

CITY OF MISSISSAUGA JUDICIAL INQUIRY

The Honourable J. Douglas Cunningham, Commissioner

CLOSING SUBMISSIONS OF TONY DECICCO AND WORLD CLASS DEVELOPMENTS LTD.

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A. Overview

1. Large commercial real estate developments, even though they may involve only private parties developing private land, take place in an environment laden with policy-driven municipal regulation. Through the various zoning, planning, and tax-levying tools at their disposal, municipalities can, and routinely do, shape development projects in accordance with the vision of the municipality's executive, namely its elected representatives. This is not unique to Mississauga; it happens in all municipalities across Canada.

2. Mississauga's mayor, Hazel McCallion, takes a more hands-on approach than some other mayors in shaping the development of her city. She encourages landowners to make good use of their land; she endeavours to persuade developers to support the City's vision. This is part of a mayor's job, and a part at which there is no doubt that Mayor McCallion is particularly effective.

3. When a development project materialized that proposed to satisfy Mississauga's long-standing desire for a luxury hotel and conference centre in its downtown core, Mayor McCallion was an enthusiastic supporter. In this particular case, knowing her son Peter McCallion had an interest in one of the companies that was a party to the transaction, she removed herself from all of the City-related aspects of the transaction. However, Mayor McCallion apparently did not appreciate that the appearance of a conflict of interest could arise from more than strictly her involvement in City-related matters. By advocating for the ultimate construction of the hotel, something that was indisputably in the City's best interest, she could also be perceived to be advocating for a position that was in her son's financial interest.

4. But for this fact, however, the transaction was unremarkable, and nothing came of it. The City was not a party to the transaction, at all. The deal fell apart amidst a commercial dispute between WCD and the Vendors. Litigation ensued, that was eventually settled out of court, in circumstances that appeared commercially reasonable to the parties then and now.¹ The City eventually bought the plot of land in question from the Vendors, for a fair price, and leased the land to Sheridan College; no aspect of this subsequent transaction is impugned. Peter McCallion made no money out of any of this.

5. Although some parties to the Inquiry endeavoured to elicit evidence of a sinister narrative underlying this sequence of events, no such evidence existed, and no such narrative is accurate. This was a land deal gone wrong, to which the City was not a party, and in which the City paid no money. There was no evidence that Mayor McCallion had the purpose of promoting any interest besides the City's, and no evidence of any impropriety otherwise.

B. The Evidence

1) Mr. DeCicco's Testimony

6. Mr. DeCicco was a forthright and cooperative witness. He did not attempt to minimize or obfuscate his involvement in any of the matters of interest to the Inquiry. On the most important issues, his evidence was corroborated by the documentary record and by the testimony of other witnesses.

¹ One of the two vendors, AIMCo, disputes the reasonableness of the settlement negotiated by its co-vendor, OMERS; such a disagreement among co-parties about the reasonableness of settlement terms is unremarkable.

2) Mr. DeCicco's Background with Mayor McCallion

7. Long before becoming involved in the WCD transaction, Mr. DeCicco made a point of contacting and keeping in contact with Mayor McCallion, as he does with other politicians in other municipalities.² This course of conduct took place over many years.

8. Mr. DeCicco considered Mayor McCallion a good friend, though not a close friend.³ Mayor McCallion maintained similar friendships with the majority of Mississauga developers, as well as with a large number of business persons and citizens of Mississauga.⁴ Similarly, Mr. DeCicco attended galas and golf tournaments for other municipalities, and lunches and dinners with other politicians including at the provincial and federal level.⁵

3) Mr. DeCicco's Contact with Mayor McCallion Regarding the WCD Project

9. Mr. DeCicco testified that he had regular contact with Mayor McCallion over the course of the WCD-OMERS transaction in order to keep her informed of the status of the deal.⁶ Mayor McCallion testified that it was not unusual for her to receive this volume of calls from a developer.⁷

10. There was no evidence that Mr. DeCicco was motivated by improper considerations in doing so. In particular, Mr. DeCicco's contacts with the Mayor were

² Evidence of Tony DeCicco, p. 3526, ln. 7-23.

³ Evidence of Tony DeCicco, p. 3526, ln. 24 – p. 3527, ln. 16.

⁴ Evidence of Mayor McCallion, p. 4803, ln. 11 – p. 4804, ln. 10.

⁵ Evidence of Tony DeCicco, p. 3534, ln. 6-14; p. 3546, ln. 16 – p. 3547, ln. 6.

⁶ Evidence of Tony DeCicco, p. 3589, ln. 2-8; p. 3963, ln. 24 – p. 3964, ln. 4.

⁷ Evidence of Mayor McCallion, p. 4804, ln. 11 – p. 4805, ln. 16.

not in any way related to Peter McCallion's involvement in the project.⁸ At the same time, the fact that Mr. McCallion was involved in WCD, and had a financial interest in the transaction between WCD and the Vendors, was known to all participants from the outset of their participation. There was no attempt to conceal Mr. McCallion's involvement; he attended meetings on behalf of WCD with representatives of both the City and the Vendors.

11. As many witnesses acknowledged, Mayor McCallion could be a powerful advocate for projects she supported.⁹ She was known for intervening directly with private landowners and developers in order to solicit their cooperation in endeavours she believed would benefit Mississauga.¹⁰ Mary-Ellen Bench described Mayor McCallion as a "very hands-on Mayor," and agreed that there was a "sort of presumption that she would be involved in some way in a big project."¹¹ These kinds of interventions are not unusual in politics, and should not be considered improper; Mayor McCallion never asked people to compromise their principles, she never threatened negative consequences, and she did not ask for personal favours.¹²

12. In addition, all witnesses were in agreement that Mayor McCallion had a strong and well-known desire to see a luxury hotel and conference centre built in

⁸ Evidence of Tony DeCicco, p. 3747, ln. 10-23.

⁹ See e.g. Evidence of Michael Latimer, p. 2190, ln. 10-14; p. 2225, ln. 6; evidence of Mary-Ellen Bench, p. 2591, ln. 16-21; p. 2666, ln. 12-16.

¹⁰ Evidence of Mayor McCallion, p. 5373, ln. 7-23.

¹¹ Evidence of Mary-Ellen Bench, p. 2591, ln. 16-21.

¹² Evidence of Mayor McCallion, p. 5372, ln. 8 – p. 5373, ln. 14.

downtown Mississauga.¹³ Securing such a development had also been the City's vision since at least the early 1990s.¹⁴

13. The City's support for a project of this nature was the foundation of the both the Vendors' and the Purchaser's enthusiasm for the deal, and the City's support had no more forceful incarnation than in the support of Mayor McCallion.¹⁵ Both WCD and the Vendors wanted to ensure that they were realizing the City's vision as closely as possible. Mr. DeCicco's desire to ensure that Mayor McCallion was kept informed of the status of the project and that she continued to support it was entirely understandable and appropriate in these circumstances.

14. At the same time, the WCD-OMERS transaction, as it had been negotiated before Mr. DeCicco's involvement, was very vendor-friendly, and strewn with difficult hurdles for WCD to surmount in order to see the deal through to completion.¹⁶ The drastic global economic downturn that occurred in the midst of the deal's unfolding greatly increased the difficulty WCD would have in completing the deal successfully.¹⁷ The Vendors, at best, appeared to be indifferent as to whether the deal succeeded or failed, and at worst hoped that time would run out with no deal completed.¹⁸

¹³ e.g. Evidence of Tony DeCicco, p. 3703, ln. 17 – p. 3704, ln. 20; evidence of Barry Lyon, p. 2476, ln. 12-16; evidence of Murray Cook, p. 440, ln. 5-7.

¹⁴ Evidence of Ed Sajecki, p. 2795, ln. 2-7.

¹⁵ See e.g. evidence of Ken Lusk, p. 1721, ln. 11 – p. 1722, ln. 6.

¹⁶ Evidence of Bram Costin, p. 1507, ln. 16 – p. 1512, ln. 1; p. 1518, ln. 1 – p. 1521, ln. 21.

¹⁷ See e.g. evidence of Michael Dal Bello, p. 2282, ln. 25 – p. 2283, ln. 19.

¹⁸ Ex. 429 (email chain between Ron Peddicord and John Filipetti ending March 31, 2008): "maybe we get our wise and time runs out with. No deal." [Peddicord to Filipetti, March 27, 2008, 6:48pm]. This is likely a typographic error; the word "wise" likely should read "wish".

15. Mr. DeCicco benefitted from a good reputation among the mayors of the various municipalities in which he had participated in development projects throughout his career, including in Mississauga. He was concerned about the reputational harm he would suffer if Mayor McCallion attributed the deal's failure to him personally.¹⁹

16. In all these circumstances, Mr. DeCicco felt it was good business to keep Mayor McCallion regularly informed of the progress of the hotel project. When he thought the Vendors were being unreasonable, he told her so. He only expected the Mayor to respond to the extent she felt was appropriate. For the most part, Mayor McCallion did not respond. On four occasions, Mayor McCallion intervened directly with the Vendors to encourage them to keep the project alive.²⁰ It was not unusual for Mayor McCallion to contact private parties, including OMERS, on issues she considered important for the best interests of Mississauga.²¹

17. There was no evidence that Mr. DeCicco ever asked Mayor McCallion to intervene in WCD's favour with City officials, or that the Mayor ever did so. The only evidence was to the contrary. Mr. DeCicco testified that he never discussed with Mayor McCallion his difficulties with City staff, because he did not feel it was appropriate.²² Mayor McCallion testified that she believed she was under an obligation not to discuss the WCD matter with City staff,²³ that she declined to be

¹⁹ Evidence of Tony DeCicco, p. 3585, In. 15 – p. 3586, In. 9; p. 3589, In. 2-12; p. 3658, In. 6-23.

²⁰ In July 2008 (Ex. 285), November 2008 (Ex. 423), and twice in December 2008 (Ex. 470, 425).

²¹ Evidence of Michael Nobrega, p. 3354, In. 15 – p. 3355, In. 4; evidence of Michael Lattimer, p. 2223, In. 24 – p. 2224, In. 24.

²² Evidence of Tony DeCicco, p. 3634, In. 6 – p. 3635, In. 21.

²³ Evidence of Mayor McCallion, p. 4844, In. 5-18; p. 4859, In. 9-15.

briefed by City staff on the WCD matter because of her obligations,²⁴ and that she did not have any knowledge of, or involvement in, WCD's site plan application or the site plan application fee issue.²⁵ Mary-ellen Bench testified that she was not aware of the Mayor becoming involved in any significant way in promoting the WCD project.²⁶ Ed Sajecki testified that he never discussed the site plan application fees with the Mayor, that the Mayor did not speak with him about the application at all, and that his staff did not feel any pressure to move the WCD application forward because of the Mayor's interest in the project.²⁷ Marilyn Ball corroborated the Mayor's evidence that she had declined to be briefed about the WCD matter.²⁸ Ms. Ball also testified that she did not receive any pressure from the Mayor's office, the Mayor personally, or any member of council, to treat the WCD application differently, and that she did not get the sense that, either in her department or in the City as a whole, the WCD application was to be treated any differently than any other.²⁹ Ms. Ball further testified that the Mayor had no involvement in the site plan application fee issue, in the City's presentations to council related to the WCD application, and that she felt no pressure from the Mayor on those issues.³⁰

18. Mr. DeCicco always believed that what motivated the Mayor's interest in the WCD project was her desire to secure a luxury hotel and conference centre for downtown Mississauga.³¹ This is consistent with the evidence of the other witnesses. No witness expressed a concern that the Mayor was motivated by something other

²⁴ Evidence of Mayor McCallion, p. 4859, ln. 22 – p. 4860, ln. 5.

²⁵ Evidence of Mayor McCallion, p. 4860, ln. 6 – p. 4861, ln. 19.

²⁶ Evidence of Mary-ellen Bench, p. 2591, ln. 11-18.

²⁷ Evidence of Ed Sajecki, p. 2780, ln. 21 – p. 2782, ln. 3.

²⁸ Evidence of Marilyn Ball, p. 4218, ln. 24 – p. 4219, ln. 8.

²⁹ Evidence of Marilyn Ball, p. 4229, ln. 14 – p. 4230, ln. 2.

³⁰ Evidence of Marilyn Ball, p. 4250, ln. 25 – p. 4253, ln. 5.

³¹ Evidence of Tony DeCicco, p. 3804, ln. 21 – p. 3805, ln. 6.

than the City's best interests. To the extent that some witnesses had concerns about Peter McCallion's involvement, these were concerns related to the appearance of a conflict of interest.

19. Mr. DeCicco candidly acknowledged that he now realizes he put Mayor McCallion in an awkward position by encouraging her to maintain an involvement in a project in which her son had an interest.³² That said, both Mayor McCallion and OMERS agreed that none of the Mayor's interventions with OMERS were improper, unusual, or caused the Vendors to do anything that was not in their commercial interest and the interests of Mississauga.³³ Other than these interventions, there is no evidence of any improper or unusual dealings between any of the City, WCD, and OMERS.

4) Site Plan Fees

20. Mr. DeCicco understood that Mississauga had required a fee of approximately \$50,000 in order to process WCD's Master Site Plan application, and that this fee had been paid in the summer of 2007, before Mr. DeCicco had become involved in WCD.³⁴ That fee was in fact paid. Mr. DeCicco thought the full site plan application fee would become due upon site plan approval.³⁵

21. WCD and the City had agreed to this arrangement in good faith. A master site plan application did not, in fact, require a fee at all. It was not a formal site plan

³² Evidence of Tony DeCicco, p. 3803, ln. 19 – p. 3806, ln. 6.

³³ Evidence of Michael Nobrega, p. 3350, ln. 3 – p. 3353, ln. 8; evidence of Mayor McCallion, p. 5372, ln. 8-20.

³⁴ Evidence of Tony DeCicco, p. 3573, ln. 21 – p. 3574, ln. 21.

³⁵ Evidence of Tony DeCicco, p. 3574, ln. 10-16.

application.³⁶ The City chose to charge an initial fee, and selected the amount in question, because it thought it was an appropriate amount to reflect the work that would be required to review WCD's master site plan application.³⁷ None of this is provided for in the City's by-law pertaining to site plan application fees, but made commercial sense to the City and to WCD.

22. In early 2008, the City asked WCD to pay the full site plan application fee. Mr. DeCicco thought the City was changing its mind about how much of the fee was due when.³⁸ The City thought WCD was changing its mind about what kind of site plan it wanted approved and when.³⁹

23. Mr. DeCicco continued to believe he was only pursuing a master site plan application that this stage, and that WCD had already paid the fee required for that application.⁴⁰ He and his agents had had numerous discussions with the City about the site plan fee issue.⁴¹ At one point, Mr. DeCicco decided he would pay half the total fee, or approximately \$220,000. He caused WCD to issue a cheque to the City for this amount. He later changed his mind about paying this amount at that time, and did not send the cheque.⁴²

24. Although the requirements for the timing and quantum of site plan application fees are provided for in Mississauga's by-laws, even the Commissioner of Planning was mistaken about what these by-laws actually provided prior to his participation in

³⁶ Evidence of Marilyn Ball, p. 4232, ln. 7-17; evidence of Ed Sajecki, p. 2764, ln. 3-5.

³⁷ Evidence of Marilyn Ball, p. 4232, ln. 18 – p. 4233, ln. 9.

³⁸ Evidence of Tony DeCicco, p. 3625, ln. 15 – p. 3626, ln. 4.

³⁹ Evidence of Marilyn Ball, p. 4243, ln. 13-14.

⁴⁰ Evidence of Tony DeCicco, p. 3753, ln. 8 – p. 3759, ln. 19.

⁴¹ See e.g. evidence of Ed Sajecki, p. 2581, ln. 13 – p. 2582, ln. 2.

⁴² Evidence of Tony DeCicco, p. 3754, ln. 20 – p. 3756, ln. 11.

the Inquiry.⁴³ Mr. DeCicco's municipal lawyers thought that the timing and quantum of the site plan application fees was negotiable, as were numerous other aspects of the site plan approval process, since they had more than one discussion with the City to discuss the site plan application fee.⁴⁴ It was not improper, or unreasonable, for Mr. DeCicco to treat this issue as one of the many moving parts that were the subject of his complicated relationship with the City planning department at that point in time.

25. Mr. DeCicco always intended to pay the full site plan application fee upon receiving full site plan approval, which is what he understood his ultimate obligation to be.⁴⁵

C. WCD's Investors

1) No Jurisdiction to Inquire Into WCD's Investors Other Than Peter McCallion

26. The Commissioner has no jurisdiction to inquire into, or make findings about, the investments of Murray Cook, Tony DeCicco, Leo Couprie, and John DiPoce in WCD, or about whether WCD owes money to those individuals. None of these people was a member of council, a municipal employee, or a person having a contract with the municipality, and the issue of their investment in WCD does not relate to the good government of Mississauga or to the conduct of its public business.

⁴³ Evidence of Ed Sajecki, p. 2773, ln. 13 – p. 2774, ln. 2.

⁴⁴ Evidence of Ed Sajecki, p. 2581, ln. 13 – p. 2582, ln. 2.

⁴⁵ Evidence of Tony DeCicco, p. 3760, ln. 19 – p. 3761, ln. 3.

27. Under the *Municipal Act, 2001*⁴⁶, the jurisdiction of a municipal public inquiry is set out in section 274 as follows:

274. (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.

28. The Supreme Court of Canada has described the section 274 power as “[t]he power of an Ontario municipality to authorize a judicial inquiry into matters touching the good government of the municipality, or ‘any part of its public business,’ and any alleged misconduct in connection therewith.”⁴⁷

29. The terms of reference of the Inquiry are to inquire into the various transactions and matters described in the recitals “**as they relate to the good government of the municipality, or the conduct of its public business**” [emphasis added].

30. On the face of the issue, Mississauga has no interest in the financial terms governing the arrangements between WCD and its investors.

⁴⁶ S.O. 2001, c. 25.

⁴⁷ *Consortium Developments (Clearwater) Ltd. v. Sarnia (City)*, [1998] 3 S.C.R. 3 at para. 26.

31. There has been no evidence that the financial relationships between WCD and any of Murray Cook, Tony DeCicco, Leo Couprie, and John DiPoce, bear some connection to the good government of Mississauga or the conduct of its public business.

32. While there was evidence that each of these individuals was to some degree a friend of Mayor McCallion's, this puts them in a class of thousands of people.⁴⁸ The Mayor testified that she knew all the developers who have developed in Mississauga over the years, and has been to many social events with their principals.⁴⁹

2) Not Relevant

33. The quantum of the investments of Murray Cook, Tony DeCicco, Leo Couprie, and John DiPoce are not relevant to the Terms of Reference of the Inquiry; neither is the question of whether any of them are currently owed money by WCD.

34. The Terms of Reference anticipate that the inquiry may include investigating and inquiring into the relationships between existing and former elected and administrative representatives of Mississauga and existing and former principals and representatives of WCD, OMERS and its affiliates. As a matter of construction, and keeping in mind the necessity to connect the inquiry to the good government of the municipality or the conduct of its public business, the Terms of Reference ought to be interpreted as permitting an investigation and inquiry into the relationships between the City representatives on the one hand, and WCD's, OMERS' and its affiliates' representatives on the other. The Terms of Reference should not be

⁴⁸ Evidence of Mayor McCallion, p. 4803, ln. 11-13.

⁴⁹ Evidence of Mayor McCallion, p. 4803, ln. 15-24.

interpreted as permitting a free-ranging inquiry into the internal relationships between all existing and former principals and representatives of WCD, and of OMERS, and of OMERS' affiliates, among themselves. Nothing in the recitals or elsewhere in the Terms of Reference suggests that these internal relationships are relevant to the good government of Mississauga or the conduct of its public business.

3) No Amounts Owing

35. There is no evidence to suggest WCD owes money to any of Murray Cook, Tony DeCicco, or Leo Couprie. John DiPoce's evidence that he believes he is entitled to repayment does not support the conclusion that he is "owed money" in any legal sense.⁵⁰

36. Murray Cook signed a release of all claims against WCD.⁵¹

37. Tony DeCicco remains the controlling shareholder of WCD. There is no evidence to suggest WCD owes him money.

38. Leo Couprie admitted that he had no right to any money beyond what WCD has already repaid him.⁵²

39. Mr. DiPoce agreed that as of June 2008, he was no longer a 50% partner in the project, and that when he withdrew from the project, he had no agreement that he was entitled to anything should the project succeed in the future.⁵³

⁵⁰ Evidence of John DiPoce, p. 4404, ln. 18-20.

⁵¹ Ex. 210; Evidence of Murray Cook, p. 4471, ln. 11-12.

⁵² Evidence of Leo Couprie, p. 3456, ln. 16 – p. 3457, ln. 16.

D. No Jurisdiction to Make Misconduct Findings Against Mr. DeCicco

40. A commission of inquiry empowered pursuant to s. 274 of the *Municipal Act, 2001* may only investigate misconduct in relation to a member of council, an employee of the City, or a person having a contract with the City, and then, only in relation to the person's duties or obligations to the City.⁵⁴

41. Mr. DeCicco was not a member of council, an employee of the City, or a person having a contract with the City, either in his personal capacity or in his capacity as a principal of WCD. There is no jurisdiction to make a finding of misconduct against him.

42. The powers of a commission of inquiry empowered pursuant to s. 274 of the *Municipal Act, 2001* are more circumscribed than those of a commission empowered pursuant to either s. 2 of the Ontario *Public Inquiries Act*,⁵⁵ or s. 2 of the federal *Inquiries Act*.⁵⁶ Specifically, while all three acts permit inquiries into any matter connected with the good government or the conduct of any part of the public business of the jurisdiction in question, only the *Municipal Act* contains the additional provision that the municipality may order a Superior Court Judge to "investigate any supposed breach of trust or other misconduct of a member of council, an employee

⁵³ Evidence of John DiPoce, p. 4421, ln. 5-18.

⁵⁴ *Municipal Act, 2001*, *supra* note 46, s. 274(a).

⁵⁵ R.S.O. 1990, c. P.41: "Whenever the Lieutenant Governor in Council considers it expedient to cause inquiry to be made concerning any matter connected with or affecting the good government of Ontario or the conduct of any part of the public business thereof or of the administration of justice therein or that the Lieutenant Governor in Council declares to be a matter of public concern and the inquiry is not regulated by any special law, the Lieutenant Governor in Council may, by commission, appoint one or more persons to conduct the inquiry."

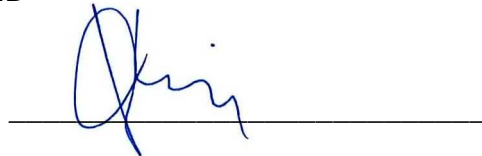
⁵⁶ R.S.C. 1985, c. I-11: "The Governor in Council may, whenever the Governor in Council deems it expedient, cause inquiry to be made into and concerning any matter connected with the good government of Canada or the conduct of any part of the public business thereof."

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.”

43. The things identified in s. 274(a) (any supposed breach of trust or other misconduct of a member of council, etc.) are plainly matters concerning the good government and the conduct of the public business of the municipality. Section 274(a) must accordingly be interpreted as limiting a municipal inquiry’s powers to investigate breaches of trust and misconduct to the categories of persons listed in that section. To read the section otherwise is to render s. 274(a) redundant.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

January 27, 2011



Linda Rothstein
Jean-Claude Killey