

(ONTARIO)  
SUPERIOR COURT OF JUSTICE

CITY OF MISSISSAUGA JUDICIAL INQUIRY

(MOTION FOR INCREASED FUNDING  
BROUGHT BY PETER MCCALLION)

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Before THE HONOURABLE MR. JUSTICE CUNNINGHAM,  
at Osgoode Hall, Toronto, Ontario,  
on Friday, the 3rd day of December, 2010.

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A P P E A R A N C E S

BRIAN GOVER/LUISA RITACCA	For Peter McCallion
TRACY WYNNE	For City of Mississauga
WILL MCDOWELL/NOAMI LOEWITH/ YASHODA RANGANATHAN	Commission Counsel
DEBORAH PALTER	For OMERS
DON JACK	For 156 Square One Ltd

FRIDAY, DECEMBER 3, 2010.

--- Court resumes at 2.00 p.m.

THE COURT: Good afternoon, Mr. Gover.

MR. GOVER: Good afternoon, Mr. Commissioner. Mr. Commissioner, we are here today to ask you to confirm your recommendation for funding for Peter McCallion's legal representation at the inquiry.

As it now stands, the inquiry is approaching its final stages. As you know, the evidence is expected to be completed on December 14th, 15th and 16th. It is reasonable to expect that you will ask for written submissions to be completed early in the New Year, to be followed by oral submissions in a timely way. It is also apparent that Peter McCallion's reputational and other interests will continue to be engaged until the conclusion of this inquiry.

The cap on legal fees established by the City, and I should say what was understood to be an initial cap, was surpassed in July. Despite that fact, we continue to represent Mr. McCallion in anticipation that the City would revisit that cap upon request.

Now it became apparent that the City Council, as previously constituted, was not disposed to revisit the funding cap. For that reason, we were instructed to withdraw the request to revisit the cap which had been on the agenda for the September 29th, 2010 council meeting. And history has proven that we correctly assessed the former Council's disinclination to fully follow your recommendations of March 4th and May 17th.

And in fact if I could take you to tab 0 of the affidavit of Chris Michael, at tab 0 you will have the resolution 0271 of 2010 adopted by the City Council on September 29th moved by Carolyn Parrish, seconded by Nando Iannicca. I refer you to item 3 here especially and it's framed in this way and, in my submission, it's quite extraordinary that City Council request the

Commissioner to confirm Peter McCallion's ownership of 16 percent shares in W.C.D. and that legal counsel request Peter McCallion return all funds advanced to Peter McCallion for his legal fees associated with this judicial inquiry. So then this item was removed from the agenda, the item of requesting that the cap be revisited and in fact Council resolved to request that you take that action and that City counsel, the City's lawyers this is, seek return of the funds previously provided for his legal representation.

Now of course in making your funding recommendation, sir, you recognized that Peter McCallion has a direct and substantial interest in the outcome of this inquiry. You recognized that procedural fairness requires that Mr. McCallion be represented by experienced counsel who could provide him with assistance in what you properly characterized as the myriad legal issues which he faces. And in making your funding recommendation, and especially in your remarks of March 4th, you took into account the balance that Justice Binnie urged must be struck in the Consortium (sic)

Development's case, a balance between procedural fairness on one hand and efficient process on the other.

Now it's our submission, of course, that refusing to fully follow your funding recommendation and in fact attempting to claw back the funding already granted would result in significant unfairness to Mr. McCallion at this critical stage of the inquiry. It would leave him with no legal representation, including no assistance in preparing for or delivering closing submissions. He would be forced to repay money to the City which he's already demonstrated, in our submission, he has no means to do so at present.

And, in our submission, the City, in its submissions at paragraph 6 where it says, "We are advised by the City Council that no steps have been taken to recover the funding previously provided to Mr. McCallion pursuant to the above resolution and it is not anticipated that any steps will be taken prior to the delivery of the Commissioner's report, if at all.", in our submission, that provides cold comfort for Mr.

McCallion, and of course there is no evidence in support of what is stated there.

So when we consider where we stand now in view of what the City Council, as formerly constituted, did on September 29th, in our submission, it is an action which has put the inquiry in a sense at a crossroad. Moreover, it is based on an inadequate understanding of the record. Of course, you can't confirm at this stage without all of the evidence and without the benefit of submissions that Mr. McCallion owns those shares.

And, further, if we look at the evidence which we have summarized in paragraph 35 of our written submissions, and it may be helpful just to take you there briefly, the evidence has revealed firstly that Mr. McCallion never received any of the 4 million dollar settlement funds from Mr. Decicco or any source. Secondly, he was not even paid back the loans he advanced to W.C.D. Thirdly, while he acknowledges that he may have a 16 percent interest in W.C.D., he believes his entitlement to any funds is limited to the

repayment of his loans. Fourthly, Mr. Couprie believes that the W.C.D. shares are being held for Mr. McCallion but not held in trust until he, Mr. Couprie, is paid. Fifthly, Mr. Decicco testified that the 4 million dollar settlement received by W.C.D. of which approximately one million dollars remains, given that the balance has been already distributed to investors and creditors of W.C.D. and of course you've heard that Mr. Decicco, an investor in W.C.D., asserts that he was entitled to repayment of his investment in W.C.D. which has not taken place, the bottom line is that nothing in the evidence heard at the inquiry to-date changes the fact that Mr. McCallion is currently unable to pay for his own legal representation. On the contrary, the evidence supports Mr. McCallion's contention that he has received no financial benefit from his role in W.C.D. and that in fact he has never recovered the amounts that he provided to the company by way of loans in 2007.

Now by its resolution of September 29th, City Council has put not only my client, but also this Commission, in the same position as we

all found ourselves in on March 4th. And, Mr. Commissioner, I have provided copies of this, this is an excerpt of proceedings from March 4th to other counsel, and I guess I will quite literally hand it up to you now if I may, sir.

THE COURT: Thank you.

MR. GOVER: And here Commission counsel, Mr. McDowell, put it concisely when he referred to Consortium Developments. Now, as I've mentioned, you referred to Consortium in your ruling of that day which is of course reflected in the materials and we have transcript of it here as well. And this is the passage from Justice Binnie's judgment where the need to strike the balance was identified. And Justice Binnie said, Mr. McDowell quotes from it, page 47 of the transcript: "A good deal of confidence is inevitably and properly placed to the ability of the Commissioner to ensure the fairness of the inquiry." And Mr. McDowell observed, "In fashioning this inquiry, Mississauga saw fit to put Mr. McCallion's business dealings right at the

centre of them.", speaking of the terms of reference.

And then if I could take you to pages 49 and 50 where Mr. McDowell there identified the central problem in what had been the situation as of March 4th which was the City Council's desire to treat Mr. McCallion solely as a witness which Mr. McCallion ..... Mr. McDowell said, it amounts to saying, "We will give Mr. McCallion counsel on Tuesdays and Wednesdays." He said that it was a difficult decision to defend rationally. And then he said this: "The whole point of funding", this is at page 50, line 7, "The whole point of funding is to have a fair inquiry. So what is proposed is to have an unfair inquiry and then at the conclusion of that unfair inquiry, we will decide whether or not the facts have turned out to the liking of Council and then Council will then undertake a decision as to whether or not funding will be provided. There's a circularity in this which again is very difficult to defend."

And you have my submission that that is really where we find ourselves today on December 3rd, 2010 in light of City Council's resolution on September 29th. And I say, with respect, that the same considerations of fairness must apply at this stage as well and that fairness requires that issues pertaining to Mr. McCallion's funding be addressed now, now before we embark on these critical final stages of the inquiry. And of course you have my point that Mr. McCallion's rights would be prejudiced if it were not at this point revisited, this issue of funding for his legal representation.

So, in conclusion then, I respectfully submit that in the present circumstances, procedural fairness requires that the Commission confirm its original recommendation for funding for legal counsel for Mr. McCallion and to recommend that City Council increase the funding limit from the original \$150,000 to \$400,000. And, further, I submit that the interest of securing a fair inquiry will necessitate that the inquiry not proceed until

such time as the City honours its commitment to fund his legal representation at this inquiry which, as you've observed, sir, has put Mr. McCallion's interest at the centre of the focus. Subject to any questions, Mr. Commissioner, those are my submissions.

THE COURT: Thank you, Mr. Gover.

MS. WYNNE: Good afternoon. I believe you have a copy of our .....

THE COURT: I do.

MS. WYNNE: ..... a couple of pages of submissions. I'll touch on them briefly, they really do encapsulate the City's position in response to Mr. McCallion's motion, I suppose starting with the most important aspects of it, our position in respect of the two parts of Mr. Gover's motion. Firstly, while we do not think that a confirmation of your May 17th recommendation is warranted, we are in your hands in that regard. I suppose, more importantly, the City does not oppose Mr. Gover's motion for a recommendation from yourself to the City to increase the funding limit.

That being said, I might add just a couple of factual points to flush out a number of matters that Mr. Gover touched on. Mr. McCallion is well aware, as Mr. Gover has said in his materials, that it was always open to Mr. McCallion to come back to City Council to seek an increase in the funding available to him. The funding limit was set some time in the summer at about \$150,000 subject to future review by City Council. The point there being that Mr. McCallion might have come back to City Council at any time, say, after July when we now understand that the funding limit was exceeded to seek a review by City Council. And in fact we know that Mr. McCallion did seek a revisiting of that limit on September 7th but then withdrew the request on September 27th before it had a chance to go before City Council.

THE COURT: He must have had a pretty good sense of what was going to happen in that .....

MS. WYNNE: I did hear that from Mr. Gover, I am not sure I saw the materials, but

that's really neither here nor there. I just point out that the exercise was engaged but not completed and that's where we left off at the end of September and for the reasons Mr. Gover had said.

If you add into the mix, Mr. Commissioner, the fact that over the course of the summer, and I take Mr. Gover's point that you'll have yet an opportunity to consider the evidence in its fullest, but the City submits it's fair to say that over the course of the summer and even in ..... especially from Mr. McCallion's own evidence, it became aware for the first time that Mr. McCallion acknowledged a 16 percent share interest in W.C.D. And you will recall I think, Mr. Commissioner, from Mr. Lax's cross-examination of Mr. McCallion that there was some concern that that acknowledgement had not formed part of Mr. McCallion's affidavit evidence and cross-examination on his initial funding request, nor was it brought to your attention subsequent to the time when that evidence was put before you and before Mr. McCallion gave his evidence at the

inquiry. And it was in that context, on the one hand the submission of a request to City Council to increase the funding limit and its withdrawal, alongside, rather contemporaneous with, the emergence of some evidence that Mr. McCallion owns an interest in W.C.D. That was the context, we understand, in which City Council resolved on September 29th to request that Mr. McCallion return the funding he had received from the City.

I take Mr. Gover's point in fairness in the brief amount of time that the City did have to respond to this motion. We sought the advice of the City's solicitor and had been advised, as Mr. Gover rightly points out in paragraph 6 of our submissions, that no steps have been taken with respect to that resolution and it is anticipated that none will be taken during the currency or prior to the delivery of your report.

We say that, on behalf of the City, it is alive to, aware of, and will abide by your recommendation of May 17th and, in those circumstances, do not think a repetition of that recommendation is necessary.

It leads me ultimately to the fact that the City is not opposing Mr. Gover's request that you make a recommendation to increase funding. Paragraph 8 of our submissions merely touches on the fact that there are some criteria that still surround the assessment by Mr. Woloshyn of the bills that are submitted. I don't think there's any dispute on that criteria. They are largely dealt with in the resolutions of the City which are attached to our submissions, the hourly rates, for example, the funding limit that you may or may not recommend to be changed.

The only additional point is about the timing of this motion, and I think there's some comment to be made there. I appreciate we now know from Mr. Gover's assistant's affidavit that Mr. McCallion exceeded the funding limit at the end of July of this year, but here we are, about seven business days before the return to the hearing and we are having this motion which clearly puts the need for that funding in close proximity to the hearing. I would comment that the motion could have been brought sooner, indeed

after July when the limit was exceeded or after the election if indeed Mr. McCallion thought there was some kind of change at Council. Indeed, for the last several months, Council or counsel, they are working quite hard with your office, sir, to find new hearing dates, so the timing issue was alive on everybody's minds.

Having said that, we are where we are. And I can advise you, sir, that since we put in our written submissions, that I am advised by the City's solicitor that there ..... should you make a recommendation as sought, next Wednesday, December 8th, there is a general council meeting ..... sorry, a general committee meeting, but the City's solicitor has advised that, should you make a recommendation, she can deliver a special notice of Council and hold a full council meeting on December 8th at which time a recommendation could be duly considered by the Council.

THE COURT: Thank you very much.

MR. JACK: I am going to make some very brief submissions. The principle of fairness is important. We are coming up to the time of

submissions, I believe in January. The need for counsel is clear. My client's chief concern though is that there not be delay and our concern and the thing that brings me here is Mr. Gover's last submission that nothing proceed until matters are satisfactorily resolved. I am very sympathetic to Mr. Gover's position, but I think that carries it a little too far. The matter does have to proceed to a conclusion, so I would urge you, Mr. Commissioner, to make a further recommendation in the hope that the City Council will do the fair and reasonable thing here, but we do have to proceed.

THE COURT: Thank you.

MR. JACK: Thank you.

MR. MCDOWELL: It's odd to be back here after the splendour of Burnamthorpe Road but ..... in this much smaller courtroom. Well, Mr. Gover has frankly said ..... quoted my remarks on the earlier occasion which takes up most of what I would have said. But I agree with all counsel who suggest that you make a further recommendation because I think that it's important that at this

critical stage Mr. McCallion be able to protect his interests.

Where we part company with Mr. Gover is in relation to remedy. We've got about a week of expert evidence and the final fact witness. To stay the inquiry until Council agree to extend funding would not adequately protect the public interest. We do have to table our concern though that if further funding is not available and if Mr. Gover has to withdraw, it has the potential to really undermine the integrity of the process because I expect you would hear submission from Mr. Gover on the way out that you could not make findings in relation to Mr. McCallion if he was not able to protect his interests, so we are not there yet, we'll cross that bridge when we come to it, but we have to put that on the table as a potential concern.

THE COURT: Mr. Gover.

MR. GOVER: Thank you. And my

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MR. MCDOWELL: One second. Just a procedural matter. We apparently have to have

your permission to get a transcript of today's proceedings?

THE COURT: Yes, you have it.

MR. MCDOWELL: Thank you.

MR. GOVER: And my reply is going to be limited to what you heard from the City's counsel about timing and let's be realistic about this, in my submission, as to the timing. Council met irregularly over the summer when the funding cap was surpassed. And, in addition, that was a Council that was frankly by a majority hostile to the interests of Peter McCallion. We've seen that. History has proven that to be right. That Council did not wait for the process to properly play out before you before making its own decision on funding. That was the point of the submissions that you heard from me on March 4th and on which you acted, so frankly Ms. Wynne's submissions that we've waited too late ought to fall on deaf ears. That Council remained in power until November 30th. We're here on December 3rd. The timing is unfortunate, but it doesn't lie in the mouth of City Council or its lawyer to criticize us with

one word about the timing of this motion. Thank you.

THE COURT: All right, thank you. I am going to just take a few minutes and review the submissions. I'd like to get a decision to you this afternoon, so I'll ..... perhaps we'll break for about half an hour.

--- Court adjourns at 2.30 p.m.

--- Court resumes at 2.55 p.m.

THE COURT: Now, Mr. Gover, I just want to be sure the funding request that you are talking about is the funding request that you made to the City that was about to go to City Council but, for reasons that you expressed, was pulled from the Council meeting agenda, is that correct?

MR. GOVER: That's correct, sir, sir.

THE COURT: All right.

MR. GOVER: Thank you.

THE COURT: Thank you, counsel. I think it is important that I give my reasons and my decision now so that there will be no delay, given that we are scheduled now to resume on December the 14th.

Counsel for Mr. McCallion raises an important issue. I will not repeat what I said on May the 17th other than to say I recommended that Mississauga City Council grant Mr. McCallion full funding for legal representation. I noted then that it was imperative that I have experienced counsel appear for Mr. McCallion who were able to properly prepare and put forward all the issues in their proper context. Mississauga City Council awarded limited funding and Mr. McCallion has been ably represented to-date.

The funding provided by the City apparently has now been exhausted and Mr. McCallion's counsel advises that it was in fact exhausted by the end of July. This is not surprising given the length of the inquiry and the complexity of the issues raised.

Ahead of us lies one further day of evidence, two days of expert testimony, the preparation of written submissions and approximately, hopefully no more, one week of oral submissions. I implore City Council to consider Mr. McCallion's request for further funding. It would be unfortunate to have come this far and not allow the hearing to finish with all the procedural protections we can afford to a party. While I have, of course, made no findings, it is obvious that Mr. McCallion's interests are squarely in play based upon the evidence which I have heard to-date. City Council set the terms of this inquiry and specifically named Peter McCallion in the terms of reference. His request for further funding is valid and should be given serious consideration. Clearly, there is some mystery, and indeed some real concern, about the alleged interests of Peter McCallion in W.C.D. This, at the end of the day, will be for me to untangle in my report.

Nevertheless, if City Council elects not to follow my recommendation, the appropriate

remedy is not to halt these proceedings. There are seven parties to this inquiry and the citizens of Mississauga have expended significant resources and are entitled to my findings of fact and to my recommendations. The only jurisdiction I have is to make a recommendation to the municipality and it would not be appropriate to hold the hearing hostage until City Council takes specific action. If further funding is not awarded, Mr. McCallion's remedy is to argue that no finding should be made against him because he lacked the procedural protection and representation by legal counsel. I would then be required to determine whether the lack of full funding would undermine the inquiry's process and hamper its ability to lead to fair and accurate findings of fact with respect to Mr. McCallion.

Therefore, the inquiry will resume as planned on Tuesday, December 14th, at 10.00 a.m. in Mississauga. I hope that Mississauga City Council will assess Mr. McCallion's request for full funding with an eye to its duty to act responsibly and fairly having set in motion the

steps leading to the inquiry and leading us here today. Regardless of City Council's decision, however, the inquiry will proceed as scheduled on December 14th.

Anything further?

MR. GOVER: Not from me. Thank you, Mr. Commissioner.

MR. MCDOWELL: Mr. Jack wants to raise a matter with you.

THE COURT: Yes, Mr. Jack.

MR. JACK: Thank you.

Commissioner, I spoke to Ms. Loewith and Mr. McDowell about this, we received an email indicating that written submissions for final argument, if you wish, should be in by the 6th of January, I believe it was, and then the oral submissions would begin on the 10th.

For me, for reasons I won't go into in great detail, that's very tight and I expect that other counsel, particularly counsel for the mayor, may be in a similar position. I wouldn't be asking for much more time, but I would ask for your permission please to speak to Mr. McDowell

and Ms. Loewith about this further after consulting the other counsel and see if can work out something which would give people another week or ten days to do this. In my experience, and perhaps in yours as well, if there is adequate time for the written submissions, it often compresses matters and saves time in the end.

THE COURT: I agree.

MR. JACK: Thank you.

THE COURT: All right, well, why don't we take this up then on the 14th? Perhaps by then you'll have a chance to .....

MR. JACK: Well, we might have been able to work out something with Mr. McDowell and Ms. Loewith before that after .....

THE COURT: Yeah, if you do, that's fine.

MR. JACK: ..... after an opportunity to speak to the other counsel. We haven't had that yet, sir.

THE COURT: Sure, fine, well, let me know. My only obligation that I was telling Mr. McDowell earlier at this point I think is to

sit in Divisional Court the weeks of January, I think it's the .....

MR. MCDOWELL: 17th I believe.

THE COURT: ..... 17th and 24th, so, with that in mind, perhaps you can have those discussions.

MR. JACK: I appreciate your telling us that.

THE COURT: Thank you. Thank you all. Have a good weekend.

--- Court adjourns at 3.05 p.m.

This is to certify that the above is a true and accurate transcript of the proceedings to the best of my skill and ability.

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Grace Cheung  
Official Court Reporter