



REPORT OF THE MISSISSAUGA JUDICIAL INQUIRY

Updating the Ethical Infrastructure

Executive Summary

The Honourable J. Douglas Cunningham
Commissioner



City of Mississauga Judicial Inquiry

The Honourable J. Douglas Cunningham, Commissioner

October 3, 2011

Her Worship Mayor Hazel McCallion and Members of City Council
City of Mississauga
300 City Centre Drive
Mississauga, ON L5B 3C1

Dear Madam Mayor and Councillors:

Re: Mississauga Judicial Inquiry

Pursuant to a resolution adopted by the Council of The Corporation of the City of Mississauga dated November 11, 2009, I respectfully submit my report on the Mississauga Judicial Inquiry.

Yours very truly,

A handwritten signature in black ink, appearing to be "J. Douglas Cunningham", written over the typed name.

J. Douglas Cunningham
Commissioner

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ABBREVIATIONS AND ACRONYMS

AIM	Alberta Investment Management Corporation
APS	agreement of purchase and sale
H designation	term used to signify a holding on land
HMC	Hydro Mississauga Corporation
ISF	infrastructure stimulus fund
MCIA	<i>Municipal Conflict of Interest Act</i>
MEUS	municipal electric utilities
OBCA	Ontario <i>Business Corporations Act</i>
OEB	Ontario Energy Board
OMB	Ontario Municipal Board
OMERS	Ontario Municipal Employees Retirement System
RFP	request for proposal
WCD	World Class Developments

OVERVIEW

On November 11, 2009, Mississauga City Council adopted a resolution requesting that the Chief Justice of the Superior Court of Justice appoint a judge to conduct an inquiry pursuant to section 274 of the *Municipal Act, 2001*. As is required by that section, a judge must be provided, and I was invited to assume the role of Commissioner.

The Inquiry was asked to look into two broad areas: the first concerned issues in connection with the December 2000 Enersource Hydro Mississauga shareholders' agreement, to which the city was a party. Earlier that same year, Hydro Mississauga had been newly incorporated and commercially restructured to become Enersource Hydro Mississauga (Enersource), the second largest electricity supplier in Ontario.

The second area involved the acquisition by the City of Mississauga of approximately 8.5 acres of land in the city centre (the City Centre Land). This acquisition followed a failed transaction in which a company by the name of World Class Developments Limited (WCD) intended to build a hotel, convention centre, and condominiums. Peter McCallion, the son of Mayor Hazel McCallion, was a shareholder in WCD and its real estate agent. Commission counsel and I determined that, for reasons of efficiency, the Inquiry would examine the Enersource questions in Phase I of the Inquiry and the City Centre Land questions in Phase II.

The evidence revealed that errors were made in relation to the Enersource

transaction. City manager David O'Brien failed to discharge his duty to communicate a significant change in the terms of the city's transaction with Borealis Energy Corporation (Borealis) to Mayor McCallion and members of city council. I conclude that, although some limited changes to the city's practices need to be implemented, it is not necessary to make extensive recommendations in relation to the good governance of Mississauga.

I have found that the actions of the mayor in relation to the City Centre Land and the WCD project raise significant concerns and require substantial recommendations. I make these findings with a measure of regret, having regard to the mayor's unique history of public service to Mississauga and to Canada.

The Inquiry revealed that substantive legislative reforms are necessary at the provincial level. The Report also proposes changes to the Mississauga Code of Conduct and makes an attempt to define a role for an integrity commissioner in Mississauga.

PHASE I

The Enersource Transaction

Background

In Phase I of the Inquiry, the Terms of Reference required me to investigate how Borealis came to have a veto over decisions of the board of directors of Enersource without Mississauga City Council being made aware of the veto before the closing of the transaction between Borealis and the city. The background facts surrounding this issue can be summarized under the headings that follow.

Change in Structure of Provincial Energy Utilities

In 1995 the Ontario government authorized an advisory committee to study the province's energy structure and to assess the options for phasing competition into Ontario's electricity system. At the time, municipal utilities were publicly owned, not-for-profit organizations established by local governments. The advisory committee, chaired by the Honourable Donald S. Macdonald, issued a report recommending that municipal utilities be restructured in a way that privatized the sale of electricity and made it competitive, but, at the same time, left the distribution of electricity as a publicly owned monopoly.

Request for Proposals

At that time the City of Mississauga operated Mississauga Hydro, which was a model utility. Although it was not the largest utility in Ontario, it was consid-

ered the most efficiently run. Mississauga began considering options in accordance with the new mandate to restructure. In due course it made a public request for proposals from those interested in acquiring, leasing, or partnering with Hydro Mississauga.

The successful bid came from Borealis, a division of the giant pension fund Ontario Municipal Employees Retirement System (OMERS). Borealis proposed to create a strategic alliance with the City of Mississauga which would bring together other municipal electric utilities in the “905 region,” an area within the 905 telephone area code in southern Ontario, and ultimately create a large utility owned by a number of municipalities. As new municipalities joined, Borealis would continue to make equity contributions to enable it to maintain a 10 per cent stake in the utility.

Negotiation with Borealis

The Put

Once its proposal was chosen by the city, Borealis and the city entered into negotiations regarding the precise terms of the deal. One of the issues addressed was the possibility of a “put” – the right to sell an asset at a fixed price for a fixed period. Although Borealis proposed purchasing only 10 per cent of Hydro Mississauga, a put would have entitled the city to require Borealis to purchase the remaining 90 per cent of shares before a set deadline if the city so desired. This arrangement would protect the city against a declining market for municipal utilities, without raising any immediate political issues by selling.

At some point during negotiations, the city proposed the option of a put. Although Borealis was initially opposed to the put, it ultimately granted the city a put option that would last for six months after the closing of the deal.

The Strategic Alliance Agreement

On April 12, 2000, city council instructed Mayor McCallion and the city clerk to execute the strategic alliance agreement with Borealis on behalf of the city. The strategic alliance agreement set out the nature of the new corporation and the principal agreement. Further details still had to be negotiated.

Governance of the New Corporation

With respect to the governance of the new corporation, the shareholders’ agreement attached to the strategic alliance agreement provided that major

decisions required the approval of at least 75 per cent of the board of directors at a properly constituted meeting. A quorum was defined as 75 per cent of the total number of directors, provided that at least two of those present were appointees of Borealis. Because six of the directors would be nominees of the city and only two would be nominees of Borealis, this definition meant the city would retain a veto over all major decisions of the newly formed corporation.

Bill 100

In June 2000 the Ontario government introduced Bill 100, which stated, among other things, that in setting distribution rates, a municipality could not pass on costs arising out of interest or dividend payments to its customers. Given that a fundamental aspect of the strategic alliance agreement had been the recapitalization of Hydro Mississauga, this bill significantly undermined the vision of the strategic alliance between Borealis and the city. Mississauga could not pass any transition costs on to its consumers.

The introduction of Bill 100 had a chilling effect on joint ventures involving municipal electric utilities. Although ultimately it was not passed into law, the main thrust of Bill 100 was adopted by the Ontario Energy Board through a minister's directive. Thereafter, it was no longer attractive for other 905 municipalities to join the strategic alliance. There was concern among those negotiating with Borealis on behalf of the city that the strategic alliance with Borealis would not close.

Final Negotiations

The chronology of the final negotiations of the strategic alliance agreement, during which the Borealis veto was added, can be summarized as follows:

November 29, 2000

- ✦ The draft of the final agreement was reviewed with city council. At this point no change had been made to article 2.15, the provision into which the Borealis veto was ultimately inserted.
- ✦ City council passed By-law 0600-2000 authorizing Mayor McCallion and the city clerk to execute all documents necessary to effect the closing of the strategic alliance agreement.

December 4, 2000

- ✦ Michael Nobrega (then CEO of Borealis) and David Lever of McCarthy Tétrault LLP (solicitors for Borealis) agreed they would take some time to review each draft agreement carefully and to share their thoughts.
- ✦ Mr. Nobrega and Mr. Lever agreed three changes were necessary, the most important of which was the insertion of the stipulation into article 2.15 of the shareholders' agreement that at least one of the Borealis directors had to be among the 75 per cent of directors required to approve a major decision. In effect, then, Borealis would have a veto with respect to major decisions of the corporation. Because the amount that OMERS would be required to pay if the city exercised the put would far exceed the value of the business, given the minister's directive, Mr. Nobrega and Mr. Lever both felt that OMERS / Borealis was in a situation where it bore all the risk of owning Hydro Mississauga. OMERS, therefore, wanted protection against decisions that could harm the value of the corporation.
- ✦ Mr. Nobrega discussed the changes with David O'Brien. Mr. O'Brien was at the time transitioning from his role as city manager of Mississauga to CEO of Enersource, but was nevertheless negotiating with Borealis on behalf of the city.
- ✦ Mr. O'Brien discussed the changes with Mr. Nobrega and then advised the city's outside counsel, William Houston of Fraser Milner Casgrain LLP.
- ✦ Counsel for Borealis prepared blacklined agreements with the changes and forwarded them to Mr. Houston.
- ✦ On receiving the blacklined agreements, Mr. Houston spoke with Mr. O'Brien, who confirmed he had reached an agreement with Mr. Nobrega about the changes contained in the shareholders' agreement.

December 6, 2000

- ✦ A very short city council meeting was held in the morning. The sole issue discussed was the interim tax levy for 2001.
- ✦ The strategic alliance agreement, which now included the Borealis veto, was executed by the mayor and the city clerk later in the day.
- ✦ Among the documents signed by the mayor was a certificate of familiarity with the strategic alliance agreement.

Summary of Main Conclusions

Pursuant to the Terms of Reference, I was required to make findings regarding

- 1 whether the Borealis veto was a reasonable term of the agreement;
- 2 whether council should have been advised of the Borealis veto before the execution of the strategic alliance agreement;
- 3 if so, whether council was so advised; and
- 4 if council was not advised, whether there were any factors that contributed to a breakdown in communication.

A summary of my conclusions is set out under the headings that follow.

The Borealis Veto

The inclusion of the Borealis veto made good sense once the deal became a bilateral deal, and there were sound business reasons for it. First, given the value of the put and the ease with which the city could have required Borealis to purchase the city's shares for \$360 million, it was reasonable for Borealis to ensure that the city could not make decisions without the approval of at least one Borealis director. In addition, Borealis was committing to purchase all Hydro Mississauga's debt, while the city was benefiting substantially from the money Borealis was investing.

Mr. Nobrega raised the veto late in the negotiations because, strategically, it was more likely to be accepted by Mississauga at that time, when agreement had been reached on virtually all the other points. I emphasize that proceeding in this manner is not in any way unfair in commercial negotiations between sophisticated parties.

Council and the Addition of the Borealis Veto

Council should have been advised that the Borealis veto had been inserted into the transaction. The veto was a major change that should have been discussed with council at a special meeting called for that purpose and with the involvement of solicitors acting for Mississauga.

Mr. O'Brien conceded that it was his duty as city manager, responsible for carriage of the negotiations, to ensure that he understood the full import of major changes to the deal. It was his duty to ensure that council and the

mayor were fully briefed about the major change after November 29. This duty existed even though Mr. O'Brien was by then acting as the CEO of Enersource.

Council Not Advised of the Borealis Veto

Mr. O'Brien failed in his obligation to draw the veto to the attention of the mayor and council. No member of council, including the mayor, was advised of the Borealis veto. The weight of the evidence precludes any other finding.

Although Mr. O'Brien believed he had made council aware of the Borealis veto at some point on December 6, he was not able to say it was "more likely than not" that he did so. Mr. O'Brien testified that it was "very probable" he spoke with the mayor about the veto, but the mayor's evidence that she was not advised of the change was more persuasive. According to the mayor, had she been told about the veto, she would have insisted council be informed of this major change, and she would have asked Mr. Houston to take council through the pros and cons of the amendment. The mayor believes members of council would have approved the change had they been properly advised.

Mr. Houston did not provide any evidence to the Inquiry as to whether council was advised of the December 4, 2000, change. Although he had a vague recollection of an in camera meeting just before the December 6, 2000, meeting, Mary Ellen Bench, the Mississauga city solicitor, told him that such a meeting had not taken place, and he accepted that statement. Ms. Bench also explained to the Inquiry that a city by-law prohibits council from meeting to transact business or make decisions without following the appropriate procedures for calling meetings.

Councillors George Carlson, Carmen Corbasson, Nando Iannicca, Patricia Mullin, and Maya Prentice swore affidavits that they did not recall any meeting or briefing on or around December 6, 2000, at which the shareholders' agreement was discussed. Councillor Iannicca added in his affidavit that he did recall a meeting with Mr. O'Brien and council members, which he said was held in the caucus room, where the put option and veto clause were discussed. However, he was certain this meeting did not occur before the shareholders' agreement was signed on December 6, 2000.

Councillor Katie Mahoney recalled a meeting in the caucus room where Mr. O'Brien outlined the veto and explained to the councillors that there was "one addition to the agreement we've agreed to." She told the Inquiry that a brief discussion followed Mr. O'Brien's statement and that Mr. O'Brien sat

in the chair usually occupied by the mayor, a detail that suggests the mayor was not in attendance. Although she believes this meeting was held before the December 6 closing of the deal, Councillor Mahoney could not assist the Inquiry in determining exactly when the meeting took place.

The weight of evidence persuades me that council was not advised of the Borealis veto before the execution of the agreement. Councillor Mahoney was alone in her recollection that council was told of the veto in advance of the closing of the deal.

Chain of Command: David O'Brien's Dual Role and the Lack of a City Solicitor

At the time the Borealis veto was added to the shareholders' agreement, David O'Brien was acting both as city manager and as a member of the board of directors of Enersource. The difficulties associated with communications and approvals were exacerbated by Mr. O'Brien's dual responsibilities as Enersource began operations and by the failure of the city to appoint a city solicitor to oversee the legal work for the largest transaction it had ever entered into.

It is imperative that large municipalities have a city solicitor involved in major transactions on an ongoing basis. The city solicitor should have sufficient information in order to brief the mayor and the city manager at regular intervals and particularly whenever there are major developments in a transaction. Although the city manager may well be the point of contact with outside counsel in such transactions, it is important that the city solicitor be kept informed of these discussions to ensure that members of council, including the mayor, are able to receive timely internal legal advice.

A proper chain of command in Mississauga would likely have ensured that the information about the Borealis veto was shared with council.

Certification of Documents

In executing the documents on December 6, 2000, the mayor was required to certify that she was familiar with all the terms of the agreement. The mayor advised the Inquiry that this was the only time during her tenure as mayor that she had ever been asked to sign such a document. It was unreasonable to require the mayor to certify personal familiarity when she, quite understandably, relied on her staff to review the provisions of the agreement in detail.

Quite simply, the mayor's certification must be taken to mean something. She was not expected to review the shareholders' agreement dealing with the shareholdings, with governance, and with all the various complexities. At the same time, the mayor should have declined to certify her familiarity unless she had taken the time to conduct such a review.

Ms. Bench testified that city council now has a procedure in place whereby the legal department stamps agreements as "approved as to form" before the mayor and the city clerk sign them, so that the mayor and the clerk know the documents have been vetted through the appropriate channels. Ms. Bench told the Inquiry that the current procedure would have ensured that the version of the agreement with the blacklined changes would not have been signed without council's approval.

In Camera Minutes

In the evidence presented at the Inquiry, intelligent and well-meaning witnesses could not agree as to what had been discussed at in camera meetings. Much of the cost of Phase I of the Inquiry could have been saved had minutes been kept. Minutes should be kept, and their distribution should be controlled to protect confidentiality.

Before this Inquiry, city council and Borealis were close to reaching an independent resolution of the outstanding issue. City council had passed a resolution indicating that it wished to purchase Borealis's interest in Enersource. However, attendees at a public meeting held to discuss Enersource subsequently indicated a strong preference for keeping Borealis as a 10 per cent shareholder of the utility. A negotiating committee was then formed by council to negotiate amendments to the shareholders' agreement with Borealis.

By early October 2009 Borealis and the negotiating committee were close to reaching a new agreement that would have, among other things, eliminated the Borealis veto. However, before approval of the newly negotiated agreement, council passed a resolution calling for this Inquiry. Mr. Nobrega did not think it would be appropriate to sign the new agreement until the Inquiry was completed. Accordingly, no deal was reached.

Summary of Recommendations for Phase I

A brief summary of my recommendations in relation to Phase I of the Inquiry follows under the headings below.

Informal Meetings of Council

No informal meetings of city council should be allowed. For clarity, it is not appropriate for city business, including briefings from officials which would otherwise be discussed at a council meeting, to be discussed in an informal setting.

[Recommendation 1, page 57*]

Minutes of In Camera Meetings

Minutes should be kept of any in camera meetings, and in paper form only. To protect confidentiality, distribution of those minutes should be controlled through bar coding or numbered copies.

[Recommendation 2, page 58]

Importance of Involvement of City Solicitor

The city solicitor should be involved in negotiations between the city and third parties from the outset and should be kept informed at all stages.

[Recommendation 3, page 59]

Certification of Personal Familiarity

Public officials should not certify personal familiarity with any document unless the statement is true in all respects.

[Recommendation 4, page 59]

* References are to the full recommendations found in the Report.

PHASE II

City Centre Land and World Class Developments

Background

The City of Mississauga is one of Canada's great urban success stories. It grew out of farmers' fields and has become a thriving regional economy, hosting more than 60 Fortune 500 companies. As a merger of smaller towns, however, Mississauga has had something of a void at its present core and has seemed to lack a centre or a soul. For much of its history an enormous shopping mall, Square One, has by default provided Mississauga with a city centre.

The city's current Official Plan envisions a robust, pedestrian friendly, traditional downtown consisting of offices, housing, and retail development. Since the early 1990s, the city hoped that a hotel and convention centre could be built next to Square One and the Living Arts Centre to support this vision of a mixed-use, vibrant core. A complex of this kind would attract tourists, meet the needs of the business community, make the city an attractive locale for conferences and conventions, and generate substantial property tax revenue for the city.

Hazel McCallion has been mayor of Mississauga since 1978 and has long intended to bring a four- or five-star hotel and convention centre to the downtown area. The quality of the hotel was important if the city hoped to attract foreign investment and corporate headquarters to the core. Although Mississauga is home to hundreds of companies, their visiting executives are often accommodated in luxury hotels located in Toronto.

In Phase II of the Inquiry, the Terms of Reference required me to investigate whether Mayor McCallion had a conflict of interest in relation to a deal between the owners of the City Centre Land – the land adjacent to Square One and the Living Arts Centre – and World Class Developments (WCD), a company formed by her son, Peter McCallion, to buy and develop land in the city centre for the purpose of developing an upscale hotel and several condominium buildings on it.

I have found that the mayor promoted the interests of WCD throughout the City Centre Land deal, and to a limited extent after its termination. She did so knowing that Peter McCallion had a pecuniary interest in relation to WCD. She ought to have known that his interest extended beyond acting as a real estate agent. Given the mayor's knowledge of her son's pecuniary interest, I find that her actions in promoting WCD amounted to a conflict of interest, both real and apparent.

City Centre Land Owners

Most land in the city centre, including the City Centre Land, is owned jointly by two Canadian pension giants: Ontario Municipal Employees Retirement System (OMERS) and Alberta Investment Management Corporation (AIM). OMERS is a large pension plan dealing with investment activities and the provision of pension services to plan members and employees. Similarly, AIM is an Alberta crown corporation responsible for pension and endowment assets for the Province of Alberta. Together they shared an equal partnership with respect to the City Centre Land. Oxford Properties (Oxford), a major investment division of OMERS, was responsible for the day-to-day property and development management of this land for both OMERS and AIM (the co-owners).

Co-owners' Objectives

Although the co-owners were not initially interested in selling the land, they were well aware of the city's desire to develop a traditional downtown core rather than merely to extend the existing suburban environment. They knew the City Centre Land was integral to that development and, given the amount of property and assets they owned in Mississauga, they understood it was in their interests to foster and maintain good relations with the mayor and the

city staff. They quite sensibly regarded it as “good business” to assist the mayor and the city to achieve certain development goals.

For the co-owners of the City Centre Land, their primary consideration in any sale was to ensure that a complementary use was made of the land. The sale price itself was of secondary importance. The co-owners also jointly own Square One, a major investment. Rather than leaving the land vacant, it was in their commercial interests to develop the City Centre Land, but only in a way that would enhance the value of Square One. From a business perspective, this goal was entirely reasonable.

World Class Developments

The Terms of Reference require me to make findings about the relationship between Mayor McCallion and various participants in the WCD transaction. Accordingly, I reviewed the evidence relating to the nature and extent of Peter McCallion’s involvement in WCD. Although Mr. McCallion held himself out simply as a real estate agent through most of the period 2005–2009, I have found, based on the evidence presented at the Inquiry, that he was, and knew that he was, a principal of WCD.

WCD and the Hotel / Condominium Project

In late 2004 Mr. McCallion approached Murray Cook, a developer and family friend, about the possibility of making a proposal to the co-owners for a hotel / condominium project on the City Centre Land. Mr. McCallion’s experience was strictly as a real estate agent, and he had never put a development project together. Mr. McCallion wanted to involve Mr. Cook to lend credibility to the project and to negotiate the agreement of purchase and sale of the City Centre Land with the co-owners.

In 2005 Mr. Cook made an initial presentation to Oxford representatives regarding the proposal. He later attended a number of meetings and presented the project to the city.

On February 22, 2005, Mr. McCallion instructed his solicitors to form the company that would become WCD with a view to facilitating the project. By 2006 he was aware that his potential investors were not prepared to invest in the project until he could confirm he had secured the City Centre Land. He

therefore approached a friend, Leo Couprie, about the project and explained he was looking for an investor to provide the deposit money for the purchase of the land. Mr. Couprie's understanding was that, once the land was secured, Mr. McCallion would find a larger developer to take over the project. Given that Mr. Couprie was the person with the money, Mr. McCallion instructed his lawyers to change the directors, officers, and shareholders of WCD to reflect Mr. Couprie as principal. Mr. Couprie agreed to invest \$750,000 in the project on the understanding that he would be repaid \$1.5 million once a developer was found.

When Mr. Cook learned that Mr. McCallion intended to become the selling agent for the condominiums, he advised him it would be difficult to find an investor if the selling agent had been engaged in advance. Most investors and developers have teams in place with whom they prefer to work. Mr. Cook and Mr. McCallion disagreed on this point, and, in the summer of 2007, Mr. McCallion invited another friend, Tony DeCicco, to join WCD. Mr. DeCicco is a businessman with experience in residential subdivision and condominium development, but he had no prior experience with a project of this magnitude. Mr. McCallion, however, believed Mr. DeCicco had both the resources to finance the project and the experience to bring it to fruition. Accordingly, he asked Mr. DeCicco to take over the lead role and to manage WCD – to deal with the co-owners, the consultants, and the city. Mr. DeCicco thereafter assumed day-to-day control over the company.

Mr. McCallion also made a personal financial commitment to the project. WCD's financial records reveal that, on a number of occasions, Mr. McCallion put money into, and received money from, the company. As he admitted at the Inquiry, these were unusual steps for a real estate agent to take.

Agreement of Purchase and Sale

The agreement of purchase and sale (APS) between the co-owners (vendors) and WCD (purchaser) was executed on January 31, 2007. The original offer involved the purchase of three parcels of land, of which one was to be dedicated to the development of a five-star hotel. Over time this purchase turned into two parcels of land – Block 9 and Block 29 – and merely a four-star hotel. However, the hotel remained a key requirement for all stakeholders throughout the process.

The negotiations regarding the APS were protracted. The most significant

sticking points revolved around assurances that the hotel would be built and that various zoning approvals would be granted. Ultimately, the co-owners' concerns were addressed in the APS by a number of conditions intended to ensure that an appropriate four-star hotel would be built. Although the agreement allowed for extensions of time to satisfy conditions relating to such things as site plan approval, unavoidable delays, and any related court applications, the condition requiring evidence of a hotel management agreement was not subject to an extension.

wCD Site Plan Application and Fees

Site plan application fees are used to cover the operating costs a city incurs in dealing with the site plan application. In Mississauga they are set out on an annual basis through a broad by-law that covers many sets of fees across the city. The amount of the fee depends on whether the development is residential or non-residential and on the size of the property in question.

The wCD project was a complex one with eight or nine buildings covering a large portion of downtown Mississauga. A hotel would be constructed initially, followed by eight condominiums.

Although application fees were not typically charged before the approval of detailed site plans, it was felt, given the scale of the wCD project, that some initial fees were reasonable. Staff in the City Planning and Building Department (the planning department) ultimately decided to charge wCD 10 per cent of the overall application fee at the time it submitted its master site plan application. wCD made an initial payment of \$52,000, as well as \$3,240 to lift the H designation (a term used to signify a holding on land), but it made no further payments toward the site plan application fee.

At the time wCD's site plan application was pending, there was an increase in regional development charges. These fees are levied by municipal governments to support infrastructure, such as water supply facilities, water treatment plants, regional roads, and police services. Regional development charges are due at the time a building permit is issued. In 2007 the Region of Peel introduced transition provisions to the development charges by-laws which allowed existing applications to be grandfathered into the old regime. wCD's site plan was appropriately grandfathered under the transition provisions of the Peel development charges by-law.

Although this status meant that wCD was entitled to pay the lesser Peel

development charges, it also meant that WCD's site plan application fee was due and payable. Despite assurances from WCD through its consultants, N. Barry Lyon Consultants Ltd., this fee was never paid. In fact, Mr. DeCicco admitted he had never intended to pay any such fees but had not conveyed this information to WCD's consultants.

Actions of City Staff

One of the subsidiary issues in the Inquiry was how and why it came about that city staff continued to work on the WCD project, notwithstanding the fact that WCD's site plan application fee was never paid. The Inquiry process revealed that the decision to continue work on the WCD project was made independently by city staff. It was not the result of influence by Mr. McCallion or the mayor, or because of their relationship to the WCD project.

The decision was made out of concern that city staff might be short of time to complete the necessary planning steps. However, the fact that WCD did not pay the application fee put city staff in a difficult position, given the mayor's ongoing promotion of the project. Mr. DeCicco took advantage of the good faith of city staff. It was most unfortunate that he relied on the excellent reputation of WCD's consultants and the trust of city staff in order to avoid paying fees.

Failure to Lift the H Designation

The H designation must be "lifted" before development can take place. For the H to be lifted, a development agreement and servicing agreement with the city must be executed. The matter then proceeds to the Planning and Development Committee of council and, finally, to city council. Council must approve the development and servicing agreement and must authorize the lifting of the H designation before development may proceed on the site.

The WCD project, along with the lifting of the H designation, was put on the council agenda on April 23 and again on April 30, 2008. This item had to be removed from the agenda at the last minute on both occasions owing to WCD's failure to pay various outstanding fees, including the site plan application fee, and to execute the necessary agreements.

Difficulty Meeting the Hotel Condition

Despite the clear provisions in the APS requiring a four-star hotel, by the end of January 2008 WCD's plans for the City Centre Land were scaled back significantly. Meeting the hotel requirement in the APS was proving to be difficult. A study conducted at the beginning of the WCD project revealed that a five-star hotel was not tenable, but that a four-star hotel might be possible. However, WCD had difficulty finding anyone interested in running even a four-star hotel on the City Centre Land.

Suresh (Steve) Gupta, the CEO of Easton's Group of Hotels, a company involved in the development and management of hotels, testified that a four-star hotel requires 24-hour room and concierge service as well as a large lobby. In his view, the high room rates required to sustain such a facility could not be achieved, given the less-expensive hotels in the vicinity and the proximity of other four-star hotels both near the airport and in downtown Toronto.

When WCD could not meet the hotel requirements in the APS on time, Mr. DeCicco, who had by now assumed control of WCD, sought to have the hotel condition waived entirely. The vendors were not keen to do so. Although they gave WCD a number of extensions with respect to the hotel condition, they ultimately required some written evidence of WCD's efforts to secure a four-star or better hotel operator for the site before any further extensions would be granted. It was in this context that Mr. DeCicco asked Mr. Gupta for a letter confirming that he had been involved in negotiations to manage a hotel for WCD. Mr. Gupta and Mr. DeCicco finally signed three documents on December 15, 2008. First, they signed a very brief letter confirming negotiations between WCD and Easton's Group. Second, they executed a management agreement. However, given that there was no assurance of when or if the hotel would be built, Mr. Gupta asked Mr. DeCicco to add a provision that allowed for termination of the management agreement on seven days' notice. A third letter (the "side letter") was then drafted by WCD's lawyer, Emilio Bisceglia. It read:

Further to our discussions and negotiation over the last year, we confirm the following:

1. The parties are not obligated to take any steps with respect to the terms and conditions of the Management Agreement executed between ourselves dated December 15, 2008 until the transaction between World Class Developments Limited and Omers Realty Management Corp. closes, or such further and other date as the parties may agree in writing.

2. Either party shall have the option to terminate the Management Agreement by providing one week's written notice. Upon delivery of the Notice of Termination, both parties will be released of all of their obligations under the Management Agreement.

The side letter was never produced to the vendors, and its existence was not known to anyone other than Mr. Gupta and WCD until late in the proceedings of this Inquiry.

The vendors regarded the brief letter confirming negotiations between WCD and Easton's Group as weak evidence of any actual steps taken toward a viable four-star hotel. They wanted evidence of a signed management agreement.

The APS was terminated on January 9, 2009. Sometime thereafter, the vendors commenced litigation against WCD.

Although the management agreement was produced as part of Mr. DeCicco's and Mr. Gupta's affidavits in WCD's counter-application against the vendors (discussed below), the side letter did not form any part of either affidavit. The failure to include the side letter as part of these two affidavits was said to be an oversight. However, the side letter clearly undermined the strength of the management agreement, making it effectively meaningless. Had the vendors been made aware of the side letter, it is likely that the APS would have been terminated even sooner, on December 15, 2008. Furthermore, had the side letter formed part of Mr. DeCicco's or Mr. Gupta's affidavit, the litigation settlement would likely have been quite different.

Termination of the APS

On July 9, 2009, the co-owners commenced an application in the Ontario Superior Court of Justice (Commercial List) to confirm that the APS with WCD had been terminated on January 9, 2009, and that WCD had no further rights pursuant to that agreement.

On August 28, 2009, WCD filed a counter-application against the vendors seeking, among other things, a declaration that the APS between the vendors and WCD remained in effect. In its counter-application, WCD sought only monetary relief. It did not seek any relief that would tie up the City Centre Land. Tony DeCicco, Steve Gupta, and Peter McCallion swore affidavits in support of the counter-application.

Sheridan College’s Interest in the City Centre Land

In 2009 Sheridan College (Sheridan) requested significant financial support from the city in exchange for establishing a campus in Mississauga. Instead of providing the funds, the city decided to purchase the now vacant City Centre Land and lease it to Sheridan at a nominal rate. On July 20, 2009, an agreement of purchase and sale was entered into between the co-owners and the city.

Out of concern for any potential claims arising from the terminated agreement with WCD, the city and Sheridan entered into an indemnification and hold-harmless agreement (the indemnification agreement) with the co-owners. It provided that the co-owners would assume all responsibility for defending any action brought by WCD and would reimburse the city or Sheridan, or both, for all reasonable legal costs incurred up to a maximum aggregate amount of \$500,000. As further protection, the city entered into a release agreement with Sheridan in which Sheridan acknowledged the possibility of a claim by WCD and released the city from any responsibility.

On September 8, 2009, City Solicitor Mary Ellen Bench recommended to city council that the city proceed to close the transaction with the co-owners on September 17, 2009. In her Report to Council of that date, Ms. Bench referred to the outstanding litigation between the co-owners and WCD in relation to the same land and noted that, in support of its counter-application, WCD relied on the following:

evidence provided through affidavits of two of its principals, namely Peter McCallion and Tony DeCicco, as well as an affidavit from Steve Gupta, of the Easton’s Group of Hotels Inc. These affidavits reference meetings with City Staff and Mayor McCallion to discuss the hotel. Again, there are no allegations or suggestions of impropriety on the part of the City, its staff or elected officials, in the materials filed by WCD.

This report was likely the first time that most members of city council became aware of Mr. McCallion’s interest in WCD. Indeed, the city solicitor became aware of Mr. McCallion’s interest only when she personally reviewed his affidavit on the counter-application.

Peter McCallion's Involvement in WCD Revealed

The affidavit of Peter McCallion sworn on August 24, 2009 (the August 24 affidavit) may be regarded as the seed that sprouted this Inquiry. In the first paragraph Mr. McCallion states: "I am one of the principals of World Class Developments." The August 24 affidavit was drafted by WCD's litigation counsel on Mr. McCallion's behalf. However, it was reviewed with Mr. McCallion by Emilio Bisceglia, WCD's solicitor. It seems apparent that Mr. McCallion was chosen as an affiant because his evidence would put pressure on the co-owners (or at least OMERS) to resolve the litigation, particularly given the inclusion of paragraphs in other affidavits describing meetings with the mayor.

Mr. McCallion requested several revisions to the first draft of the August 24 affidavit, none of which dealt with the statement that he was a principal of WCD. When Mr. Bisceglia asked Mr. McCallion to come to his office to swear the affidavit, Mr. McCallion advised him he would do so after his mother and Mr. DeCicco had a chance to discuss it.

Mr. McCallion told the Inquiry that he mentioned he was swearing an affidavit to his mother, but he did not discuss the contents with her before he did so. Mr. McCallion also said that sometime after the city solicitor's September 8, 2009, Report to Council, the mayor called him to ask why he had referred to himself as a "principal." Mr. McCallion claimed he did not believe he was a principal of WCD and had simply overlooked this statement in his affidavit. Mr. McCallion thereupon advised Mr. Bisceglia's office that the statement in the affidavit needed to be changed. When Mr. Bisceglia heard about the requested change, he was concerned. He instructed his staff not to commission the affidavit because he knew Mr. McCallion was indeed a principal of WCD. Mr. Bisceglia was not only WCD's lawyer but an investor as well.

It appears that the second affidavit, which purported to "delete" any reference to Peter McCallion being a principal of WCD, was drafted by Mr. Bisceglia's staff before he instructed them that such an affidavit should not be commissioned. Mr. McCallion ultimately took the second affidavit to the mayor's personal solicitors, Danson Schwarz Recht LLP, to be sworn on September 11, 2009. Sometime thereafter, Ms. Bench received Mr. McCallion's second affidavit by fax, without a covering letter or any explanation of the changes.

A third affidavit was sworn a few days later, on September 15, 2009. This affidavit stated that Peter McCallion was not a principal of WCD. Mr. McCallion said he swore this third affidavit on the advice of his mother, who felt that the

second affidavit was not sufficiently clear. By contrast, Mayor McCallion testified that she had never seen or heard about the third affidavit.

The weight of the evidence presented at the Inquiry is quite compelling. Peter McCallion was clearly a principal in WCD. Furthermore, he knew he was a principal, and he ought not to have sworn his second and third affidavits suggesting otherwise. Although Mr. McCallion swore the third affidavit at the instance of his mother, it is probable the mayor did not fully appreciate her son's precise interest in WCD. It is therefore most unfortunate that she urged him to change his sworn testimony without ensuring that all the facts were on the table.

Settlement of the WCD Litigation

The APS was terminated on January 9, 2009. On April 30, 2009, Michael Kitt, on behalf of OMERS / Oxford, sent a letter to Mr. DeCicco indicating that the co-owners were in negotiation with another potential purchaser for the City Centre Land.

At the TACC (Developments) golf tournament dinner in July 2009, Mayor McCallion raised with former city manager David O'Brien her concerns about difficulties in closing the Sheridan deal. Her main concern, according to Mr. O'Brien, related to contamination found on the City Centre Land. She was also worried that the outstanding litigation between WCD and the co-owners might have an impact on the deal. The mayor suggested that Mr. O'Brien become familiar with the issues. Later that same evening, Mr. O'Brien suggested to Mr. McCallion that they meet to discuss the possibility of a settlement.

Mr. O'Brien insisted in his testimony that the mayor had not explicitly asked him to become involved in the resolution of the WCD litigation. Likewise, Mayor McCallion denied asking Mr. O'Brien to negotiate a settlement with WCD. Nevertheless, the mayor and Mr. O'Brien had worked closely together over a number of years, and it is evident that Mr. O'Brien understood from his conversation with the mayor at the golf tournament dinner that he was to do whatever he could to resolve the litigation. He immediately set out to do just that.

On July 16, 2009, Mr. O'Brien met with Mr. DeCicco and Mr. McCallion at a Sunset Grill in Mississauga to discuss settlement of WCD's litigation with OMERS. Mr. O'Brien told Mr. DeCicco that WCD had no case, but Mr. DeCicco was adamant that WCD held a legitimate interest in the land and declined to discuss a settlement.

On September 7, 2009, Michael Nobrega, the current CEO of OMERS, met with Mr. O'Brien before a meeting of the OMERS investment committee. Mr. Nobrega asked Mr. O'Brien to explore with Mr. DeCicco a monetary range for possible settlement with WCD. Mr. Nobrega testified that he had concerns regarding OMERS' liability pursuant to the indemnification agreement which the co-owners had executed in favour of the city. He said he believed the indemnification agreement resulted in some sort of open-ended liability for the co-owners in favour of the city and Sheridan.

On review, it is clear that the indemnity exposed the co-owners to no such liability beyond the damages being sought by WCD. None of the lawyers involved (Borden Ladner Gervais LLP acting on behalf of Sheridan; Thornton Grout Finnigan LLP on behalf of OMERS; or City Solicitor Ms. Bench) thought there was any legal risk arising from the indemnification agreement.

Mr. Nobrega nevertheless believed there was a business risk that was completely divorced from any notion of legal risk. He was without question well aware of the political dimensions in Mississauga of the WCD counterclaim. On August 27, 2009, Mr. O'Brien had emailed Mr. Nobrega the following message:

Can we talk sometime today. Hazel called me concerning the Oxford issue with Mississauga. She is quite concerned. Could be political issues.

By this point Mr. O'Brien had seen the affidavit Mr. McCallion had sworn in which he described himself as a principal of WCD. Mr. O'Brien quite accurately anticipated that the exposure of Peter McCallion as a principal of WCD would raise political issues. It is more than probable that Mr. Nobrega also recognized that, whatever legal risks there might have been, the WCD litigation had the potential to become much messier once Mr. McCallion's interest in WCD had been disclosed.

A second meeting took place involving Mr. O'Brien, Mr. DeCicco, and Mr. McCallion on September 10, 2009, at the Delta Meadowvale Hotel in Mississauga. By all accounts Mr. McCallion was silent throughout the meeting. After a couple of hours of negotiation between Mr. O'Brien and Mr. DeCicco, the meeting ended without resolution. About half an hour later, Mr. DeCicco called Mr. O'Brien to suggest that an offer of \$5 million from the co-owners would be acceptable to WCD. After brief further negotiations, they agreed on \$4 million. Although Mr. DeCicco's testimony differed as to how the

negotiations proceeded, all witnesses agree the ultimate settlement was \$4 million. To conclude the settlement, on September 11, 2009, Mr. Bisceglia served a formal offer to settle on behalf of WCD with the co-owners for \$4 million.

The evidence was clear that Peter McCallion did not receive any of the \$4 million settlement. He was not the only investor Tony DeCicco failed to repay. John Di Poce, a prominent businessman and at the time a friend of Mr. DeCicco, invested \$992,753 in WCD, which included a payment of \$392,753.71 for WCD's outstanding bills when he exited the deal at the end of April 2008. The Inquiry heard no evidence of any repayment to Mr. Di Poce, and it seems he has received nothing for his investment. It would appear that all the equity partners, except Mr. McCallion and Mr. Di Poce, were repaid. Mr. Bisceglia received his and his family's entire investment (\$61,000). Mr. DeCicco and his companies got approximately \$2.2 million. Mr. Couprie was repaid his initial \$750,000 investment in three instalments, but he did not receive the additional \$750,000 he was to get when WCD found a developer.

Peter McCallion's Interest in WCD

Mr. McCallion owned 16 per cent of the equity of WCD. He understood at all material times that he had a significant ownership interest in WCD but may not, at all times, have had a precise understanding of the nature of that interest.

Although Mr. McCallion minimized his role with WCD in his testimony, a review of his association with WCD reveals that he was responsible for several important decisions made on behalf of WCD and that he took a number of active steps to further the WCD project:

- ✦ Mr. McCallion lent money to WCD to meet its financial obligations to keep the deal alive, and, on occasion, he received money from WCD for his personal living expenses.
- ✦ Mr. McCallion advanced WCD's interests with the co-owners.
- ✦ Mr. McCallion was named as an owner of WCD in a marketing document circulated by Ernst & Young on WCD's behalf.
- ✦ Mr. McCallion was the guarantor of a loan from Leo Couprie to WCD.
- ✦ Pursuant to a declaration of trust, Mr. Couprie held shares in WCD in trust

for the benefit of Mr. McCallion, and no steps were ever taken to terminate this trust.

- ✦ Mr. McCallion carried “World Class Group” business cards bearing his name.

The Mayor’s Knowledge and Role

On January 29, 2007, at Pier 4 Storehouse Restaurant in Toronto, Mayor McCallion witnessed the signatures of Peter McCallion and Leo Couprie on both a loan agreement involving WCD and a declaration of trust making Peter McCallion the beneficiary of WCD shares. In her testimony at the Inquiry, the mayor insisted she had not read either of those documents before she signed them. When they were produced for her signature at the restaurant, they were described to her as agreements to protect her son’s and Mr. Couprie’s interests in case something happened to them while they were travelling abroad.

From even a brief review of these documents, however, Mayor McCallion must have known that her son was involved in the WCD transaction in some way beyond acting as a real estate agent. She knew that the documents she was being asked to sign were business documents and that they bore the signatures of her son and Leo Couprie. She also knew that Mr. McCallion had been involved in the WCD transaction for some time and that Mr. Couprie was an investor in WCD. Given her intention to advocate for the WCD project, she ought to have asked more questions before, and even after, witnessing these signatures.

To the extent that Mayor McCallion acted in her official capacity in relation to the City Centre Land deal, a real conflict of interest existed as a result of Peter McCallion’s pecuniary interest in WCD. The mayor knew of her son’s pecuniary interest from the outset.

The Mayor and City Staff

There is no evidence that Mayor McCallion interacted with city staff in relation to the WCD project before the termination of the APS. Nor is there any evidence that she was involved with city staff with respect to the amount or timing of WCD’s site plan application fee, or with the city planning department’s decision to process the application notwithstanding the non-payment of fees.

The May 21, 2008, Meeting Minutes

The minutes of the May 21, 2008, Mississauga City Council meeting reflect that Mayor McCallion declared a conflict that day with respect to WCD. A review of the video footage of that council meeting revealed, however, that no such declaration was made. The reason for this discrepancy became an issue in this Inquiry.

The Inquiry revealed that the mayor had declared a conflict of interest on a prior occasion, when the WCD matter was first brought before council. It is most likely that Mayor McCallion simply forgot to do so again on May 21, 2008, the date to which the matter had been deferred and on which, as it turned out, the WCD project was only briefly before council.

I have accepted the evidence of Shalini Alleluia, the council meeting coordinator at the time of the May 21, 2008, council meeting, that she has never been asked by the mayor or any other councillor either to insert or to delete anything from council minutes.

I note that in the wake of the discovery of this discrepancy, a new procedure was established for Mississauga City Council meetings requiring the city clerk or the deputy clerk to review the draft minutes to ensure the proper recording of conflicts of interest.

The Mayor's Involvement

Interventions with the Co-owners on WCD's Behalf

The evidence established the following facts regarding Mayor McCallion's interventions with the co-owners on behalf of WCD:

- ✦ The mayor convinced the co-owners to negotiate with WCD regarding the sale of their land despite their concerns about the viability of the proposed transaction.
- ✦ Once the APS between WCD and the co-owners was signed, the mayor continued to involve herself by advancing WCD's requests that the hotel conditions be relaxed and that WCD be given more time to meet its obligations under the APS.
- ✦ It was the mayor and not WCD who almost single-handedly promoted the project and kept the deal alive throughout 2008.

- ✦ The mayor gave assurances to the co-owners regarding the ability of Murray Cook, and later Tony DeCicco, to complete the project.

There is no doubt that the mayor's interest in the WCD project was driven principally by her desire for a four- or five-star hotel in Mississauga, and not simply by a desire to assist her son. However, the mayor knowingly used her public office and her relationship with OMERS to influence the co-owners to agree to concessions that benefited WCD. She knew her son Peter McCallion stood to gain financially if the deal succeeded. For this reason, the exercise of influence put her in a position of conflict, both real and apparent.

Involvement in WCD's Internal Affairs

In addition to her interactions with the co-owners, Mayor McCallion met at various times with Mr. Cook and Mr. DeCicco regarding the WCD project. Her involvement continued throughout the project's life. Numerous documents entered as exhibits reflected the mayor's involvement in resolving matters between Mr. DeCicco and Mr. Cook after Mr. DeCicco joined the WCD project.

During the period when Mr. DeCicco wanted to terminate a put and call agreement that would allow Mr. Cook to exit WCD at any time, the mayor arranged a meeting at her house at which she attempted to mediate the differences between them. There are numerous telephone messages from Mr. DeCicco suggesting that he kept the mayor apprised of every development regarding his dispute with Mr. Cook.

A Mayor's Duties in a Conflict of Interest Situation

In the face of this conflict of interest, Mayor McCallion had the following duties:

- ✦ *Obligation to make reasonable inquiries* A mayor, like any member of council, has an obligation to make reasonable inquiries when there is reason to believe that a relative's involvement in a project may place the elected official in a real or apparent conflict of interest. Even if Mayor McCallion did not understand the extent of Peter McCallion's interest in WCD, she knew

her son stood to benefit financially if the WCD transaction was successfully completed. She should have made further inquiries of her son to fully understand the nature of his interests before advocating on behalf of WCD.

- ✦ *Responsibility to keep council informed* A mayor has an obligation to keep council informed of actions taken in the discharge of office. City council does not appear to have been aware of Mayor McCallion's private interventions on WCD's behalf, and she should have been more transparent about her interventions. She should have identified and disclosed to council the nature and extent of her son's interest in WCD.
- ✦ *Duty to refrain from official action where conflict exists* A mayor should refuse involvement in any activity once he or she becomes aware of a real or apparent conflict of interest. Mayor McCallion actively pushed WCD's interests at many different stages of the transaction even though she knew her son had a pecuniary interest in the project. In advocating for WCD's interests, and by extension Peter McCallion's, the mayor acted in the face of a clear conflict of interest and used the influence of her office in her executive, rather than legislative, role. The mayor's involvement created uncertainty for the vendors and ultimately led to unnecessary costs. But for the mayor's involvement, the APS between the vendors and WCD likely would not have been executed and numerous extensions to time requirements in the APS would not have been provided. It is no answer for the mayor to say that her actions were done for the benefit of the City of Mississauga, when her son stood to make millions of dollars if the deal was concluded. Once the mayor learned of her son's pecuniary interest in WCD (which she knew from the outset), she should have refrained from all further involvement in the transaction, and not simply withdrawn from her legislative role.

Mr. O'Brien and Conflict of Interest

The Terms of Reference require me to "inquire into whether any existing or former elected or administrative representatives of ... the City of Mississauga had a direct or indirect personal economic interest, or other conflict of interest." David O'Brien was a former "administrative representative" of the city during his involvement in events considered in Phase II of the Inquiry. I have found

that he faced several discrete conflicts of interest while making inquiries on behalf of Mayor McCallion and by negotiating with WCD. Mr. O'Brien was a former Mississauga city manager and a trustee of the mayor's family trust. He was also a former member of the board of Sheridan College as well as a current member of the OMERS board of directors. Mr. O'Brien owed a fiduciary duty to OMERS, and also owed fiduciary duties to the mayor's children, including Peter McCallion. He had owed a fiduciary duty to the city in the past as its most senior public servant.

Because of her relationship with Mr. O'Brien and the fact that he was on the OMERS board, Mayor McCallion expected him to resolve any problems she brought to his attention in relation to the WCD project, but she did not expect him to report back to her on the negotiations. At the time Mr. O'Brien sought to resolve the outstanding litigation between WCD and the vendors at the mayor's instance, the city had an indemnity agreement with the vendors to the effect that it would not be responsible for the payment of any settlement funds to WCD. On the one hand, OMERS wanted to settle the litigation for as little money as possible. On the other hand, the mayor and the city wanted the litigation resolved and had no concern about the amount of money paid to WCD.

The mayor testified that her desire to put an end to the litigation was motivated by her concern that the litigation might have a negative impact on the Sheridan College deal. I have found that Mayor McCallion was undoubtedly also concerned about the "political issues" that could have arisen from litigation involving a company in which her son was a principal. All these competing factors put Mr. O'Brien in an impossible position in seeking to resolve the matter.

Summary of Recommendations for Phase II

A culture of accountability that pervades municipal government is essential to any effective municipal accountability regime. That culture cannot simply be imposed top-down through legislation; it requires strong leadership from various municipal stakeholders. A balance must be struck that provides consistency, predictability, coherence, fairness, and transparency, as well as sufficient flexibility.

In the recommendations section of Phase II of the Report, I have considered the existing framework of accountability for conflicts of interest in both Ontario and Mississauga and made recommendations regarding amendments to the *Municipal Act, 2001*, the *Municipal Conflict of Interest Act*, and the Mississauga Code of Conduct. I have also made recommendations in regard to strengthening the office of the integrity commissioner. Finally, I have suggested other measures that might prevent circumstances such as those giving rise to this Inquiry from happening in the future. I have suggested a practice of providing comfort letters to aid third parties in negotiating with the city, the introduction of a lobbyist code of conduct, and amendments to the *Municipal Councillor's Guide*.

A summary of my recommendations arising out of Phase II of the Inquiry is set out under the headings below.

Recommended Amendments to the *Municipal Act, 2001*

The wording of section 223.3 of the *Municipal Act, 2001*, appears to place responsibility for maintaining personal impartiality entirely on the integrity commissioner. This assignment of responsibility is wholly unsatisfactory.

- ♦ Additional statutory safeguards should be added to the office of the integrity commissioner in the *Municipal Act, 2001*, including
 - ♦ a minimum term of appointment to provide security of tenure; and
 - ♦ a requirement that municipalities indemnify the integrity commissioner. [Recommendation 5, page 165*]

* References are to the full recommendations found in the Report.

Section 223.8 of the *Municipal Act, 2001*, should also be amended to prevent conflict between an investigation by an integrity commissioner and a court.

- ✦ Section 223.8 of the *Municipal Act, 2001*, should be amended to require explicitly that an integrity commissioner suspend his or her investigation or proceedings relating to a matter which is the subject of proceedings before a court of competent jurisdiction.

[Recommendation 6, page 166]

Recommended Amendments to the *Municipal Conflict of Interest Act*

The following points summarize my recommendations as to how the *Municipal Conflict of Interest Act* (MCIA) could be improved through amendment.

Create a Preamble

- ✦ A preamble should be added to the MCIA setting out broad overarching principles. It would be appropriate to include a preamble similar to the one found in the *Members' Integrity Act, 1994*, which provides as follows:

It is desirable to provide greater certainty in the reconciliation of the private interests and public duties of members of the Legislative Assembly, recognizing the following principles:

1. The Assembly as a whole can represent the people of Ontario most effectively if its members have experience and knowledge in relation to many aspects of life in Ontario and if they can continue to be active in their own communities, whether in business, in the practice of a profession or otherwise.
2. Members' duty to represent their constituents includes broadly representing their constituents' interests in the Assembly and to the Government of Ontario.
3. Members are expected to perform their duties of office and arrange their private affairs in a manner that promotes public confidence in the integrity of each member, maintains the Assembly's dignity and justifies the respect in which society holds the Assembly and its members.
4. Members are expected to act with integrity and impartiality that will bear the closest scrutiny.

[Recommendation 7, page 167]

Clarify Scope of Act

- ✦ A statement should be added within the MCIA that the interests of spouses, parents, children, siblings, and other relatives are deemed also to be the interests of the member.
[Recommendation 8, page 169]

Beyond Pecuniary Interests

- ✦ The MCIA should be extended to include private interests more broadly. The MCIA currently applies only to a “pecuniary interest.”
Depending on the scope of amendments to the MCIA, the wording “pecuniary interest” should be replaced with “private interest,” although such a change would likely require an explicit materiality threshold so that insignificant private interests are not caught.
[Recommendation 9(a), page 170]

This extension of what constitutes a conflict of interest should be accomplished through the inclusion of a provision similar to section 5 of the *Members’ Integrity Act, 1994*, which provides that:

This Act does not prohibit the activities in which members of the Assembly normally engage on behalf of constituents in accordance with Ontario parliamentary convention.

[Recommendation 9(b), page 170]

Clarify Types of Meetings Captured by the MCIA

The MCIA should apply to matters beyond the deliberative and legislative functions of municipal council. Subsection 5(1) of the MCIA should be clarified and amended in this regard. Clear guidelines are essential in deciding what meetings are caught by the sweep of the MCIA. The MCIA should be read as requiring the member not only to declare a conflict of interest but to specify the nature and extent of the interest.

- ✦ Although some courts have found that section 5 of the MCIA applies to committee meetings, the statute should be amended so that it clearly applies to all meetings attended by members of council in their official capacities.
[Recommendation 10, page 171]

The Need for Lesser Sanctions

- ✦ The existing sanctions in the MCIA should remain in place; however, none should be mandatory, and lesser sanctions should be made available. The following specific measures should be implemented:

Subsection 10(3) should be repealed, and these lesser sanctions should be made available where a judge finds contravention of the MCIA:

- ✦ suspension of the member for a period of up to 120 days;
- ✦ a form of probation of the member, with oversight by the integrity commissioner or auditor;
- ✦ removal from membership of a committee of council;
- ✦ removal as chair of a committee of council;
- ✦ a reprimand publicly administered by the judge; and
- ✦ a formal apology by the member.

[Recommendation 11(a), page 172]

Section 13 of the MCIA dealing with remedies should be amended to provide only for declaring a seat vacant.

[Recommendation 11(b), page 172]

Should the available sanctions under the MCIA be broadened, section 15, which provides that the MCIA prevails over other conflicting statutory provisions, might be repealed.

Standing to Pursue Claims

- ✦ Electors, as well as individuals or organizations that are demonstrably acting in the public interest, should be able to bring applications under the MCIA. The mischief addressed by the MCIA is of such gravity that section 9 should be amended to allow the Attorney General to bring applications as well.

[Recommendation 12, page 172]

The MCIA and the Integrity Commissioner

The powers of integrity commissioners are already recognized in the *Municipal Act, 2001*, but not in the MCIA.

- ✦ The MCIA should be amended to recognize the role of the integrity commissioner to investigate and to report on matters that are covered by the MCIA.

[Recommendation 13, page 173]

Coordination with Municipal Codes of Conduct

- ✦ The MCIA should be amended to include a provision stating explicitly that nothing in the Act prevents a member of council from making submissions regarding a finding in a report by the integrity commissioner or regarding the imposition of a penalty under a municipal code of conduct. It is important that members of council are afforded procedural fairness under municipal codes of conduct.

[Recommendation 14, page 173]

Recommended Amendments to the Mississauga Code of Conduct

Preamble

The focus of the Mississauga Code of Conduct should be on the spirit, principles, and goals underlying its creation. The Code is not intended to be strictly interpreted.

- ✦ The preamble to the Mississauga Code of Conduct (Mississauga Code) should be revised to identify clearly the values that underlie it and the mischief the scheme is set up to address. It may be counterproductive for the city to adopt a strict rules-based approach to the Code. Instead, the Mississauga Code should set out strong value statements, followed by a small number of general rules and more detailed commentary about those rules.

[Recommendation 15, page 174]

Changes to the Conflict Rules

- ✦ The Mississauga Code should be strengthened by replacing the prohibition against real and apparent conflicts of interest in Rule No. 1(b) with the two following stand-alone rules:

Members of Council should be committed to performing their functions with integrity. Members *shall avoid* the improper use of the influence of their office and *shall avoid* conflicts of interest, both apparent and real [emphasis added].

Members of Council shall not extend in the discharge of their official duties preferential treatment to *any individual or organization if a reasonably well-informed person would conclude that the preferential treatment was advancing a private interest* [emphasis added].

[Recommendation 16, page 175]

- ✦ Mississauga City Council should include a commentary following these two stand-alone rules:

For greater clarity, this Code does not prohibit members of Council from properly using their influence on behalf of constituents.

Instead of taking the form of stand-alone rules, Rules No. 1(d), (e), (f), and (g) of the Mississauga Code should form a commentary following the new Rule No. 1(b). That way, they will clearly fall under the statement in the “Framework and Interpretation” section of the Mississauga Code, which provides that “[c]ommentary and examples used in this *Code of Conduct* are illustrative and not exhaustive.”

[Recommendation 17, page 176]

Integrity Commissioner

- ✦ The Mississauga Code should clarify further that the MCIA takes precedence over the Mississauga Code only when an actual complaint is made under the MCIA involving the very same matter.

[Recommendation 18, page 176]

- ✦ When a proceeding under the MCIA has been commenced with respect to the same matter, the Mississauga Code should contain a provision requiring the integrity commissioner to suspend his or her own investigation or proceedings until the process under the MCIA has been completed.

[Recommendation 19, page 177]

Improper Use of Influence, Gifts, and Benefits

- ✦ An overarching principle should be articulated in the Mississauga Code to the effect that no inappropriate gifts are allowed “that would to a reasonable member of the public appear to be in gratitude for influence, to induce influence, or otherwise to go beyond the necessary and appropriate public functions involved.” The simplicity of such a rule is attractive, and it could be supplemented with a detailed commentary as well as future “cases” decided by the integrity commissioner.
[Recommendation 20, page 177]
- ✦ The commentary to Rule No. 7 of the Mississauga Code should be expanded to say that members of council cannot make submissions to a municipal adjudicative body, such as a licensing tribunal, on behalf of a member of their ward.
[Recommendation 21, page 177]

Lobbyists

- ✦ The Mississauga Code should be amended to include clear guidelines setting out how municipal politicians may deal with lobbyists.
[Recommendation 22, page 178]

Procedural Fairness

As noted, the MCIA should include a provision explicitly stating that nothing in the MCIA prevents a member of council from making submissions regarding a finding in a report of the integrity commissioner or regarding the imposition of a penalty under a municipal code of conduct. Members of council should be afforded procedural fairness, particularly where they are concerned that a report critical of them may be adopted or that a penalty may be imposed as a matter of political expediency. Specifically, a member of a municipal council should have the opportunity to respond at council to a damning report or to a recommendation that a penalty be imposed under a municipal code of conduct.

- ✦ The procedure for making a complaint should be set out in the Mississauga Code. In the interest of independence, complaints made under the

Mississauga Code should be submitted directly to the integrity commissioner instead of through the civic administration.

[Recommendation 23(a), page 179]

- ✦ The current Rule No. 18 of the Mississauga Code should be revised to recognize explicitly the need to hear from a member before a critical report is adopted or a penalty is imposed by city council.

[Recommendation 23(b), page 179]

Office of the Integrity Commissioner

The most well-intentioned municipal code of conduct and legislative enactments governing municipal officials will not be effective without a proper enforcement regime. An integrity commissioner can play a vital role in this regard.

- ✦ Mississauga should create a permanent office of the integrity commissioner, responsible for receiving, investigating, and reporting on formal and informal complaints.

[Recommendation 24, page 181]

To enhance impartiality, an integrity commissioner should not be an employee of the municipality. An integrity commissioner not only should be independent from municipal council, but should also be seen to be independent. The appointment process for an integrity commissioner should be fair and transparent.

An integrity commissioner's tenure should be fixed in length, non-renewable, and reasonably long. A term of five to seven years – organized on a part-time or a half-time basis, depending on the size of the municipality – would be appropriate. To avoid concerns about undue influence, the remuneration of an integrity commissioner should also be fixed at a reasonable level. Resources permitting, an integrity commissioner should also conduct educational outreach work with the public and, in particular, the development industry so that they understand the municipal accountability regime.

An integrity commissioner should report publicly on complaints received as well as on advice provided. To encourage members of council and municipal

staff to seek advice from the integrity commissioner, the names of those requesting advice should be removed from the published version of any such report.

- ✦ The Ontario legislature should require that, where a municipality has created the office of integrity commissioner, the municipality is required to identify a source for funding in the event an inquiry is called by the commissioner.
[Recommendation 25, page 181]
- ✦ In order to assist smaller municipalities in avoiding the costs of maintaining their own offices of integrity commissioners, a roster of integrity commissioners should be created through the Association of Municipalities of Ontario. Integrity commissioners on this roster would be available on an on-call basis, and they would be funded accordingly.
[Recommendation 26, page 182]

Lobbyists

Given the costs involved, Mississauga should not create a lobbyist registry at this time. However, the creation of a clear and straightforward lobbyist code of conduct could help increase transparency for commercial developers and other third parties that deal with the municipality.

- ✦ Mississauga should create a concise lobbyist code of conduct. The integrity commissioner should be given responsibility for overseeing the lobbyist code and educating third parties about it.
[Recommendation 27, page 182]

Additional Considerations

Publication of All Known Conflicts of Interest

The city clerk's office should consider the feasibility of creating a searchable database containing a list of all declared or known conflicts of interest. The list could then be posted on the city's website.

Comfort Letters

The city solicitor or the city clerk, in some cases involving input from the integrity commissioner, should provide “comfort letters”^{*} to third parties in negotiations with the city. These comfort letters should detail any known or declared conflicts of interest or findings of improper influence made in relation to a transaction. There might be a concern that, by issuing comfort letters, the city could expose itself to liability, but that should be tempered by the moderate level of investigation undertaken by the municipality and the inclusion of plain language limitation of liability clauses. Providing comfort letters to private entities would not be an onerous process because it would not require rigorous investigation or due diligence – and it may very well prevent circumstances such as those that have led to this Inquiry.

The Municipal Councillor’s Guide

The *Municipal Councillor’s Guide*, published by Ontario’s Ministry of Municipal Affairs and Housing, contains an unduly restricted review of conflicts of interest affecting municipal politicians. As discussed in the Report, the MCIA is not a complete code in respect of the conflicts of interest of municipal politicians.

^{*} A comfort letter in this context refers to a letter written by the city to give assurance to the party involved in business dealings with it that there are no known conflicts of interest which could call into question the integrity of the transaction.

CONCLUSION

In this Report I have answered the questions identified for consideration by the Terms of Reference. As I said at the outset, the issues related to the 2000 Enersource Hydro Mississauga shareholders' agreement discussed in Phase I give rise to fewer concerns than the issues surrounding the City Centre Land transaction which I reviewed in Phase II. Mississauga was fortunate that the errors in relation to Enersource and the instances of conflict of interest in relation to the City Centre Land did not injure the city in a material way. OMERS / Borealis never exercised its power of veto. Although the World Class Developments hotel / convention centre transaction failed to materialize on the City Centre Land, another opportunity emerged. The city will now enjoy the benefits of a thriving campus of Sheridan College at the city core.

Whether public confidence in city institutions was damaged is more difficult to measure. A review of the interaction between the mayor and various players in relation to the WCD deal suggests that those who are fortunate enough to enjoy friendships with the mayor have derived benefits from those relationships. Although in some communities this situation would garner controversy, this appears not to have been the case in Mississauga. The business community has had the benefit of many years of stable leadership and a mayor who understands business. Mayor Hazel McCallion enjoys a considerable measure of public trust, as demonstrated by her history of electoral success.

Nevertheless, it is clear that Mississauga, and indeed all Ontario municipalities, requires a better ethical infrastructure. Members of the public have the expectation that mayors, other members of council, and public officials will conform to ethical standards. Amending the *Municipal Act, 2001*, the *Municipal Conflict of Interest Act*, and the Mississauga Code of Conduct will promote clarity in those standards. It is fundamental that members of the public do not have to depend only on the personal ethical standards of elected officials. I have laid out the framework for the changes I believe are required.

I believe as well that adoption of my recommendations will serve to create greater transparency as to the nature of the public and private interests which may influence official decisions. Economic transparency will promote public trust. This transparency will also serve to protect the public interest by removing possibilities for members of council to discharge their public offices in their pursuit of private interests.

