

MISSISSAUGA JUDICIAL INQUIRY

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

**SUBMISSIONS OF OMERS ADMINISTRATION CORPORATION
(PHASE II OF THE INQUIRY: MISSISSAUGA LANDS SALE)**

OMERS SUBMISSIONS

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SUBMISSIONS – MISSISSAUGA LANDS SALE

ARTICLE I - OVERVIEW

1. OMERS Administration Corporation (“OMERS”) makes these submissions in order to provide the Commissioner with the perspective of a party with standing in the Inquiry but that is outside of municipal government.
2. In these submissions, OMERS comments on its role in the Inquiry and places this role within the jurisdiction of the Commissioner. In essence this Inquiry is aimed at improving the governance mechanisms within the City of Mississauga (“City”) and other Ontario municipalities. Such improvement will occur by the Commissioner utilizing the learning derived from the relevant facts to fashion recommendations regarding the good government and business of the City.
3. OMERS has set out specific findings which it asks the Commission to make in respect of OMERS involvement in the relevant transactions. OMERS submits that based upon the amount of public attention which the Inquiry has garnered, findings of fact which are relevant to the jurisdiction of the Inquiry are warranted.
4. More broadly, OMERS offers the Commissioner its perspective on the issues which have been identified both by lay witnesses and the expert panel as important questions to be addressed in the Report.
5. The central question to be addressed is whether the existing framework for the regulation of municipal officials can be improved. Improvement, from OMERS’ perspective, means practical and useful recommendations to strengthen City governance which will be good for the City and for third parties who wish to do business with and within the City.
6. The more specific issues arise out of the proper scheme to address conflicts of interest. The evidence has demonstrated that the existing statutory regime is incomplete. The primary method of completing the regime has been the introduction of municipal codes of conduct and the appointment of integrity commissioners.

7. As it did in the Enersource Phase of this Inquiry, OMERS strongly supports the adoption of municipal codes of conduct and the appointment of integrity commissioners.
8. From OMERS' perspective, any code of conduct should provide certainty to municipal officials about what conduct is mandated or prohibited. This certainty would greatly benefit third parties as well by reducing the potential costs of uncertainty. This Inquiry has demonstrated the cost of uncertainty.
9. In contrast to codes of conduct, which should provide certainty, OMERS suggests the role of integrity commissioners should be flexible. An agile and engaged integrity commissioner is likely the best catalyst for ensuring compliance with municipal codes of conduct and dealing with issues which may arise on a real time basis.
10. OMERS' is appreciative of the steps taken by the Commissioner, his counsel and all parties and counsel at the Inquiry which have resulted in a high degree of civility throughout the proceedings.

ARTICLE II – OMERS' PARTICIPATION IN THE INQUIRY

2.01 OMERS' Role in the Inquiry

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

2.01 Jurisdiction Under the Municipal Act

13. The jurisdiction for the calling of this Inquiry is derived from section 274(1) of the *Municipal Act* and the Terms of Reference established by the City.
14. Pursuant to section 274(1) of the *Municipal Act*, a municipality may ask a judge of the Superior Court of Justice to conduct an inquiry to investigate:
 - (a) any supposed breach of trust or other misconduct by municipal representative or a person having a contract with a municipality in relation to the duties or obligations of that person to the municipality;
 - (b) inquire into any matter connected with the good government of the municipality;
or
 - (c) inquire into the conduct of any part of the public business of the municipality.
15. While the terms of reference authorize a broad review of facts and circumstances, including, for example the actions of OMERS in connection with Enersource and World Class Developments (“WCD”), the Inquiry findings must ultimately be able to fit within section 274(1) in any Report of the Commission.
16. Under subsection 274(1)(a), the only jurisdiction is to investigate the conduct of two categories of person: (a) municipal representatives and (b) persons having a contract with the municipality where they also have duties or obligations to the municipality. With respect to the WCD Transaction, OMERS and its co-owner, Alberta Investment Management (“AIM”) (together, the “Co-Owners”) fall into neither of these categories. The investigation under subsection 274(1) is therefore restricted, in this Phase of the Inquiry, to the conduct of municipal representatives as it relates to their involvement in the WCD Transaction. That transaction involved the City as a regulator not as a party.
17. With respect to Sheridan College (“**Sheridan**”), OMERS and AIM were parties to a contract with the municipality even though the role of the City was to facilitate a transaction involving Sheridan. There has been no suggestion about breach of trust or

other misconduct by OMERS or AIM in relation to the sale of the Lands to the City for use by Sheridan.

18. The evidence is that OMERS/AIM exercised their best business judgment in the interests of their respective organizations at all times.
19. There is therefore no issue under subsection 274(1)(a) relating to OMERS/AIM conduct.
20. Under subsection 274(1)(b), the focus of the Inquiry and the Report must be on matters connected with the good government of the municipality. The majority of the evidence which has been called in this Phase of the Inquiry appears to be directed at 274(1)(a) and conflict of interest rather than the broader subject of the good government of the municipality, such as why the City would be prepared to become a principal in a transaction like Sheridan. Specific governmental decisions or actions are not under scrutiny.
21. Similarly, under subsection 274(1)(c) the focus of the Inquiry and any Report must be on the public business of the municipality. The events which have been described in the evidence called in this Phase of the Inquiry do not involve the public business of the municipality separate and apart from conflict issues. The City was not, for example, a party to the WCD Transaction, although it served as regulator. There is no jurisdiction under the *Municipal Act* to inquire into the private business of non municipal parties.
22. The evidence which has been called in this Phase of the Inquiry has touched on many topics. Some of this evidence has been directly relevant to the issues which are properly before the Inquiry. Other evidence has been contextual only and has involved transactions and events which are beyond the jurisdiction of the Inquiry. The Commissioner made the point in the hearings, for example, that he was not interested in the relationship between OMERS and AIM although it was raised several times. Questions involving the rights of the owners and purported owners of WCD as between themselves, while interesting, are outside the scope of this Inquiry.

23. In accordance with the Terms of Reference for the calling of this Inquiry, but subject always to the scope and the mandatory nature of section 274 of the *Municipal Act*, the Commissioner is bound:

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

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

24. A review of the recitals set out in the Resolution calling the Inquiry make it clear that the focus of this Phase of the Inquiry is the conduct of the various persons involved in the WCD and Sheridan Transactions in light of what is variously described as “a perception of a conflict of interest” and “a conflict of interest”.

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

25. With the benefit of evidence which has been adduced by the Commissioner through his counsel, OMERS submits that the central issue which falls within the jurisdiction of this Inquiry is whether the existing regime of regulation of municipal officials is sufficient. Under the regulatory regime in place at the time, the question that did not seem to be addressed was the extent to which a municipal official who was subject to a conflict of interest was free to attempt to influence third parties to act in a particular manner. This gives rise to the companion question of whether there should be any obligation on the part of the third party who is the subject of such attempts to influence.

ARTICLE III – CONFLICT OF INTEREST

26. As the evidence of the expert witnesses made clear, the existence of a conflict of interest is not in and of itself improper. In fact, it has always been clear from the first declaration of a conflict of interest by the Mayor, in respect of the WCD Transaction, that the Mayor

was conflicted with respect to that transaction. The conflict arose because her son had a pecuniary interest in the WCD Transaction, regardless of the nature or extent of that interest. This gave rise to a conflict between the duties owed by Mississauga Mayor Hazel McCallion (the “**Mayor**”) to the City and the relationship with her son and his pecuniary interest.

27. The real issue for determination in this Phase of the Inquiry in all the circumstances, is the conduct that should be mandated or prohibited in light of this type of admitted conflict of interest. This question is of some historical interest with respect to the actual events under scrutiny. The real relevance of the factual inquiry, however, is to determine what learning can be derived from these facts to support useful and practical recommendations to strengthen City governance, which will be good for the City as well as third parties such as OMERS and AIM who wish to do business with the City.
28. The recommendations which the Commissioner has jurisdiction to make must be in the public interest and flow from the events that relate to the good government of the municipality, or the conduct of its public business.
29. OMERS submits, based upon the totality of the factual and expert evidence, the task of the Commissioner is to assess the current statutory and common law regime of regulation of the conduct of municipal officials to determine whether changes to that regime are warranted.
30. As the evidence has demonstrated, this is a complex task with many interdependent aspects. In determining whether to make recommendations to change the laws relating to the regulation of municipal officials there are a number of interrelated issues. These may include:
 - What conduct should be governed by the *Municipal Conflict of Interest Act*, R.S.O. 1990, c. M.50 (“*MCLA*”) and by what Codes of Conduct;
 - Who should be entitled to commence proceedings;
 - What sanctions should apply;

- What the proper forum is for adjudication;
 - What the proper procedure is.
31. OMERS, as a party outside of municipal government, is interested in ensuring strong governance within municipalities as it tends to bring certainty, but also makes the point that any scheme of regulation should not impede persons from doing business either directly with municipalities or engaging in transactions which require municipal approval. Impediments to transactions may include increased transactions costs or uncertainty of outcome.
32. OMERS' submissions are aimed at assisting the Commissioner in considering the impact of any recommendations he may choose to make on outside parties investing in the City and other municipalities. The impact of regulation may affect outside parties both before and after entering into contracts.
33. OMERS makes its submissions as a witness, but also in the capacity as an interested party. It has been necessarily fully engaged in this Inquiry according to the terms of the Resolution and the expectations of the Commission. In that capacity, OMERS as an organization has been materially affected by the proceedings to date, and will continue to be affected until the Inquiry is complete and a Report has been issued, and potentially even after those events. The impact includes:
- (a) The engagement of OMERS' senior managers, including its CEO, and other staff in the Inquiry and the related time and effort spent in connection with the Inquiry;
 - (b) Material out-of-pocket costs for legal and related professional counsel and advice, which have been borne by OMERS Plan members;
 - (c) Reputational consequences, even by the very fact of having been named in the Resolution and made a part of the Inquiry.

ARTICLE IV – FINDINGS (OMERS)

34. OMERS wants to contribute to the processes that will bring greater certainty to municipal government and has willingly cooperated in this Inquiry. In that vein, OMERS submits the Commission should find:
- (a) OMERS acted in a commercially reasonable manner in all its dealings with the City in relation to the WCD transaction;
 - (b) OMERS acted fairly at all times with the City and treated the City fairly, notwithstanding that it was not obligated to do anything other than act in its own self interest as a matter of law;
 - (c) OMERS was under no obligation to take steps to regulate the conduct of municipal officials;
 - (d) There was no readily available mechanism for OMERS to deal with any issues arising from the conduct of municipal officials at the time of the events in question.

ARTICLE V – FRAMEWORK OF ANALYSIS

35. The evidence in this Inquiry in this Phase has focused on establishing the facts surrounding an aborted real estate transaction between two groups of private parties - the Co-Owners on the one hand and WCD on the other hand. The transaction was conditional upon a luxury hotel being constructed on the lands and a subsequent sale of the same lands to the City for the purpose of leasing to Sheridan College to build a business school.
36. For the purpose of this Inquiry, a key point of interest arising out these transactions is the conduct of the Mayor in relation to these transactions in light of the fact that the Mayor's son was involved with the purchaser in the WCD Transaction.
37. In the context of this Inquiry, this involves questions surrounding what constitutes a conflict of interest, whether compliance with the *MClA* by a municipal councillor is the

end of the matter, whether the City had, at the time, adequate safeguards in place to assist municipal councillors and staff in managing conflicts of interest, whether the children of councillors should be permitted to conduct business in the municipality if it is going to restrict councillors from doing their job, and what conduct should either be prohibited or mandated in the face of a conflict of interest, especially as it relates to municipal officials dealing with outside parties.

38. These questions lead to a further set of issues regarding the appropriate scheme of regulation to provide certainty to all persons affected when a conflict of interest arises. As set out above, numerous issues arise when attempting to design a regulatory scheme which brings certainty but avoids stifling business activity within or with municipalities.
39. Arising out of these facts are many interesting issues at the margin. As such, it may be useful to first identify what is not controversial within the existing legal framework.

The Criminal Law

40. Conflicts of interest that rise to the level of criminality can be investigated under the provisions of the *Criminal Code of Canada*, R.S.C. 1985, c. C-46 (“*Criminal Code*”). Such things as bribery, fraud, embezzlement and influence-peddling can be the subject of criminal investigations and attract penal consequences. Criminal investigations and inquiries are not mutually exclusive; as Dean Sossin pointed out, the *Criminal Code* functions as separate kind of oversight. The actions of both office holders and third parties are caught by the provisions of the *Criminal Code*.

Sossin (T. Wynne) - p. 5690

The Municipal Conflict of Interest Act

41. The *MClA* identifies what constitutes a conflict of interest for municipal officials and then, as a consequence of such a conflict, mandates certain behaviours and prohibits a range of other behaviours. This is set out in section 5 of the *MClA*:

The Duty of Member

When present at meeting at which matter considered

5. (1) Where a member, either on his or her own behalf or while acting for, by, with or through another, has any pecuniary interest, direct or indirect, in any matter and is present at a meeting of the council or local board at which the matter is the subject of consideration, the member,

(a) shall, prior to any consideration of the matter at the meeting, disclose the interest and the general nature thereof;

(b) shall not take part in the discussion of, or vote on any question in respect of the matter; and

(c) shall not attempt in any way whether before, during or after the meeting to influence the voting on any such question. R.S.O. 1990, c. M.50, s. 5 (1).

Where member to leave closed meeting

(2) Where the meeting referred to in subsection (1) is not open to the public, in addition to complying with the requirements of that subsection, the member shall forthwith leave the meeting or the part of the meeting during which the matter is under consideration. R.S.O. 1990, c. M.50, s. 5 (2).

When absent from meeting at which matter considered

(3) Where the interest of a member has not been disclosed as required by subsection (1) by reason of the member's absence from the meeting referred to therein, the member shall disclose the interest and otherwise comply with subsection (1) at the first meeting of the council or local board, as the case may be, attended by the member after the meeting referred to in subsection (1). R.S.O. 1990, c. M.50, s. 5 (3).

42. The *MClA* highlights the basic format of the regulation of conduct by municipal officials in the case of a conflict of interest: the first task is to identify what constitutes a conflict of interest and the second task is to identify conduct which is either mandated or prohibited in the face of a conflict of interest.
43. The existence of a conflict of interest is not a pernicious event in and of itself. The only improper event is to fail to act in a way mandated by a regulatory scheme in the face of a conflict of interest. Under the *MClA*, if a conflict exists, then municipal officials are mandated to declare the conflict and refrain from voting or attempting to influence voting.

44. On the facts of this Inquiry, there is no doubt that a conflict of interest existed as defined in the *MClA* since Peter McCallion had a financial interest in the WCD transaction. There is no analytical significance, for the purpose of the *MClA*, in determining the extent of that interest.
45. There also appears to be little doubt that the Mayor recognized that conflict and acted in the manner mandated by the *MClA* by declaring her conflict and refraining from either voting or influencing voting in respect of any matter touched by the conflict when such matter came before City Council.
46. There are absolutely no requirements or obligations placed on any person other than “members” of municipal councils and local boards under the *MClA*.
47. Under section 8 of the *MClA*, issues of non-compliance are adjudicated in a court in an action brought by an elector. Under section 10 of the *MClA*, the sanctions available to the Court are to declare the seat vacant, disqualify the member or require restitution. Under section 13, these remedies can only be sought under the *MClA*.

Beyond the MClA

48. As the Commissioner decided in his ruling on July 8, 2010, the mandate of this Inquiry extends beyond the question of compliance or non-compliance with the *MClA*. Good government and the business and affairs of the City may benefit from more controls and safeguards as may third parties dealing with municipalities. While the *MClA* sets standards, there is nothing in the *MClA* to prohibit municipalities from setting additional standards. The *MClA* still provides a useful guide, however, to shape the analysis beyond it.
49. The challenge presented by the *MClA* is that it is limited to providing guidance for those circumstances that fall within its terms. The issues that have arisen on the evidence fall, largely, outside the scope of the *MClA* but still involve the conduct of municipal officials that municipalities (and specifically the City of Mississauga) may decide to regulate as part of the good government and public business of municipalities.

50. As the *MClA* highlights, the first question to be addressed in the context of a scheme of regulation of the conduct of municipal officials is to ask what constitutes a conflict of interest. As stated above, the definition contained within the *MClA* would include the Mayor in relation to Peter McCallion's involvement in WCD, regardless of the extent of that interest.
51. Looking beyond the *MClA*, a conflict of interest may be said to arise when a duty owed to the municipality comes into conflict with another duty, relationship or personal interest. The scope of conflict of interest that might reasonably be regulated looking ahead, might therefore be broader than those covered in the *MClA*. Whatever steps are taken to broaden the scope of regulated conflict of interest by the City, persons, both those subject to the rules and those doing business in the municipality, should be able to identify with precision the situations in which a conflict arises. This assists third parties avoiding inadvertently taking an action that might be problematic in light of local municipal rules. The danger in casting the conflict net too broadly is that the rules may be ignored because of lack of clarity. It may also impede productive behaviours.
52. After defining conflict of interest comes the difficult task of identifying the activities that should be mandated or prohibited in the face of a conflict of interest (again, there is nothing pernicious about the existence of a conflict of interest). The approach of many codes of conduct is to create a scheme of regulation that seeks to alter conduct in the face of a conflict of interest by barring certain conduct (such as voting under the *MClA*) or other interventions within or outside the Council Chamber that would be regarded as the exercise of improper influence.
53. The issue that arises out of the evidence that has been called at this Inquiry is the extent to which municipal officials should be broadly constrained in attempting to influence third parties in the face of an existing conflict of interest. There appear to have existed no clear or easily accessible legal guidance with respect to this question at the time the events under scrutiny occurred.
54. Not only did the *MClA* not provide any guidance on this question about conduct outside of what it strictly prohibits, but the common law was equally unhelpful. There are many

statements in the case law about general duties and obligations in the context of cases dealing with attempts to invalidate prior municipal decisions or actions or attempts to recover improper financial gains. These cases would have provided no guidance to the Mayor in assessing the propriety of her dealings with third parties.

55. At the time of the events in question, there was no Municipal Code of Conduct in effect in Mississauga.

Relevant Facts and Issues

56. In a companion to this Submission, OMERS has reviewed the relevant facts in order to assist the Commissioner in making specific findings of fact. The Commissioner is mandated by the Terms of Reference to review these facts “as they relate to the good government of the municipality, or the conduct of its public business and to make any recommendations that the Commissioner may deem appropriate within that framework and in the public interest as a result of the inquiry.”
57. As noted above, OMERS submits that the central issue that arises out of the facts mandated for review by the Inquiry Terms of Reference, is whether the existing regime of regulation of municipal officials is sufficient. The question being asked is whether a municipal official who was subject to a conflict of interest, and had complied with the *MClA*, should be free to attempt to influence third parties to act in a particular manner if that manner would be consistent with the interests of the municipality.
58. This gives rise to the companion question of whether there should be any obligation on the part of the third party who is the subject of such attempts to influence.
59. In order for there to be a conflict of interest which is relevant to this Inquiry it must be a conflict that flows from the government or public business of the municipality. For any individual to be subject to this type of conflict he or she must, as a threshold, owe a duty to the municipality. Elected municipal officials clearly fall within this category. In contrast, outside parties who are contracting between themselves do not owe duties to the municipality, even where municipal approvals may be required to complete the

transaction. Therefore, there can be no relevant conflict of interest issue with respect to them.

60. The issue that arises with WCD is whether actions taken by the Mayor in promoting the transaction should be prohibited or dissuaded under some form of regulatory regime in the future, even if not prohibited under the statute further to which she declared her conflict. OMERS notes that subsequent to the calling of this Inquiry, the City has adopted a Code of Conduct which attempts to address this issue.
61. The Mayor's attempts to influence the Co-Owners to complete the WCD Transaction were entirely consistent with her conduct in respect of many transactions and events in which she did not have a conflict of interest. This use of her influence on outside parties for the purpose of achieving City goals was something City staff encouraged and utilized and from which the City benefited greatly. City staff were aware of the involvement of Peter McCallion and the active involvement of the Mayor but did not discourage it directly.
62. At the same time, the Mayor's attempts to have the WCD Transaction completed and a hotel built were ultimately unsuccessful. The Co-Owners were not swayed by her desire to see a hotel built but instead ultimately terminated the WCD Transaction for good business reasons. This final outcome demonstrates a good balance of "give and take". At the end of the day, all relevant steps taken by the Co-Owners with respect to both the WCD and Sheridan Transactions were governed by the exercise of their business judgment as to what was in the best interests of their stakeholders. In many instances, the Co-Owners were constrained by the terms of the contracts that they had entered into.
63. The facts before the Commissioner indirectly raise the question of the response of a third party when faced with a potential conflict involving a municipal official. While not an issue squarely in the purview of the Commission, no witness who testified has suggested that such an outside party is under any obligation to take any steps, and in fact some of the testimony acknowledges the risk of doing so, even though asked.

64. Parties who have entered into binding contracts will often not be free to take steps which disregard the interests of the counter parties to those contracts, even should they want to. The law has broadened beyond the narrow concept of breach of the specific terms of contracts to include a larger duty of good faith.
65. Similarly, a party who wishes to assert allegations or raise questions in respect of municipal officials must have firm substantiation of misconduct, particularly in the absence of a regime which allows for anonymous questioning. The detrimental impact of false allegations can run from a defamation action to adverse commercial consequences in future dealings.
66. The more salient question is what recommendations can be made to strengthen City governance and business and reduce the implicit perception of conflict of interest, which can affect the reputation of both the City and those that may be touched by those circumstances. At the time of the events under investigation, there was no clear path to either lodge a complaint or seek clarification about the appropriateness of municipal officials' conduct.
67. In the Enersource Phase of this Inquiry, OMERS submitted:

... in order to provide a mechanism to both prevent situations which may lead to judicial inquiries and as an alternative to dealing with issues which arise in the course of the public business of municipalities, the Commissioner should consider recommending that all municipalities appoint an Integrity Commissioner. An Integrity Commissioner would be able to deal with issues such as conflict of interest and the critical overlap between municipal business and commercial business for municipalities. An Integrity Commissioner would be able to help bridge the gap between the political arena and the business arena which have the potential, as this Inquiry demonstrates, for substantial miscommunication.”

OMERS reiterates that recommendation.

ARTICLE VI – PROPOSALS FOR REGULATION OF MUNICIPAL OFFICIALS

68. The Commissioner will ultimately decide whether the facts revealed in this Inquiry, together with the expert commentary on those facts, form a sufficient basis for making recommendations regarding the regulation of municipal officials. OMERS interacts with municipalities on many levels – as pension administrator, as investor in lands and businesses which require municipal approval and as a direct investor in business which contract with municipalities.
69. Against this background, OMERS supports recommendations which will result in municipalities having strong governance around conflicts of interest. This will benefit the councillors, the municipalities and third parties like OMERS. For third parties, such as OMERS, municipalities which publish their rules about conflicts of interest and which have internal systems and controls that will prevent conflicts of interest or perceived conflicts of interest from becoming an issue and potentially affecting third party arms-length negotiations and transactions are to be commended. This will best ensure that dealings with municipalities will not later be questioned – and thereby avoid attendant uncertainties and costs. This Inquiry demonstrates, in both the Enersource and Mississauga Lands Phase, the high cost of uncertainty. The challenge for the Commissioner is to assess which regulatory package, among the many competing alternatives, provides the best chance of achieving these goals.
70. OMERS submits that clear and certain codes of conduct, administered by an actively engaged integrity commissioner whose job is to educate, oversee and protect municipal interests, are appropriate. The integrity commissioner has to perform this role in such a way so as not to stifle unnecessarily the creativity of municipal officials, including the Mayor, in proactively securing good business deals for the municipality. The best codes of conduct will allow both municipal officials and those dealing with them to know whether certain conduct is mandated, approved or prohibited with a high degree of certainty.

71. While a high degree of certainty is desirable in a code of conduct, OMERS submits that a degree of flexibility in the office of an integrity commissioner is warranted. Integrity commissioners can be given various roles - advisor, investigator, prosecutor or adjudicator. As the role of the integrity commissioner escalates, the degree of freedom with which to creatively carry out his or her mandate decreases. An integrity commissioner who is required to investigate and adjudicate a complaint will be required to follow strict procedures, with the attendant increase in cost and delay. An integrity commissioner who is able to carry out consultative, educational and reporting functions will have a much higher degree of flexibility in carrying out their mandate.
72. OMERS suggests that this Inquiry has demonstrated, that in the absence of an integrity commissioner there is no functional route for any person, either within a municipality or outside of it, to raise questions about the conduct of municipal officials which falls below that covered by the *MCIA*. An integrity commissioner administering a clear municipal code of conduct would provide a forum for such questions to be raised.
73. In that regard, the Commissioner may wish to consider the elements of the regulatory framework in which an integrity commissioner operates. OMERS submits that the greater the degree of flexibility given to the integrity commissioner, the more likely efficient, effective and timely results will be achieved. If the integrity commissioner is able to exercise a degree of judgment on the best method of dealing with requests for assistance, then most matters will likely be dealt with through either alerting municipal officials to their duties, or providing advice to outside parties on the applicable rules. As the expert panel noted, the ability of an integrity commissioner to make a report, without imposing any further sanction is, in most instances, sufficient to alter behaviours.
- Sossin (W. McDowell) – pp. 5653-5655, 5659, 5661-5665**
74. There will be instances of more severe misconduct by municipal officials. OMERS acknowledges that there may be a place for a regulatory scheme which has a more formal structure which contains many of the elements which are currently embodied in other professional regulatory schemes. Provincially appointed judges and regulated professionals are all governed by disciplinary schemes under provincial legislation.

These share many common features including a complaints and discipline process. The range of outcomes under these schemes includes dismissal of a complaint, alternative dispute resolution, admonishments, reprimands, fines, suspensions and removal from office.

75. The Commissioner may wish to consider whether the *MClA* should be amended to provide a more current version of regulation of municipal officials, especially in respect of the more egregious forms of misconduct. There are likely not a sufficient number of incidents to warrant the cost of the administrative structure which is associated with a full program of regulation. OMERS submits that the Commissioner consider what amendments might be made to the *MClA* to allow the more serious complaints to be adjudicated by the court.

ARTICLE VII – COMMENTS ON EXPERTS EVIDENCE

76. The Commissioner has been aided in his deliberations by the expert panel of Dean Sossin, Professor Mullan and Professor Levine. The very spirited discussion in which they engaged shed a great deal of light on the challenges of making recommendations for the improvements to the current scheme of regulation of municipal officials. The experts agreed that the goal of the law, whatever its source, is to provide a form of professional regulation in respect of municipal politics. They identified, as described above, the current scheme and the broad issues requiring consideration.

Experts – p. 6045 -6050

77. Dean Sossin noted that it is “cost effective for municipalities to have clear and consistent and robust arrangements” for regulation of municipal officials. He noted that this allows municipalities to send the message “not only are we open for business but the risks coming here to do business are far lower than [elsewhere] ...it’s both good for the municipality as long as reasonable and commercially viable mechanisms are in place for the third party and reasonable and not unduly onerous obligations are in place for municipal councillors, mayors and staff.” OMERS agrees with these comments.

Sossin (D. Jack) – p. 5990

78. The experts all agreed that prior to codes of conduct being adopted, there was little clarity for third parties as to what conduct was or was not appropriate and little clarity around what third parties could do when faced with questions about municipal conduct. They noted that in the absence of a code of conduct and an integrity commissioner, it is very difficult to make an inquiry or a complaint, or for third parties to engage in the process of regulation of municipal conduct. With the *MCIA* as the only avenue, third parties have concerns about the cost of pursuing a complaint, relationship damage, and relationship subtleties.

Sossin, Mullan, Levine (M. Barrack) – pp. 6106 – 6109

Sossin, Mullan (M. Barrack)– p. 6115

Levine (M. Barrack) – p. 6116

79. Dean Sossin and Professor Mullan both agreed that the task is to define the prohibited behaviours, identify the appropriate sanction, identify the appropriate body to adjudicate the allegations and identify the appropriate procedure to adjudicate those allegations. They agreed that all these things are interrelated.

Sossin, Mullan (M. Barrack)– p. 6122

80. Dean Sossin believed an advisory function is the most useful in this kind of context, more useful than a complaints system or whistle-blowing scheme. OMERS supports an advisory role.

Sossin (W. McDowell) – p.5634

81. Dean Sossin testified that his preferred approach, as an integrity commissioner, is to work creatively to find solutions rather than simply prohibit behaviours. The primary objective is that the officeholder take a look at his or her own obligations and find a way to act appropriately.

Sossin (D. Jack) – pp. 6028-6030

82. Dean Sossin testified that it would be problematic, from a whole range of fairness perspectives, if advice on a specific level was being given to third parties with respect to the actions of a certain councillor. He said that an advice giving function could work on a more generic level – for instance, pointing out one or two reports that are on the

integrity commissioner's website that deal with the issue raised, without commenting on the facts. Different types of advice could be provided to a councillor versus third parties.

Sossin (J. Renihan) – pp. 5727-5728

83. Professor Mullan agreed with Dean Sossin, and added that an outreach function of an integrity commissioner would also be useful. He pointed to the example of discussing the relationship between trade associations' codes of conduct and those of a city.

Mullan (J. Renihan) – p. 5729

84. Professor Levine stated that generally, an educational function is very important, as is an advisory function. Commissioner Oliver (B.C.'s former conflict of interest commissioner) commented frequently on the advisory role being a critical role, and a way to prevent adverse events and thereby avoid invoking a punitive system. Professor Levine noted that Mississauga could follow Toronto's bylaw in this regard, as Vaughan and Aurora did, by incorporating education outreach and advice functions.

Levine (F. Kristjanson) – pp. 5896, 5898

85. OMERS notes that there are challenges in designing the role of integrity commissioner when the advice being given is seen as binding. Professor Mullan stated that in providing formal binding advice to third parties, there is a real danger of the integrity commissioner being in a conflict of interest with respect to giving advice to both sides of a transaction. Professor Mullan also outlined the concern that third parties not unload their due diligence onto a municipality. In addition, if the integrity commissioner is seen as a dispenser of formal legal advice then the role of city solicitor might be compromised.

Mullan (D. Jack) – pp. 5997-6000, 6004-6005

86. The experts addressed the issue of the form of sanction which should be available for breach of a municipal code of conduct. OMERS supports the view that integrity commissioners should not be involved in the imposition of severe sanctions. The attendant procedural burdens which would be placed on their activities create a real risk

of increased cost and delay without any guarantee of better outcomes in terms of encouraging compliance.

87. Dean Sossin believed that the main function of the office of integrity commissioner is to bring transparency and consistency to the accountability regime. He endorsed reporting by the integrity commissioner as the most appropriate and significant outcome. He noted that in electoral politics, where reputation and credibility with the public have such dramatic effects, an adverse report will be an outcome which elected municipal officials will seek to avoid. Dean Sossin said that the deterrent effect of an adverse report depends on integrity commissioners achieving a significant profile, media interest, and ultimately, a culture-changing role, which is the most important role and most powerful remedy.

Sossin (W. McDowell) – pp. 5653-5655, 5659, 5661, 5663

88. Professor Levine agreed with both Dean Sossin and Professor Mullan. He testified that sanctions should be administrative, and not offences *per se*. He supported creating a level of fairness in an ombuds-type role.

Levine (W. McDowell) – p. 5665

89. With respect to the content of codes of conduct, OMERS submits that the primary goal should be to provide certainty to both municipal officials and outside parties regarding the propriety of conduct. The process of developing a jurisprudence under a vague set of rules is unlikely to provide meaningful guidance in an efficacious timeframe. There are likely too few cases and no efficient means of disseminating them to achieve the desired result of certainty. This submission does, in part, deviate from the expert evidence on this particular point.

90. Dean Sossin advocated a principles-based approach to codes, and although such codes would not create immediate certainty, he felt that the accumulated decisions, commentary, and advice of the integrity commissioner interpreting it would do so. Advice-giving annual reports where parts of the code are animated and elaborated anonymously would help provide better predictability, if not certainty.

Sossin (M. Barrack) – pp. 6118-6119

91. Professors Mullan and Levine agreed that, to the extent there is a more generalized standard, it heightens the need for an advice-giving capacity which would allow for the *ex ante* certainty that third parties may be looking for. OMERS notes that one concern with a general approach which requires an advice-giving capacity is that there will be restraints potentially on third parties being able to complain in the middle of a transaction.

Mullan (M. Barrack) – p. 6120

Levine (M. Barrack) – p. 6121

92. The experts addressed a number of specific issues which arise in the drafting of municipal codes. The discussion around these individual issues is illustrative of the challenges faced by those attempting to provide certainty through rule making.

93. Professor Mullan added that he would like to see the word “conflict” clarified, particularly in the context of an exclusive code such as the *MCI*A.

Mullan – p. 6075

94. There was debate about the use of the term “improper” influence in the Code, and whether this introduced a gap. Dean Sossin said that the use of word “improper” was correct and underscored the difficulty of this area, and the need to explain this in very clear, transparent and consistent terms. An integrity commissioner could address concerns raised regarding uncertainty, and the lack of shared understanding.

Sossin (W. McDowell) – pp. 5650-5651

95. Levine would amend the Code by making “apparent” and “real” modify “improper use of influence”.

Levine (W. McDowell) – p. 5652

96. OMERS submits that concepts such a “apparent” and “improper” necessarily lead to confusion and uncertainty. Municipal officials and those dealing with them should not be

governed by the imprecise impressions of an unidentified group. Municipal officials owe duties to their municipalities. When another duty, interest or relationship comes into conflict with these duties then a conflict exists. This is a question of fact not perception.

97. Mr. O'Brien noted that a running list of declared conflicts may be helpful going forward and thinks that the responsibility for keeping that list would probably rest with the City Clerk. He thought it could also be helpful if staff reminded a member of council if a matter was coming up with respect to which they have declared a conflict in the past.

O'Brien Cross (F. Kristjanson) – pp. 3064-3065

98. OMERS would agree with more communication around declared conflicts for the benefit of third parties. OMERS supports the recording of declared conflicts of interest and making them easily accessible, perhaps on the municipal website.

The Obligations of Third Parties

99. Dean Sossin, Professor Mullan and Professor Levine all agreed that, prior to codes of conduct, there was little clarity for third parties as to what conduct by municipal officials was inappropriate. Also, there was little clarity around what third parties could do in the face of attempted influence in the face of a possible conflict of interest. In the absence of a code and an integrity commissioner, they observed that it is very difficult to make an inquiry or a complaint.

Experts (M. Barrack) – pp. 6106 – 6109, 6115-6116

100. Dean Sossin offered observations on the framework for assessing the position of outside parties dealing with situations where they become concerned in the course of their dealings with a municipality that there has been some wrongdoing or ethical breach or suspicion of ethical breach. He noted that among the various perspectives, there is the view that third parties cannot “be expected or obliged to undertake the role of integrity commissioner”. He stated “[i]n other words, they cannot be expected to investigate, to police, to report on ...breaches of ...standards”. This is consistent with a successful municipal accountability scheme. OMERS agrees with this approach.

Sossin (W. McDowell) – p. 5631

101. Dean Sossin testified that while outside parties are under no legal obligation to take any steps in the face of questionable municipal conduct, the best practice “is to take reasonable and commercially appropriate steps that facilitate, or enhance, municipal accountability schemes that exist”.

Sossin (W. McDowell) – p. 5632

102. Dean Sossin pointed out that the best practices of outside commercial parties will be driven by a desire to have predictable, consistent and risk averse dealings with municipalities.

Sossin (W. McDowell) – p. 5632-3

103. The issue of lobbyist registration was raised with both expert and non-expert witnesses. On balance the evidence was not supportive of lobbyist registration.

104. Mr. Nobrega commented on lobbyist registration in his evidence. He stated that at the municipal level, he believes that a lobbyist registration system would be burdensome and inefficient. It would also be costly to both OMERS, the employee and the more than 400 municipalities across Ontario. Logging all calls to or from municipal officials would be very difficult. Some of OMERS plan employers are municipalities with whom OMERS deals daily on a range of issues. Structuring some type of communication log would not be impossible, but it would be very difficult.

Nobrega Cross (F. Kristjanson) – pp. 3379-3381

Nobrega Re-Exam (W. McDowell) – pp. 3383-3384

105. With respect to the concept of comfort letters, there may be specific situations in which comfort letters may be of assistance, especially if there has been a declared conflict. The difficulty is the ability of municipal officials to undertake the due diligence required to give credibility to comfort letters. Presuming the letter is designed to provide an assurance that no conflicts exist, a mechanism must exist to determine the existence of conflicts. OMERS is not certain that it is either possible or practical to implement a system which will effectively identify all possible conflicts which may exist involving all

municipal officials. Comfort letters may suggest there is some responsibility on the part of third parties to look after conflict issues for municipalities.