917-1920.

The WCD Participants

22. In his testimony, Mr. McCallion candidly acknowledged that he did not have the necessary expertise or resources to lead the development project on his own.

During the relevant period, Mr. McCallion recruited three people to finance and ultimately run WCD.

Leo Couprie

23. Mr. McCallion first met Mr. Couprie in 2002 on his trip to China with Mr. Shim. They have been friends since that time. Mr. McCallion asked Mr. Couprie to become involved in WCD when Mr. McCallion arranged for the incorporation of the company, as he knew Mr. Couprie had sufficient resources to fund the early stages of the development project. Mr. McCallion testified that he would not have arranged for the incorporation of WCD if Mr. Couprie had not previously agreed to make an investment. Between January and March 2007, Mr. Couprie provided bank drafts in the total amount of \$750,000.00. The drafts were used by WCD to make deposit payments to the Vendors.

McCallion Chief, July 27, 2010, at pp. 1808-10; Couprie Chief, August 17, 2010, at pp. 3405-06.

24. In exchange for his investment into WCD, Mr. Couprie became the sole shareholder of the company. On January 29, 2007, Mr. Couprie entered into a loan agreement with WCD, setting out the terms of his investment (the "January Loan Agreement"). The January Loan Agreement provided that, in exchange for lending WCD a total of \$750,000.00 for the exclusive use of funding the deposit for the purchase of the Vendors' Lands, Mr. Couprie would receive the return of his principal investment, plus an additional \$750,000.00 if a developer was in place and the deal closed, for a total of \$1,500,000.00.

Couprie Cross, August 17, 2010, at pp. 3457, 3477; January Loan Agreement, Exhibit 189

25. Mr. McCallion guaranteed the loan Mr. Couprie made to WCD. Although Mr. McCallion lacked the resources necessary to satisfy the full extent of this guarantee, he considered it important to provide some measure of comfort to Mr. Couprie that his investment in WCD was secure because Mr. Couprie was only interested in making an investment that was secured and fully refundable.

McCallion Chief, July 27, 2010, at pp. 1810; McCallion Cross, July 27, 2010, at pp. 1909, 1913; McCallion Cross, July 28, 2010 at p. 2061; Couprie Cross, August 17, 2010, at pp. 3475-76.

26. At the same time the January Loan Agreement was signed, Mr. Couprie and Mr. McCallion signed a document entitled "Declaration of Trust" (the "Trust Declaration"). The Trust Declaration was very quickly prepared by Mr. Couprie based on an online template. The Trust Declaration was prepared by Mr. Couprie, and signed by Mr. McCallion, without the assistance or advice of counsel.

McCallion Chief, July 27, 2010, at pp. 1811-12; Couprie Chief, August 17, 2010, at pp. 3416-17; Couprie Cross, August 17, 2010, at p. 3479; Trust Declaration, Exhibit 190

27. With respect to the Trust Declaration, Mr. Couprie and Mr. McCallion testified as follows:

(a) The Trust Declaration was prepared and signed on the eve of a trip they took together to Hong Kong and Vietnam;

(b) Neither Mr. Couprie nor Mr. McCallion received independent legal advice with respect to the Trust Declaration either before or after signing it;

- (c) Mr. McCallion and Mr. Couprie believed that by signing the Trust Declaration they could preserve their respective interests in WCD before leaving abroad. In particular, Mr. McCallion wanted to ensure that the work he had done to put WCD together and to engage with OMERS for the potential sale of the Vendors' Land would result in some benefit to his estate in the event that something happened to him. Ultimately, Mr. McCallion trusted that Mr. Couprie would recognize his work in the project either by providing a share in the equity, or by ensuring that Mr. McCallion would be involved as the listing agent for the condominium development planned for the Vendors' Land;
- (d) The Trust Declaration was only designed to provide reassurance for estate purposes during the trip to Asia and both Mr. McCallion and Mr. Couprie forgot about it upon coming home;
- (e) Mr. McCallion testified that he believed he destroyed his copy of the Trust Declaration once he and Mr. Couprie returned from abroad; and
- (f) Mr. McCallion only became aware of the existence of the signed Trust Declaration in June 2010, when provided with a copy by Commission counsel.

28. In preparation for the inquiry, Mr. McCallion came to understand that the Trust Declaration states that Mr. Couprie was holding the shares of WCD in trust for his (Mr. McCallion's) benefit.

McCallion Chief, July 27, 2010, at p. 1815.

29. As he testified, at the time he signed the Trust Declaration and thereafter, Mr. McCallion did not understand that he had any equitable or ownership interest in WCD. Mr. McCallion never believed that he was a beneficial owner of WCD, nor did he believe that Mr. Couprie had to deal with the shares of WCD in a manner that was for his (Mr. McCallion's) benefit. Rather, Mr. McCallion believed that since Mr. Couprie had advanced the deposit on the company's behalf, the shares were rightfully Mr. Couprie's to dispose of as he (Mr. Couprie) saw fit.

McCallion Chief, July 27, 2010, at pp. 1815-16.

30. For example, Mr. McCallion did not take issue with Mr. Couprie's decision to transfer 20% of the his shares to Mr. Murray Cook in February 2007, or his decision to transfer 80% of his shares in WCD to Mr. DeCicco in August 2007.

McCallion Chief, July 27, 2010, at pp. 1817, 1821-22.

31. Mr. Couprie testified that for his part, he did not understand that the Trust Declaration resulted in him losing control of the company and holding the shares in trust for Mr. McCallion.

Couprie Chief, August 17, 2010, at pp. 3423-24; Couprie Cross, August 17, 2010, at pp. 3484-85.

32. Both the January Loan Agreement and the Trust Declaration were signed during a dinner with Mr. Couprie at Pier 4 restaurant in Toronto. According to Mr,

Couprie, only himself, Mr. McCallion and the Mayor were present. The Mayor witnessed the signatures on both documents, but did not discuss their content.

McCallion Chief, July 27, 2010, at p. 1813; McCallion Cross, July 27, 2010, at p. 1911; Couprie Cross, August 17, 2010, at pp. 3412-14, 3420, 3480-81; Examination-in-Chief of Hazel McCallion ("Hazel McCallion Chief"), September 21, 2010, at pp. 5114-15.

Murray Cook

33. In early 2005, Mr. McCallion asked Murray Cook to become involved in WCD. Mr. Cook and Mr. McCallion have been acquaintances since childhood. Mr. McCallion knew Mr. Cook had prior experience in land development, including in Mississauga, and he believed that Mr. Cook had the necessary skill to negotiate the purchase of the Vendors' Land and to oversee completion of the development.

McCallion Chief, July 27, 2010, at pp. 1806, 1819-20; Cross-Examination of Murray Cook ("Cook Cross"), September 15, 2010, at p. 4584.

34. Among the representatives of the Vendors who knew Mr. Cook, he was well regarded, given his experience.

Cross-Examination of Kenneth Raymond Lusk ("Lusk Cross"), July 26, 2010, at pp. 1664, 1669, 1715.

35. Mr. Cook took on the primary responsibility for negotiating the terms of the Agreement of Purchase and Sale ("APS") with the Vendors. Mr. Cook did not invest any money in WCD, but in exchange for his work, Mr. Couprie agreed to transfer 20% of the shares of WCD to Mr. Cook. This transfer is provided for in a Shareholders' Agreement, dated February 28, 2007. Mr. McCallion was aware of Mr. Couprie's decision to transfer the shares to Mr. Cook, but he was not a party to the Shareholders' Agreement, nor was he involved in its negotiation.

McCallion Chief, July 27, 2010, at pp. 1821-22; Exhibit 193 – Shareholders’ Agreement, February 28, 2007

36. Apart from his investment, Mr. Couprie did not have an active role in the development project. Mr. McCallion remained involved in the project, primarily as Mr. Couprie’s representative.

McCallion Chief, July 27, 2010, at p. 1819; McCallion Cross, July 27, 2010, at pp. 1916-17; Couprie Cross, August 17, 2010, at pp. 3478, 3486.

37. Mr. Cook took the lead in discussions with the Vendors and the City. During the time of Mr. Cook’s involvement, Mr. McCallion was not involved in every meeting that took place, nor was he included in all the correspondence.

McCallion Chief, July 27, 2010, at pp. 1821, 1825; Cook Cross, September 15, 2010, at pp. 4587-89; DeCicco Cross, August 18, 2010, at p. 3905; Cross-Examination of Norman Lyon (“Lyon Cross”), August 9, 2010, at pp. 2451, 2482; Cross-Examination of Edward Walker (“Walker Cross”), August 9, 2010, at p. 2507.

38. Mr. Cook also hired a number of consultants for the project, including the architecture firm Page & Steele, planning consultant Barry Lyon and hotel economic viability consultants Horwath Horizon Consultants. Although Mr. McCallion attended some meetings with the consultants hired on behalf of WCD, Mr. Cook was their primary contact.

McCallion Chief, July 27, 2010, at pp. 1823-24; Examination-in-Chief of Barry Lyon, August 9, 2010, at pp. 2450-51.

39. Mr. Cook testified that he understood Mr. McCallion to be a representative of the financial group backing the project, and represented him as such in meetings with City staff, consultants and Vendors. Given Mr. McCallion’s role as the real estate agent for the project, Mr. Cook said that he did not find Mr. McCallion’s interest in being kept informed about the project, and attending certain meetings with the City and consultants, to be exceptional. Nor did Kenneth Lusk, who attended some of the same meetings as a representative of one of the Vendors.

Cook Cross, September 15, 2010, at pp. 4584-86; Lusk Cross, July 26, 2010, at pp. 1709-10; Examination-in-Chief of Kenneth Raymond Lusk, July 26, 2010, at p. 1704.

Tony DeCicco

40. Mr. McCallion testified that in or about the summer of 2007, he was advised by Mr. Cook that WCD was failing to meet its financial obligations under the APS, with the City and with its consultants. In Mr. McCallion's view, it was becoming apparent that Mr. Cook intended to try to squeeze Mr. Couprie out of the project – something Mr. McCallion considered detrimental to his potential interest in the development of the Vendors' Land and, in particular, to his ability to secure the right to be the listing agent for the condominiums WCD expected to develop. Given Mr. Cook's position and the project's potential failure to meet its financial obligations, Mr. McCallion invited Mr. Tony DeCicco to join WCD, assume primary responsibility for the continued dealings with the Vendors and the City, and ultimately develop the Vendors' Land.

McCallion Chief, July 27, 2010, at pp. 1832-33, 39; McCallion Cross, July 27, 2010, at pp. 1926-27; Couprie Cross, August 17, 2010 at p. 3489.

41. By the summer of 2007, Mr. McCallion had known Mr. DeCicco for approximately ten years, first meeting him when Mr. DeCicco purchased property for which Mr. McCallion was the listing agent. Although Mr. DeCicco knew the Mayor, Mr. McCallion invited Mr. DeCicco to participate in WCD as a result of their prior dealings. In other words, Mr. McCallion and Mr. DeCicco enjoyed a separate friendship from Mr. DeCicco's relationship with the Mayor.

McCallion Chief, July 27, 2010, at pp. 1830-31; Examination-in-Chief of Tony DeCicco ("DeCicco Chief"), August 17, 2010, at pp. 3525-26; DeCicco Cross, August 18, 2010, at pp. 3899-90.

42. Mr. DeCicco has experience as both a commercial and residential land developer. Given his experience and his resources, Mr. McCallion kept Mr. DeCicco apprised of the development project since its inception in case an opportunity should arise for his participation. Mr. McCallion also understood that Mr. Couprie was only holding the shares as collateral for the money he lent to WCD and he was not interested in keeping his shares of WCD indefinitely.

DeCicco Chief, August 17, 2010, at pp. 3520-21; McCallion Cross, July 27, 2010, at p. 1933; Couprie Chief, August 17, 2010, at p. 3407.

43. On or about August 1, 2007, Mr. Couprie entered into a Declaration of Trust and Shareholders' Agreement with Landplex Inc., a corporation controlled by Mr. DeCicco, for the transfer of 80% of Mr. Couprie's beneficial interest in WCD, or 64 common shares (the "Landplex Agreement"). In exchange, Mr. DeCicco took on the primary responsibility as the day-to-day manager of WCD, including dealing with OMERS and the City for the purposes of following through on the development plans.

McCallion Chief, July 27, 2010, at pp. 1833-34; Couprie Chief, August 17, 2010, at pp. 3422, 3425; Landplex Agreement – Exhibit 197.

44. Mr. McCallion was not a party to the Landplex Agreement, but he was both aware and supportive of the agreement.

McCallion Chief, July 27, 2010, at pp. 1817-18.

45. The Landplex Agreement eventually resulted in litigation between Mr. Cook, Mr. Couprie and WCD (the "Cook Litigation"). Mr. McCallion had no involvement in the Cook Litigation. The matter was ultimately resolved in the fall of 2008.

McCallion Cross, July 28, 2010, at pp. 2028-2030; Couprie Cross, August 17, 2010, at p. 3491; Cook Litigation, Exhibits 198 and 199.

46. Starting in the fall of 2007, Mr. DeCicco became directly involved in dealing with the City and the Vendors with respect to the development project. By early 2008, Mr. DeCicco was in charge of the project; he made all of the major decisions, instructed WCD's solicitor and dealt directly with all outside parties.³ Throughout Mr. DeCicco's time at WCD, Mr. McCallion continued to participate in some meetings with consultants and with the City, but he was not present at all meetings or privy to all communications between Mr. DeCicco and these outside parties.

McCallion Chief, July 27, 2010, at pp. 1833-34, 51; DeCicco Chief, August 17, 2010, at p. 3570; Cross-Examination of Tony DeCicco ("DeCicco Cross"), August 18, 2010, at pp. 3901, 3905; Cross-Examination of Emilio Bisceglia ("Bisceglia Cross"), December 14, 2010, at p. 5556.

Other investors

47. Mr. DeCicco approached John Di Poce in October 2007 about making a potential investment in the WCD project, which Mr. Di Poce eventually did. Mr. Di Poce never discussed the WCD project with Mr. McCallion. Mr. McCallion did not know of Mr. Di Poce's involvement in WCD, and only learned of it in the course of preparing for this Inquiry.

Examination-in-Chief of John Di Poce ("Di Poce Chief"), September 13, 2010, at pp. 4396-97, 4406, 4410; McCallion Cross, July 28, 2010, at p. 2044.

48. Similarly, at Mr. DeCicco's invitation, Emilio Bisceglia – a lawyer who had previously done work for Mr. DeCicco and who eventually became WCD's solicitor – made investments in WCD in November 2007 and January 2008 through his

³ For example, on or about March 2008, Mr. DeCicco arranged with Steve Gupta, of Easton's Group of Hotels Inc., to tour a Residence Inn, Marriott Hotel in downtown Toronto to compare it to what could be developed on the Vendors' Land. The tour took place on March 19, 2008 (MIS.064.004.020). Mr. McCallion attended, along with Mr. DeCicco, Mr. Gupta, Mr. Sajecki, and the Mayor. Both the Mayor and Mr. McCallion came away from the tour unimpressed with the style of hotel Mr. Gupta was proposing. A second hotel tour with Mr. Gupta was also arranged, but Mr. McCallion did not attend. (McCallion Chief, July 27, 2010, at pp. 1834-35; DeCicco Chief, August 17, 2010, at pp. 3605-08)

family company. While Mr. Bisceglia testified that his investment in WCD was known to Mr. McCallion, Mr. McCallion testified that he only understood Mr. Bisceglia to be the lawyer for WCD, and it was as a result of this Inquiry that Mr. McCallion discovered that Mr. Bisceglia was, in fact, an investor in the project. In any event, there is no question that Mr. McCallion did not invite Mr. Bisceglia or anyone other than Mr. DeCicco at this stage to participate in the project.

Examination-in-Chief of Emilio Bisceglia ("Bisceglia Chief"), December 14, 2010, at pp. 5494-95; Cross-Examination of Emilio Bisceglia ("Bisceglia Cross"), December 14, 2010, at p. 5537; McCallion Cross, July 27, 2010, at pp. 1974-75.

49. In the course of the Inquiry, it also became apparent that Mr. DeCicco sought out a number of other investors who put money into WCD.

DeCicco Cross, August 18, 2010, pp. 3822-24, 3904-05.

Mr. McCallion's Financial Contributions to WCD

50. Mr. McCallion testified that in or about the spring of 2007, he became concerned that WCD could not meet a number of its payment obligations, including those it owed to the City for its site plan application and to the Vendors under the APS. On March 7, 2007, Mr. McCallion loaned \$30,000 to WCD. On May 24, 2007, he loaned an additional \$73,500 to the company. These loans were used to keep the development project alive and, in particular, to pay outstanding invoices for Page & Steele, WCD's lawyers, and other consultants.

McCallion Chief, July 27, 2010, at pp. 1840-41.

51. By that time, Mr. McCallion had devoted substantial amounts of time toward the goal of a hotel and convention centre in Mississauga's City Centre. Mr. McCallion recognized that if the project died, he would not be compensated for his efforts.

McCallion Chief, July 27, 2010, at pp. 1839-40.

52. Aside from a few small payments for business and living expenses, the loans Mr. McCallion made to WCD have not been repaid.

McCallion Chief, July 27, 2010, at pp. 1844-46, 1848; Couprie Cross, August 17, 2010, at pp. 3493-94.

53. In addition to the loans Mr. McCallion made directly to WCD, in July 2007, he asked the principals of TACC to make a loan to WCD of \$50,000. This loan was to pay a site plan application fee charged by the City, which was due by no later than July 31, 2007 under the APS.

McCallion Chief, July 27, 2010, at p. 1842.

54. The principals of TACC made the loan to WCD on the understanding that Mr. McCallion would be personally responsible to ensure that the loan was paid back. To this end, Mr. McCallion signed a promissory note in the amount of \$50,000 plus interest, on behalf of WCD. Although Mr. McCallion never had the legal authority to bind WCD, he signed the promissory note in favour of TACC out of concern that WCD would not be able to pay the City its application fee by the required deadline. Given the circumstances, Mr. McCallion felt it necessary to sign the promissory note.

McCallion Chief, July 27, 2010, at pp. 1846-47; McCallion Cross, July 27, 2010, at p. 1993; Exhibit 196.

55. The loan from TACC has not been repaid and remains outstanding.

McCallion Chief, July 27, 2010, at p. 1848.

Mr. McCallion's Role in Discussions with the City

56. Edward Sajecki, the Commissioner of the Planning and Building Department of the City, testified that he met several times with WCD representatives throughout the development approval process. Mr. Sajecki understood that Mr. Cook was leading this process, and the WCD project more generally. Later, Mr. Sajecki was advised that Mr. DeCicco was taking over this role from Mr. Cook.

Examination-in-chief of Edward Sajecki ("Sajecki Chief"), August 10, 2010, at pp. 2749-52.

57. On occasion, Mr. McCallion would attend the meetings between WCD representatives and Mr. Sajecki (and/or other City employees), but participated very little in the discussions. Mr. Sajecki testified that he understood that Mr. McCallion was the real estate agent responsible for putting together the purchase and sale agreement with the Vendors. Based on his prior experience dealing with development teams, Mr. Sajecki did not consider Mr. McCallion's level of involvement in the project, or his attendance at meetings, to be unusual.

Sajecki Chief, August 10, 2010, at pp. 2750-51; DeCicco Cross, August 18, 2010, at p. 3906.

58. In or about November 2008, Mr. McCallion and Mr. Sajecki discussed what the City could do to provide the Vendors reassurance that a hotel would be built on a portion of the Vendors' Land, including the possibility of amending the Official Plan to require a hotel on the Vendors' Land. There is no suggestion in the

evidence that Mr. McCallion ever asked Mr. Sajecki or any other City official to circumvent to the appropriate process for changing the Official Plan.

McCallion Cross, July 27, 2010, at pp. 1942-43, 1945, 1947; Cross-Examination of Edward Sajecki ("Sajecki Cross"), August 10, 2010, at pp. 2792-93.

59. More generally, Mr. McCallion never asked Mr. Sajecki or anyone else at the City for WCD to receive special treatment. The evidence confirmed that no favouritism was shown on the part of City staff to Mr. McCallion, WCD or any other WCD consultant or representative. Simply put, the City treated WCD's application just as any other application.

McCallion Cross, July 27, 2010, at pp. 1942-43, 1945, 1947; Sajecki Cross, August 10, 2010, at pp. 2789-90; Cross-Examination of Barry Lyon ("Lyon Cross"), August 9, 2010, at p. 2482; Ball Cross, August 19, 2010, at p. 4229; Re-direct Examination of Marilyn Ball, August 19, 2010, at p. 4253.

60. Nobody at the City ever expressed any concerns to Mr. Cook or Mr. DeCicco that Mr. McCallion's attendance at meetings, or indeed his larger role in the WCD project, was awkward or improper.

McCallion Chief, July 27, 2010, at pp. 1821, 1825; Cook Cross, September 15, 2010, at pp. 4587-89; DeCicco Cross, August 18, 2010, at p. 3905.

61. Mr. McCallion never hid his role in the project from the Mayor, who was fully aware of Mr. McCallion's involvement in WCD as a representative for Mr. Couprie. Nor did Mr. McCallion intentionally misrepresent what he understood to be the nature of his interest in the company.

Hazel McCallion Chief, September 20, 2010, at pp. 4828-29; Cross-Examination of Hazel McCallion, September 23, 2010, at pp. 5443-44.

Mr. McCallion's Role in Negotiations with respect to the APS

62. Although Mr. McCallion was quite involved at the front-end of the deal, in terms of incorporating WCD and assembling the necessary team, he was not an active participant thereafter. In particular, he did not actively participate in the negotiation and execution of the APS, the APS amendment process, the events leading to the eventual termination of the APS or the WCD/OMERS settlement process (discussed in the next section).

The Agreement of Purchase and Sale

63. Mr. McCallion was not directly involved in negotiating or drafting the terms of the APS between WCD and the Vendors, which was executed on January 31, 2007. However, Mr. McCallion understood that the APS required WCD to meet a number of conditions by certain fixed dates. For example, the timing of obtaining site plan approval from the City and the removal of the "H" (or "hold") zoning designation for the development was an important issue.

McCallion Chief, July 27, 2010, at p. 1825; McCallion Cross, July 28, 2010, at pp. 1882, 2065-66; Cook Cross, September 15, 2010, at pp. 4587-88; Agreement of Purchase and Sale, Exhibit 192.

64. While Mr. Cook was primarily responsible for conducting negotiations with the Vendors with respect to the APS, it was clear from the evidence that those involved in the early stages were aware of Mr. McCallion's involvement in WCD and in the transaction.

Lusk Cross, July 26, 2010, at pp. 1707-08; Examination-in-Chief of Robert Latimer, July 28, 2010, at pp. 2195-96.

65. Further, it was never communicated to Mr. McCallion by any of the Vendors that development of an upscale hotel in the City Centre was not economically viable. Mr. Cook believed the project was economically viable.

McCallion Chief, July 27, 2010, at p. 1827; Cook Cross, September 15, 2010, at pp. 4447-4449, 4590.

The APS Amendments

66. By the summer of 2008, global economic conditions had begun to worsen and the climate for commercial real estate development in particular had grown somewhat cold. While Mr. McCallion remained confident that WCD would eventually complete the hotel component of the development project, he was concerned that WCD could not do so by the dates imposed under the APS.

McCallion Chief, July 27, 2010, at pp. 1849-50; Cross-Examination of Michael Kitt ("Kitt Cross"), August 19, 2010, at pp. 4162-63.

67. At this stage, Mr. DeCicco was in charge of WCD and served as the main contact for Michael Kitt of OMERS. Mr. McCallion did ask Mr. Kitt for additional time to meet the conditional dates imposed under the APS, but Mr. McCallion does not remember when or where this conversation took place.

McCallion Chief, July 27, 2010, at pp. 1850-51; DeCicco Cross, August 18, 2010, at p. 3901.

68. WCD and the Vendors entered into an Amending Agreement on July 31, 2008, which provided, in part, an extension of time for WCD to commence construction of the hotel (from 18 to 24 months) and to complete construction of the hotel (from 48 to 55 months). The Amending Agreement also provided for further

extensions for WCD to complete the "H" designation removal applications with respect to the site plan. Mr. McCallion was not involved in negotiating the terms of the Amending Agreement. It was Mr. DeCicco who instructed the lawyers in this regard.

McCallion Chief, July 27, 2010, at p. 1851; DeCicco Cross, August 18, 2010, at pp. 3901-02; Exhibit 105.

The Vendors terminate the APS

69. In or about October 2008, Mr. McCallion met twice with Mr. Kitt and John Filipetti, both of OMERS, to discuss removing certain conditions set out in the APS. As Mr. McCallion testified, at that meeting, Mr. Kitt suggested that the Vendors would be willing to remove all conditions in the APS associated with the hotel construction in exchange for an increase of the purchase price by \$2.5 million.

McCallion Chief, July 27, 2010, at pp. 1852-54; Examination-in-chief of Michael Kitt ("Kitt Chief"), August 19, 2010, at pp. 4031-34.

70. As was confirmed by the evidence, Mr. McCallion was never made aware of any concerns about his involvement in the development project by Mr. Kitt or anyone else – at OMERS/Oxford, AIMco or otherwise – during this period. Nor did the Vendors seek any further information from Mr. McCallion or WCD about Mr. McCallion's role in the project. Finally, Mr. McCallion was never asked by OMERS/Oxford or AIMco, directly or indirectly, to stay out of the project.

McCallion Cross, July 27, 2010, at p. 1952-54; Kitt Cross, August 19, 2010, at pp. 4113-14; Lusk Cross, July 26, 2010, at p. 1708; Cross-Examination of Michael Dal Bello ("Dal Bello Cross"), July 29, 2010, at pp. 2308-2312, 2316; Cross-

Examination of Michael Latimer, July 28, 2010 at p. 2242; Cross-Examination of Craig Coleman, August 11, 2010, at pp. 2871-72.

71. Mr. McCallion did not tell his mother or anyone else during this time period that he was "off the project".

McCallion Chief, July 27, 2010, at p. 1854.

72. The Vendors made no further amendments to the APS. On January 9, 2009, the Vendors delivered written notice terminating the APS

Exhibit 117

The Vendors/WCD Litigation and Settlement

73. WCD did not accept the termination of the APS and, in the early months of 2009, Mr. DeCicco carried on with the development project.
74. On or about July 16, 2009, OMERS, on behalf of the Vendors, commenced an application for a determination, among other things, that the APS was terminated effective January 9, 2009 and that WCD had no right or claim to the Vendors' Land. WCD commenced a counter-application. Mr. McCallion was not a named party in the litigation.

McCallion Chief, July 27, 2010, at p. 1856.

Mr. McCallion's Affidavit, August 24, 2009

75. Mr. Bisceglia, WCD's lawyer, and Mr. DeCicco asked Mr. McCallion to provide an affidavit in support of WCD's counter-application and in response to OMERS'

application. Mr. McCallion met with Mr. Bisceglia and two lawyers from Paliare Roland, WCD's counsel on the application and counter-application.

McCallion Chief, July 27, 2010, at pp. 1858, 1860; DeCicco Cross, August 18, 2010, at pp. 3911-12.

76. Following this meeting with counsel, a draft affidavit was prepared on Mr. McCallion's behalf. Mr. McCallion made a number of revisions and provided those revisions to Mr. Bisceglia. At the time, Mr. McCallion neglected to correct the statement that he was a "principal" of WCD.

McCallion Chief, July 27, 2010, at pp. 1860-61.

77. Mr. McCallion mentioned the draft affidavit to his mother over the telephone and, in particular, commented about how many revisions he had to make, but did not discuss its specific contents or show her a copy.

McCallion Chief, July 27, 2010, at pp. 1862-63, 1865; McCallion Cross, July 27, 2010, at pp. 1965-66, 1968-69.

78. Mr. McCallion returned the draft affidavit with revisions to Mr. Bisceglia, who shortly thereafter provided him with a revised, second draft affidavit for review. Mr. McCallion made a few more changes to the second draft, but did not discuss or show the contents of the affidavit to anyone else.

McCallion Chief, July 27, 2010, at pp. 1860-61.

79. Mr. McCallion swore the affidavit on August 24, 2009, in Mr. Bisceglia's office (the "August Affidavit", Exhibit 212). Paragraph 1 of the August Affidavit sets out, in part, that Mr. McCallion is "one of the principals of World Class Developments Limited". Mr. McCallion testified that at the time he reviewed the

draft affidavits and swore the August Affidavit, he did not consider the meaning of the word "principal", nor whether it appropriately described his role with WCD.

McCallion Chief, July 27, 2010, at pp. 1863-64; August Affidavit, Exhibit 206

Mr. McCallion's Affidavits, September 11 and 15, 2009

80. In or about early September 2009, Mr. McCallion received a telephone call from his mother asking about the August Affidavit. He does not know how his mother became aware of its contents. Mr. McCallion's mother questioned Mr. McCallion as to why he was described as a "principal" of WCD in the August Affidavit. They both understood "principal" to mean "owner". At the time, Mr. McCallion certainly did not believe he was an owner of WCD, and thus became concerned that he had made a mistake in the August Affidavit.

McCallion Chief, July 27, 2010, at pp. 1864-65.

81. Following the discussion with his mother, Mr. McCallion contacted Mr. Bisceglia and asked him to prepare a further affidavit to correct the August Affidavit. Mr. Bisceglia's office prepared a further affidavit, which Mr. McCallion picked up and later signed at the law offices of Danson Schwartz Recht LLP on September 11, 2009 (the "September 11 Affidavit") as Mr. Bisceglia was not available.

McCallion Chief, July 27, 2010, at pp. 1865-66; September 11 Affidavit, Exhibit 206.

82. Mr. Bisceglia never suggested to Mr. McCallion that he had any documentation showing Mr. McCallion was, in fact, a principal of WCD.

McCallion Chief, July 27, 2010, at p. 1866.

83. Further, Mr. Bisceglia confirmed in his testimony that he never communicated any concerns he might have had regarding the content of the September 11 Affidavit to Mr. McCallion, either at the time of Mr. McCallion's visit on September 11 or subsequently. Nor can Mr. Bisceglia say that any of his staff communicated any of their concerns to Mr. McCallion regarding the September 11 Affidavit.

Bisceglia Cross, December 14, 2010, at pp. 5552, 5558-59.

84. At the Mayor's request, and in light of concerns expressed by Mary Ellen Bench (the City's solicitor) relating to the clarity of the September 11 Affidavit, Mr. McCallion asked Mr. Bisceglia to prepare a further affidavit, explaining why Mr. McCallion wanted reference to the sentence "I am one of the principals of World Class Developments Limited ("WCD")" to be deleted. A further affidavit was prepared and Mr. McCallion swore it on September 15, 2009 (the "September 15 Affidavit"). Again, Mr. Bisceglia was unavailable to commission the September 15 Affidavit and so Mr. McCallion arranged to swear it at Mr. Schwartz' office. Mr. McCallion does not believe that his mother was aware of this.

McCallion Chief, July 27, 2010, at pp. 1867-69; McCallion Cross, July 27, 2010, at p. 1968; Cross-Examination of Mary Ellen Bench ("Bench Cross"), August 10, 2010, at p. 2660; Exhibit 207.

85. At the time Mr. McCallion asked for the September 11 Affidavit and the September 15 Affidavit (collectively the "September Affidavits") to be prepared, Mr. McCallion did not believe he was a "principal" of WCD as he understood that he had no ownership interest in the company. Save for the two loans he had advanced to the company, he had not invested any money with WCD. He was

not an officer or director of WCD, nor was he a shareholder of the company. In September 2009, Mr. McCallion simply believed his role in the company was that of agent and representative of Mr. Couprie. Mr. McCallion now recognizes that, according to the Trust Declaration, he has a beneficial interest in 20% of the shares of WCD.

McCallion Chief, July 27, 2010, at pp. 1865, 1869-70.

The Settlement of the Vendors/WCD Litigation

86. WCD and OMERS entered into settlement negotiations in late summer 2009. Mr. McCallion was involved in preliminary settlement discussions. In particular, at a charity golf tournament in July 2009, Mr. McCallion discussed WCD with David O'Brien and, at Mr. O'Brien's request, arranged for Mr. O'Brien to meet with Mr. DeCicco at the Sunset Grill in Mississauga. Mr. McCallion attended the Sunset Grill meeting, but did not actively participate in the discussion and does not recall the specifics of what was discussed.

McCallion Chief, July 27, 2010, at pp. 1870-71; DeCicco Cross, August 18, 2010, at p. 3912; Cross-Examination of David O'Brien ("O'Brien Cross"), August 11, 2010, at p. 2973-.

87. In early September 2009, Mr. McCallion arranged for a second meeting between Mr. DeCicco and Mr. O'Brien. The second meeting took place at the bar in the Delta Hotel in Mississauga. Again, Mr. McCallion did not actively participate and does not recall the specifics of what was discussed at this meeting. Mr. McCallion and Mr. O'Brien testified as to their recollection that by the end of the second meeting, Mr. DeCicco and Mr. O'Brien had still not reached any resolution

of the matter. Mr. O'Brien's understanding was that Mr. DeCicco would call him later with a suggested settlement figure and, later that night, Mr. DeCicco telephoned Mr. O'Brien for exactly this reason. Mr. McCallion was not a part of that conversation.

McCallion Chief, July 27, 2010, at pp. 1871-72; O'Brien Cross, August 11, 2010, at pp. 3042-44, 3074.

88. Mr. McCallion did not become aware of the final terms of the settlement until after the start of this Inquiry. Mr. DeCicco did not consult him before agreeing to the settlement, nor did Mr. McCallion expect to be consulted.

McCallion Chief, July 27, 2010, at p. 1872-73; DeCicco Cross, August 18, 2010, at pp. 3915-16.

89. Mr. Couprie was never informed by Mr. McCallion about the final settlement number. Mr. Couprie testified that he believes that if Mr. McCallion had known about the terms of the settlement, he would have communicated this information to him.

Couprie Cross, August 17, 2010, at pp. 3496-97.

90. Mr. McCallion expected to receive repayment of the two loans he made to WCD. Beyond this, his continued involvement in WCD was only intended to secure the ability to derive income as the real estate agent with the listing for the sale of the condominium units. The project not having come to fruition, Mr. McCallion does not believe he is entitled to other proceeds from the settlement of the Vendors/WCD litigation.

McCallion Chief, July 27, 2010, at pp. 1873-74.

91. To date, Mr. McCallion has not received any payment from the settlement funds.

McCallion Chief, July 27, 2010, at pp. 1873-74; Bisceglia Cross, December 14, 2010, at p. 5560.

92. It is clear from the evidence that Mr. McCallion brought together a number of individuals, whom he believed could realize the development potential of the Vendors' Land and build a hotel, conference centre and condominium complex in Mississauga's City Centre, consistent with the City's Official Plan. At no time did Mr. McCallion use or attempt to use his relationship with his mother to influence the decisions made at the City with respect to WCD's development application. It is Mr. McCallion's submission that had it come to fruition, the WCD development project would have been a significant benefit to the City and to the businesses operating within Mississauga's City Centre.

Part II

Procedural fairness for participants in public inquiries

93. In order for there to be public confidence in the inquiry and for a Commissioner's recommendations to be accepted, the public must trust that the inquiry process has been a fair and reasonable one. This includes ensuring procedural protections for the individuals involved in the process.

See generally, E.D. Ratushny, **The Conduct of Public Inquiries**, (Irwin Law: 2009), pages 163-166

94. Section 274 of the *Municipal Act, 2001* prescribes no such procedural protections. In empowering municipalities to require a judicial inquiry to be conducted, it provides as follows:

(1) If a municipality so requests by resolution, a judge of the Superior Court of Justice shall,

(a) investigate 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;

(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, including business conducted by a commission appointed by the council or elected by the electors.

S.O. 2001, Chapter 25 (the "*Municipal Act*")

95. Pursuant to this provision, City Council adopted Resolution 0271-2009 and the Commissioner was appointed to inquire and investigate the matters set forth in the Terms of Reference. Together, section 274 and the Terms of Reference define the scope of the Commissioner's jurisdiction, set limits on the issues to be investigated, and provide a roadmap for those participating in the inquiry process.

96. In this case, it was clear from the Terms of Reference that the Commissioner was mandated to inquire into Mr. McCallion's role in WCD, and his involvement in the negotiations regarding the proposed land deal with the Vendors. As is made plain in Part I above, there is no doubt that Mr. McCallion's business and reputational interests are at stake in this Inquiry.
97. In *Consortium Developments (Clearwater) Ltd. v. Sarnia (City)* ("*Consortium*"), Justice Binnie held that a Commissioner is limited by the principles of procedural fairness, regardless of whether or not those limits are spelled out in the enabling legislation. Mr. McCallion submits that in the face of a politically driven public inquiry, a Commissioner needs to have his or her ability to ensure procedural fairness set out in the enabling legislation. The existing judge-made law is inadequate to "supply the omission" in that commissioners can only recommend funding to permit meaningful participation by someone who is placed "front and centre" by an inquiry's terms of reference but lacks the necessary resources to retain counsel. Without clear statutory language, the Commissioner's ability to control the inquiry process is limited by the whims of a municipal council. As presently drafted, section 274 does not give the judge appointed to conduct the inquiry sufficient power to ensure that the process is fair for those involved. And so while the inquiry has the imprimatur of a judicial proceeding – given that it is conducted by a judge – it remains a process that is highly influenced by the political motives of a municipal council.

98. Mr. McCallion submits that this tension between the Commissioner's powers and the limits set out in the *Municipal Act* creates a challenge for the Commissioner to strike the necessary balance as recognized by Justice Binnie in *Consortium* between:

- (a) the municipality's desire to use the judicial inquiry process to determine facts pertinent to its good government or public business and to obtain useful recommendations from the Commissioner on the one hand with,
- (b) the right of the private citizen who has been swept up into the Inquiry process to have his legitimate interests recognized.

Justice Binnie acknowledged that it falls upon the Commissioner to ensure the necessary balance and fairness of the process:

The fact a s. 100 inquiry is a judicial inquiry clearly seeks to balance the municipality's desire to have accurate information and useful recommendations from an independent Commissioner against the right of private citizens and others to have their legitimate interests recognized and protected. A good deal of confidence is inevitably and properly placed in the ability of the Commissioner to ensure the fairness of the inquiry.

Ibid, at para. 27 [emphasis in original]

99. Further, Justice Binnie recognized that as "hearings will often unfold in the glare of publicity", it is "a tall order to ask any Commissioner to orchestrate this

process to further the public interest in getting at the truth without risking unnecessary, avoidable or wrongful collateral damage on the participants.”

Ibid, at para. 41 [emphasis in original]

100. Similarly, in their discussion on the duty of fairness in the context of public inquiries, Brown and Evans note:

Moreover, since the conduct of the inquiry takes on a distinctly judicial form, including powers to subpoena witnesses and documents, and to conduct cross-examination, witnesses and other interested persons have the right to be represented by counsel because of the risk of reputational damage inherent in the public nature of the proceedings and reports. As well, these public inquiries are subject to the duty of fairness, and procedural issues that are not specifically dealt with by the statutory code must be resolved within those parameters.

D. Brown and J. Evans, *Judicial Review of Administrative Action in Canada* (Toronto: Canvasback, 2001) at pp. 7-63 to 7-64

101. In Part III of her report, Commissioner Bellamy acknowledged that while a municipal public inquiry has some broad powers – including the power to “demand” the services of a judge of the Superior Court of Justice to conduct it, in some other critical aspects, a municipal public inquiry is more limited. As discussed below, Mr. McCallion submits that these limits can result in negative consequences for participants of the inquiry process.

Commissioner Bellamy, *Toronto Computer Leasing Inquiry and Toronto External Contracts Inquiry, Report, Volume III: Inquiry Process*, page 21 (hereinafter, “TCLI & TECI Report”)

102. As the Commission is aware, Mr. McCallion faced a number of challenges to ensure his right to fully participate in the hearing throughout the inquiry process.

In large measure, these challenges were as a result of politically motivated decisions of the City Council. Those decisions were outside the Commissioner's control, but had a real and significant impact on the inquiry process and Mr. McCallion's participation therein:

- (a) Mr. McCallion was granted standing to participate in the Inquiry pursuant to the Commissioner's ruling on December 14, 2009. In his ruling, the Commissioner urged the parties seeking funding to attempt to negotiate a reasonable arrangement with the City, thereby avoiding the need for him to make a specific ruling. In the absence of any agreement, the Commissioner indicated that he would formulate a recommendation with respect to funding.

Commissioner's Ruling, December 14, 2009

The City essentially ignored the Commissioner's comments and instead adopted Resolution 0032-2010 (the "February Resolution") regarding funding for parties with standing. The February Resolution limited Mr. McCallion's funding for legal representation to preparation for and attendance at the Inquiry when Mr. McCallion was giving evidence; required that as a precondition to any funding Mr. McCallion provide the City with further evidence of financial need; and deferred any decisions of Council for further funding to following the receipt of the Commissioner's final report.

As a result, on February 26, 2010, Mr. McCallion was forced to bring a motion to the Commission, wherein he sought a recommendation that the City Council reconsider its grant of limited funding for his legal representation.

Ultimately, following the strong recommendations given by the Commissioner in his rulings of March 4, 2010 and May 17, 2010, the City Council approved funding for Mr. McCallion's legal fees up to \$150,000.00.

February Resolution

Resolution 0139-2010, dated May 26, 2010

- (b) Just prior to bringing his motion, on February 24, 2010, the City Council engaged in a further debate regarding Mr. McCallion's limited funding. Councillor Parrish brought a Notice of Reconsideration to revisit the February Resolution and to potentially strip Mr. McCallion of his right to even the limited funding proposed in the February Resolution. It is suggested in the Notice of Reconsideration that the decision to grant Mr. McCallion, a non-City employee, limited funding was unprecedented. While Council declined to revisit its decision regarding funding for Mr. McCallion, the fact that such a decision was even contemplated raised serious concerns for Mr. McCallion, put his ability to participate in the inquiry process at risk, and brought further and unnecessary media attention to Mr. McCallion's involvement in the process.

Notice of Reconsideration

- (c) On a motion by then Councillor Parrish, on September 29, 2010, City Council voted to take steps to recoup from Mr. McCallion the \$150,000.00 the City had advanced for his legal expenses to date.

Motion By Councillor Parrish, dated September 29, 2010

- (d) In the face of City Council's resolution to attempt to recoup legal fees and in light of the fact that Mr. McCallion had exceeded the funding cap several months earlier, Mr. McCallion was again forced to bring a motion on November 26, 2010 asking the Commissioner to confirm his original recommendation for funding for legal counsel and to recommend to the City Council that it increase the funding limit from \$150,000.00 to \$400,000.

Again, only following the strong recommendation given by the Commissioner in his ruling of December 3, 2010, did the City Council approve a further \$125,000.00 in funding for Mr. McCallion's legal representation.

Commissioner's Ruling, December 3, 2010

103. While having chosen to name Mr. McCallion in the Terms of Reference, thereby requiring the Commissioner to investigate and inquire into Mr. McCallion's business activities, City Council nonetheless took every opportunity to try to limit Mr. McCallion's participation in the process, treating him as a witness rather than

a party with a direct and substantial connection to the subject matter of the inquiry.

104. Mr. McCallion submits that the challenges he faced as a result of the choices made by City Council can be minimized by making changes to the *Municipal Act*, which would provide the Commissioner with greater power to ensure fairness.

Proposed Recommendation 1: *A judge appointed to conduct a municipal public inquiry should have all the same powers granted to a judge appointed to conduct a provincial public inquiry*

105. Given the current language of the *Municipal Act*, a municipal public inquiry has only those powers contained in Part II of the *Public Inquiries Act*⁴, as augmented by the existing judge-made law. As such, the judge conducting a municipal public inquiry has no specific power to:

- (a) Grant individuals with substantial and direct interest in the subject-matter of the inquiry an opportunity to give evidence and to call and examine or to cross-examine witnesses personally or by counsel⁵;
- (b) Make orders and give directions as the commission considers proper to maintain order and to prevent the abuse of the commission's processes⁶;

⁴ R.S.O. 1990, c. P-41. Note that on a day to be named by proclamation of the Lieutenant Governor, this Act will be repealed and replaced by *Public Inquiries Act, 2009*, S.O. 2009, c. 33, Schedule 6 ("*Public Inquiries Act, 2009*"). The powers of a Commissioner as set out under Part II of the *Public Inquiries Act* are set out starting at s. 33 of the *Public Inquiries Act, 2009*. For ease of reference, we will refer to "Part I" and "Part II" powers as the powers set out in the *Public Inquiries Act* and to the "2009 Powers" as the powers set out in the *Public Inquiries Act, 2009* throughout these submissions.

⁵ See s. 5 of the *Public Inquiries Act* and s. 15 of the *Public Inquiries Act, 2009*

⁶ See s. 28(1) of the *Public Inquiries Act, 2009*. Mr. McCallion submits that this authority is particularly important, where, as in this case there is serious question as to a municipal council's true motives behind decisions made regarding a public inquiry. In *Homex Realty and Development Co. v. Wyoming (Village)*, [1980] 2 S.C.R. 1011 at page 1031, the Supreme Court recognized that where municipalities make decisions which are in substance "quasi-judicial" rather than "legislative" - in that the decisions impact

- (c) Cause a person who has been served with a summons and has failed to appear to be apprehended⁷; or
- (d) Direct that a search warrant issue⁸.

106. In addition, there is nothing in *Municipal Act* that requires the Commission to issue a formal notice if it intends to make findings of misconduct⁹. In the TCLI & TECI Report, Part III, Commissioner Bellamy concluded that a municipal public inquiry conducted pursuant to the *Municipal Act*, would be strengthened if it had the additional powers set out in Part I of the *Public Inquiries Act*.¹⁰

107. Mr. McCallion submits that this Commission should recommend changes to the *Municipal Act*, granting a judge authorized under s. 274 to conduct an investigation or inquiry, all of the powers available to provincial public inquiries, be they the powers set out under Parts I and II of the *Public Inquiries Act* or in the *Public Inquiries Act, 2009*.¹¹

Proposed Recommendation 2: *The Municipal Act should be amended to provide a judge authorized under s. 274 with the power to grant funding to inquiry participants, where a financial need as been established.*

108. Mr. McCallion proposes that the Commissioner recommend that a new subsection of s. 274(5) of the *Municipal Act* be added as follows:

one specific individual or small group of people - the principle of reasonable notice and the doctrine of *audi alteram partem* will apply. In addition, such "quasi-judicial" decisions may be subject to judicial review. Mr. McCallion submits that cumulatively, the Council's decision to specifically name him in the Terms of Reference; its treatment of his request for funding throughout the process; and its attempts to claw-back the funding granted appear to be a deliberate targeting of Mr. McCallion and his business dealings in the City, with no real "legislative" purpose.

⁷ See s. 16 of the *Public Inquiries Act* and ss. 10, 29 and 30 of the *Public Inquiries Act, 2009*

⁸ See s. 17 of the *Public Inquiries Act* and s. 13 of the *Public Inquiries Act, 2009*

⁹ See s. 5(2) of the *Public Inquiries Act* and s. 17 of the *Public Inquiries Act, 2009*

¹⁰ See page 95, TCLI & TECI Report, Part III, page 95

¹¹ We note that at present, the only change contemplated in the *Municipal Act* in this regard is at s. 274(2), which will be repealed on a day to be named by proclamation, with the following substituted: "Section 33 of the *Public Inquiries Act, 2009* applies to the investigation of inquiry by a judge"

s. 274(5.1) The judge may require council to ensure adequate funding for legal representation for any person whose conduct is called into question in the investigation or inquiry and who establishes an economic need for financial assistance.

109. Mr. McCallion recognizes that this proposal represents a significant shift in the legislation. Further, Mr. McCallion acknowledges that the power to order funding for inquiry participants does not appear in the *Public Inquiries Act*, the *Public Inquiries Act, 2009* or the federal *Inquiries Act*.¹² Mr. McCallion submits that this power, coupled with his Proposed Recommendation 1, are necessary for judicial inquiries conducted under the *Municipal Act*, because such inquiries are more susceptible to political interference than are judicial inquiries conducted under the provincial and federal legislation. The history recited above in paragraph 102 (challenges to Mr. McCallion's right to fully participate in the hearing throughout the inquiry process) amply demonstrates this to be the case. The fairness of municipally created judicial inquiries – and public confidence in the inquiries' process and any recommendations resulting from them – should not be put at risk at every municipal council meeting held while those inquiries are underway.

110. Moreover, creating the power to grant funding to inquiry participants where a financial need as been established would serve the interests of municipal taxpayers and voters, who have an interest at the outset in knowing the potential consequences of their Councillors' decisions to create judicial inquiries.

111. At a certain level, all judicial inquiries play out at the intersection of law and politics, but in the municipal context, the intersection tends to be very narrow. There is more risk of the politics interfering with the inquiry process, particularly where the decision to commence such a process was politically motivated in the first place.
112. As currently structured, the *Municipal Act* does not ensure the procedural rights of individuals who are swept up in the inquiry process. While the Commissioner made a number of recommendations directing City Council to ensure Mr. McCallion's procedural rights, those rights were ultimately left in the hands of a City Council, who having specifically named him in the Terms of Interest, already displayed a keen interest in targeting Mr. McCallion. The Commissioner had no ability to challenge or override the City Council's decisions, regardless of their potential impact on his ability to conduct a fair hearing.
113. In order for there to be greater assurance that inquiry process is not driven by political whim, Mr. McCallion submits that the changes to the *Municipal Act* he has proposed are appropriate.

Summary and Conclusion

114. In *Krever*, Justice Cory recognized the importance of procedural fairness in the context of an inquiry:

The findings of fact and the conclusions of the commissioner may well have an adverse effect upon a witness or a party

to the inquiry...It is true that the findings of a commissioner cannot result in either penal or civil consequences for a witness Nonetheless, procedural fairness is essential for the findings of commissions may damage the reputation of a witness. For most, a good reputation is their most highly prized attribute. It follows that it is essential that procedural fairness be demonstrated in the hearings of the commission.

Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System in Canada-Krever Commission), [1997] 3 S.C.R. 440 at para. 55

115. Having been specifically named in the Terms of Reference, Mr. McCallion's business and personal dealings have been placed under a microscope. Mr. McCallion has participated in the process to protect his reputational interests. He submits that on a fair review of the evidence, this Commission should make the following findings of fact:

- (a) Mr. McCallion never intended to be, and never understood that he was, an owner of WCD until the true meaning of the Trust Declaration was brought to his attention in the course of this Inquiry;
- (b) Mr. McCallion never requested special treatment from anyone at the City, nor did the City offer any such treatment to Mr. McCallion or any other individual associated with WCD;
- (c) Mr. McCallion never involved the Mayor in matters relating to WCD in any manner causing her to run afoul of her obligations under the *Municipal Conflicts of Interest Act*, R.S.O. 1990, c. M. 50;

- (d) Mr. McCallion's decision to swear the September Affidavits was a good faith effort to accurately represent what he believed was the true nature of his involvement in WCD, which at the time he believed the August Affidavit misstated;
- (e) Mr. McCallion never attempted to misrepresent or mislead the City, the Vendors, the consultants or any other party with respect to his role at WCD or the nature of his interest in the company, as he understood it at the time.

116. Further, Mr. McCallion submits that this Commission should give serious consideration to his proposal for changes to the *Municipal Act*. In order to fully protect individuals drawn into the inquiry process, judges appointed to conduct such inquiries must be given the authority to ensure a procedurally fair process. This necessarily includes giving judges the same powers that would be available to them under the *Public Inquiries Act* and the *Public Inquiries Act, 2009* and, importantly, the authority to order funding to ensure participation by individuals who have established a direct and substantial interest in the outcome of the inquiry and financial need.

All of which is respectfully submitted

per: Wesley R. DeLuca

Stockwoods LLP
Counsel for Peter McCallion

January 24, 2011