CITY OF MISSISSAUGA JUDICIAL INQUIRY
THE HONOURABLE J. DOUGLAS CUNNINGHAM, COMMISSIONER
(PHASE II)

FINAL WRITTEN SUBMISSIONS OF 156 SQUARE ONE LIMITED AND ALBERTA INVESTMENT MANAGEMENT CORP.

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Heenan Blaikie LLP
Bay Adelaide Centre
333 Bay Street, Suite 2900
P.O. Box 2900
Toronto, Ontario M5H 2T4

Don H. Jack LSUC#: 14307Q
Tel: (416) 643-6933

Adam S. Goodman LSUC#: 51031B
Tel: (416) 643-6857

Fax: (416) 360-8425

Lawyers for 156 Square One Limited and
Alberta Investment Management Corp.

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PART I - INTRODUCTION

1. Public inquiries perform a very important role in Canada.

2. Although they cannot assign criminal or civil liability to individuals or corporations regarding matters of public controversy, they frequently carry out an exhaustive and open fact-finding investigation into the matters at issue to explain "what went wrong." They also often provide the governments who appointed them with policy options to prevent the reoccurrence of past problems. The nature of a public inquiry has been described by Justice Cory of the Supreme Court of Canada as follows:

> A public inquiry is not equivalent to a civil or criminal trial. . . . In a trial, the judge sits as an adjudicator, and it is the responsibility of the parties alone to present the evidence. In an inquiry, the commissioners are endowed with wide-ranging investigative powers to fulfil their investigative mandate. . . . The rules of evidence and procedure are therefore considerably less strict for an inquiry than for a court. Judges determine rights as between parties; the Commission can only "inquire" and "report"… Judges may impose monetary or penal sanctions; the only potential consequence of an adverse finding… is that reputations could be tarnished. [1]

3. As the foregoing description makes clear, the absence of jurisdiction to assign legal liability to the parties involved does not mean that the work of a public inquiry is irrelevant to them. On the contrary, the reputations of those involved are often at risk. Moreover, the way that the relevant government deals with the Commission's findings of fact and its policy prescriptions can be very important to a party's interests.

4. This inquiry is no exception.

5. By way of Resolution 0271-2009 (the "**Terms of Reference**"), Mississauga City Council called this Inquiry, amongst other things, (i) to inquire into a series of transactions and litigation involving a parcel of land in the Mississauga City Centre; and (ii) to make recommendations as appropriate as a result of the Inquiry. The Terms of Reference specifically anticipated inquiring into the relationships between City officials and the

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[1] *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System)*, [1997] 3 S.C.R. 440 at para. 34 per Cory J. quoting *Beno v. Canada (Commission of Inquiry into the Deployment of Canadian Forces to Somalia)*, [1997] 2 F.C. 527 at para. 23 (C.A.).

principals of businesses involved in the relevant land transactions and to report on whether any City officials acted in a conflict of interest.[2]

6. The recitals in the Terms of Reference outlined the controversy. Mississauga had purchased 8.5 acres of land from OMERS Realty Management Corporation ("**OMERS Realty**") and 156 Square One Limited ("**156**") (collectively, the "**Co-Owners**") for the purpose of building a downtown Mississauga college campus for Sheridan Institute of Technology and Advanced Learning ("**Sheridan**").[3] The City was aware of a previous agreement by which the Co-Owners had agreed to sell the same land to World Class Developments ("**WCD**") for a hotel development. In light of this, the City had negotiated an Indemnity with the Co-Owners to protect against any claims against it by WCD.[4] Litigation between the Co-Owners and WCD had ensued[5] and in the course of that litigation, Peter McCallion, the son of Mississauga Mayor Hazel McCallion, had sworn an affidavit in which he described himself as a principal of WCD.[6] In their affidavits, Peter McCallion and two other WCD witnesses described their discussions with the Mayor, the head of OMERS and City staff to acquire the lands and develop a hotel.[7] City Council specifically recorded that it was concerned with the involvement of both the Mayor and her son, Peter McCallion, in the transactions at issue and the possibility of a conflict of interest.[8]

7. Although not specifically mentioned in the Terms of Reference, the settlement of the litigation between the Co-Owners and WCD, which settlement resulted in the payment of $4 million in September of 2009, also emerged as an issue of controversy involving the parties.

8. The evidence at this Inquiry has confirmed that the Mayor took a very active role in the transactions at issue, including championing the sale of the land at issue to WCD with the Co-Owners, and pressuring the Co-Owners to make concessions to WCD. Although the

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[2] Exhibit 1, City of Mississauga, Resolution 0271-2009 (11 November 2009) at p. 3.
[3] Exhibit 1, City of Mississauga, Resolution 0271-2009 (11 November 2009) at p. 1, recital 5.
[4] Exhibit 1, City of Mississauga, Resolution 0271-2009 (11 November 2009) at p. 2, recital 7.
[5] Exhibit 1, City of Mississauga, Resolution 0271-2009 a(11 November 2009) at p. 2, recitals 8 & 9.
[6] Exhibit 1, City of Mississauga, Resolution 0271-2009 (11 November 2009) at p. 2, recital 10.
[7] Exhibit 1, City of Mississauga, Resolution 0271-2009 (11 November 2009) at p. 2, recitals 10 & 11.
[8] Exhibit 1, City of Mississauga, Resolution 0271-2009 (11 November 2009) at p. 3, recitals 13 & 15.

Mayor testified that she did not know that her son had an equity interest in WCD,[9] she testified that she would not have acted any differently had she known.[10]

9. As one of the co-owners of the lands at issue but lacking day-to-day operational authority and much relevant information, 156 and its ultimate investment manager, Alberta Investment Management Corp. ("**AIMCo**") found themselves in a unique position at this Inquiry. 156 and AIMCo have fully participated in Part II of this Inquiry in order to bring this unique perspective and the evidence of its witnesses forward for the benefit of the Inquiry.

10. Without any funding by the City – and thus at great expense to themselves – 156 and AIMCo have participated in this Inquiry because they themselves were and remain concerned by many of the issues identified in the Terms of Reference and explored in the hearings. 156 and AIMCo remain co-owners of Square One Shopping Centre in the Mississauga City Centre, which is an asset worth approximately $800 million. As a result of this substantial investment in the heart of Mississauga, 156 and AIMCo have a significant interest in the way Mississauga deals with conflicts of interest, both real and apparent.

11. Through 22 days of hearings, which included the testimony of 26 fact witnesses and three expert witnesses, this Inquiry has exhaustively inquired into the Part II issues identified in the Terms of Reference. 156 and AIMCo's submissions address these issues from their own independent perspective. As these submissions will discuss in greater detail, the evidence clearly established the following:

(a) With regard to her actions vis-à-vis the Co-Owners in the hotel transaction with WCD, the Mayor was acting in an apparent conflict of interest, as she herself admitted in cross-examination;

(b) At all relevant times, 156 and AIMCo acted reasonably, based on the information that was available to them, in attempting to deal with the apparent conflict. At the outset of the WCD transaction, in which Peter McCallion was presented as a real estate agent, Ken Lusk of 156 (at the time, 133) insisted that the his organization would not pay Mr. McCallion's commission. Later, when

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[9] Evidence of Hazel McCallion (20 September 2010), p. 4843.
[10] Evidence of Hazel McCallion (20 September 2010), p. 4894.

the WCD transaction was falling apart, and Peter McCallion was presenting himself as some sort of principal of WCD, and the Mayor herself was applying pressure to accommodate WCD's requests for concessions, Craig Coleman (Mr. Lusk's successor) asked OMERS/Oxford, as the Co-Owner with day-to-day operational management, to report back to him regarding Peter McCallion's exact interest in WCD;

(c) OMERS/Oxford informed Mr. Coleman that the Mayor had been asked and had provided her assurance that Peter McCallion was "off the file." The Mayor, in her testimony, denied having advised OMERS/Oxford that Mr. McCallion was "off the file" but it is undisputed that this is what OMERS/Oxford reported to 156 and AIMCo;

(d) Michael Kitt, the OMERS/Oxford executive with carriage of the WCD transaction formed the opinion that WCD and in particular, its President, Tony DeCicco, were "using the Mayor" but that it was difficult to tell her so because of her son, Peter McCallion's involvement. This opinion was not shared with 156 or AIMCo, who relied on the assurance that Peter McCallion had ceased to be involved;

(e) The Co-Owners' grounds for terminating the agreement with WCD were strong as WCD could not fulfill its commitments related to the development of a four-star hotel on the lands. In fact, these grounds became even stronger than appreciated at the time because of an undisclosed side agreement with a termination provision related to WCD's hotel management agreement, which side agreement only came to light in the course of this Inquiry;

(f) As a result of having strong grounds to terminate the agreement with WCD, the litigation between the Co-Owners and WCD presented minimal risk to the Co-Owners. This low risk profile was confirmed by Thornton Grout LLP, counsel for the Co-Owners, as well as by Mary Ellen Bench, Mississauga's City Solicitor, and by Borden Ladner Gervais LLP, counsel for Sheridan, both of whom were adverse in interest to the Co-Owners on this issue;

(g) The settlement of the litigation between the Co-Owners and WCD was negotiated by Tony DeCicco, President of WCD, and David O'Brien, an OMERS director, former Mississauga City Manager and confidant of the Mayor. Mr. O'Brien acted on the authority of Michael Nobrega, CEO of OMERS, without the knowledge or consent of anyone at 156 or AIMCo;

(h) When OMERS finally disclosed to 156 and AIMCo, after the fact, that it had agreed to settle the litigation for the payment of $4 million to WCD, 156 and AIMCo refused to contribute anything beyond WCD's deposits, which was their consistent position throughout;

(i) Given their lack of information about the settlement and their distaste for it, 156 and AIMCo required that OMERS provide them with an agreement in which OMERS/Oxford acknowledged that the settlement was taking place without their participation or concurrence and in which OMERS/Oxford indemnified 156 and AIMCo for proceedings arising from the settlement, which Acknowledgement/Indemnity Agreement 156 and AIMCo arranged through their own independent counsel, John Fingret of Gowling Lafleur Henderson LLP.

12. These submissions will be divided into five further parts, as follows:

(a) Part II will review background facts regarding the Co-Owners, their interests, and the evidence related to the conditional agreement to sell the lands at issue to WCD. In particular, this section will examine the relationship between the Co-Owners as well as the City's policies regarding a hotel in the City Centre;

(b) Part III will examine the Mayor's involvement in the WCD transaction. In this part, these submissions will examine the role the Mayor played, at the request of Tony DeCicco, in pressuring the Co-Owners to make concessions and the response of the Co-Owners;

(c) Part V will examine the termination of the WCD transaction, the emergence of the Sheridan transaction and the Co-Owners' litigation with WCD; and

(d) Part VI will examine the evidence surrounding the settlement of the litigation with WCD by OMERS/Oxford without the knowledge or consent of 156 or AIMCo.

13. By way of a failed motion, the Mayor attempted to limit the focus of this Inquiry to the standards imposed by the *Municipal Conflicts of Interest Act* (the "**MCIA**").[11] If this were indeed what this Commission was supposed to inquire into, there would be little controversy. The only relevant provisions of the MCIA applicable to Part II of this Inquiry are section 3 – which deems a City Councillor or Mayor to have a direct pecuniary interest in a matter if their children have a pecuniary interest – and section 5 – which requires that a Council Member or Mayor in a conflict of interest declare that interest, refrain from voting on the issue and not attempt to influence the voting. The evidence seems reasonably clear that at all times, except for one mistaken instance, the Mayor adhered to the MCIA by declaring she had a conflict of interest to City Council and then refrained from voting in the Council chamber on anything related to WCD.

14. However, the MCIA standard was not the only standard relevant to this Inquiry's mandate. The Commissioner's ruling of July 8, 2010 stated:

> Members of City Council are entrusted by those who elect them to act in the public interest. Optics are important. In other words, members of a municipal council must conduct themselves in such a way as to avoid a reasonable apprehension that their personal interest could in any way influence their elected responsibility. Suffice it to say that members of Council (and staff) are not to use their office to promote private interests, whether on their own or those of relatives or friends. They must be unbiased in the exercise of their duties. That is not only the common law, but the common sense standard by which the conduct of municipal representatives ought to be judged.[12]

15. The evidence before this Inquiry established that the Mayor was acting in an apparent conflict of interest when she intervened to request concessions from the Co-Owners on behalf of WCD.

16. The serious problem facing third party investors, such as 156 and AIMCo, when they encounter a real or apparent conflict of interest situation was addressed by the expert panel. Dean Lorne Sossin of the University of Toronto explained that the third party cannot act as

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[11] R.S.O. 1990, c. M.50.
[12] Mississauga Judicial Inquiry, Ruling of the Commissioner on "Conflict of Interest" (8 July 2010) at p. 9.

the municipality's integrity commissioner. On the other hand however, the third party cannot take no action in the face of a real or apparent conflict.[13] Turning a blind eye to a real or apparent conflict of interest is unsatisfactory and highly risk.

17. Dean Sossin further posited that if a municipality lacks an effective method of dealing with conflicts of interest that may arise in transactions with third parties, undue "political risk" will be created for third parties transacting with or in the municipality:

> So I think it may be a kind of cost benefit analysis would be much more cost effective for municipalities, to have clear and consistent and robust arrangements of this kind and therefore be able to say not only are we open for business but the risks coming here to do business are far lower than in those municipalities where, you know, you may find yourself with toe stubbing or -- or worse metaphors.
>
> And so I think it's both good for the firms that do business; it's good for the municipality as long as -- as reasonable and commercially viable mechanisms are in place for the third party, and reasonable and not unduly onerous obligations are in place for municipal councillors, mayors, and – and staff.[14]

18. When the events giving rise to this Inquiry took place, Mississauga had no mechanism to deal with conflicts of interest by the Mayor or members of Council, apart from the narrow prohibitions set out in the MCIA. Because of this, many facts about Peter McCallion's equity interest in WCD were not known to 156 and AIMCo. When suggestions were made that he might have an equity interest, 156 and AIMCo requested clarification from OMERS/Oxford, but received information that has emerged at the Inquiry to have been faulty.

19. In the circumstances, 156 and AIMCo acted entirely reasonable, and based on the information in their possession. 156 and AIMCo respectfully request a specific finding from the Commission in this regard.

20. Since the events giving rise to this Inquiry, Mississauga has adopted a *Code of Conduct*[15] which addresses real and apparent conflicts of interest. This should go some way to ameliorating risk to third party investors in Mississauga. However, more is needed. These submissions will make further suggestions in this regard for the Commissioner's consideration.

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[13] Expert Panel Evidence, Lorne Sossin (15 December 2010) at p. 5631.
[14] Expert Panel Evidence, Lorne Sossin (16 December 2010) at p. 5990.
[15] City of Mississauga, *Code of Conduct* (29 September 2010).

PART II - BACKGROUND: SQUARE ONE AND THE WCD TRANSACTION

(a) Square One Shopping Centre

21. Square One Shopping Centre ("**Square One**") is a large, upscale shopping centre located in Mississauga's City Centre. Square One is ultimately owned by the two Co-Owners as a long term, income-generating investment. Each of the Co-Owners has approximately $400 million invested in Square One.[16] Square One sees 24 million customers pass through each year.[17]

22. In addition to Square One itself, the Co-Owners own (or, in case of the lands at issue, owned) several vacant lots of adjacent land.[18] Given the importance of Square One's long-term value to the Co-Owners, the use of the adjacent lands, including their development in a manner complimentary to Square One, was a more important consideration to the Co-Owners than the price at which those lands could be sold.[19] Only "complementary use" projects, having the potential to enhance the value of Square One as the Co-Owners' principal investment would be considered by the Co-Owners.[20]

(b) The Co-Owners and their Management Structure

23. The Co-Owners each own 50% of Square One and adjacent lands through separate holding companies, as explained below.

24. Alberta holds its interest in Square One through 156 (previously 1331430 Ontario Inc. ("**133**")). 156's shares are held by Arca Investments Inc., whose shares are, in turn, held by the Crown in right of Alberta.[21] Management, as distinct from ownership, of Alberta's pension and endowment assets, including Square One and adjacent lands, is provided by AIMCo, which is an Alberta crown corporation created pursuant to statute in 2008.[22] Prior to

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[16] Evidence of Michael Latimer (28 July 2010) at p. 2190; Evidence of Ken Lusk (26 July 2010) at pp. 1743, 1751-1752.
[17] Evidence of Ken Lusk (26 July 2010) at p. 1706.
[18] See Exhibit 96, Map, Mississauga City Centre Land Holdings (12 October 2004).
[19] Evidence of Ken Lusk (26 July 2010) at p. 1752.
[20] Evidence of Craig Coleman (11 August 2010) at pp. 2820-2821; Evidence of Michael Latimer (28 July 2010) at p. 2201.
[21] Evidence of Ken Lusk (26 July 2010) at pp. 1659-1660.
[22] *Alberta Investment Management Corporation Act*, S.A. 2007, c. A-26.5.

2008, AIMCo's functions were performed by Alberta Investment Management ("**AIM**"), a division of Alberta's Ministry of Finance.

25. Hawthorne Realty Advisors Inc. ("**Hawthorne**") is a private investment management business that provides AIMCo (and AIM previously) with local advice regarding AIMCo-managed assets in the Greater Toronto Area (GTA).[23]

26. OMERS, the pension fund for Ontario's municipal employees, holds its interest through OMERS Realty Management, a subsidiary of OMERS Administration Corporation.[24]

27. Another OMERS subsidiary, Oxford Properties Group Inc. ("**Oxford**") acts as the property and development manager, with day-to-day responsibility for Square One and adjacent lands on behalf of both Co-Owners. [25]

28. The agreement between the Co-Owners provided that all decisions on significant matters regarding the management and development of Square One and adjacent lands had to be unanimous as between 156/AIMCo on the one hand and OMERS/Oxford on the other.[26] As the operating Co-Owner with responsibility for day-to-day management, Oxford had to consult with 156 and AIMCo and keep them reasonably informed on matters so that they could make decisions on an informed basis. [27]

(c) The City and Mayor's Vision for Mississauga City Centre and Square One

29. Forty years ago, the land currently occupied by Square One, adjacent lands and surrounding developments were a corn field.[28]

30. Over the years, Square One was developed, Mississauga was incorporated and the land around Square One was identified for the development of Mississauga's "downtown" (also referred to as the "City Centre"). Mississauga's Official Plan entitled *City Plan 2001* calls for the area to be developed as a traditional downtown, with offices, retail development, housing and other mixed-use developments. Currently, the area houses Mississauga City Hall,

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[23] Evidence of Micheal Dal Bello (29 July 2010) at p. 2270.
[24] Evidence of Ken Lusk (26 July 2010) at pp. 1659-1660.
[25] Evidence of Ken Lusk (26 July 2010) at p. 1753; Evidence of Michael Nobrega (16 August 2010) at pp. 3312-3313.
[26] Evidence of Ken Lusk (26 July 2010) at pp. 1753-1754; Evidence of Abraham Costin (8 July 2010) at pp. 1546-1547.
[27] Evidence of Michael Latimer (28 July 2010) at p. 2250; Evidence of Michael Nobrega (16 August 2010) at p. 3313.
[28] Evidence of Edward Sajecki (8 July 2010) at p. 1385.

the central Library, and the Living Arts Centre. Still missing from the City Centre however, was a hotel and convention centre, which would bring pedestrian tourists to the area [29]

31. The vacant lands adjacent to Square One were zoned "H-CC2", which permitted a wide range of primary uses, including apartment buildings, offices, banquet halls/conference centres, universities/colleges and hotels. Because of Mississauga's interest in developing a downtown, all of the lands had an "H" or "holding" designation, making development plans subject to City approval.[30]

32. Pursuant to a 2007 consultation, Mississauga determined that a post-secondary institution could assist with the development of the City Centre and undertook in its 2009 Strategic Plan to attract such a facility to the area.[31] The City's vision for the City Centre also included the development of a hotel and convention centre.[32]

33. Municipal affairs consultant Barry Lyon, an experienced professional, testified that the Mayor shared the City's vision for the development of an urban centre in the City Centre, reportedly telling him she was "sick and tired" of Mississaugans saying they were going "downtown", which meant downtown Toronto and not downtown Mississauga.[33] The Mayor specifically encouraged developers to build a hotel in the City Centre. Her efforts included encouraging the Hong Kong-based Shangri-La chain to make an investment.[34]

34. Notwithstanding the Mayor's efforts, apart from WCD discussed below, there was no interest expressed by investors in building a four- or five-star hotel in the City Centre. Ken Lusk, the former principal of Hawthorne and 156, a witness with extensive hotel experience, testified that a four-star hotel in the City Centre would not work economically without support from other related developments.[35]

(d) The Mayor's "Preferred Group": World Class Developments

35. Sometime around March 21, 2005, OMERS/Oxford received an offer to purchase three parcels of land adjacent to Square One, referred to as Blocks 9, 29 and 10, from an

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[29] Evidence of Edward Sajecki (8 July 2010) at pp. 1385-1386.
[30] Exhibit 95, Will Say of Edward Sajecki (6 July 2010) at pp. 2-3.
[31] Exhibit 95, Will Say of Edward Sajecki (6 July 2010) , p. 3.
[32] Evidence of Barry Lyon (9 August 2010) at p. 2476.
[33] Evidence of Barry Lyon (9 August 2010) at p. 2476.
[34] Evidence of Hazel McCallion (20 September 2010) at pp. 4823-4824.
[35] Evidence of Ken Lusk (26 July 2010) at p. 1662.

unknown company, World Class Developments Inc. ("**WCD Inc.**")[36] for a purchase price of $17,826,900.00.[37] The offer was presented by Peter McCallion in his capacity as agent for WCD Inc. and signed by D. Jared Brown, the lawyer who had incorporated WCD Inc. only the month prior.[38] The offer from WCD Inc. contained no commitments regarding the future use of the lands and was only open for acceptance for eight days. Deeming it unacceptable, OMERS/Oxford did not even provide a copy of it to Ken Lusk of Hawthorne/133 (later 156) until February of 2006, some 11 months after it had expired.[39]

36. The issue of the Co-Owners potentially selling the land arose again in late 2005, when the Mayor expressed her strong displeasure to Paul Haggis, then President and CEO of OMERS, that Oxford was not selling the land to what Mr. Haggis referred to as her "preferred group." The Mayor confirmed WCD was the only group that ever came forward willing to develop a hotel at the City Centre.[40] The Mayor's comments to Mr. Haggis were recorded in an email he sent to Fred Biro and Michael Latimer on October 4, 2005. Michael Latimer responded to the email, reporting that Oxford was in the process of reaching out to WCD and its principal, Murray Cook. Mr. Latimer also went on to explain that a decision on whether or not to sell the land to the Mayor's preferred group would be made in the best interest of OMERS and AIM (then a division of Alberta Revenue):

> Let there be no misunderstanding, we are interested to make the best investment decision, in the context of what will be the best economic decision for our shareholders, while attempting to meet the appropriate commercial uses for the City of Mississauga and to compliment our substantial financial investment in Square One and our partner Alberta Revenue. Our decisions may not always be popular and may not fit a third party agenda but they are based upon what is best for us, that being Omers. Independent of Omers Alberta Revenue our co owner in Square One is entitled to ensure their investment decisions are in their best interest.
>
> We have no intention to frustrate the Mayor, nor frankly would it be in our best interest as you would expect given our investments in Mississauga, we

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[36] World Class Developments Inc. was renamed World Class Developments Ltd. in August 2006 because its letterhead and business cards misprinted the name and it was less expensive to change the corporation's name than to order new letterhead and business cards. Evidence of Peter McCallion (27 July 2010) at pp. 1805-1806.
[37] Exhibit 148, Agreement of Purchase and Sale (offer) dated 21 March 2005.
[38] Exhibit 146, Email from Ida Evangelista to Micheal Dal Bello dated 9 March 2006 re: Oxford Meeting; Exhibit 187, Form 1 Confirmation of Filing for World Class Developments Inc.
[39] Exhibit 147, Note to Ken Lusk from Oxford dated 1 February 2006.
[40] Evidence of Hazel McCallion (20 September 2010) at p. 4869.

> have resources devoted to the issue and hopefully we can bring this to a soft landing but not to the detriment of our stakeholders.[41]

(e) The 2006 Face of WCD: Murray Cook

37. Oxford disclosed to Mr. Lusk that a developer named Murray Cook was the principal of WCD at a meeting on January 18, 2006.[42] Mr. Cook had credibility in the eyes of Mr. Lusk, who managed Hawthorne and 156 (at that time, still 133) and in the eyes of Micheal Dal Bello, Senior Vice-President, Real Estate at AIM. They were familiar with Mr. Cook from his time at Inducon Development Corporation.[43] Mr. Lusk was further familiar with Mr. Cook's management of Deerhurst Resort, which had a very large luxury hotel.[44]

38. At the January 18 meeting, Mr. Lusk informed Oxford that he might support selling a portion of the Co-Owners' lands for the development of an upscale hotel. Mr. Lusk also indicated that an upscale hotel on its own was not feasible and would have to be supported by more profitable developments, such as condominiums.[45]

39. Mr. Lusk had an introductory lunch with the Mayor in March of 2006. Mr. Lusk explained AIM's interest in Square One. The Mayor complained about the lack of development on the Co-Owners' lands. The Mayor also specifically indicated that she wanted to see a five-star hotel developed in the area and indicated that she had confidence in Mr. Cook's ability to develop an appropriate hotel.[46]

40. Mr. Cook provided Mr. Lusk with a letter from Marriott to WCD in which Marriott's Senior Vice-President, Lodging Development Michael J. Beckley wrote that "Marriott would be extremely interested in working with your organization to develop and manage a first class hotel located in Mississauga City Centre."[47] After being provided with a copy of the letter by Mr. Cook, Mr. Lusk phoned Mr. Beckley who confirmed Marriott's interest in having a Marriott-flagged hotel in the area. The letter and his conversation with Mr. Beckley gave Mr.

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[41] Exhibit 258, Email chain between Michael Latimer and Paul Haggis dated 4 October 2005 re: Hazel and Oxford.
[42] Evidence of Ken Lusk (26 July 2010) at p. 1663.
[43] Evidence of Micheal Dal Bello (29 July 2010) at p. 2274-2275).
[44] Evidence of Ken Lusk (26 July 2010) at p. 1664.
[45] Exhibit 146, Email from Ida Evangelista to Micheal Dal Bello dated 9 March 2006 re: Oxford Meeting.
[46] Evidence of Ken Lusk (26 July 2010) at pp. 1667-1668.
[47] Exhibit 136, Letter from Michael J. Beckley (Marriott) to Murray Cook (WCD) dated 23 February 2006.

Lusk comfort that Mr. Cook could develop an appropriate hotel on land adjacent to Square One.[48]

41. Given WCD was a private corporation, the Co-Owners' knowledge of WCD in 2006 was limited to what they were told by the Mayor and Mr. Cook. Although Mr. Cook did not recall being asked about ownership structure in his evidence,[49] Mr. Lusk recalled and wrote an email confirming that Mr. Cook had represented to him that he owned WCD, would be putting up his own funds for the planning work and legal fees, but would require a further equity investor to implement the transaction. One possibility mentioned by Mr. Cook to Mr. Lusk was an unnamed Korean investor. Mr. Lusk further recalled recommending an alternative investor to Mr. Cook for that purpose.[50]

42. At the time, there was no indication given to Mr. Lusk or anyone else at the Co-Owners that Peter McCallion was involved in WCD in any other capacity than as its real estate agent or broker. Mr. Cook testified that he was personally very clear on this issue from the beginning. He informed those involved in the project that Peter McCallion was an agent and further that he was not being paid by the Co-Owners.[51]

43. Regarding Mr. McCallion's broker or agency fee, Mr. Lusk made it quite clear to Mr. Cook that 133/AIM would not pay that fee.[52] In cross-examination, Peter McCallion testified that while he had initially hoped that his fee on the transaction would be paid by the Co-Owners, Mr. Lusk's position on the issue made it clear this would not occur.[53]

44. Given that rental apartments (an ideal development for pension funds seeking long-term revenue streams) would not be profitable in the City Centre, and given the strong desire on the part of the Mayor and City for a hotel in the area, Mr. Lusk recommended to Mr. Dal Bello that AIM approve the sale of land to WCD for the development of a four-star hotel, to be supported by condominium development.[54]

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[48] Evidence of Ken Lusk (26 July 2010) at pp. 1671-1672.
[49] Evidence of Murray Cook (15 September 2010) at p. 4479.
[50] Exhibit 149, Emails between Craig Coleman and Ken Lusk dated 10 December 2009; Evidence of Ken Lusk (26 July 2010) at pp. 1666-1667.
[51] Evidence of Murray Cook (15 September 2010) at p. 4480.
[52] Evidence of Murray Cook (15 September 2010) at p. 4488; Evidence of Ken Lusk (15 September 2010) at p. 1670.
[53] Evidence of Peter McCallion (27 July 2010) at p. 1876.
[54] Evidence of Ken Lusk (26 July 2010) at p. 1721; Exhibit 156, Memorandum from Ken Lusk to Micheal Dal Bello dated 1 May 2006.

(e) The Agreement of Purchase and Sale between the Co-Owners and WCD

45. Over the course of 2006, negotiations regarding a potential sale of land took place between the Co-Owners (represented by Ron Peddicord of Oxford and Mr. Lusk) and WCD (represented by Murray Cook). The negotiations were protracted and also involved outside counsel for the parties.[55] By October of 2006, the Mayor had grown frustrated with the slow pace of discussions and called Mr. Lusk to complain, informing him that another developer had approached the City about building a hotel in the vicinity, which could jeopardize the WCD hotel project near the Living Arts Centre.[56]

46. Abraham Costin of McCarthy Tétrault LLP, outside counsel for the Co-Owners in the negotiations with WCD, explained that the Co-Owners had no burning desire to sell the land other than to satisfy the City's desire for a hotel.[57] For his part, Mr. Lusk was comfortable with an upscale hotel being developed on the lands because it would attract shoppers to Square One.[58] Mr. Dal Bello of AIMCo and Mr. Latimer of Oxford both felt that a four-star hotel accommodated the City's goal of developing the City Centre while at the same time complimenting Square One.[59]

47. The protracted negotiations ultimately culminated in the signing of an Agreement of Purchase and Sale dated January 31, 2007 (the "**APS**"). Reflecting the Co-Owners' interest in permitting only projects that complimented their investment in Square One, the APS provided onerous conditions regarding other uses of land and made closing conditional on WCD providing the Co-Owners with evidence indicating a four-star hotel under a recognized international brand would be developed on the site. The key provisions in this regard were as follows:

(a) Section 6.6(iv)(A) – which defined the hotel that WCD undertook to develop as a "four star hotel having convention facilities and having no fewer than 200 rooms and to be operated by an international hotel brand and having full service guest amenities including a full service restaurant, a fitness facility and

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[55] Evidence of Michael Latimer (28 July 2010) at p. 2200.
[56] Exhibit 162, Emails between Ken Lusk and Ron Peddicord dated 20 October 2006; Evidence of Ken Lusk (26 July 2010) at p. 1699.
[57] Evidence of Abraham Costin (8 July 2010) at p. 1432.
[58] Evidence of Ken Lusk (26 July 2010) at p. 1672.
[59] Evidence of Micheal Dal Bello (29 July 2010) at p. 2277; Evidence of Michael Latimer (28 July 2010) at pp. 2201-2202.

room service" and prohibited any construction on Block 29 until 90 days after the bona fide commencement of construction of the hotel;

(b) Section 6.6(iv)(B) – which prohibited any other construction on Block 9, on which the hotel was to be developed, until substantial performance of the construction of the hotel; and

(c) Section 4.1(e)(iii) – which made closing of the purchase and sale transaction conditional on WCD providing the Co-Owners with evidence satisfactory to the Co-Owners acting reasonably that WCD had entered into a management agreement for the hotel with a four-star or better operator.[60]

48. The APS permitted WCD to purchase extensions from the Co-Owners regarding the conditions it was required to satisfy. Its obligation to provide evidence of entering into a hotel management agreement could be extended once by the payment of $300,000 which would be credited towards the purchase price.[61]

49. Mr. Lusk's refusal to pay Peter McCallion's agency fee was further included as a term of the APS. In section 6.1(d), the APS provided that the Co-Owners "had no liability to any real estate agency for any fees or commissions in respect of the sale of the Lands to the Purchaser."[62]

(f) Recommended Findings on Background Issues and the WCD Transaction

50. Regarding the issues reviewed in Part II of these submissions, 156 and AIMCo request the following findings:

(a) The Co-Owners' most important consideration regarding the development of their lands was to compliment Square One, an entirely legitimate purpose;

(b) Regarding the relationship between the Co-Owners, Oxford (a subsidiary of OMERS) was the operating entity with day-to-day property and development management of Square One and adjacent lands. 156 and AIMCo were equal Co-Owners of the lands at issue. Decision-making between the two Co-Owners

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[60] Exhibit 97, Agreement of Purchase and Sale dated 31 January 2007, ss. 6.6, 4.1.
[61] Exhibit 97, Agreement of Purchase and Sale dated 31 January 2007,, s. 4.5.
[62] Exhibit 97, Agreement of Purchase and Sale dated 31 January 2007, s. 6.1.

was to be arrived at by consensus. Oxford and OMERS had the responsibility to keep 156 and AIMCo reasonably informed on material issues relating to the properties;

(c) The development of both an upscale hotel and a secondary educational institution in the City Centre were legitimate and important policy objectives of the City generally and the Mayor specifically;

(d) The development of a four-star hotel in Mississauga's City Centre was not economically viable on its own. Such a development was achievable if supported by other developments, such as condominiums, as Mr. Lusk testified;

(e) The decision to enter into the APS with WCD was made by both Co-Owners for ordinary commercial considerations. The Co-Owners were willing to enter into the APS because it afforded them protection that an appropriate "complimentary use" hotel would be developed – otherwise the transaction would not proceed. In this regard, 156 and AIMCo adopt the position of Michael Latimer of Oxford, as set out in his email to Paul Haggis dated October 4, 2005 (Exhibit 258), which is quoted above;

(f) Murray Cook was presented to the Co-Owners as the one and only principal of WCD prior to the execution of the APS. In that regard, 156 and AIMCo specifically request a finding that Mr. Cook informed Mr. Lusk that he owned WCD;

(g) The Co-Owners were informed that Peter McCallion was WCD's real estate agent or broker. This was his only role in WCD that was disclosed to the Co-Owners prior to the execution of the APS, and a specific finding reflecting this is also requested;

(h) When Mr. Lusk was informed of Peter McCallion's role as real estate agent or broker, he insisted that 133 (later 156) would not pay his fee. In that regard, 156 and AIMCo request a finding that Mr. Lusk took appropriate steps to

ensure that 156/AIMCo (133/AIM at the time) were not paying or rewarding Mr. McCallion;

(i) The Mayor vouched for Mr. Cook's capabilities to Mr. Lusk; and

(j) The APS contained onerous conditions that were intended to ensure that an appropriate four-star hotel was built that would enhance Square One.

PART III - THE MAYOR'S INVOLVEMENT IN THE WCD TRANSACTION

(a) The Mayor's Apparent Conflict of Interest

51. From the perspective of the Co-Owners, the Mayor involved herself in the WCD transaction at several important points. As explained in Part II of these submissions, at the outset the Mayor applied pressure on the Co-Owners in 2006 to enter into a hotel development agreement with WCD. When Murray Cook left WCD and Tony DeCicco took control in 2007, the Mayor provided assurances regarding Mr. DeCicco's capabilities. When it later became clear to the Co-Owners that Mr. DeCicco could not fulfill the obligations in the APS regarding a four-star hotel, the Mayor applied pressure on the Co-Owners to provide extensions, relax or waive requirements, and close the transaction in the absence of those requirements.

52. Taken on its own, the Mayor's application of pressure on the Co-Owners, while remarkable was not in and of itself improper. Hazel McCallion is perceived as a powerful and effective Mayor and a tireless problem-solver. In her Report to Toronto City Council, Justice Denise Bellamy described the Mayor as follows:

> The most commonly referred to example in our interviews of a strong Mayor along these lines was Hazel McCallion of the City of Mississauga. Mayor McCallion is perceived to be very effective in all of the categories identified above and as a result is seen as being a very powerful Mayor, not withstanding the relatively weak powers conferred upon her by the *Municipal Act, 2001*.[63]

53. Mississauga's remarkable development has benefited from Mayor McCallion's strong governance style. Today, unique high-rise developments are under construction in the City Centre,[64] many Fortune-500 companies have local offices in Mississauga, and it has emerged as Canada's sixth-largest municipality.

54. The Mayor's intervention in the WCD transaction, however, must now be considered by this Inquiry in light of the involvement of her son, Peter McCallion in the project. Regarding his involvement as a real estate agent, the Mayor found herself in a conflict of

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[63] Exhibit 717, Justice Denise Bellamy, Toronto Computer Leasing Inquiry/Toronto External Contracts Inquiry, Report, vol. 2: Good Government (excerpts) at p. 57.
[64] See discussion of the "Marilyn Monroe" towers in Evidence of Edward Sajecki (8 July 2010) at p. 1387.

interest under the MCIA, which she acknowledged by declaring it and abstaining from voting on the project in the Council chamber. Notwithstanding this however, the Mayor felt free to intervene in the project on behalf of WCD with the Co-Owners because she felt such actions were not prohibited under the MCIA, and would in any event benefit the City.[65] Indeed, when asked if she would have done anything differently in hindsight had she known Mr. McCallion was, in fact, not merely a real estate agent but also an equity owner of WCD, the Mayor answered no (although she would have included Mr. McCallion's equity interest as a further basis for declaring a conflict of interest under the MCIA).[66]

55. 156 and AIMCo take no issue with the Mayor's evidence that her actions were in fact intended to benefit the City and were not made to benefit her son:

> Q: And to what extent did Peter's prospects influence your actions?
>
> **A: No -- no influence at all. I would have given the same attention to a pro -- the same attention to the project from a person not related to me at all. It was for the good of the City.** [67]

56. As reviewed in Part II of these submissions, a hotel development was something the Mayor and the City had long sought for the City Centre.

57. However, even though it would be wrong to conclude that the Mayor was acting in an actual conflict of interest or otherwise putting her son's interest ahead of the municipality's interest, it does not follow that her actions regarding the WCD transaction were reasonable or appropriate. As will be set out below, given Peter McCallion's eventual emergence as a principal of WCD, the Mayor was acting in an apparent conflict of interest, which apparent conflict caused significant concern to 156 and AIMCo.

58. Apparent conflicts of interest are serious matters. The appearance of a conflict can be just as problematic as an actual conflict because notwithstanding the true motivations behind an officeholder's actions, apparent conflicts can be destructive of public confidence in municipal government.[68]

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[65] Evidence of Hazel McCallion (20 September 2010) at p. 4868.
[66] Evidence of Hazel McCallion (23 September 2010) at p. 5458.
[67] Evidence of Hazel McCallion (20 September 2010) at p. 4868.
[68] Expert Panel Evidence, Lorne Sossin, Gregory Levine (16 December 2010) at pp. 6012-6013.

59. The apparent conflict of interest arose when the Mayor involved herself increasingly in the APS transaction as WCD's *de facto* advocate. This gave rise to a serious issue for 156 and AIMCo. 156 and AIMCo were advised that Peter McCallion's involvement in the project was only as a real estate agent, a role no witness appeared to take issue with in and of itself.[69] As explained in Part II of these submissions, the evidence is clear that Peter McCallion's involvement as agent was open and disclosed and was effectively dealt with by Mr. Lusk, who refused to pay his agency fee. However, if Mr. McCallion in fact also had a further role in WCD as an owner or principal, then there was in AIMCo CEO Leo de Bever's words, "a distinct possibility for, you know, confusing objectives, why you are doing certain things."[70] This was not a position in which 156 or AIMCo wanted in any way to find themselves.

60. Peter McCallion's emergence over time as a possible principal or shareholder of WCD, at the same time that the Mayor was pressuring the Co-Owners to make concessions to WCD, was very problematic for 156/AIMCo. They were ultimately unwilling to accede to the Mayor's pressure in the face of a possible conflict of interest. Instead, at the relevant time, they required clarification on Mr. McCallion's role and continued to make their decisions regarding the WCD transaction based on their own economic interests. The history of these issues is set out below.

(b) The Mayor Introduces WCD's New Principal – Tony DeCicco

61. On April 1, 2008, John Filipetti, Vice-President, Development at Oxford reported to Craig Coleman, who had assumed management of Hawthorne and 156 from Ken Lusk, that Murray Cook was no longer involved in the project. Mr. Filipetti went on to report that Mr. Cook's role was taken over by Tony DeCicco, of whom Oxford "knew little." Mr. Filipetti added that Mr. DeCicco was introduced to Oxford by the Mayor and that he was "known to the Mayor who indicates she believes he has the resources to complete the purchase and the project."[71] Michael Kitt, Executive Vice-President, Development of Oxford who attended that

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[69] Evidence of Leo de Bever (13 September 2010) at p. 4248.
[70] Evidence of Leo de Bever (13 September 2010) at p. 4248.
[71] Exhibit 292, Email from John Filipetti to Craig Coleman dated 1 April 2008 re: Sq 1 – Sale of 9 and 29 (6 and 7) to WCD; Exhibit 293, Handwritten Notes of Dean Hansen dated 9 April 2008; Evidence of Dean Hansen (29 July 2010) at pp. 2404-2407.

meeting held in the office of OMERS CEO Michael Nobrega, confirmed that the Mayor "vouched" for Mr. DeCicco.[72]

62. When 156 and AIMCo were informed that Mr. DeCicco was taking over WCD, they were concerned because, unlike Mr. Cook, he was unknown to them. However, the APS had no change in control clause, which would have made a change in control at WCD dependent on the Co-Owners' consent. As a result, the Co-Owners had no ability to do anything about it.[73]

63. Ida Evangelista, who worked in Hawthorne's office had some personal knowledge of Mr. DeCicco. She met with him and reported to Mr. Coleman that he was mainly in the banquet business and had some sub-division home-building experience but no experience developing high rise structures, as contemplated in the APS.[74]

64. From the outset of his introduction to the Co-Owners, Mr. DeCicco sought a relaxation of the conditions imposed on WCD pursuant to the APS.[75] At the time, Mr. Kitt noted that Mr. DeCicco's requests and negotiation were going on through the Mayor.[76] On April 1, 2008, Mr. DeCicco sent a letter to Mr. Kitt in which he proposed deleting the following sections from the APS:

(a) section 6.6(iv)(B), which prohibited construction on Block 9 other than the hotel until substantial performance of the construction of the hotel; and

(b) section 6.6(ix) which allowed the Co-Owners to repurchase Block 9 for $10.00 if the hotel construction was not substantially performed within 48 months of closing.[77]

65. Negotiations between the Co-Owners and WCD ensued, resulting in the Amending Agreement to the APS dated July 31, 2008.[78] The Amending Agreement relaxed some of the

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[72] Evidence of Michael Kitt (19 August 2010) at pp. 4005-4006, 3398.
[73] Evidence of Micheal Dal Bello (29 July 2010) at pp. 2345-2347.
[74] Evidence of Craig Coleman (11 August 2010) at p. 2826.
[75] Exhibit 292, Email from John Filipetti to Craig Coleman dated 1 April 2008 re: Sq 1 – Sale of 9 and 29 (6 and 7) to WCD.
[76] "Hazel called me last Friday (through Michael Nobrega) and asked that we give the WCD people 6 more months to find a hotel. Interesting to note, the actual developer didn't call." Exhibit 285, Emails between Michael Kitt and Michael Latimer dated 9 July 2008 re: WCD.
[77] Exhibit 99, Letter from Tony DeCicco (WCD) to Michael Kitt (Oxford) dated 1 April 2008.
[78] Exhibit 105, Amending Agreement dated 31 July 2008.

most onerous conditions on WCD and created further incentives geared towards the development of a four-star hotel including:

(a) Section 6.6(iv)(A), which was strengthened to permit condominium construction to occur on Block 29 only after the hotel construction on Block 9 was completed in all material respects;

(b) Section 6.6(iv)(B), which was deleted, allowing WCD to construct condominiums on Block 9 at the same time as the hotel; and

(c) Section 4.5(c), which was added and provided to WCD the ability to purchase three 60-day extensions by providing the Co-Owners with $125,000 on each occasion (which would not be applied towards the purchase price) and a written update detailing investigations, discussions and negotiations and expressions of interest between WCD and potential hotel operators.[79]

66. The Amendment Agreement however, left in place WCD's obligation to provide the Co-Owners with evidence of a hotel management agreement with a four-star operator.

67. In his evidence at the Inquiry, Mr. Kitt disclosed that prior to entry into the Amendment Agreement he had met with Peter McCallion at the request of the Mayor to discuss possible amendments to the APS.[80] This was not disclosed to 156/AIMCo.[81]

(c) WCD's Inability to Fulfill its Obligations under the APS

68. On September 24, 2008, WCD's lawyer, Monica Bianchini of Minden Gross LLP wrote to the Co-Owners' lawyer, Mr. Costin giving notice of a 60-day extension request, enclosing payment of the $125,000 fee and a letter from Steve Gupta, President and CEO of Easton's Group of Hotels Inc. ("**Easton's**") regarding a potential hotel management agreement.[82] The letter from Mr. Gupta vaguely stated that his organization had been in "negotiations for some time with respect to allowing our company to enter into a management

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[79] Exhibit 105, Amending Agreement dated 31 July 2008, ss. 2, 3.
[80] Evidence of Michael Kitt (19 August 2010) at pp. 4013-4017.
[81] Evidence of Craig Coleman (11 August 2010) at pp. 2828-2829.
[82] Exhibit 107, Letter from Monica Bianchini to Abraham Costin dated 24 September 2008.

contract to manage the hotel" in Mississauga's City Centre.[83] Easton's, however, did not operate any four-star hotels.[84]

69. The Co-Owners considered this update to be completely insufficient and required further particulars. In response Ms. Bianchini forwarded to Mr. Costin a copy of a draft hotel management agreement, which she stated was under discussion between WCD and Easton's. As Mr. Costin testified, the draft agreement caused even further concern to the Co-Owners. The relevant section omitted the number of hotel rooms contemplated and defined the hotel Easton's planned to manage as a "limited service property of quality equal to a Hilton Garden Inn or Marriott Springhill Suites standard."[85]

70. While the Co-Owners permitted WCD to purchase the extension, Mr. Costin registered their concern. Emailing Ms. Bianchini on September 29, 2008, Mr. Costin wrote, "The material indicated the hotel is to be a limited services hotel and not the quality prescribed by the purchase agreement."[86] Mr. Costin followed up his email of September 29 with a letter dated October 8, 2008 in which Mr. Costin forcefully insisted that the Co-Owners "have no intention of amending the nature of the hotel your client is required to put in place on these lands." Mr. Costin concluded his letter by stating:

> We are not certain why your client continues to seek these extensions since it seems unable to fulfill its obligations with respect to the hotel under the Purchase Agreement. Accordingly, the next update must be definitive in stating the type, timing and Hotel deal terms that are reflective of the Purchase Agreement conditions.[87]

71. On the same day that Mr. Costin sent his letter, Mr. Filipetti informed Mr. Coleman that he (Mr. Filipetti) had received a surprise request for a meeting with Peter McCallion.[88]

72. Mr. Filipetti's meeting with Peter McCallion took place on October 23, 2008. Mr. McCallion provided Mr. Filipetti with a letter from Mr. DeCicco in which Mr. DeCicco proposed closing the transaction by deleting certain conditions in the APS, including the requirement in section 4.1(e)(iii) that WCD provide evidence of a hotel management

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[83] Exhibit 133, Letter from Steve Gupta (Easton's) to WCD dated 6 August 2008.
[84] Evidence of Craig Coleman (11 August 2010) at p. 2827.
[85] Exhibit 109, Draft Hotel Project Management Agreement from Easton's, Schedule D, p. 25.
[86] Exhibit 110, Email from Abraham Costin to Monica Bianchini dated 29 September 2008 re: World Class acquisition.
[87] Exhibit 111, Letter from Abraham Costin to Monica Bianchini dated 8 October 2008.
[88] Exhibit 249, Email from John Filipetti to Grant Charles and Craig Coleman dated 8 October 2008.

agreement and the restrictions on what could be constructed on the lands in section 6.6.[89] Mr. Filipetti also informed Mr. Coleman that Mr. McCallion had presented a WCD business card with his name on it[90] and identified himself a principal of WCD[91] and had verbally offered increasing the purchase price by $2.5 million to effect a "clean sale" (without meeting the hotel conditions). According to Mr. Filipetti, Mr. McCallion informed him that he had spoken to "key people" at the City who were comfortable with such a clean sale.[92]

73. While Oxford was willing to consider a clean sale,[93] Mr. Coleman viewed this proposal to be a non-starter as "the hotel was critical to us proceeding."[94] If 156/AIMCo were going to consider a straight sale of the lands for condominium development, this would not have been to WCD, but would have been to the winning developer in a competitive bid process.[95] Similarly, Mr. Charles of 156 told Mr. Filipetti that he did not see any compelling reason to consider a clean sale but, given that the Co-Owners had not canvassed the position of the City on the issue of dropping the hotel conditions, they should obtain that information before making a final decision. In reporting these developments to Dean Hansen of AIMCo in Edmonton, Alberta, Mr. Charles assessed WCD's position to be a recognition that it would not be able to meet the conditions in the APS.[96] Mr. Charles also noted that he found it "odd" that Mr. DeCicco was continually "hiding" behind someone else, in this case Peter McCallion, and that the "key people" Peter McCallion had spoken to at the City could have involved his mother.[97]

(d) Mr. DeCicco "Using the Mayor" against the Co-Owners

74. During his evidence-in-chief and notwithstanding his extraction of a $4 million payment to settle litigation over the APS, Mr. DeCicco made an extraordinary admission, conceding that WCD was not capable of meeting its obligations under the APS:

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[89] Exhibit 245, Letter from Tony DeCicco to Michael Kitt dated 17 October 2008.
[90] Exhibit 691, WCD Business Card of Peter McCallion.
[91] Evidence of Craig Coleman (11 August 2010) at pp. 2829-2830.
[92] Exhibit 247, Emails between John Filipetti, Grant Charles and Craig Coleman dated 24 October 2008. Mr. McCallion's evidence was that it was Mr. Kitt who suggested that if the purchase price was increased by $2.5 million, he would not care if WCD ever built a hotel. Evidence of Peter McCallion (27 July 2010) at p. 1854.
[93] Exhibit 306, Email from Grant Charles to Dean Hansen dated October 27, 2008.
[94] Evidence of Craig Coleman (11 August 2010) at pp. 2829-2830.
[95] Evidence of Craig Coleman (11 August 2010) at pp. 2849-2850.
[96] Exhibit 306, Email from Grant Charles to Dean Hansen dated October 27, 2008.
[97] Exhibit 247, Emails between Grant Charles and John Filipetti dated 24 October 2008 re: WCD Request to Drop Hotel Conditions.

> At the end of the day, I think the agreement, the Agreement of Purchase and -- was a roadmap, and only a roadmap, to getting this deal done. I mean, if -- if anybody stuck just to the agreement, this would never get done. [98]

75. Given that WCD was incapable of fulfilling its obligations under the APS, Mr. DeCicco enlisted the assistance of the Mayor to pressure the Co-Owners to grant further concessions in favour of WCD, leaving 17 recorded messages for the Mayor about the transaction in November of 2008.[99]

76. Mr. DeCicco's persistence resulted in the Mayor making multiple calls to OMERS/Oxford and AIMCo to convince them to accede to his demands, including that WCD be allowed the purchase the land outright without the hotel condition.

77. On December 2, 2008, Mr. Filipetti reported to Mr. Coleman and Mr. Charles that the Mayor was calling him, demanding that the Co-Owners relax the hotel conditions in the APS:

> Hazel is calling me as Mike Kitt is out of town. She will be looking for us to relax the hotel requirement because of economic conditions etc. My message to her will be: we are aware that it is a difficult situation and we are discussing the situation with our co-owners. This morning Tony wanted to know if the two co-owners had different positions on the hotel issue… my response was that all decisions are made by consensus. Hazel may try to 'divide and conquer' and she surely knows people on both boards. [100]

78. Mr. Filipetti went on to say that Mr. Kitt was supportive of the idea of selling the land outright for the original purchase price and an additional $2.5 million and asked AIMCo to consider such an alternative. For his part, Mr. Kitt reported to Mr. Nobrega that "Hazel would like us to cooperate" with WCD's demands and that he supported a clean sale for an increased purchase price.[101]

79. Mr. Coleman pointedly responded to Mr. Filipetti's report about the Mayor's request as follows:

> I would like to [know] exactly what is Peter McCallion's interest in this project…[102]

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[98] Evidence of Tony DeCicco (17 August 2010) at pp. 3664-3665.
[99] Evidence of Tony DeCicco (18 August 2010) at pp. 3732-3734.
[100] Exhibit 252, Emails between Craig Coleman and John Filipetti dated 2 December 2008 re: WCD – Tony Dicico Call back.
[101] Exhibit 310, Emails between John Filipetti, Craig Coleman, Grant Charles, Michael Kitt and Michael Nobrega dated 2 December 2008 re: Call with Hazel.
[102] Exhibit 252, Emails between Craig Coleman and John Filipetti dated 2 December 2008 re: WCD – Tony Dicico Call back.

80. In his testimony, Mr. Coleman explained that this question was prompted by the Mayor involving herself in the transaction by pressuring the Co-Owners to relax WCD's obligations shortly after her son's role in the project had become uncertain:

> Well, if we're getting calls or – or indirect pressure from the Mayor to relax certain requirements in our agreement with -- when her son's on the other side of the table, the optics are not very good.[103]

81. Following his conversation with the Mayor later that day, Mr. Filipetti gave a "blow by blow" account of his telephone call with her.[104] According to Mr. Filipetti, the Mayor stated as follows:

> She said there has been a good spirit of co-operation with Oxford/AIM, but now she is concerned we will 'terminate' this deal when there are difficult economic conditions that make it impossible to live up to the hotel timelines.
>
> […]
>
> She said she knows she cannot get the quality of Hotel she wants today. She wants a deal in place to enable hotel development to go forward when conditions improve.
>
> […]
>
> She wondered if 'the guys in Alberta' were a hold-up but I said our decision-making was through discussion and consensus.
>
> She wants to have a meeting with Kitt, Nobrega, and Tony as soon as possible, so she can find out what's 'up our sleeve'. If it can't happen by Friday, she wants us to extend again. I did respond to say there was nothing up our sleeve – just the deal as amended and executed. The call was cordial.[105]

82. In response to Mr. Coleman's query, Mr. Filipetti undertook to ask for more information about Peter McCallion's role and suggested that the Co-Owners provide a one-week extension to December 12, 2008 which would provide them with time to develop a position and meet with WCD.[106] Mr. Coleman agreed with Mr. Filipetti's suggestion of a one-week extension.[107] During that time, Mr. Coleman obtained further background information regarding the transaction and WCD from Mr. Lusk.[108]

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[103] Evidence of Craig Coleman (11 August 2010) at p. 2835.
[104] Exhibit 310, Emails between John Filipetti, Craig Coleman, Grant Charles, Michael Kitt and Michael Nobrega dated 2 December 2008 re: Call with Hazel.
[105] Exhibit 310, Emails between John Filipetti, Craig Coleman, Grant Charles, Michael Kitt and Michael Nobrega dated 2 December 2008 re: Call with Hazel.
[106] Exhibit 310, Emails between John Filipetti, Craig Coleman, Grant Charles, Michael Kitt and Michael Nobrega dated 2 December 2008 re: Call with Hazel.
[107] Exhibit 628, Emails between John Filipetti, Michael Kitt and Michael Nobrega dated 3 December 2008.
[108] Exhibit 149, Emails between Craig Coleman and Ken Lusk dated 10 December 2008.

83. By December 11, 2008, 156/AIMCo had concluded that no further extensions should be granted and WCD had to live up to its obligations under the APS. Oxford was surprised by this decision.[109] Mr. Coleman informed Mr. Filipetti that 156/AIMCo might agree to a one-week extension, "but this will just provide one more week for the mayor to pressure us further."[110] At Mr. Kitt's request, Mr. Filipetti put together a memorandum outlining the status of the transaction and the position of the Co-Owners. In the first draft of the memorandum, Mr. Filipetti recorded as follows:

> Tomorrow, December 12th, is the conditional date by which the potential purchaser, WCD, was to have fulfilled three conditions of the deal as follows:
>
> […]
>
> 3) provide evidence of a management contract with a Hotel operator for the operation of a 4-star hotel on the site.
>
> It is our understanding that WCD has not satisfied any of the three conditions noted above. At WCD's request we have provided a total of three weeks of further no-fee extensions from the original exercise date of November 21st until tomorrow, December 12th. There have been discussions with WCD about a further extension with no fee on the grounds that the current economic turbulence makes securing a Hotel commitment virtually impossible in WCD's view. Our co-owner AIM is not in agreement and no extension has been granted and the deal will expire December 12th, 2008. As this deal has been strongly supported by Mayor McCallion she will not be pleased by the expiry of the deal.
>
> At the request of the Mayor and WCD as represented by Tony DeCicco, we undertook to persuade our co-owner, AIM, that a 'clean sale' could be orchestrated to Square One's advantage as follows:
>
> - Higher selling price [by] $2.5 million…
> - Protection for Square One's interests – complex and difficult to enforce conditions on the current deal would be replaced with simple restrictions on title in Square One's favour designating part of the land for hotel use only and restricting the amount of retail and restaurant space in the development.
> - Collateral Benefits for Square One – in the spirit of increased co-operation between Square One and the City matter such as future road conveyances and construction, and outstanding development charge claims dating from 1997 could be resolved in our favour. This could have an immediate impact positive on the Crate and Barrel and Whole Foods deal, as well as future development.
>
> AIM rejected these arguments with the following rationale for not revising the agreement:

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[109] Exhibit 300, Emails between Micheal Dal Bello and Craig Coleman dated 12 December 2008 re: WCD and Hazel update.
[110] Exhibit 139, Email from John Filipetti to Michael Kitt dated 11 December 2008 re URGENT WCD – AIM does not want to revise the deal.

- The pricing is not important because as a matter of principle they do not want to sell land around major assets. They agreed to the original deal because it had sufficient conditions related to the Hotel to satisfy them however the proposed revisions do not guarantee a Hotel will ever be built in their view.
- AIM feels we have been more than fair and flexible in 'watering down' some of the original deal terms (i.e. the additional 6 months to build the hotel), as well as granting additional three 60-day extensions to allow the purchaser additional time to secure a hotel. They feel the purchaser has had sufficient conditional time (23 months) in which to make the deal happen.
- AIM do not want to tie any concessions from the City to this deals because of the potential unfavourable optics in their view. They are also uncomfortable with the involvement of Peter McCallion as an apparent principal of WCD.
- It is only the Mayor who really wants the hotel and perhaps her influence is waning in their view (witness the recent Enersource vote against the mayor's position).
- As a concession to the Mayor, AIM will support a designation of part of the lands for hotel use only to preserve the potential for future hotel development.[111]

84. At the same time that 156/AIMCo had decided against further concessions to WCD, the Mayor again began to make calls to pressure to the Co-Owners regarding the transaction with WCD.[112] In his testimony, Mr. DeCicco conceded he was using the Mayor as his emissary at this point and ultimately expressed regret in putting her in such an awkward situation.[113] On the afternoon of Friday, December 12, 2008, the Mayor's office left four messages for Mr. Dal Bello, saying she needed to speak with him "urgently."[114] Mr. Dal Bello and the Mayor ended up speaking to each other on Monday, December 15, 2008. During that call, the Mayor expressed frustration that AIMCo was not allowing the transaction to proceed and accused it of not being a "good corporate citizen". Mr. Dal Bello answered the Mayor by stating that AIMCo had approved this transaction on the basis that there would be a hotel developed on the lands and it now appeared that WCD could not deliver that hotel.[115] The call lasted approximately five minutes.[116]

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[111] Exhibit 143, Memorandum from John Filipetti to Michael Kitt, cc: Michael Nobrega, Michael Latimer dated 11 December 2008 re: WCD – Update on Sale of Blocks 9 and 29 at Square One.
[112] Exhibit 301, Emails between Craig Coleman, Grant Charles, Micheal Dal Bello and John Filipetti dated 11-12 December 2008 re: Hazel – WCD.
[113] Evidence of Tony DeCicco (17 August 2010) at pp. 3658-3659.
[114] Exhibit 300, Emails between Micheal Dal Bello and Craig Coleman dated 12 December 2008 re: WCD and Hazel update.
[115] Evidence of Micheal Dal Bello (29 July 2010) at pp. 2287-2288.
[116] Evidence of Micheal Dal Bello (29 July 2010) at p. 2395.

85. Also on December 12, 2008, Mr. Kitt forwarded Mr. Filipetti's memo summarizing the status of the transaction to Mr. Nobrega and Mr. Latimer. In his forwarding email, Mr. Kitt noted:

> The only way to save the deal (although I am not even sure the purchaser has money to close) is to waive certain conditions in our favor (ie. The requirement of a hotel deal) and our co-owner is not willing to do this. This memo outlines why we recommend this and why our co-owner (Dal Bello) disagrees…
>
> … I have spoken to Hazel numerous times and will meet with her next week. She will likely call Dal Bello to "explain" why she wants the deal to proceed.[117]

86. Mr. Nobrega answered Mr. Kitt's email by offering to call Leo de Bever, CEO of AIMCo to request another extension. In his evidence, Mr. Nobrega explained that he made this offer because he was "on the forefront of receiving all the calls from the Mayor… on these issues" and had known Dr. de Bever for 12 years although he, in fact, did not get involved to save the transaction.[118] In answer to Mr. Nobrega on December 14, 2008, Mr. Kitt reported the following:

> I have a lunch with Hazel tomorrow. The important thing is to maintain our relationship with the City and we have done this to date.
>
> I don't trust the buyer, and there is no doubt they are using Hazel in this process, but it is difficult to tell her that, especially with her son involved.[119]

87. Mr. Kitt's observation that WCD and Tony DeCicco were using the Mayor but that it was hard to tell her so was made only to Mr. Nobrega and was not shared with 156/AIMCo.[120]

(e) The Old Barber House Meeting and Following: Peter McCallion "Off the File"?

88. As Mr. Kitt noted in his email to Mr. Nobrega, he had arranged a lunch meeting with the Mayor on December 15, 2008 at the Old Barber House in Mississauga. At this meeting, Mr. Kitt informed Mr. DeCicco and the Mayor that the deal was going to terminate as the result of Mr. DeCicco not providing evidence of a hotel management agreement or purchasing a further $125,000.00 extension for more time to obtain one.[121] In response, Mr. DeCicco held

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[117] Exhibit 494, Email from Michael Kitt to Michael Nobrega and Michael Latimer dated 12 December 2008 re: Hazel – Sq 1 Lands.
[118] Evidence of Michael Nobrega (16 August 2010) at pp. 3110-3114.
[119] Exhibit 144, Email from Michael Kitt to Michael Nobrega dated 14 December 2008 re: Hazel – Sq 1 Lands.
[120] Evidence of Michael Kitt (19 August 2010) at p. 4123.
[121] Evidence of Michael Kitt (19 August 2010) at p. 4062.

up a letter and proclaimed that Mr. Kitt was wrong and he did have a hotel management agreement in place. While Mr. Kitt did not have time to read the letter and Mr. DeCicco did not provide him with a copy, Mr. DeCicco explained that it was an agreement with Easton's. Mr. Kitt did notice that the letter was dated that very day, which Mr. Kitt noted to Mr. DeCicco was convenient.[122] The letter, signed by Mr. DeCicco and Steve Gupta, read as follows:

> We confirm that our companies have entered into a Management Agreement for a four star hotel having convention facilities and having no fewer than 200 rooms to be operated by an international hotel brand and having full service guest amenities including a full service restaurant, a fitness facility and room service on the Hotel Site (the "Hotel").[123]

89. In his testimony, Mr. Kitt observed, "Why wouldn't he [Mr. DeCicco] give us the hotel management agreement if he had entered into it? Why wouldn't he have given this letter to us if he had it?"[124] In any event, Mr. Kitt agreed to provide a further brief extension for Mr. DeCicco to provide the evidence of a hotel management agreement pursuant to the APS.[125]

90. Mr. Kitt recalled raising the issue of Peter McCallion's involvement at the Old Barber House meeting. In his evidence, Mr. Kitt stated he asked the question only because of 156/AIMCo's recent questions about Mr. McCallion's involvement.[126] Mr. Kitt apparently had come to accept Mr. McCallion's imprecise involvement as a layer of added complexity to this transaction.[127] Mr. Kitt recalls asking the Mayor about Mr. McCallion's involvement and the Mayor's response was that Peter was "off the file."[128] The Mayor denies saying this to Mr. Kitt that and further claimed to not even know what "off the file" means.[129] For his part, Mr. DeCicco recalls that Mr. Kitt raised Mr. McCallion's involvement with him at a point during the meeting when the Mayor had excused herself. According to Mr. DeCicco, when the Mayor went to the rest room, Mr. Kitt brought up the issue in the context of the Mayor allegedly failing to declare a conflict of interest on the subject. In answer, Mr. DeCicco

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[122] Evidence of Michael Kitt (19 August 2010) at pp. 4062-4064.
[123] Exhibit 113, Confirmation Letter between Tony DeCicco and Steve Gupta dated 15 December 2008 re: Management Agreement dated December 15, 2008.
[124] Evidence of Michael Kitt (19 August 2010) at p. 4064.
[125] Evidence of Tony DeCicco (18 August 2010) at p. 3736.
[126] Evidence of Michael Kitt (19 August 2010) at p. 4132.
[127] Evidence of Michael Kitt (19 August 2010) at p. 4015.
[128] Evidence of Michael Kitt (19 August 2010) at pp. 4062, 4126.
[129] Evidence of Hazel McCallion (20 September 2010) at p. 4954.

claimed to have informed Mr. Kitt that Peter McCallion had asked to be "out" of WCD. Mr. DeCicco admitted that notwithstanding this representation to Mr. Kitt, no paperwork was ever signed giving effect to such an exit and Mr. McCallion, in fact, continued to be involved.[130]

91. While the evidence is unclear about who, if anyone, informed Mr. Kitt that Mr. McCallion was "off the file," what is certain is that in a teleconference amongst the Co-Owners and their lawyer, Mr. Costin, on December 16, 2008, Mr. Kitt informed 156/AIMCo that Peter McCallion was "off the file." Mr. Hansen's notes record Mr. Kitt advising the group that Peter McCallion was "off the file."[131] Mr. Charles' handwritten notes of the call record Oxford informing the group that, "Mayor assured everyone that Peter McCallion is off the file and has no further involvement in project."[132] In his testimony, Mr. Kitt confirmed that he did tell 156/AIMCo that he was informed by the Mayor that Peter McCallion was "off the file" and, further, that he did not dispute the accuracy of Mr. Hansen's or Mr. Charles' recording of his comments.[133] Mr. Kitt also acknowledged that he expected 156/AIMCo to rely on his information in this regard.[134]

(f) The Difference between Agent and Principal

92. In her evidence before this Inquiry, the Mayor indicated that, while she did not know Peter McCallion was anything more than the real estate agent for WCD,[135] his further role as a principal in the company would have made absolutely no difference to her because she knew from the outset he was WCD's real estate agent. In the Mayor's view, the only constraint on her actions was the MCIA, which did not differentiate between degrees of interest. In her words:

> Q: So when you -- when you first heard about this -- this project, and you knew Peter was involved as a real estate agent, what -- what did you conclude with respect to what that meant your involvement could be in the project?
>
> **A: Well, I -- I -- Peter knew from day 1, and so did Murray Cook, that I could -- that when this application, if it ever got to Council, that I would -- either to a committee of Council or to a Council meeting, that I**

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[130] Evidence of Tony DeCicco (18 August 2010) at pp. 3920-3923.
[131] Exhibit 141, Handwritten Notes of Dean Hansen dated 16 December 2008; Evidence of Dean Hansen (29 July 2010) at p. 2414; Evidence of Micheal Dal Bello (29 July 2010) at p. 2292; Evidence of Craig Coleman (11 August 2010) at p. 2838.
[132] Exhibit 142, Handwritten Notes of Grant Charles dated 16 December.
[133] Evidence of Michael Kitt (19 August 2010) at p. 4065.
[134] Evidence of Michael Kitt (19 August 2010) at p. 4133.
[135] Evidence of Hazel McCallion (20 September 2010) at p. 4843.

> **would be declaring a conflict of interest according to the Conflict of Interest Act. Anything to do with the City, any -- I would not get involved in any discussions with staff or -- on the -- on the application itself.**[136]
>
> […]
>
> Q: Now, you've told us that you understood throughout that Peter was acting as the agent on behalf of [WCD's first investor] Mr. Couprie. What difference would it have made to your view had you thought that he had a beneficial --
>
> **A: Abs --**
>
> Q: -- interest?
>
> **A: -- absolutely none because the Conflict of Interest Act does not in any way indicate the degree of direct or indirect pecuniary interest. It's very straightforward. It doesn't say it could be your son worked as the planner, or worked as the -- and -- consulting engineer on the project. It says you have a conflict. So the degree of conflict is not anywhere indicated in the Act.**
>
> Q: Would it have made any difference to your actions had you known that -- that Peter had – or you thought that Peter had a property interest, or a beneficial interest in -- in World Class Developments?
>
> **A: Well, as a real estate agent he had a benefit. No, it would not.**[137]

93. The Mayor was correct to point out that the degree of her son's interest in WCD was irrelevant to the MCIA requirement that she declare the conflict of interest and refrain from voting on issues related to WCD at City Council.[138] However, the key issues of controversy in

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[136] Evidence of Hazel McCallion (20 September 2010) at p. 4844.
[137] Evidence of Hazel McCallion (20 September 2010) at p. 4865.
[138] *Municipal Conflict of Interest Act*, R.S.O. 1990, c. M.50. The relevant provisions of the MCIA are as follows:

> 3. For the purposes of this Act, the pecuniary interest, direct or indirect, of a parent or the spouse or any child of the member shall, if known to the member, be deemed to be also the pecuniary interest of the member.
>
> […]
>
> 5. (1) Where a member, either on his or her own behalf or while acting for, by, with or through another, has any pecuniary interest, direct or indirect, in any matter and is present at a meeting of the council or local board at which the matter is the subject of consideration, the member,
>
> (a) shall, prior to any consideration of the matter at the meeting, disclose the interest and the general nature thereof;
>
> (b) shall not take part in the discussion of, or vote on any question in respect of the matter; and
>
> (c) shall not attempt in any way whether before, during or after the meeting to influence the voting on any such question.

this Inquiry relate to the Mayor's actions outside of City Council, specifically in the role she adopted as advocate for WCD in the APS transaction.

94. As the Commissioner pointed out in his ruling early in this Inquiry, the MCIA was not the only constraint on the Mayor's actions. While City Council had not yet adopted a code of conduct with broader constraints on the actions of Mississauga public officials in real or apparent conflicts of interest, there still existed and common law recognized principles governing the actions of public officials.[139] Moreover, at issue in this Inquiry is whether the Mayor's actions in relation to issues identified in the Terms of Reference met the standard of the reasonable person in similar circumstances.

95. In this regard, the Inquiry will have to determine whether the Mayor taking on the role of WCD's advocate in negotiations with the Co-Owners was reasonable when, at about the same time, her son was presenting himself as a principal of the company.

96. The Mayor has stated that even if she were constrained in her dealings with the third party Co-Owners regarding WCD, the degree of Peter McCallion's involvement was irrelevant because everyone already knew that he was involved in the project as agent. In the Mayor's own words, "He would be benefiting, period, either way."[140] 156 and AIMCo respectfully disagree with the Mayor's assessment.

97. Mr. McCallion's role as agent was, as the Mayor pointed out, disclosed and known to all involved from the outset of the transaction. Pursuant to this role, the implications of Mr. McCallion's interest were apparent – Mr. McCallion was expected to make the usual agent's fee associated with the transaction on closing, which Mr. Lusk insisted 156/AIMCo would not pay. On cross-examination, Mr. McCallion conceded that his interest as an agent receiving a fee was quite different from an interest as a principal, who would be expected to share in the ultimate profits of the development.[141]

98. From the perspective of 156 and AIMCo, as stated by Dr. de Bever,[142] there was a significant qualitative difference between Mr. McCallion's disclosed role as agent for WCD

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[139] Mississauga Judicial Inquiry, Ruling of the Commissioner on "Conflict of Interest" (8 July 2010) at pp. 6-9.
[140] Evidence of Hazel McCallion (20 September 2010) at pp. 4958-4959.
[141] Evidence of Peter McCallion (27 July 2010) at pp. 1877-1878.
[142] Evidence of Leo de Bever (13 September 2010) at p. 4292.

and his emergence as a possible principal quite apart from the potentially wide financial disparity between the two roles.[143]

99. For his part, Mr. Coleman, who himself had raised with OMERS/Oxford his concern about Mr. McCallion's role testified:

> Well, if we're getting calls or – or indirect pressure from the Mayor to relax certain requirements in our agreement with -- when her son's on the other side of the table, the optics are not very good.[144]

100. If Peter McCallion was a principal of WCD, which now appears to have been the case,[145] the Mayor was seeking concessions for her own son's company – not a company that happened to employ her son's agency services. This problem is not, and was not addressed by the Mayor's disclosure under the MCIA.

101. Even the Mayor, who was extremely reluctant to admit that any of her actions could lead to reasonable concerns[146] had to concede that her advocacy on behalf of WCD soon after Peter McCallion had presented a WCD business card with his name on it and referred to himself as a principal of WCD could reasonably raise the appearance of a conflict of interest:

> Q. So you are not prepared to agree with my suggestion that, in those circumstances, it would have
>
> appeared --
>
> **A. Oh, appearance is what you're --**
>
> Q. -- appeared that you were seeking concessions for his own company?
>
> **A. That would be a -- a -- I'm sure many people would have thought -- or some people would have thought it appeared that I was only doing it on behalf of WCD. That was not so.**
>
> Q. Fine. So you are at least prepared to agree that that appearance was there --
>
> **A. Yeah.**
>
> Q. -- even though you have made it very, very clear in your testimony that that is not what motivated you?
>
> **A. That is not what motivated me at all.**
>
> Q. But you do agree the appearance was there?

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[143] Evidence of Michael Dal Bello (29 July 2010) at p. 2378.
[144] Evidence of Craig Coleman (11 August 2010) at p. 2835.
[145] Exhibit 190, Declaration of Trust between Leo Couprie and Peter McCallion; Evidence of Peter McCallion (27 July 2010) at p. 1870; Evidence of Emilio Bisceglia (14 December 2010) at p. 5514; Evidence of Tony DeCicco (27 July 2010) at p. 3790.
[146] Evidence of Hazel McCallion (23 August 2010) at pp. 5326-5332.

A. Oh, the appearance was the -- obviously it -- it was the son of the Mayor that was involved, so ...[147]

(g) Recommended Findings on the Mayor's Involvement in the WCD Transaction

102. Regarding the issues reviewed in Part III of these submissions, 156 and AIMCo request the following findings:

(a) The Mayor involved herself in the APS transaction, including vouching for Tony DeCicco's capabilities, and applying pressure to the Co-Owners to grant concessions to WCD;

(b) The Mayor exerted pressure on the Co-Owners to provide extensions for WCD to meet certain of its obligations under the APS. When it became clear that WCD could not fulfill its obligation to provide evidence of a hotel management agreement with a four-star operator and international brand, the Mayor applied pressure on the Co-Owners to drop the hotel conditions.

(c) The Mayor's pressure on the Co-Owners came about shortly after Peter McCallion had met with Oxford and presented a WCD business card with his name on it and referred to himself as a principal of WCD. There was a clear apparent conflict of interest;

(d) John Filipetti's memorandum to Michael Kitt of December 11, 2008 (Exhibit 143) accurately described the position of 156/AIMCo. Notwithstanding the Mayor's pressure on the Co-Owners to effect a "clean sale" of the lands to WCD without the hotel conditions, 156/AIMCo were unwilling to accommodate the Mayor's requests. 156/AIMCo were very uncomfortable with Peter McCallion's emergence as a principal of WCD in a transaction championed by the Mayor and in which the Mayor was applying pressure on the Co-Owners on behalf of WCD;

(e) 156/AIMCo's refusal to accommodate the "clean sale" advocated by the Mayor was reasonable and appropriate. The Co-Owners had entered into the APS with WCD on the basis of the commitment to develop an appropriate

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[147] Evidence of Hazel McCallion (23 August 2010) at pp. 5332-5333.

four-star hotel. As Mr. Coleman testified, if the Co-Owners were going to sell the land for condominium development, it would not have been to WCD in an exclusive sale but would have been to an experienced developer chosen in a competitive bidding process;

(f) Mr. DeCicco used the Mayor to attempt to obtain concessions for WCD from the Co-Owners;

(g) The Mayor's comment to Micheal Dal Bello that AIMCo was not being a "good corporate citizen" for refusing to accede to her demands was entirely inappropriate. In fact, 156 and AIMCo behaved appropriately throughout the events giving rise to this Inquiry, including with regard to their response to the apparent conflict;

(h) 156/AIMCo had serious concerns regarding the Mayor's application of pressure on the Co-Owners to effect a clean sale at the same time as Peter McCallion had presented himself as a principal of WCD. 156/AIMCo's concerns were entirely reasonable and appropriate in the circumstances. They sensed an apparent conflict of interest, and an apparent conflict in fact existed;

(i) 156/AIMCo requested that Oxford, as the property manager with day-to-day responsibility over the project, clarify Mr. McCallion's interest in the transaction. In response, Mr. Kitt informed 156/AIMCo that Peter McCallion was "off the file" and no longer involved in the project. 156 and AIMCo relied on this assurance;

(j) There is a significant difference between a mere real estate agent and a principal/owner. One aspect of this difference is quantitative – a principal/owner has a potentially much larger financial interest that an agent, who receives a fee on closing. Another aspect is qualitative – an agent provides services to a company, while a principal/owner controls and has a beneficial, legal and/or proprietary interest in the company. If Peter McCallion was a principal of WCD, as now seems to be the case, the Mayor was seeking concessions for her son's company, not a company that employed his agency services;

(k) Another difference between the positions of real estate agent and principal is unique to the facts giving rise to this Inquiry. Peter McCallion's interest as agent was disclosed to the Co-Owners at the outset – which afforded Mr. Lusk the opportunity, which he exercised, to refuse to pay or reward him. His interest as a principal was not so disclosed and this is what caused the entire problem;

(l) The MCIA provided no assistance to 156/AIMCo regarding the Mayor's apparent conflict of interest. It did not address the Mayor's activities as an advocate or negotiator for WCD. It only addressed her activities at City Council, which were not an issue from 156 or AIMCo's perspective;

(m) Mr. Kitt's observation to Michael Nobrega that Tony DeCicco was using the Mayor but Mr. Kitt could not call her on it because her son, Peter McCallion, was involved was accurate but was not shared with 156/AIMCo by anyone; and

(n) The message to 156/AIMCo that Peter McCallion was "off the file" coming as it did from OMERS/Oxford, who were obliged to inform 156/AIMCo of such facts, was reasonably relied upon by 156 and AIMCo.

PART IV - TERMINATION OF THE WCD TRANSACTION, THE SHERIDAN TRANSACTION AND THE LITIGATION WITH WCD

(a) The Termination of the WCD Transaction

103. During the telephone conference between the Co-Owners and their lawyer, Mr. Costin, of December 16, 2008, Mr. Kitt ran through the history of the transaction, explaining that he believed there was a relationship between the Mayor and Mr. DeCicco but that Mr. DeCicco was "in over his head." In his notes of the call, Dean Hansen of AIMCo recorded that Mr. Kitt had reported that Mr. DeCicco was "into" the deal for $3 million and that Mr. DeCicco either wanted the hotel condition removed or an end to the transaction.[148] Mr. Kitt also reported that Mr. DeCicco was claiming to have fulfilled the hotel condition in APS by entering into a hotel management agreement with Mr. Gupta of Easton's. The Co-Owners agreed that because of the holidays and a request to meet with the Mayor, they would provide Mr. DeCicco until January 9, 2009 to fulfill the outstanding hotel management obligations.[149] In a letter delivered later that day, Mr. Costin on behalf of the Co-Owners wrote to Ms. Bianchini and provided the extension and requested a copy of the hotel management agreement:

> In order to provide your client an opportunity to finalize these arrangements and without prejudice to its rights, our client is prepared to extend the Second Condition Date as it related to the Hotel management agreement to January 9, 2009 in order for your client to provide the required agreement to our client.[150]

104. On behalf of WCD, Mr. DeCicco signed Mr. Costin's letter of January 16, 2008 and agreed to the deadline of January 9, 2009.[151]

105. In response, Ms. Bianchini provided Mr. Costin a copy of the December 15, 2008 letter purporting to confirm the existence of a hotel management agreement between WCD and Easton's.[152] Mr. Costin testified that this letter was "very thin and without any backup"

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[148] Evidence of Dean Hansen (29 July 2010) at pp. 2422-2424; Exhibit 141, Handwritten Notes of Dean Hansen dated 16 December 2008.
[149] Exhibit 141, Handwritten Notes of Dean Hansen dated 16 December 2008.
[150] Exhibit 145, Letter from Abraham Costin to Monica Bianchini dated 16 December 2008, agreed to by Tony DeCicco.
[151] Exhibit 145, Letter from Abraham Costin to Monica Bianchini dated 16 December 2008, agreed to by Tony DeCicco.
[152] Exhibit 113, Confirmation Letter between Tony DeCicco and Steve Gupta dated 15 December 2008 re: Management Agreement dated December 15, 2008.

and that there was no indication of involvement with a four-star flag.[153] In his response to Ms. Bianchini, Mr. Costin spelled out what evidence WCD had to present in order to satisfy the condition in the APS:

> What our client will require by January 9, 2009 is written evidence from the operator as to the international hotel brand which will be operating the Hotel on the Hotel Site and evidence that the operator is a four star or better operator. We also require a copy of the management agreement between World Class Developments Limited and that four star operator. Our client needs to understand the basis on which Eastons Group of Companies, which we understand to be a hotel owner and not a hotel operator, will have a role in this development.[154]

106. On January 8, 2009, just one day prior to the deadline by which WCD had to fulfill the hotel requirements under APS, Ms. Bianchini sent Mr. Costin a letter from Easton's.[155] In this letter dated January 7, 2009, Mr. Gupta wrote the following to Mr. DeCicco:

> Further to our conversation and our letter confirmation dated December 15, 2008, we confirm that Easton's Group of Hotels Inc. intends to manage the hotel on site. Easton's Group of Hotels Inc. is a well established hotel manager for over 20 years. We also confirm that we have spoken to Marriott and they have agreed to allow us to apply for a franchise and carry the Marriott flag at the site. We manage a number of Marriott hotels now.[156]

107. Mr. Costin forwarded this letter to the Co-Owners with this pointed assessment, "I don't think we could have been clearer on what we wanted and this isn't it."[157] During his evidence, Mr. Costin noted his clients also did not think much of Mr. Gupta's January 7 letter, given that no expression of interest from Marriott was provided alongside.[158] When considered in the context of a much more direct indication of interest from Marriott to Mr. Cook at the outset of the transaction, it was clear that little progress had been made by WCD in the interim three years to secure a four-star flag on the site.[159]

108. Prior to taking the position that the APS was terminated as the result of WCD's default of its obligations, the Co-Owners sought further legal advice from Mr. Costin. On January 7,

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[153] Evidence of Abraham Costin (8 July 2010) at pp. 1466-1468.
[154] Exhibit 114, Letter from Abraham Costin to Monica Bianchini dated 23 December 2008.
[155] Exhibit 135, Email from Abraham Costin to John Filipetti, Craig Coleman and Grant Charles dated 8 January 2009, forwarding email from Monica Bianchini dated 8 January 2009.
[156] Exhibit 115, Letter from Steve Gupta to Tony DeCicco dated 7 January 2009 re: World Class Development Hotel Site.
[157] Exhibit 135, Email from Abraham Costin to John Filipetti, Craig Coleman and Grant Charles dated 8 January 2009, forwarding email from Monica Bianchini dated 8 January 2009.
[158] Evidence of Abraham Costin (8 July 2010) at pp. 1471-1472.
[159] Exhibit 136, Letter from Michael J. Beckley (Marriott) to Murray Cook (WCD) dated 23 February 2006; Evidence of Abraham Costin (8 July 2010) at pp. 1549-1551.

2009, Mr. Costin confirmed that the non-satisfaction of the hotel condition alone was sufficient for the APS to be terminated.[160] The Co-Owners also spoke to Mr. Costin to confirm they had no liability in the event they decided to terminate the agreement. In his evidence Mr. Costin explained: "I recall telling them that this was as clear as it gets, in terms of a -- right to terminate but -- but you never know."[161] As a diligent and careful lawyer, Mr. Costin also elaborated that renowned litigator J.J. Robinette of his firm would say, "chances [of success in litigation generally] are never better than 60 percent, so I -- I kind of live by that."[162] Mr. Dal Bello testified that, "Bram's advice was that we were pretty -- in pretty good shape to make the decision we made."[163]

109. On a conference call on January 9, 2009, based on Mr. Costin's advice that their grounds to consider the APS terminated as the result of WCD's default were "as clear as it gets" and that everyone was "on side," the Co-Owners agreed that Mr. Costin should send a letter to Ms. Bianchini indicating their position.[164] Pursuant to his instructions, Mr. Costin set out the Co-Owners' position to Ms. Bianchini as follows:

> Our clients have not been provided with the evidence required by Section 4.1(e)(iii) of the Purchase Agreement (the "Condition"). We do not accept your position that the Condition has been satisfied and my clients are not prepared to waive the Condition. Accordingly, the Purchase Agreement is at an end pursuant to Section 4.3 of the Purchase Agreement. […]
>
> Our clients do not accept that Easton's Group of Companies (or Easton's Group of Hotels Inc.) is a four star or better operator. You have provided no evidence of this and our clients' research indicates that the hotels it manages are not four star hotels.
>
> You have also provided no evidence that the Hotel will meet the criteria set out in the Purchase Agreement other than a letter by your client and Easton's saying it will. That is not reasonable evidence of the fact as required by the Purchase Agreement. You have said that Marriott has agreed to allow Easton's to apply for a franchise and carry the Marriott flag at the Hotel site. You must know that Marriott has a full range of hotels running from economy hotels to luxury hotels. You have not provided any evidence that the Marriott flag will be for a four star hotel having the attributes required by the Purchase Agreement.[165]

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[160] Exhibit 137, Emails between John Filipetti, Craig Coleman, Grant Charles and Abraham Costin dated 7 January 2009 re: FW: WCD; Evidence of Abraham Costin (8 July 2010) at p. 1552.
[161] Evidence of Abraham Costin (8 July 2010) at p. 1555.
[162] Evidence of Abraham Costin (8 July 2010) at p. 1593.
[163] Evidence of Micheal Dal Bello (29 July 2010) at p. 2295.
[164] Exhibit 138, Handwritten Notes of Dean Hansen dated 9 January 2009.
[165] Exhibit 117, Letter from Abraham Costin to Monica Bianchini dated 9 January 2009.

110. Although Mr. Costin took steps to return WCD's refundable deposits to Ms. Bianchini, she would not accept the funds.[166]

111. In the aftermath of the termination of the APS by virtue of WCD's default, the Co-Owners attended a cordial meeting with the Mayor in her office on January 12, 2009 for approximately 30 minutes. Present at the meeting were Craig Coleman of 156, Micheal Dal Bello of AIMCo, John Filipetti and Michael Kitt of Oxford and the Mayor. At the meeting, the Mayor discussed in a general way the need for more city building and strengthening the Co-Owners' relationship with the City. The Mayor made a single brief comment that it was unfortunate the way the WCD transaction had turned out and that she felt sorry for Mr. DeCicco but that she understood business.[167]

(b) What the Co-Owners Did Not Know about WCD: The Easton's Side Letter and Mr. DeCicco's Attempts to Flip the Land

112. Based on the foregoing, the evidence is clear that the Co-Owners' decision was made in good faith, based on the clear lack of reasonable evidence that WCD had failed to meet its conditions regarding a hotel management agreement with a four-star operator and international chain. However, that is not the full extent of the issue. This Inquiry has also heard extraordinary evidence about things occurring at WCD about which the Co-Owners were not aware at the time. This evidence has validated the view of both OMERS/Oxford and 156/AIMCo that WCD under Tony DeCicco would never develop and had no plans to develop a four-star hotel.

113. Although WCD would later disclose its Management Agreement with Easton's dated December 15, 2008 (the "**Easton's Agreement**")[168] during the course of the litigation with the Co-Owners, it never provided a copy to the Co-Owners during the life of the APS. Mr. Costin explained that Ms. Bianchini expressed concerns over confidentiality, but having reviewed the Easton's Agreement, there were only a few financial terms that could be

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[166] Evidence of Abraham Costin (8 July 2010) at p. 1592.
[167] Evidence of Micheal Dal Bello (29 July 2010) at pp. 2315-2316, 2396-2397; Evidence of Craig Coleman (11 August 2010) at pp. 2845-2846.
[168] Exhibit 134, Management Agreement between Easton's and WCD, Affidavit of Suresh (Steve) Gupta sworn 27 August 2009, Exhibit "D", pp. 227-261.

considered confidential and those could have been redacted. Mr. Costin even offered to accept a redacted management agreement, but WCD refused.[169]

114. Mr. DeCicco claimed he never provided a copy of the Easton's Agreement to the Co-Owners because the Co-Owners did not give him a clear and unequivocal answer regarding what they would require in order for WCD to satisfy the hotel condition.[170] However, the evidence is clear that Mr. Costin requested a copy of the Management Agreement and this request was denied.

115. In any event, on its own, the Easton's Agreement could not have fulfilled the condition because, as Mr. Costin made clear to Ms. Bianchini, the Co-Owners had no evidence that Easton's was a four-star or better operator nor were they provided with evidence of a commitment from an international hotel chain to allow Easton's or WCD to fly a four-star brand at the site. Mr. DeCicco called this a "chicken-and-egg" situation. The hotel brand was unwilling to commit to anything until the site was developed.[171]

116. Although Mr. DeCicco had to disclose the status of his search for a hotel operator to purchase extensions from the Co-Owners, he did not disclose that at his first meeting with Mr. Gupta, Mr. Gupta told him: (a) he did not operate four-star hotels, and (b) he had no interest in a four-star hotel on the site.[172] In fact, as the result of his discussions with many hotel operators, Mr. DeCicco learned, but never disclosed to the Co-Owners, that "Nobody wanted to operate a four-star hotel at this location."[173]

117. Pursuant to its terms, the Easton's Agreement came into force on December 15, 2008, the day it was executed. It would continue through the development phase of the hotel until the end of the first five years of operation of the hotel, at which time, it was renewable by Easton's for two further five-year terms.[174] The provision dealing with termination of the Easton's Agreement was set out in Article 15, which permitted either party to terminate only

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[169] Evidence of Abraham Costin (8 July 2010) at pp. 1473, 1594-1595.
[170] Evidence of Tony DeCicco (17 August 2010) at pp. 3661-3663.
[171] Evidence of Tony DeCicco (17 August 2010) at pp. 3663, 3664-3665; Exhibit 118, Memorandum to File from Monica Bianchini dated 9 January 2009 re: World Class Developments.
[172] Evidence of Tony DeCicco (17 August 2010) at pp. 3605, 3647.
[173] Evidence of Tony DeCicco (17 August 2010) at p. 3602.
[174] Exhibit 134, Management Agreement between Easton's and WCD, ss. 7.1 & 7.2, p. 10, Affidavit of Suresh (Steve) Gupta sworn 27 August 2009, Exhibit "D", p. 235.

in the event of a specifically enumerated default by the other.[175] As the Easton's Agreement further contained an "entire agreement" clause, anyone reading it would understand that it had come into force on December 15, 2008 and it could only be terminated before the end of its term in the event of an enumerated default.

118. Notwithstanding the above, Mr. Gupta and Mr. DeCicco negotiated standstill and termination provisions extraneous to the Easton's Agreement (the "**Easton's Side Agreement**"). Executed on December 15, 2008 – the same day that the Easton's Agreement was signed – the Easton's Side Agreement provided the Easton's Agreement would not be in force and could be terminated on very short notice by either party without cause. The Easton's Side Agreement stated:

> Further to our discussions and negotiation over the last year, we confirm the following:
>
> 1. The parties are not obliged 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 notice. Upon delivery of the Notice of Termination, both parties will be released of all their obligations under the Management Agreement.[176]

119. Therefore, notwithstanding the provisions of the Easton's Agreement which stated it was in force and could not be terminated before the end of its long term unless a party was in default, the Easton's Side Agreement provided the Easton's Agreement was not yet in operation and moreover could be terminated without consequence and without cause on the provision of seven days of notice. Effectively, it rendered the Easton's Agreement useless. Although the Co-Owners and WCD did enter into litigation over the APS, as will be discussed later in these submissions, the existence of Easton's Side Agreement was not disclosed to the Co-Owners until well into the hearing of the evidence in this Inquiry. When presented with a copy of the Easton's Side Agreement during his testimony before the

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[175] Exhibit 134, Management Agreement between Easton's and WCD, Article 15 Termination, pp. 25-27, Affidavit of Suresh (Steve) Gupta sworn 27 August 2009, Exhibit "D", pp. 250-253.
[176] Exhibit 401, Letter Agreement between World Class Developments Limited and Eastons Group of Companies dated 15 December 2008 re: Management Agreement dated December 15, 2008.

Inquiry, Mr. Coleman's assessment was: "Well, obviously then the management agreement wouldn't -- doesn't hold much weight."[177]

120. The Easton's Side Agreement was executed at the request of Mr. Gupta.[178] Mr. Gupta explained that he typically did not seek such short termination provisions because, unlike the "uncertain" deal he had struck with WCD, his "other deals were very definite."[179] Lawyer Emilio Bisceglia, who acted for and invested in WCD, drafted the Easton's Side Agreement. He maintained that the Easton's Side Agreement did not affect the Easton's Agreement or the December 15, 2008 letter confirming the parties had entered into the Easton's Agreement. Mr. Bisceglia testified that the Easton's Side Agreement was a reasonable request from Mr. Gupta, given the uncertainty related to the WCD project.[180]

121. Mr. DeCicco maintained that the Easton's Side Agreement "did not weaken anything, because at the end of the day there was a lot of work still to do… on the four-star hotel. We needed a brand. The brand needed to approve it."[181]

122. Notwithstanding Mr. Bisceglia's denial[182] and Mr. DeCicco's position, the fact that the Easton's Side Agreement was signed the very same day as the Management Agreement makes it appear that it was executed as a separate document to keep the Co-Owners from discovering that the Management Agreement could be terminated on short notice with no consequence.

123. When Mr. Gupta requested the ability to exit his arrangement with WCD without consequence, Mr. DeCicco and Mr. Bisceglia insisted that both parties be accorded the ability to terminate.[183] One reason Mr. DeCicco would have wanted the termination provision in the Easton's Side Agreement to be mutual was that it would have assisted him in his efforts to "flip" the lands to another purchaser.

124. Although unknown to the Co-Owners at the time, and notwithstanding that WCD did not own the lands and was obliged under the APS to develop a four-star hotel on the site, Mr.

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[177] Evidence of Craig Coleman (11 August 2010) at p. 2843.
[178] Evidence of Tony DeCicco (17 August 2010) at p. 3663; Evidence of Steve Gupta (16 September 2010) at pp. 4749-4750.
[179] Evidence of Steve Gupta (16 September 2010) at pp. 4747-4748, 4762.
[180] Evidence of Emilio Bisceglia (14 December 2010) at pp.5508- 5510.
[181] Evidence of Tony DeCicco (17 August 2010) at p. 3664.
[182] Evidence of Emilio Bisceglia (14 December 2010) at p. 5548.
[183] Evidence of Steve Gupta (16 September 2010) at p. 4750.

DeCicco had been attempting to sell the lands to another buyer for some time. In cross-examination, Mr. DeCicco admitted that if he had his choice, the APS would have been a much "cleaner" deal without the hotel condition. A key consideration for Mr. DeCicco was that the Co-Owners' predecessor, Hammerson PLC ("**Hammerson**") had pre-paid parkland fees, which led to a credit of $7,100 per unit, up to 2,055 units. Mr. DeCicco testified that this led WCD's consultant, Barry Lyon, to assign a value of $50 million to the land that WCD was paying approximately $15 million for under the APS.[184] Mr. DeCicco admitted that one option for him would have been to close the APS with the Co-Owners and then turn around and sell the land to a third party, capitalizing on the "hidden value" in the pre-paid parkland fees.[185]

125. One attempt to sell the land was Mr. DeCicco's effort to sell the Hotel Site to Mr. Gupta. Mr. Gupta refused Mr. DeCicco's offer to purchase that parcel for $5 million because he only operated 3- and 3.5-star hotels and did not think he could obtain the room rates to develop a four-star hotel on the site.[186] Mr. Gupta explained that he was interested in purchasing the land but thought Mr. DeCicco's $5 million offer was "outrageous."[187]

126. Mr. DeCicco also engaged in discussions with a well-known developer, Minto Group Inc. ("**Minto**"). In an email exchange with Ernst & Young on September 11, 2008, Mr. Bisceglia indicated that WCD would be prepared to sell the south block (inclusive of the Hotel Site) to Minto for a purchase price of approximately $22.5 million.[188] Although Mr. DeCicco now claims the negotiations with Minto were for the mere purpose of "gathering information,"[189] this explanation is not credible. In the email to Ernst & Young, Mr. Bisceglia represented that he had "met with Tony" and "IF THEY [Minto] WANT TO PROCEED THEN WE CAN GO TO THE OFFER STAGE."[190]

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[184] Evidence of Tony DeCicco (18 August 2010) at pp. 3780-3782, 3785; Exhibit 624, Summary of the Omers Sale to Worldclass Developments.
[185] Evidence of Tony DeCicco (18 August 2010) at p. 3786.
[186] Evidence of Tony DeCicco (18 August 2010) at p. 3764; Exhibit 626, World Class Developments Limited Hotel Term Sheet.
[187] Evidence of Steve Gupta (16 September 2010) at pp. 4717-4718.
[188] Exhibit 561, Emails between Emilio Bisceglia and Ray Drost dated September 10-11, 2008 re: FW: WCD.
[189] Evidence of Tony DeCicco (18 August 2010) at p. 3812.
[190] Exhibit 561, Emails between Emilio Bisceglia and Ray Drost dated September 10-11, 2008 re: FW: WCD (emphasis in original).

127. Although Mr. DeCicco rejected Commission Counsel's suggestion that he was attempting to "flip" the lands on the basis that "flipping" involved selling the land before the seller even owned it,[191] that was precisely what he was doing. His efforts to sell the Hotel Site to Mr. Gupta and the South Block to Minto in this regard illustrate that Mr. DeCicco had no intention of ever developing the four-star hotel required by the APS and desired by the Mayor. For her part, the Mayor explained why she was pressuring the Co-Owners to relax conditions in favour of WCD at Mr. DeCicco's request:

> Q: And what were you trying to achieve by making that call?
>
> **A: Well, to give WC[D] another opportunity to pursue what they were -- that I was assured they were pursuing in a very -- Tony was doing in a very intense way to get a hotel agreement because he knew that was the deal. No hotel, no deal**.[192]

128. When considered in the context of his efforts to flip the land, Mr. DeCicco's enlisting of the Mayor to pressure the Co-Owners to drop the hotel condition may be seen as a deliberate manipulation of the Mayor. Mr. Kitt's assessment that, "I don't trust the buyer, and there is no doubt they are using Hazel in this process, but it is difficult to tell her that, especially with her son involved,"[193] was, although undisclosed to anyone except Mr. Nobrega, extremely accurate.

(c) The Sheridan Transaction

129. When the Co-Owners made the decision to treat the APS as terminated on January 9, 2009, they had no alternative purchaser for the lands. In March of 2009, Sheridan College Institute of Technology and Advanced Learning ("**Sheridan**") issued a Request for Proposals for the development of a campus in Mississauga (the "**Sheridan RFP**").[194] The Co-Owners considered a Sheridan campus on the lands to be a good use of the lands, given it would bring several thousand students across the street from Square One.[195] As Michael Latimer noted, apart from complimenting Square One, a college campus also fit with the City's vision to build a real downtown in the City Centre. In his estimation, hotels, university campuses and

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[191] Evidence of Tony DeCicco (18 August 2010) at pp. 3785-3786.
[192] Evidence of Hazel McCallion (20 September 2010) at p. 4942.
[193] Exhibit 144, Email from Michael Kitt to Michael Nobrega dated 14 December 2008 re: Hazel – Sq 1 Lands.
[194] Evidence of Michael Kitt (19 August 2010) at p. 4067.
[195] Evidence of Craig Coleman (11 August 2010) at pp. 2846-2846.

condominiums were the type of developments that go into making a vibrant downtown.[196] Edward Sajecki, Mississauga's Commissioner of Planning and Development, noted that the City had sought to attract a university to the City Centre.[197] In addition to permitting a hotel development, the lands were zoned to permit a university campus, such as Sheridan.[198]

130. The Co-Owners submitted their proposal in response to the Sheridan RFP on April 15, 2009.[199]

131. Initially, Sheridan had planned to purchase land and develop the campus itself. By June of 2009, the Co-Owners were informed that Sheridan had come up short on provincial funding. As a result, the City of Mississauga indicated it was willing to purchase the land and lease it back to Sheridan for 99 years for a nominal fee.[200] City Solicitor Mary Ellen Bench explained that Sheridan was relying on federal and provincial infrastructure funding, as well as its own sources to finance the land purchase and development. When Sheridan approached Mississauga to contribute, the City decided it would prefer instead to purchase the land for the project and lease it for a nominal $2 annual charge, which would provide the City with additional control over the project to ensure the campus was developed on the land.[201]

132. From the perspective of the Co-Owners, as long as the purchase price remained the same and use of the land remained appropriate, it was irrelevant whether it was the City or Sheridan who took title to the lands.[202]

133. The Co-Owners disclosed to Mr. DeCicco that they were considering selling the land to another purchaser. They did so because Mr. DeCicco was taking the position that the APS remained in effect. In this regard, WCD had filed an appeal to the Ontario Municipal Board (the "**OMB**") regarding the planning process. While Mr. DeCicco takes the position that the OMB appeal was launched because of "genuine issues with the City,"[203] WCD had not even

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[196] Evidence of Michael Latimer (28 July 2010) at p. 2211.
[197] Evidence of Edward Sajecki (8 July 2010) at p. 1390.
[198] Evidence of Bram Costin (8 July 2010) at p. 1483; Exhibit 118, Oxford Proposal for Sheridan Mississauga Campus dated 15 April 2009, p. 6.
[199] Exhibit 118, Oxford Proposal for Sheridan Mississauga Campus dated 15 April 2009.
[200] Exhibit 373, Handwritten Notes of Dean Hansen dated 12 June 2009
[201] Evidence of Mary Ellen Bench (10 August 2010) at pp. 2592-2593.
[202] Evidence of Craig Coleman (11 August 2010) at p. 2848.
[203] Evidence of Tony DeCicco (18 August 2010) at p. 3840.

paid the City its outstanding site plan fees.[204] From the City's perspective, City Solicitor Mary Ellen Bench, a reasonable and careful lawyer, assessed WCD's OMB appeal as frivolous:

> Q: So that it was meant to -- to allow WCD to deal with the vendor of the land in some way, was that part of it?
>
> **A: That part of it we learned kind of later on as matters progressed. We weren't really sure what was happening at the time. We just -- there was no substance to what they were appealing because we didn't have the details, so it seemed very strange to us that they would be appealing. If anything, the City should be the one who was offended by the process.**
>
> Q: So that part of this seemed to be to be a way to stall or slow down the approval process from the point of view of site plan approval?
>
> **A: It seemed like that. We thought the appeal was -- was frivolous.**[205]

134. The Co-Owners' disclosure of a potential sale of the lands was intended to put Mr. DeCicco on notice that he would be responsible for any damages suffered as the result of any ongoing assertion of interest by WCD to the lands.[206] In a letter dated April 30, 2009, Mr. Kitt wrote the following to Mr. DeCicco:

> As you are aware, the Agreement of Purchase and Sale (the "PSA") originally entered into on January 31, 2007 by OMERS Realty Management Corporation and 156 Square One Limited, collectively, as Vendor and World Class Developments Limited, as Purchaser, has been terminated due to the failure of the Purchaser to satisfy certain of the conditions set forth therein in advance of closing.
>
> We are aware, however, that the Purchaser continues to act as though the PSA has not been terminated. It has refused to accept a return of the Deposit and continues to pursue site plan approval with the Ontario Municipal Board.
>
> Given the Purchaser's continued course of action, we have elected to notify you, as a courtesy, that the Vendor is in discussions with a specific purchaser for the Property and may enter into an agreement for its sale. This represents a unique opportunity for the Vendor to sell to a specific purchaser, that is unlikely to be replicated in future.
>
> Accordingly, we plan to take all reasonable commercial steps we deem necessary to market and effect a sale of the Property and, if required, will also take all and any necessary legal action to challenge any interference by World Class Developments Limited in this process, either directly or indirectly. You should be aware that the loss of any opportunity to sell the Property as a result of WCD's course of action to date, or in the future, may result in damages arising in favour of the Vendor, for which WCD will be held fully liable.
>
> We would urge you to discontinue all current actions in respect of the Property and take whatever measures are necessary to ensure that WCD's

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[204] Evidence of Mary Ellen Bench (10 August 2010) at p. 2590; Evidence of Tony DeCicco (17 August 2010) at p. 3626.
[205] Evidence of Mary Ellen Bench (10 August 2010) at pp. 2585-2586.
[206] Evidence of Craig Coleman (11 August 2010) at p. 2847.

> actions or inactions do not encumber or adversely affect the marketability of the Property.[207]

135. Mr. DeCicco's response indicated that he expected to close the APS but he was prepared to engage in without prejudice discussions to resolve the dispute.[208]

136. Following Mr. DeCicco's invitation to open negotiations, the Co-Owners discussed the parameters of a reasonable settlement with WCD amongst themselves. Since the execution of the APS, WCD had provided the Co-Owners with $1.5 million in deposits, $750,000 of which were refundable and the other $750,000 of which were non-refundable. Since receipt from WCD, these refundable and non-refundable deposits had sat in McCarthy Tétrault's interest-bearing trust account. When the Co-Owners made the decision to treat the APS as terminated, they offered to return the refundable deposits, which WCD rejected.[209] On May 14, 2009, the Co-Owners made the joint decision to offer Mr. DeCicco the return of WCD's refundable deposits and $250,000 of the non-refundable deposits, with the expectation that this would open up reasonable negotiations.[210]

137. During these discussions, Mr. Coleman noted to Mr. Kitt that "we [156/AIMCo] would be willing to give back all of the non-refundable money to make this go away."[211]

138. The Co-Owners' offer to return WCD's refundable deposits plus $250,000 in non-refundable deposits was made by Gawain Smart, Vice-President, Legal of Oxford. In his letter, marked without prejudice, Mr. Smart wrote:

> As we have previously offered, the Vendor proposes to return to WCD the refundable deposit, in the amount of $750,000. In addition, we also propose to return $250,000 of the non-refundable deposit. In return, you and WCD will agree to forever release any and all claims that you or your affiliates may now or in the future have with respect to the PSA. […]
>
> We intend to notify Sheridan that we will know within ten (1) days from the date of this letter whether we have either reached a conclusion with you and WCD on this matter or whether we will be required to enter into litigation proceedings. […]
>
> In the event we do not timely receive the Release by the Offer Deadline, as we have previously noted, we will commence whatever action we believe

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[207] Exhibit 120, Letter from Michael Kitt to Tony DeCicco dated 30 April 2009.
[208] Exhibit 121, Letter from Tony DeCicco to Michael Kitt dated 5 May 2009.
[209] Evidence of Abraham Costin (8 July 2010) at pp. 1560-1561.
[210] Exhibit 354, Emails between Michael Kitt, Craig Coleman, John Filipetti, Gawain Smart and Awanish Sinha dated 12-14 May 2009 re: Letter to Tony D and WCD – draft.
[211] Exhibit 354, Emails between Michael Kitt, Craig Coleman, John Filipetti, Gawain Smart and Awanish Sinha dated 12-14 May 2009 re: Letter to Tony D and WCD – draft.

> necessary and prudent both against WCD and you personally in order to protect our interests in the Property.[212]

139. Mr. DeCicco's response to Mr. Smart's offer was terse. In a letter dated May 21, 2009, Mr. DeCicco indicated he intended to proceed with the OMB appeal and characterized Mr. Smart's letter as "threatening, insulting, rather abusive, and without merit."[213]

140. On behalf of the Co-Owners, Mr. Kitt went to Mr. DeCicco's banquet hall in Vaughn and made a final attempt to settle the matter on July 15, 2009. He offered Mr. DeCicco the full $1.4 million in refundable and non-refundable deposits, as agreed with Mr. Coleman. Mr. DeCicco stated that he wanted $4 million and the matter did not settle.[214]

141. Mr. DeCicco's settlement position was formally conveyed by Mr. Bisceglia in a letter sent the next day. In the letter, Mr. Bisceglia provided the Co-Owners with two settlement options:

> Option A – The Preferred Option
>
> 1. Our client's preferred option is as follows:
>
> a) Block 9 is dropped from the purchase agreement. The purchase price would be reduced on a pro rata basis […];
>
> b) All deposits, both refundable and non-refundable would be credited to the purchase price; […]
>
> e) All references to restrictions relating to Block 9 including the hotel, letters of credit and option to purchase back would be deleted in its entirety;
>
> f) All references to closing and development approvals by your client and the City are deleted (i.e. there will be no requirement to delete the H or register the site plan prior to closing; […]
>
> Option B – Alternative Option
>
> 2. As an alternative to Option A above, (and not our client's preferred option), our client is prepared to settle this matter on the following basis:
>
> a) Our client obtains a return of all deposits paid both deposits and extension fees (refundable and non-refundable) in the amount of $1.4 million plus accrued interest;
>
> b) Our client is paid the further sum of $2.4 million plus G.S.T.;
>
> c) All monies are paid within 7 days of acceptance; and

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[212] Exhibit 122, Letter from Gawain Smart to Tony DeCicco dated 15 May 2009.
[213] Exhibit 125, Letter from Tony DeCicco to Gawain Smart dated 21 May 2009.
[214] Evidence of Michael Kitt (19 August 2010) at p. 4083.

> d) The Agreement of Purchase and Sale is terminated and the parties execute Mutual Full and Final Releases and appropriate confidentiality provisions contained in the release.[215]

142. The relevant offer contained in Mr. Bisceglia's letter, namely Option B which would have seen the Co-Owners pay WCD $3.8 million (plus interest and taxes) for a release was open for acceptance for one day.[216] Both Co-Owners considered the $4 million ($3.8 million plus interest and costs) offer to be unacceptable.[217]

143. The Co-Owners disclosed their dispute with WCD regarding the termination of the APS to the City and to Sheridan. No one amongst the City, Sheridan, the Co-Owners or their respective legal counsel assigned heightened risk to the issue.

144. As explained in the previous Part of these submissions, before they took the position that the APS was terminated as the result of WCD's failure to meet its obligations regarding the hotel, the Co-Owners sought legal advice from Mr. Costin and were informed that their grounds were "as good as it gets." For his part, Mr. Kitt concurred with Mr. Costin's positive assessment of the Co-Owners' position.[218] Similarly, Mr. Coleman confirmed that 156 and AIMCo were comfortable with their position.[219]

145. On June 22, 2009, counsel for the City, Sheridan and the Co-Owners discussed the WCD issue as it related to the sale of land for the Sheridan campus. By this point in time, Thornton Grout Finnigan LLP ("**Thornton Grout**") had been retained to represent the Co-Owners as litigation counsel. Borden Ladner Gervais LLP ("**BLG**") acted for Sheridan. During the discussion, Deborah Palter of Thornton Grout pointed out to BLG and Ms. Bench that WCD had not brought an injunction and opined that WCD did not have a good case for specific performance of the APS that would result in an interest in the land. Mr. Smart indicated that the Co-Owners were willing to provide an indemnity to the City and Sheridan which would pay their legal fees in the event of a claim by WCD. However, Mr. Smart insisted that the Co-Owners could not be responsible for any consequential damages.[220] At the

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[215] Exhibit 287, Letter from Emilio Bisceglia to Deborah Palter dated 16 July 2009.
[216] Exhibit 287, Letter from Emilio Bisceglia to Deborah Palter dated 16 July 2009.
[217] Evidence of Craig Coleman (11 August 2010) at p. 2858.
[218] Evidence of Michael Kitt (19 August 2010) at p. 4138.
[219] Evidence of Craig Coleman (11 August 2010) at p. 2848.
[220] Exhibit 315, Transcription of Mary Ellen Bench's Handwritten Notes dated 22 June 2009, pp. 10-12; Evidence of Mary Ellen Bench (10 August 2010) at pp. 2639-2645.

end of the meeting, the consensus among counsel for the Co-Owners, the City and Sheridan was that the risk emanating from WCD, if any, was in damages and not in specific performance or other relief that would tie up title to the land or otherwise interfere with the plans of the City or Sheridan.[221]

146. The Agreement of Purchase and Sale between the Co-Owners and the City (the "**Sheridan APS**") was executed on July 20, 2009. The price of the land, payable by the City, in Sheridan APS was $14,908,902.00, which was the same price as in the APS with WCD.[222] Although the Mayor was prepared to negotiate the purchase price directly with Michael Nobrega of OMERS, the Mayor decided not to do so because the Co-Owners' asking price was accepted by Ms. Bench, the City Solicitor, to be market value based on two appraisals.[223] The Sheridan APS had a firm closing date of September 17, 2009.[224]

147. Alongside the Sheridan APS, the Co-Owners provided an indemnity to the City and Sheridan regarding certain liabilities emanating from WCD's position (the "**Indemnity Agreement**"). The scope of the indemnity was limited to direct damages and costs incurred as the result of a claim by WCD in section 1 of the Indemnity Agreement:

> Subject to the terms and conditions hereinafter set forth, the Indemnifier [OMERS Realty and 156] shall indemnify the Indemnified Parties [Mississauga and Sheridan] (including their elected officials, officers, board of governors, administrators, employees and agents) from and against all damages ordered by a court together with related legal fees and disbursements ("Losses"), suffered or incurred by such Indemnified Parties as a result of any claim, demand, action, application, injunction or other court proceeding (each, an "Indemnified Claim") initiated by WCD or its successors or assigns against any of the Indemnified Parties in connection with the First APS and the completion of the transaction of purchase and sale contemplated by the APS, including damages and costs which may be adjudged, assessed or ordered by a court against the Indemnified Parties or any one of them as payable to WCD or its successors and assigns in connection therewith.[225]

148. Section 3 of the Indemnity Agreement excluded any liability for general or consequential losses, including loss of revenues or profits. Also specifically excluded under

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[221] Evidence of Mary Ellen Bench (10 August 2010) at p. 2646.
[222] Exhibit 128, Agreement of Purchase and Sale dated 20 July 2009.
[223] Evidence of Hazel McCallion (21 September 2009) at pp. 4986-4987.
[224] Exhibit 128, Agreement of Purchase and Sale dated 20 July 2009, s. 3.1.
[225] Exhibit 129, Indemnification and Hold Harmless Agreement dated 20 July 2009, s. 1.

the provision were any damages suffered by the City or Sheridan as the result of any reduction or forfeiture of government funding.[226]

149. The City and Sheridan agreed to use the same counsel as the Co-Owners in any litigation initiated by WCD against them, further limiting the Co-Owners potential liability under the Indemnity Agreement. In the event they had to hire their own, separate counsel, section 6 of the Indemnity Agreement capped the Co-Owners' liability for such separate counsel at $500,000.[227]

150. Ms. Bench described the Indemnity Agreement to City Council in her report dated September 8, 2009 as adequately covering the City's exposure arising from the failed WCD transaction:

> Given the potential for claims to arise out of the terminated agreement of purchase and sale entered into between the Owners and WCD, at the time the City and Sheridan College entered into an Indemnification and Hold Harmless Agreement with the Owners. That Agreement provides that in the event of a claim by WCD, the Owners will assume all responsibility for defending such an action, and further provides that in the event that the City or Sheridan College chooses to retain independent counsel, the Owners will contribute that cost up to $250,000 for each party, being Sheridan College and the City. In accordance with the terms of the Indemnification Agreement, the Owners are responsible for indemnifying the City, including elected officials and staff, for any and all damages ordered by a Court together with related legal fees and disbursements.[228]

151. Ms. Bench recommended that the City close the Sheridan APS with the Co-Owners, as agreed.[229]

152. Although Mr. Coleman was initially concerned with the potential for open-ended liability under an indemnity agreement, he was comfortable with the terms of the Indemnity Agreement negotiated by Mr. Smart.[230] Mr. Kitt testified that the Indemnity Agreement did not introduce any further incremental exposure that the Co-Owners did not already have.[231]

(d) The Litigation Between the Co-Owners and WCD

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[226] Exhibit 129, Indemnification and Hold Harmless Agreement dated 20 July 2009, s. 3.
[227] Exhibit 129, Indemnification and Hold Harmless Agreement dated 20 July 2009, s. 6.
[228] Exhibit 327, Corporate Report from Mary Ellen Bench to Mayor and Members of Council dated 8 September 2009, p. 2.
[229] Exhibit 327, Corporate Report from Mary Ellen Bench to Mayor and Members of Council dated 8 September 2009, p. 5.
[230] Evidence of Craig Coleman (11 August 2010) at pp. 2852-2853.
[231] Evidence of Michael Kitt (19 August 2010) at pp. 4082-4083.

153. When the APS was terminated as the result of WCD's default, the Co-Owners felt no urgency to litigate their position because they had no alternative use for the property. The assumption amongst the Co-Owners was that Mr. DeCicco would bring an action and they would respond or the matter would settle without litigation.[232] According to Mr. Kitt, the Co-Owners were only interested in settling with Mr. DeCicco for a return of WCD's $1.4 million of deposits. Moreover, because Mr. DeCicco had not registered a certificate of pending litigation (a "**CPL**") on the land and the City and Sheridan were willing to accept a limited indemnity to protect against any risk from a lawsuit, there was no title impediment to the sale of the lands to the City.[233]

154. On the advice of counsel and in the interest of moving forward, the Co-Owners decided to bring an application on the Commercial List of the Ontario Superior Court of Justice.[234] The Co-Owners' Notice of Application was issued by the Registrar of the Commercial List on July 9, 2009.[235] Ms. Palter of Thornton Grout acted as counsel of record for the Co-Owners. The Notice of Application requested declaratory relief that the APS was properly terminated and was of no force or effect. The relief requested was set out as follows:

> 1. An Order declaring that the agreement of purchase and sale entered into by OMERS Realty Management Corporation ("ORC") and 156 Square One Limited (formerly 1331430 Ontario Inc.) collectively as the Vendor and World Class Developments Limited ("WCD") as the Purchaser, dated January 31, 2007, as amended (the "Agreement") was terminated in accordance with its terms on January 9, 2009;
> 2. An Order declaring that the Agreement is null and void and of no further force and effect whatsoever;
> 3. An Order declaring that the Respondent has no rights or claims against the Applicants or any other party in connection with the Agreement;
> 4. An Order declaring that the Respondent has no rights or claims against the Applicants or any other party in connection with the property that is the subject matter of the Agreement; […][236]

155. In the grounds for the declaratory relief requested, the Co-Owners set out the relevant terms and history of the APS, including the precise wording of section 4.1(e)(iii) of the APS

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[232] Evidence of Abraham Costin (8 July 2010) at p. 1488.
[233] Evidence of Michael Kitt (19 August 2010) at pp. 4084-4086.
[234] Evidence of Michael Kitt (19 August 2010) at p. 4082; Evidence of Craig Coleman (11 August 2010) at p. 2854.
[235] Exhibit 127, OMERS Realty Management Corporation and 156 Square One Limited v. World Class Developments Limited, Notice of Application, Commercial List, Court File No.: CV-09-00008270-00CL.
[236] Exhibit 127, OMERS Realty Management Corporation and 156 Square One Limited v. World Class Developments Limited, Notice of Application, Commercial List, Court File No.: CV-09-00008270-00CL, p. 3.

which contained the hotel condition. Regarding WCD's default of this condition, the Notice of Application set out as follows:

> [C]ounsel for the Applicants confirmed that the Applicants required by January 9, 2009 written evidence from the operator as to the international hotel brand which will be operating the Hotel on the Property and evidence that the operator is a four-star or better operator. Counsel for the Applicants further confirmed that the Applicants required a copy of the Management Agreement between WCD and that four-star operator. Counsel for the Applicants further confirmed that the Applicants required a copy of the Management Agreement between WCD and that four-star operator. It was made clear to WCD that the Applicants needed to understand the basis on which Eastons (which was understood to be a hotel owner and not a hotel operator) would have a role in the development of the Property. The Applicants reserved their right to request further reasonable evidence as to the satisfaction of the Condition in the Agreement.
>
> […]
>
> An executed Management Agreement was not provided. No evidence was provided that Eastons was granted a franchise by Marriott or that Eastons was permitted to carry the Marriott flag at the Hotel site. No evidence was provided that any Marriott flag flying at the Hotel site would be for a four-star hotel having the attributes required by the Agreement.[237]

156. Linda Rothstein and Jean-Claude Killey of Paliare Roland Rosenberg Rothstein LLP ("**Paliare Roland**") acted as counsel of record for WCD in the Commercial List proceedings. On August 28, 2009, Mr. Killey sent Ms. Palter a draft, unissued copy of WCD's Notice of Counter-Application (the "**Draft Notice of Counter-Application**"). In the Draft Notice of Counter-Application, WCD requested a declaration from the Court that the APS remained in force and in effect by virtue of WCD's appeal before the OMB and that the Co-Owners' refusal to accept the evidence provided by WCD regarding the management agreement for the hotel was unreasonable.[238]

157. Regarding WCD's materials Mr. Coleman was only provided with a copy of the Draft Notice of Counter-Application in late August of 2009, which listed three witnesses who would swear affidavits – Mr. DeCicco, Peter McCallion and Mr. Gupta. He was not provided with a copy of Mr. McCallion's, or any other WCD, affidavit.[239] From the Draft Notice of

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[237] Exhibit 127, OMERS Realty Management Corporation and 156 Square One Limited v. World Class Developments Limited, Notice of Application, Commercial List, Court File No.: CV-09-00008270-00CL, pp. 8-9.
[238] Exhibit 379, World Class Developments Limited v. OMERS Realty Management Corporation and 156 Square One Limited, Draft Notice of Application (Counter-Application), pp. 3-4.
[239] Evidence of Craig Coleman (11 August 2010) at pp. 2854-2855, 2860.

Counter-Application, Mr. Coleman was surprised to see that Mr. McCallion's name had reemerged as a WCD witness as he understood Mr. McCallion was "off the file".[240]

158. This Inquiry has heard evidence indicating that Mr. DeCicco had been involved in questionable legal proceedings. As discussed earlier, Ms. Bench assessed WCD's OMB appeal as "frivolous." Mr. DeCicco commenced what he conceded was a "very aggressive"[241] lawsuit in the name of WCD's original investor, Leo Couprie, against WCD's former lawyers, Weir Foulds LLP, and Murray Cook for over $100 million in damages,[242] which was settled by Mr. DeCicco's holding company paying to Mr. Cook $200,000 for his shares.[243] In 2008, Mr. Justice Murray dismissed a claim brought by Mr. DeCicco's company, Endplex Investments Inc. as "frivolous and vexatious", brought in "bad faith" and a misuse of the legal system.[244] However, in the WCD litigation, Mr. DeCicco did not seek a CPL on the Co-Owners' lands as part of WCD's Counter-Application because he had received legal advice not to do so and the exposure of such an interference in the Sheridan transaction would have been too great.[245]

159. Affidavits were sworn by Mr. DeCicco, Mr. McCallion and Mr. Gupta in support of WCD's Counter-Application in late August. In Mr. DeCicco's affidavit, he disclosed the extent of WCD's investment in the project to be $2,650,588.53.[246]

160. Mr. DeCicco's affidavit also suggested it was not reasonable for the Co-Owners to be provided with an actual copy of the Management Agreement because, "WCD was concerned about maintaining the confidentiality of [its] financial terms."[247] Mr. DeCicco omitted that Mr. Costin had offered to accept a redacted copy of the Management Agreement. Moreover, WCD filed a copy of the Management Agreement as an exhibit to Mr. Gupta's affidavit.[248]

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[240] Evidence of Craig Coleman (11 August 2010) at p. 2855.
[241] Evidence of Tony DeCicco (17 August 2010) at p. 3638.
[242] Exhibit 198, Statement of Claim, Leo Couprie v. Weir Foulds LLP and Murray Cook, Ontario Superior Court of Justice File No.: 08-CV-351421PD, p. 4.
[243] Evidence of Tony DeCicco (17 August 2010) at pp. 3638-3639.
[244] *Endplex Investments Inc. v. Derrydale Golf Course Limited*, 2008 CanLII 49330 at paras. 100-105 (Ont. S.C.J.); Evidence of Tony DeCicco (18 August 2010) at pp. 3896-3897.
[245] Evidence of Tony DeCicco (18 August 2010) at pp. 3923-3924.
[246] Exhibit 448, Affidavit of Tony DeCicco sworn 27 August 2009, para. 12.
[247] Exhibit 448, Affidavit of Tony DeCicco sworn 27 August 2009, para. 74.
[248] Exhibit 134, Management Agreement between Easton's and WCD, Affidavit of Suresh (Steve) Gupta sworn 27 August 2009, Exhibit "D", pp. 227-261.

161. In their affidavits, Mr. DeCicco and Mr. Gupta suggested that Easton's is a four-star operator, as required by the APS.[249] However, in his testimony before the Inquiry, Mr. DeCicco conceded that Mr. Gupta told him at their first meeting that he operated only three- to 3.5-star hotels.[250] In cross-examination, he also conceded that a four-star hotel through a single operator such as Easton's was not achievable at the site.[251]

162. In paragraph 9 of Mr. Gupta's affidavit, he indicated that it would be impossible to secure a four-star international flag at that point in the project, "No international hotel brand would grant a franchise for a 4 star hotel without seeing, at the very least, final plans for the hotel building."[252] When counsel for WCD confronted Mr. Dal Bello with that suggestion, he responded as follows:

> Q: Well, can I put it to you simply, sir, that no international hotel brand would grant a franchise for a four-star hotel to a hole – hotel operator without seeing the final plans for the hotel building?
>
> **A: Well, then our purchasers probably should have pushed harder to have that as their term for the agreement.**[253]

163. Mr. Dal Bello's response reflected the problem inherent with WCD's position in the litigation. WCD was trying to maintain the position that it had complied with the APS, while simultaneously explaining why it could not comply. Paragraph 9 of Mr. Gupta's affidavit was a confirmation that WCD could not comply with its contractual obligation.

164. A significant omission from all three affidavits was mention or production of the Easton's Side Agreement. Mr. DeCicco and Mr. Bisceglia contend that it was omitted by mere "oversight."[254] Mr. Bisceglia confirmed that the Easton's Side Agreement had not even been disclosed to Paliare Roland who were acting as WCD's counsel of record on the Application and Counter-Application.[255]

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[249] Exhibit 448, Affidavit of Tony DeCicco sworn 27 August 2009, para. 29; Exhibit 134, Affidavit of Suresh (Steve) Gupta sworn 27 August 2009, para. 4.
[250] Evidence of Tony DeCicco (17 August 2010) at p. 3605.
[251] Evidence of Tony DeCicco (18 August 2010) at p. 3862.
[252] Exhibit 134, Affidavit of Suresh (Steve) Gupta sworn 27 August 2009, para. 9.
[253] Evidence of Micheal Dal Bello (29 July 2010) at p. 2336.
[254] Evidence of Tony DeCicco (17 August 2010) at p. 3665; Evidence of Emilio Bisceglia (14 December 2010) at p. 5512.
[255] Evidence of Emilio Bisceglia (14 December 2010) at p. 5563.

165. Although prepared by Paliare Roland, Mr. Bisceglia did review Mr. Gupta's affidavit and acted as its commissioner. His evidence was that he and the affiants simply forgot about the Easton's Side Agreement.[256] This Inquiry must determine whether this evidence is true.

166. Mr. Gupta claims that he did not even know he was swearing an affidavit for use in litigation.[257] He also maintains that he was not informed by Mr. Bisceglia that he could be cross-examined on the affidavit[258] although Mr. Bisceglia insists that he told Mr. Gupta that he would almost certainly be cross-examined.[259] During his testimony at the Inquiry, Mr. Gupta indicated that he was upset the Easton's Side Agreement had been omitted from his affidavit, but also maintained that he depends on lawyers and could not be expected to "physically read" all of the documents that lawyers put in front of him before signing them.[260]

167. Given the fundamental impact the Easton's Side Agreement had on the strength of the Easton's Agreement, the evidence from Mr. DeCicco, Mr. Bisceglia and Mr. Gupta that its omission from the application materials was an "oversight" is not credible. The Easton's Side Agreement was never produced to the Co-Owners and was further kept from WCD's own litigation counsel because of the harmful effect it would have on WCD's position.

168. In Mr. DeCicco's affidavit, he set out evidence regarding meetings with the Mayor concerning the project, including a tour of an Easton's hotel with the Mayor on March 19, 2008,[261] and the meeting with Mr. Kitt and the Mayor at the Old Barber House on December 15, 2008.[262]

169. In Peter McCallion's affidavit, Mr. McCallion disclosed that he became interested in developing the land on behalf of Leo Couprie in 2004-2005 and had approached Michael Nobrega, CEO of OMERS with his plans.[263] In his affidavit, Mr. McCallion further disclosed that he recruited Murray Cook to negotiate the APS with the Co-Owners.[264]

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[256] Evidence of Emilio Bisceglia (14 December 2010) at p. 5564.
[257] Evidence of Steve Gupta (16 September 2010) at pp. 4760-4761.
[258] Evidence of Steve Gupta (16 September 2010) at p. 4761.
[259] Evidence of Emilio Bisceglia (14 December 2010) at p. 5520.
[260] Evidence of Steve Gupta (16 September 2010) at pp. 4760-4761.
[261] Exhibit 448, Affidavit of Tony DeCicco sworn 27 August 2009, para. 30.
[262] Exhibit 448, Affidavit of Tony DeCicco sworn 27 August 2009, para. 69.
[263] Exhibit 212, Affidavit of Peter McCallion sworn 24 August 2009, paras. 4, 6.
[264] Exhibit 212, Affidavit of Peter McCallion sworn 24 August 2009, para. 9.

170. In the first paragraph of his affidavit, Mr. McCallion swore to the following, "I am one of the principals of World Class Developments Limited ("WCD")."[265]

171. The Court set a date of October 19, 2009 for the hearing of the Co-Owners' application and any counter-application WCD would bring.[266] Mr. Kitt confirmed that if Mr. DeCicco was not willing to consider a return of deposits as the basis for a settlement, there was no need to negotiate any further and he was quite prepared to let the court determine the outcome. He was confident in the outcome.[267] Mr. Coleman was comfortable with the Co-Owners' position in the application.[268] Mr. Dal Bello indicated, "We had a reasonable case and we were prepared to play it out."[269]

(e) Recommended Findings on the Termination of the WCD Transaction, the Sheridan Transaction and the Litigation with WCD

172. Regarding the issues reviewed in Part IV of these submissions, 156 and AIMCo request the following findings:

(a) The Co-Owners' decision to treat the APS as terminated on January 9, 2009 was reasonable and appropriate, made in good faith, was based on WCD's failure to provide reasonable evidence that it could comply with the hotel conditions in the APS, and was made on the basis of sound legal advice that confirmed their position in this regard was as good or clear as it gets;

(b) The meeting between the Co-Owners and the Mayor on January 12, 2009 concerned the development of the City Centre generally, which was an appropriate exchange between the parties. The Mayor made only a brief comment on the WCD transaction to the effect that the way it turned out was unfortunate, which was not improper;

(c) The Easton's Agreement was not disclosed to the Co-Owners by WCD before the termination of the APS despite the Co-Owners' request for a copy before the transaction terminated;

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[265] Exhibit 212, Affidavit of Peter McCallion sworn 24 August 2009, para. 1.
[266] Evidence of Craig Coleman (11 August 2010) at p. 2848.
[267] Evidence of Michael Kitt (19 August 2010) at p. 4085.
[268] Evidence of Craig Coleman (11 August 2010) at pp. 2848, 2857.
[269] Evidence of Micheal Dal Bello (29 July 2010) at p. 2296.

(d) The Easton's Side Agreement was not disclosed to the Co-Owners until this Inquiry;

(e) Whatever weight the Easton's Agreement carried, which was little or none, was nullified by the Easton's Side Agreement. In that regard, Mr. Gupta's commitment to a hotel project in downtown Mississauga was nothing more than a non-binding expression of interest, which did not fulfill WCD's obligations under the APS;

(f) Unbeknownst to the Co-Owners, Mr. DeCicco was planning to re-sell the lands to another developer, hoping to capitalize on the prepaid parkland fees at great profit. Mr. DeCicco did not intend to develop a four-star hotel on the lands;

(g) Given that Mr. DeCicco did not intend to develop the four-star hotel and the Mayor's purported goal was to achieve that hotel, her pressure on the Co-Owners to effect a "clean sale" to WCD was inappropriate;

(h) WCD's OMB appeal was frivolous;

(i) The Sheridan transaction was entered into by the Co-Owners for ordinary commercial reasons. A new Sheridan campus was complimentary and beneficial to Square One and, similar to a four-star hotel, would also fulfill one of the City's aims to enhance the City Centre.

(j) From the perspective of the Co-Owners, the Indemnity Agreement did not result in any further liability to them than that which they already had for potential damages to WCD. Legal costs for representation of the City and Sheridan would not be incurred by the Co-Owners at first instance because the City and Sheridan agreed to joint representation by the Co-Owners' lawyers. If the City and Sheridan were required to retain their own lawyers because of a divergence of interest, the legal fees for which the Co-Owners would be responsible were capped;

(k) The view that the Co-Owners' position in the litigation was strong was shared by everyone involved the project at OMERS/Oxford and 156/AIMCo. It was also shared by the Co-Owners' lawyers (Thornton Grout) the City Solicitor

(Ms. Bench) and the lawyers for Sheridan (BLG), who agreed to accept the limited Indemnification Agreement;

(l) Based on legal advice, WCD did not seek a CPL on the lands or take other steps to interfere with the Sheridan transaction because the risk of liability of so doing was too high;

(m) WCD's Counter-Application against the Co-Owners did not claim any interest in the land. There was no CPL registered on title nor did the City or Sheridan perceive any threat of WCD interfering with their taking title to the lands;

(n) In July of 2009, WCD made an offer to settle for payment of $3.8 million plus interest and taxes (a total of approximately $4 million) by the Co-Owners. This offer was rejected by OMERS/Oxford and 156/AIMCo;

(o) In his affidavit in the litigation, Mr. DeCicco stated that WCD's investment in the project was approximately $2.7 million; and

(p) The Easton's Side Agreement was deliberately omitted from WCD's affidavit materials and further, was not even disclosed to its own litigation counsel, Paliare Roland because it completely undermined WCD's position in the litigation.

PART V - THE SETTLEMENT OF THE LITIGATION

(a) Mr. DeCicco's Thinly Veiled Threat to the Mayor

173. Before WCD's litigation materials were completed in the summer of 2009, Mr. DeCicco gave the Mayor what he called a "courtesy call" to make her aware of the proceedings. He specifically informed her that there would be affidavits filed and that her name would be appearing in them.[270] Although Mr. DeCicco denied it,[271] putting the Mayor's name into his affidavit in combination with Peter McCallion stating his principal/proprietary interest in WCD was clearly an attempt to politicize a commercial dispute. In so doing, Mr. DeCicco likely calculated that the potentially explosive political ramifications would result in a more favourable outcome for himself. Such a crisis also had the potential to result in a faster settlement, which would avoid having to disclose the Easton's Side Agreement during the course of the litigation, which Mr. DeCicco conceded would occur.[272]

174. Peter McCallion appeared to have understood the implications. In scheduling an appointment to swear his affidavit, Mr. McCallion indicated that he would do so only "after Tony and My Mother have a chance to discuss it."[273]

175. The Mayor's measured response to Mr. DeCicco's courtesy call was, "[Y]ou do what you need to do."[274]

(b) The Mayor Involves David O'Brien

176. On July 7, 2009, the Mayor attended a dinner held at a golf tournament organized by TACC Construction Ltd. ("**TACC**") and Arista Homes (the "**TACC Golf Tournament**") with her son, Peter McCallion.[275] At the dinner, the Mayor spoke to David O'Brien about issues she was encountering with Oxford regarding the Sheridan transaction. According to Mr. O'Brien, these issues included the City's negotiation of the Sheridan APS with Oxford, land contamination and the outstanding issue of WCD.[276] Although the Mayor denied asking

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[270] Evidence of Tony DeCicco (18 August 2010) at p. 3695.
[271] Evidence of Tony DeCicco (18 August 2010) at pp. 3700-3701.
[272] Evidence of Tony DeCicco (17 August 2010) at p. 3665.
[273] Exhibit 700, Emails between Peter McCallion to Emilio Bisceglia dated 20-21 August 2009.
[274] Evidence of Tony DeCicco (18 August 2010) at p. 3695.
[275] Exhibit 673, Mayor's Journal Summary for 7 July 2009, p. 2; Evidence of Hazel McCallion (21 September 2010) at pp. 4992-4994.
[276] Evidence of David O'Brien (11 August 2010) at pp. 2921-2923.

Mr. O'Brien to get involved in the WCD dispute, she did concede that she might have discussed the WCD issue with him at the dinner.[277]

177. Mr. O'Brien is the former City Manager of Mississauga. By 2009, however, Mr. O'Brien was serving on OMERS' board of directors.[278] Mr. O'Brien is also very close to the Mayor and a trustee of her family trust of which Peter McCallion is a beneficiary.[279]

178. Having been appraised of an issue regarding WCD at the TACC Golf Tournament by the Mayor, Mr. O'Brien asked Peter McCallion, whom he understood to be involved in WCD, to arrange a meeting to discuss WCD.[280] As a result, a few days later, Mr. O'Brien met with Mr. McCallion and Tony DeCicco over breakfast at the Sunset Grill in Mississauga.[281] At this meeting, Mr. O'Brien claims to have been "gathering information" from Mr. DeCicco about WCD while Peter McCallion sat there without speaking.[282] According to Mr. DeCicco, Mr. O'Brien was not on a fact-finding mission but specifically explained that he attended the meeting to attempt to settle the dispute between WCD and the Co-Owners, although Mr. DeCicco could not recall on whose behalf Mr. O'Brien was speaking.[283] Mr. O'Brien recalled Mr. DeCicco requesting $10 million as settlement from the Co-Owners, which he did not take seriously,[284] but Mr. DeCicco claims he did not make an offer to settle because he wanted the lands.[285] As explained previously, however, Mr. DeCicco did make an offer to settle for $3.8 million plus interest and taxes through Mr. Bisceglia shortly after his meeting with Mr. O'Brien.

179. Mr. O'Brien reported on his meeting with Mr. DeCicco to Mr. Latimer of Oxford.[286]

(c) "Concern with Conflict": Mr. O'Brien Reads WCD's Affidavits

180. WCD served its affidavits on Thornton Grout in late August. Mr. Latimer provided a copy of Peter McCallion's affidavit to Mr. O'Brien, who after reading it became concerned

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[277] Evidence of Hazel McCallion (21 September 2010) at pp. 4993-4994.
[278] Evidence of David O'Brien (11 August 2010) at pp. 2919-2921.
[279] Evidence of David O'Brien (11 August 2010) at p. 2945.
[280] Evidence of David O'Brien (11 August 2010) at p. 2925.
[281] Evidence of David O'Brien (11 August 2010) at p. 2925-2926.
[282] Evidence of David O'Brien (11 August 2010) at p. 2926.
[283] Evidence of Tony DeCicco (18 August 2010) at pp. 3796-3797; Evidence of Tony DeCicco (17 August 2010) at p. 3667.
[284] Evidence of David O'Brien (11 August 2010) at p. 2929.
[285] Evidence of Tony DeCicco (18 August 2010) at p. 3672.
[286] Evidence of David O'Brien (11 August 2010) at pp. 2935-2936; Exhibit 315, Transcription of Mary Ellen Bench's Handwritten Notes dated 3 September, p. 30.

that the Mayor was in a conflict of interest, although he was not aware that she had previously declared a conflict.[287]

181. On August 27, 2009, Mr. O'Brien emailed Michael Nobrega the following:

> Can we talk sometime today. Hazel called me concerning the Oxford issue in Mississauga. She is quite concerned. Could be political issues.[288]

182. By this point in time, Mr. O'Brien had seen Peter McCallion's affidavit.[289] Mr. Nobrega maintained that the Mayor's concern was about soil contamination.[290] Mr. O'Brien, on the other hand explained that the Mayor's concern was about settling the WCD matter because of the potential disruption to the Sheridan transaction. In his testimony, he stated:

> Q: Now, first of all, tell me about what Hazel told you when she called you before you sent this email to Mr. Nobrega.
>
> **A: The -- the issue here revolved around the precarious position of Sheridan College in its evolution in Mississauga. When the WCD -- WCD deal failed and the lands were sold to the City, it was for the express purpose of leasing the lands to Sheridan College. And Sheridan College was taking advantage of the Federal infrastructure funding, and still is for that matter.**
>
> **And if I can go forward a little bit on that scenario. March 2011 is the end date for funding. The government will cease funding these projects at that point in time.**
>
> **And so the start point and the in – the assurance that it would start on time in order to meet that deadline was -- was of critical importance. Her concern there was that, in fact, the litigation that was pending, or the issues that were still unresolved, could cause a delay in that project starting, and, therefore, could cause the potential of it not being completed on time.**
>
> Q: Now, did you ask her what the litigation was? Because, so far, in the chronology you haven't indicated that you knew about any pending litigation.
>
> **A: Well, there was perhaps not litigation, but there was certainly -- it was well known that there was cons -- issues between OMERS and WCD around the development of the land, yes.**[291]

183. On September 3, 2009, in his capacity as the Mayor's friend, Mr. O'Brien called the City Solicitor, Mary Ellen Bench, to discuss outstanding issues regarding the Sheridan transaction. Ms. Bench testified and her notes of the conversation record that Mr. O'Brien told

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[287] Evidence of David O'Brien (11 August 2010) at pp. 2931-2932.
[288] Exhibit 404, Emails between David O'Brien and Michael Nobrega dated 27 August 2009.
[289] Evidence of David O'Brien (11 August 2010) at p. 2985.
[290] Evidence of Michael Nobrega (16 August 2010) at p. 3143.
[291] Evidence of David O'Brien (11 August 2010) at pp. 2983-2984.

her that he had met with Mr. DeCicco and Peter McCallion at the Mayor's request. Mr. O'Brien also reported that he had read WCD's affidavits and had a "concern with conflict."[292] Ms. Bench reported her call from Mr. O'Brien to City Manager Janice Baker in an email later that day:

> I was surprised by a call from Dave O'Brien about [Sheridan College property]. When you have some time maybe we can talk. Peter McCallion filed an affidavit in support of WCD, but hasn't done his mom any favours. I've told Dave to keep her out of anything going on.[293]

184. Mr. O'Brien called Ms. Bench again on September 5, 2009. He reported to Ms. Bench that he had spoken to the Mayor at length regarding WCD and she "agreed to declare a conflict." Ms. Bench recorded in her notes that Mr. O'Brien recognized that it was clear "all along" that the Mayor had a conflict because she had been "actively involved." Ms. Bench also recorded that Mr. O'Brien told her that he would sit down with Mr. DeCicco to see if he could make the dispute "go away."[294]

185. Mr. O'Brien denied telling Ms. Bench he had authority from Oxford or OMERS to negotiate with Mr. DeCicco at this point in time. Instead, Mr. O'Brien contended that he was given authority to settle from Mr. Nobrega one week later.[295] Mr. Latimer and Mr. Nobrega stated that Mr. O'Brien was authorized to become involved in the WCD dispute at an OMERS Investment Committee meeting held on September 8, 2009.[296] Mr. Nobrega maintained that he authorized Mr. O'Brien to negotiate with Mr. DeCicco and engage in "fact finding" but retained for himself ultimate authority over a settlement.[297]

186. Mr. Nobrega testified that he became concerned about the way OMERS/Oxford was handling the Sheridan transaction and WCD. Following his initial discussion with Mr. O'Brien shortly after the email concerning looming "political issues," he spoke to Mr. Latimer. Mr. Nobrega contended that he was "blown away" by what he learned from Mr. Latimer. While they did not discuss the contamination issue, which Mr. O'Brien contends was the reason for his email of August 27, they did discuss WCD. Mr. Nobrega maintained Mr.

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[292] Exhibit 315, Transcription of Mary Ellen Bench's Handwritten Notes dated 3 September, p. 30; Evidence of Mary Ellen Bench (10 August 2010) at pp. 2602-2604.
[293] Exhibit 326, Emails between Mary Ellen Bench and Janice Baker dated 3 September 2009.
[294] Exhibit 315, Transcription of Mary Ellen Bench's Handwritten Notes dated 5 September, p. 31.
[295] Evidence of David O'Brien (11 August 2010) at p. 2936.
[296] Evidence of Michael Latimer (28 September 2010) at pp. 2219-2220.
[297] Evidence of Michael Nobrega (16 August 2010) at pp. 3168-3170.

Latimer was "getting worried" about WCD. From this conversation, Mr. Nobrega concluded that Oxford had "double sold" the lands, once to WCD and then again to the City, which he deemed inappropriate for a pension fund. Mr. Latimer explained that Oxford had provided the Indemnity Agreement to the City and Sheridan. Finally, Mr. Latimer explained that the Sheridan campus development was dependent on infrastructure grants.[298]

187. Around the same time, the Mayor also became concerned with the WCD litigation and her son's affidavit specifically. Having been contacted by Mr. O'Brien about the situation, Mary Ellen Bench obtained a copy of Peter McCallion's affidavit stating he was a "principal" in WCD and was preparing to disclose that fact the to City Council.[299] When the Mayor was informed of the contents of the affidavit by Ms. Bench she was "surprised and shocked" to learn that Mr. McCallion swore to the fact that he was a principal of WCD because, she testified, she always understood that he was only a real estate agent. Mr. McCallion denied to her he was a principal and the Mayor informed him that he had better go get it corrected because this was a "serious matter."[300]

188. After the phone call from the Mayor advising him to correct his affidavit, Mr. McCallion claimed that he called Mr. Bisceglia, who was out of the office at the time, and Mr. Bisceglia instructed his office to prepare a correcting affidavit.[301] Mr. Bisceglia testified that he learned of the request for the correcting affidavit from his office and instructed them not to proceed with it because he believed that Mr. McCallion was, in fact, a principal and owner of WCD.[302]

189. In any event, Mr. McCallion took the correcting affidavit to his mother's personal law firm, Danson Schwarz Recht LLP ("**Danson Schwarz**") to be sworn.[303] This correcting affidavit stated:

> I am preparing this affidavit to amend paragraph 1 of my affidavit sworn on August 24, 2009. The second sentence of paragraph 1 of this affidavit, which

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[298] Evidence of Michael Nobrega (16 August 2010) at pp. 3147-3149; Evidence of Michael Latimer (28 July 2010) at pp. 2217-2218.
[299] Evidence of Mary Ellen Bench (10 August 2010) at p. 2611.
[300] Evidence of Hazel McCallion (21 September 2010) at pp. 5021-5022, 5023.
[301] Evidence of Peter McCallion (27 July 2010) at p. 1865.
[302] Evidence of Emilio Bisceglia (14 December 2010) at pp. 5521-5522, 5527.
[303] Evidence of Peter McCallion (27 September 2010) at p. 1867.

> reads: "I am one of the principals of World Class Developments Limited ("WCD")", is hereby deleted.[304]

190. Danson Schwarz sent a copy of the revision to Mary Ellen Bench without cover letter.[305] According to Mr. McCallion, the revision was not sufficient for the Mayor. His evidence was that the Mayor told him his role "needed to be more clarified."[306] Mr. McCallion had a third affidavit prepared which stated:

> I am preparing this affidavit to amend paragraph 1 of my affidavit sworn on August 24, 2009. The second sentence of paragraph 1 of this affidavit, which reads: "I am one of the principals of World Class Developments Limited ("WCD")", should be deleted because it is not true. I am not a principal of WCD.[307]

191. For her part, although she admitted advising Mr. McCallion to change his first affidavit, the Mayor denied seeing the second or third affidavit or taking issue with the clarity in the second affidavit.[308]

(d) Mr. O'Brien Negotiates the $4 million Settlement with WCD

192. Against the backdrop of the flurry of activity going on as a result of Mr. McCallion's affidavit, Mr. O'Brien – an OMERS board member and close confidant of the Mayor – met with Tony DeCicco at the Delta Meadowvale Hotel on September 10, 2009 and negotiated a $4 million settlement of the litigation with WCD. In similar fashion to their meeting at the Sunset Grill, Peter McCallion arranged and attended the meeting but did not say anything.[309] Mr. Nobrega approved the settlement by phone that evening.[310]

193. The $4 million settlement was negotiated notwithstanding 156/AIMCo had rejected a similar offer from WCD earlier and despite Mr. DeCicco's affidavit which listed WCD's total investment in the APS as $2,650,588.53, although 156 and AIMCo had not yet seen Mr. DeCicco's affidavit at that time. It was also negotiated without 156 or AIMCo's knowledge or consent, as detailed below.

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[304] Exhibit 206, Affidavit of Peter McCallion sworn 11 September 2009, para. 2.
[305] Evidence of Mary Ellen Bench (10 August 2010) at p. 2619.
[306] Evidence of Peter McCallion (27 August 2010) at p. 1868.
[307] Exhibit 207, Affidavit of Peter McCallion sworn 15 September 2009, para. 2.
[308] Evidence of Hazel McCallion (21 September 2010) at pp. 5023-5024.
[309] Evidence of David O'Brien (11 August 2010) at pp. 2947, 3014.
[310] Evidence of David O'Brien (11 August 2010) at p. 2950.

194. In his testimony at the Inquiry, Mr. Nobrega explained the concerns which led to his approval of the $4 million settlement. He thought the Sheridan/WCD issue had the potential to damage OMERS' reputation and decided it needed to be dealt with directly by himself and Mr. Latimer.[311] OMERS had ongoing relationships with large players in the infrastructure field and, as such, Mr. Nobrega decided, apparently without legal advice, that he had a "duty of care" to report Oxford's "double sale" to Infrastructure Ontario.[312] He also perceived, once again apparently without legal advice, that the Indemnity Agreement resulted in open-ended liability for the Co-Owners to the City and Sheridan. In reality, as Mr. Kitt pointed out, the Indemnity Agreement added no further liability to the Co-Owners than that which existed already.[313] Nevertheless, according to Mr. Nobrega, if there were litigation that triggered a claim under the Indemnity Agreement, the infrastructure bureaucrats, advised of the situation by Mr. Nobrega pursuant to his perceived "duty of care", might cut off funding. Such a scenario could endanger the project, for which OMERS would then be liable. While the Indemnity Agreement specifically excluded claims for lost infrastructure funds, apparently Mr. Nobrega's concern was the risk of a "novel claim" being advanced.[314]

195. Mr. Nobrega's risk assessment depended heavily on his perceived "duty of care" to advise infrastructure bureaucrats that OMERS/Oxford's position could result in a delay that would interfere with the project's timetable. It is noteworthy that Mr. Nobrega felt no duty to advise anyone at 156 and AIMCo of his view or that Mr. O'Brien was undertaking negotiations on behalf of the Co-Owners before instructing Mr. O'Brien to proceed, or that Mr. O'Brien had negotiated a $4 million settlement of the litigation, notwithstanding that OMERS/Oxford had the contractual obligation to do so and that all such decisions were to be made jointly.[315]

196. Mr. Nobrega's risk assessment also stood in contrast to the assessment of Mr. Kitt, the Oxford executive with carriage of the file, as well as those of Mr. Coleman of 156 and Mr. Dal Bello of AIMCo – and their lawyers, Thornton Grout – who were all comfortable with their position in the litigation and with the limited scope of the Indemnity Agreement. It also

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[311] Evidence of Michael Nobrega (16 August 2010) at p. 3149.
[312] Evidence of Michael Nobrega (16 August 2010) at pp. 3145-3146, 3166.
[313] Evidence of Michael Kitt (19 August 2010) at p. 4082.
[314] Evidence of Michael Nobrega (16 August 2010) at pp. 3334-3338.
[315] Evidence of Michael Nobrega (16 August 2010) at p. 3313; Evidence of Michael Latimer (28 July 2010) at p. 2250.

contrasted with the assessment of Ms. Bench, counsel for the City, and of BLG, counsel for Sheridan who were prepared to proceed with the transaction on the basis of the Indemnity Agreement.

(e) OMERS/Oxford Disclose the Settlement to 156/AIMCo as a Fait Accompli

197. When Mr. O'Brien and Mr. DeCicco agreed to settle the litigation for $4 million, Mr. O'Brien advised Mr. DeCicco to have his lawyer send over a formal offer to settle in that amount.[316] The formal offer was faxed by Mr. Bisceglia's office to Thornton Grout at 10:19 am on September 11, 2009. It read:

> WCD offers to settle on the following terms:
>
> 1) Omers will pay WCD the sum of $4 million dollars plus GST, all inclusive of the return of deposits paid by WCD, damages, interest and costs ("Settlement Funds") within thirty (30) days of today. The Settlement Funds are to be paid to "Bisceglia & Associates Professional Corporation, in trust."
>
> 2) Upon receipt of the Settlement Funds the parties will consent to an order dismissing the Application and Counter Application without costs. The Ontario Municipal Board proceedings will also be dismissed without costs. […]
>
> 3) Upon receipt of the Settlement Funds, the parties will consent to an order to remove all the Application and Counter Application materials from the court file or to seal the court file. You will prepare, at your client's cost, the motion for same. […]
>
> 4) Upon receipt of the Settlement Funds, the parties will execute and exchange full and final releases. […]
>
> 6) This offer is open for acceptance until 3:00 p.m. today at which time it is withdrawn if it has not been accepted.[317]

198. Gawain Smart forwarded the offer to Mr. Coleman, copying Grant Charles.[318]

199. September 11, 2009 was a Friday. On that day, Mr. Coleman was out of the office during the day and was without Blackberry reception.[319] Mr. Charles received a call from John Filipetti and Gawain Smart of Oxford in which they explained that Oxford would be settling the litigation for $4 million. Mr. Charles sent Mr. Filipetti and Mr. Smart an email confirming that 156/AIMCo had not agreed to their settlement proposal and reported this exchange to Mr. Coleman in an email sent at 3:04 pm:

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[316] Evidence of David O'Brien (11 August 2010) at p. 3021.
[317] Exhibit 382, Fax Cover Sheet and Letter from Emilio Bisceglia to Deborah Palter dated 11 September 2009.
[318] Exhibit 380, Email from Gawain Smart to Craig Coleman dated 11 September 2009 re: FW: WCD Offer.
[319] Evidence of Craig Coleman (11 August 2010) at pp. 2855-2856.

> Craig, just got a call from John [Filipetti] and Gawain [Smart] (2:40 PM) indicating that due to a larger OMERS relationship with the city of Mississauga that they a[re] willing to accept this settlement and OMERS will fund the entire amount, and they will determine what contribution from AIM will be appropriate at a later date. I indicated to them that it was very short notice and that I would not be able to give them an answer on such short notice, but they indicated that they will be proceeding regardless and we'll have to settle the matter between ourselves subsequently.
>
> I also sent the following E-mail just before 3:00 PM, so it was on the record that we have not agreed to anything if the[y] chose to proceed.
>
> Gentlemen, I have not been able to discuss the proposed settlement with our client so I'm not able to confirm that they are agreeable to proceeding on the basis proposed.[320]

200. Around 4 pm, Mr. Coleman acquired Blackberry reception and a number of emails and phone messages popped up.[321] To Mr. Coleman, the settlement came "out of the blue."[322]

201. On his return to the office shortly after, Mr. Coleman had a phone conversation with Mr. Smart at Oxford. Mr. Coleman explained his concerns. Mr. Smart appeared to have been caught off guard by the settlement as well. Mr. Coleman's testimony about this conversation was as follows:

> Q: Did you speak to Mr. Smart about the settlement personally?
>
> **A: Yes.**
>
> Q: Tell us about that discussion.
>
> **A: Well, again, we weren't happy. We were trying to understand why. We were con -- we were concerned about -- we were concerned in that we – we don't know why this settlement happened; we don't know the details of the settlement; we don't know what the impetus to the settlement was; and I relayed all that Gawain, and quite frankly, was concerned that -- we were concerned with our position.**
>
> Q: Did you appreciate that -- that he had been out of the loop in the settlement discussions as well?
>
> **A: It seemed to maybe catch him a bit off guard as well.** [323]

202. Mr. Coleman and Mr. Charles then called Mr. Hansen and Mr. Dal Bello in Edmonton. They explained that OMERS was under pressure from the City of Mississauga had agreed to settle the litigation with WCD for $4 million. Mr. Coleman also reported that Peter McCallion's name had recently popped up again in WCD's Notice of Counter-Application as

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[320] Exhibit 383, Email from Grant Charles to Craig Coleman dated 11 September 2009 re: WCD (emphasis added).
[321] Evidence of Craig Coleman (11 August 2010) at pp. 2855-2856.
[322] Evidence of Craig Coleman (11 August 2010) at p. 2857.
[323] Evidence of Craig Coleman (11 August 2010) at p. 2858.

a witness, notwithstanding Mr. Kitt's previous report that Mr. McCallion was "off the file."[324] Mr. Coleman, at this point, still had not seen Mr. McCallion's affidavit, but was concerned about Mr. McCallion even being mentioned as a witness. Mr. Coleman had the view that the optics of the settlement, coming at the same time as Mr. McCallion's apparent continued involvement in WCD as a witness, could become a media issue. In his notes of the call, Mr. Hansen wrote, "stinks of politics."[325]

203. Mr. Dal Bello testified that the settlement, presented as a *fait accompli*,[326] upset him. He found it "unpalatable" that OMERS/Oxford, who had the obligation to consult with 156/AIMCo on decisions such as this, would agree to such a liability unilaterally. He was also frustrated because he felt that the Co-Owners had a good position in the litigation and AIMCo was not prepared to contribute to a $4 million settlement.[327]

204. Mr. Coleman provided Mr. Smart with the position of 156/AIMCo on the settlement in an email sent at 7:09 pm on September 11, 2009. In that email, Mr. Coleman stated that OMERS/Oxford would be responsible for the entire settlement amount. However, he was prepared to contribute 156's share of the deposits to be used for the settlement, consistent with his position throughout the litigation. The email stated as follows:

> Our position is that we were prepared to go through with the notice of application, as we believed we had a strong position and that the only monies which we have to refund to WCD should be the refundable deposit and not the non-refundable deposit. We were not privy to any agreement or settlement as presented, as such we are of the position that Omers Realty Management Corp (or Affiliates) are responsible for the full cost of the settlement, however we are willing to allow the full deposit monies (both refundable and non-refundable) to be utilized towards any settlement.
>
> We will be preparing some form of acknowledge of the above over the weekend for Oxford/Omers Realty Management Corp to sign Monday morning.[328]

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[324] Evidence of Craig Coleman (11 August 2010) at pp. 2859-2860; Exhibit 296, Handwritten Notes of Dean Hansen dated 11 September 2009. Although Mr. Hansen's notes refer to Peter McCallion as an "expert" witness, he was, in fact, listed as a witness in an affidavit "to be sworn" in WCD's Draft Notice of Counter-Application. Mr. Coleman testified that he had seen only the Draft Notice of Counter-Application by September 11, 2009 and did not see Mr. McCallion's affidavit until the commencement of the Inquiry in October or November of 2009. Evidence of Craig Coleman (11 August 2010) at pp. 2860, 2915; Exhibit 379, World Class Developments Limited v. OMERS Realty Management Corporation and 156 Square One Limited, Draft Notice of Application (Counter-Application), p. 9.
[325] Exhibit 296, Handwritten Notes of Dean Hansen dated 11 September 2009.
[326] Evidence of Micheal Dal Bello (29 July 2010) at p. 2393.
[327] Evidence of Micheal Dal Bello (29 July 2010) at pp. 2296-2297.
[328] Exhibit 384, Email from Craig Coleman to Gawain Smart dated 11 September 2009 re: WCD.

205. Mr. Nobrega responded to Mr. Coleman's email directly to Dr. de Bever, AIMCo's CEO in Edmonton. He wrote:

> Unfortunately, there appears to be a cloud on title to the land on which the business school will be built and a closing of the land is expected late next week. […]
>
> We are in the process of clearing the cloud and I have asked our Oxford personnel to contact AIM to bring them up to date.
>
> In asking the Oxford personnel to clear this apparent cloud, I recognized the risk that AIM would not see it the way that I do and that we would have to underwrite the additional costs – and I accept that responsibility. The e-mail below [from Craig Coleman] confirms that AIM sees it differently that I do but we will proceed to underwrite the additional cost to clear the cloud and let the construction of the business school proceed – and allow the provincial and federal governments to announce in the very near future their contributions to the school. […][329]

206. Dr. de Bever responded to Mr. Nobrega's email as follows:

> Thanks for your note.
>
> I have been briefed on this issue.
>
> I understand that a law suit could bring embarrassment to local players who you would rather keep on your side.
>
> I also understand that law suits are expensive.
>
> The hotel developer did not meet his obligations under our original deal.
>
> Looks like some of the same parties want the new deal to happen.
>
> A few observations:
>
> Making a settlement without our agreement was not wise.
>
> You have broader interests at stake in Mississauga, so I understand why you felt a greater need to compromise.
>
> We are willing to write off the deposit, as indicated.
>
> If you feel that does not reflect a fair outcome, let's discuss it. [330]

207. Dr. de Bever's reference to "local players" being embarrassed referred to the City of Mississauga. The reference to the "same parties want the new deal to happen" was a reference to the City pressing for the Sheridan transaction.[331]

208. Mr. Nobrega replied to Dr. de Bever's email as follows:

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[329] Exhibit 426, Emails between Michael Nobrega and Leo de Bever dated 12 September 2009 re: WCD.
[330] Exhibit 426, Emails between Michael Nobrega and Leo de Bever dated 12 September 2009 re: WCD.
[331] Evidence of Leo de Bever (13 September 2010) at pp. 4277-4278.

> 2. Our interest in Mississauga is mainly Square One; we have only a 10% interest in Enersource which is a minor involvement and would in no way cloud my judgement on what is in the best interest of Square One;
>
> 3. I am not the least concerned about embarrassment of local players in a lawsuit; that did not enter my mind; […]
>
> 5. This deal would die if the cloud is not removed; not a chance that the business school will be built on lands if someone had not decided to move on the issue and attempt to remove the clouds; the govts would step away and the infrastructure grants would be gone.[332]

209. In his evidence, Mr. Nobrega conceded that he should have called Dr. de Bever before the settlement to say "let's close this loop here."[333] However, given the risks that he perceived, which view was not shared by Mr. Coleman, Mr. Dal Bello, Mr. Kitt, Thornton Grout (as counsel for the Co-Owners), Ms. Bench (as counsel for the City) or BLG (as counsel for Sheridan), Mr. Nobrega was willing to accept the risk of OMERS funding the settlement entirely, apart from 156's contribution of its share of WCD's deposits.[334] In his testimony Mr. Nobrega stated, "I think that [my] decision [to settle the litigation for $4 million] stands today as a wonderful decision."[335]

210. 156 and AIMCo did not agree with Mr. Nobrega's assessment.[336] On September 11, 2009, 156 retained independent counsel, John Fingret of Gowling Lafleur Henderson LLP, to represent its interests in relation to OMERS/Oxford's settlement.[337] Mr. Fingret drew up an agreement in which OMERS Realty Management acknowledged that "any settlement with [WCD] will take place without the participation or concurrence of 156 Square One Limited". However, 156 would sign court documents and WCD's deposits were permitted to be used towards the settlement. Pursuant to the OMERS Indemnity, OMERS Realty further provided an indemnity for other proceedings launched "with respect to the payment of monies to WCD."[338]

(f) Mr. Nobrega's Assessment of Peter McCallion: "Not a Person of Interest"

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[332] Exhibit 426, Emails between Michael Nobrega and Leo de Bever dated 12 September 2009 re: WCD.
[333] Evidence of Michael Nobrega (16 August 2010) at pp. 3235-3236.
[334] Evidence of Michael Nobrega (16 August 2010) at pp. 3341-3344.
[335] Evidence of Michael Nobrega (16 August 2010) at p. 3344.
[336] Evidence of Leo de Bever (13 September 2010) at p. 4275.
[337] Evidence of Micheal Dal Bello (29 July 2010) at pp. 2298-2299.
[338] Exhibit 297, Acknowledgement by OMERS Realty Management Corporation and 156 Square One Limited dated 14 September 2009.

211. In agreeing to the $4 million settlement unilaterally, Mr. Nobrega appears not to have taken into consideration 156/AIMCo's previously stated unease over the role of Peter McCallion in WCD. Although informed by Mr. Kitt that Mr. McCallion was off the file, his name reappeared in WCD's Notice of Counter-Application as a proposed witness, although Mr. Coleman was not provided with a copy of Mr. McCallion's affidavit until this Inquiry had commenced.[339] Although Mr. Latimer provided a copy of Mr. McCallion's affidavit to Mr. O'Brien, who passed it along to Mary Ellen Bench at the City, no one provided a copy of that affidavit to Mr. Coleman or anyone else at 156/AIMCo. There was no disclosure to 156/AIMCo that the settlement was negotiated by an OMERS board member who was also a close confidant of the Mayor and whom the Mayor had also asked to become involved in the litigation.[340] There was also no disclosure that Peter McCallion had arranged and attended the settlement discussion with Mr. DeCicco and Mr. O'Brien. This lack of disclosure from OMERS/Oxford is perhaps attributable Mr. Nobrega's assessment that Peter McCallion was "not a person of interest."[341] When crossed-examined regarding the concern that Mr. Kitt had expressed to him previously about the Mayor being "used" by WCD, Mr. Nobrega's response was that such conflicts of interest were the City's concern and not his. His relevant evidence is as follows:

> Q: Please answer my question. Was it not of concern to you, as head of OMERS, that it appeared to Mr. Kitt, an experienced and astute person, that WCD was using the Mayor?
>
> **A: Well, that was his comment, but he also -- I think we should -- we should read the entire email.**
>
> Q: You can answer what --
>
> **A: He said, Leave it -- leave it to me.**
>
> Q: Fine. Was it of personal concern to you, Mr. Nobrega, --
>
> **A: No.**
>
> Q: I'm reading this.
>
> **A: No.**
>
> Q: You -- you were not concerned?
>
> **A: I was not concerned.**
>
> Q: You didn't consider it to be significant?

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[339] Evidence of Craig Coleman (11 August 2010) at pp. 2875-2876.
[340] Evidence of David O'Brien (11 August 2010) at p. 3051.
[341] Evidence of Michael Nobrega (16 August 2010) at pp. 3242-3243.

A: Because Peter -- Peter McCallion was not a person of interest to me. I've said that before.

Q: Yes, you have, and I'm going to ask the question again. Was it not of concern to you that Peter McCallion, who was involved in WCD -- that's also in the email -- that WCD was using the Mayor in Mr. Kitt's estimation?

A: I would say no.

Q: And what would you say to this: It's apparent on the face of this email, in accordance with Mr. Kitt's observations, that there is a serious prospect of significant conflict going on in this WCD transaction. WCD using the Mayor, and her son involved in WCD.

What do you say about that?

A: Well, I think you've got to ask Mr. Kitt what he means by this, whether this was becoming personal with him. I'm not sure.

Q: Well, we will be asking Mr. Kitt but I want to hear it from you, Michael Nobrega.

A: Yeah.

Q: What did you make of that? Didn't you think that was a serious conflict issue?

A: I'm not here -- I run the pension fund. I'm not here to run the City's politics or the City's administration. The City is big enough to look after itself. That would me my view, Mr. Jacks. It's a four thousand (4,000) op -- it's a four thousand (4,000) person operation. It has a right to set its own governance standards and do its own -- have its own standards put in place.

I'm not here to monitor the City or its relationship between the son and the Mayor, or the son and a councillor, or the son and -- or the daughter and a councillor. I'm not here to do that.

Q: Did it occur to you, sir, that your co-owner might have a different view of that situation?

A: Well, it -- to the extent that it -- it raises that issue, yeah, we -- we would probably discuss that. As I said to you earlier on, if there are

any findings that shortage -- and I -- I encourage you to go to www.omers.com, our governance practices. If there's something that comes from the Commissioner that says we should look at our governance practices, we will.

Q: Did it occur to you that my clients might have a different view of it than yours?

A: Probably today, but at that time, because of the number of files I have, I didn't see Peter as a -- this was not a significant issue in my -- on my radar screen.[342]

212. Mr. Nobrega's evidence on this point demonstrates that he was insensitive to the apparent conflict that existed.

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[342] Evidence of Michael Nobrega (16 August 2010) at pp. 3321-3324.

213. Mr. Nobrega's position stands in stark contrast to that of 156 and AIMCo. Dr. de Bever testified that, had he known Peter McCallion was an owner of WCD, he would have been more assertive with Mr. Nobrega. The concern of Dr. de Bever was a "confusing of objectives" on the part of everyone involved regarding why such a high settlement was negotiated.[343] He simply did not like it.

214. Mr. Dal Bello explained it this way:

> Q: Okay. When you said that AIM would have had concerns doing the deal had it known that Peter McCallion was an owner of WCD, you spoke of -- of risk and optics and so on, can you expand on that? I mean, what -- what really is the concern that AIM had?
>
> **A: Well, it's -- it kind of jumps out at you that, you know, you're selling the land to the company with the Mayor's son as an investor and the Mayor's -- Mayor has a reasonable sway on how things unfold in the -- in the City of Mississauga. I mean, it -- it's not -- not the way -- not the type of activity we want to be associated with, or involved in, so we would have probably wanted to definitely back away from that.**[344]

215. Mr. Coleman was concerned that Mr. McCallion's involvement as a witness in the litigation coupled with a high settlement, which he did not know had been negotiated with Mr. McCallion present, could become a media issue.[345]

216. Mr. O'Brien's involvement in the WCD litigation was apparently prompted by a concern to protect the Mayor. Mr. DeCicco, having engineered the political crisis as described earlier, used Mr. O'Brien to extract a settlement from OMERS/Oxford that did not correspond to the legal risks emanating from the litigation. The settlement was palatable to Mr. Nobrega but as noted above, he was insensitive to the apparent conflict on the part of the Mayor, and also, it seems to Mr. O'Brien's own conflicting agenda – representing OMERS in settling the litigation while at the same time extinguishing the political fire lit by Mr. DeCicco to protect the Mayor.

(e) Recommended Findings Regarding the Settlement of the Litigation

217. Regarding the issues reviewed in Part V of these submissions, 156 and AIMCo request the following findings:

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[343] Evidence of Leo de Bever (13 September 2010) at pp. 4281-4282, 4285.
[344] Evidence of Michael Dal Bello (29 July 2010) at p. 2300.
[345] Evidence of Craig Coleman (11 August 2010) at p. 2860.

(a) References to the Mayor in Mr. DeCicco's affidavit in combination with Peter McCallion swearing an affidavit outlining his previously undisclosed involvement as a principal of WCD was calculated to put political pressure on the Mayor, who in turn, it was anticipated by Mr. DeCicco, would pressure the Co-Owners to settle the litigation faster and on terms favourable to WCD;

(b) The flurry of activity by Peter McCallion to amend his affidavit, which named him as a principal of WCD was undertaken at the direction of the Mayor. That the Mayor was concerned by Mr. McCallion referring to himself as principal stands in contrast to her stated position at this Inquiry that there was no difference between the two positions as they both involved a pecuniary interest. In fact, her encouragement of Mr. McCallion to amend his affidavit confirms the position of 156 and AIMCo – namely, that Mr. McCallion's disclosed involvement as a real estate agent was very different in scope and nature from his undisclosed involvement as a principal;

(c) Mr. O'Brien became involved in settling the dispute between the Co-Owners and WCD at the TACC Golf Tournament at the request of the Mayor, as he himself testified;

(d) Peter McCallion twice arranged for Mr. O'Brien to meet with Mr. DeCicco, neither of which meetings was disclosed by OMERS/Oxford to 156/AIMCo;

(e) Mr. O'Brien's role in discussions with WCD was to negotiate a settlement of the litigation. In so doing, Mr. O'Brien was acting on behalf of the Mayor and on behalf of OMERS. At no point was Mr. O'Brien acting on behalf of, or with the knowledge or consent of 156 or AIMCo;

(f) Mr. O'Brien appears to have been given formal authority to negotiate a settlement by OMERS/Oxford at the OMERS Investment Committee meeting on September 8, 2009;

(g) In negotiating the settlement and representing the interests of the Mayor and of OMERS, Mr. O'Brien himself appears to have been in a conflict of interest. 156 and AIMCo make no submissions on whether or not that conflict of

interest was disclosed and consented to by Mr. Nobrega or others at OMERS/Oxford. It might have never occurred to them;

(h) At no point prior to this Inquiry were 156/AIMCo made aware by OMERS/Oxford of the particulars of how the settlement was negotiated, or of the participation of Mr. O'Brien and Peter McCallion therein;

(i) Mr. Nobrega's approval of the $4 million settlement was done without the knowledge or consent of 156 or AIMCo;

(j) Mr. Nobrega's risk assessment of the litigation and the Indemnity Agreement, which assessment led to the $4 million settlement, did not accord with the risk assessment of anyone else involved in the project, including Mr. Kitt, Mr. Coleman, Mr. Dal Bello and the lawyers for the Co-Owners, the City and Sheridan.

(k) OMERS/Oxford did not advise 156/AIMCo of the settlement discussions until the $4 million settlement had already been agreed. The settlement was presented to 156/AIMCo by OMERS/Oxford as a *fait accompli*;

(l) On learning of the settlement, 156 and AIMCo retained their own lawyer, Mr. Fingret, to represent their own interests against those of OMERS/Oxford. Mr. Fingret drew up a form of Acknowledgement in which OMERS acknowledged that the settlement with WCD would take place without the participation or concurrence of 156/AIMCo, except they would execute documents to dismiss the proceedings and would allow WCD's deposits to be used, which was their consistent position throughout;

(m) 156 and AIMCo did not pay any of their own money towards the settlement of the litigation. However, they did allow OMERS/Oxford to apply WCD's deposits towards the settlement, which was consistent with their position throughout;

(n) Although Mr. Nobrega did not view Peter McCallion as a "person of interest," 156 and AIMCo had already voiced concerns about his involvement as a potential principal when the WCD transaction was falling apart. This concern

was addressed by Oxford when it reported that Mr. McCallion was "off the file" and no longer involved in the project. The settlement proceeded with Mr. Nobrega irrespective of the apparent conflict, which concerned 156/AIMCo;

(o) 156 and AIMCo acted reasonably throughout the WCD litigation based on the very limited information made available to them; and

(p) 156 and AIMCo have been cooperative, forthcoming, frank and helpful to this Inquiry throughout and have assisted significantly in its deliberations.

PART VI - CONCLUSION AND POLICY OPTIONS

(a) 156/AIMCo's Concern: The Lack of Information

218. From 156 and AIMCo's perspective, the primary problem in the events leading up to the calling of this Inquiry was a lack of information. Dr. de Bever stated in his evidence:

> Q: Have you had the opportunity to speak to Mr. Nobrega about this at any point since this happened?
>
> **A: No, I didn't think that was appropriate. I mean, it's unfortunate. I mean, we are natural partners for a project like Square One, but what's unfortunate is that the lack of transparency and the lack of exchange of information on this transaction has -- has made it very difficult to -- to work with OMERS on this.**[346]

219. In this regard, 133 (and later 156) and AIM (and later AIMCo), made appropriate requests for information throughout their involvement in the WCD transaction. Ken Lusk was informed at the outset that Murray Cook was the only principal of WCD. Peter McCallion's only disclosed interest was as real estate agent and Mr. Lusk insisted that 133 would not pay his fee. When Oxford reported to Craig Coleman that the Mayor was pressuring the Co-Owners to effect a "clean sale" without the hotel condition – which occurred shortly after Peter McCallion had presented a WCD business card and referred to himself as a principal of the company – Mr. Coleman requested that Oxford make inquiries regarding his interest in WCD. The answer, which 156 and AIMCo were entitled to rely on, was that Mr. McCallion was "off the file" and no longer involved in the project.

220. When the settlement was reached, there was no disclosure to 156 and AIMCo about the circumstances which led to it, including the involvement of Peter McCallion and David O'Brien, a close confidant of the Mayor. The settlement was presented as a *fait accompli*.

221. 156 and AIMCo should have been told all relevant facts but were not. It is noteworthy that Mr. Coleman was not even provided with a copy of Mr. McCallion's affidavit which identified him as a principal of WCD.

(b) Policy Options to Address Political Risk

222. Mississauga's recently enacted adopted *Code of Conduct* for the Mayor and Members of Council (the "**Code**") may assist to avoid such a situation in the future. Its relevant

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[346] Evidence of Leo de Bever (13 September 2010) at p. 4286.

provisions are geared towards the avoidance of conflicts of interest generally, as opposed to the MCIA, which deals exclusively with conflicts as they relate to voting in the Council Chamber.[347]

223. Moreover, the Code is concerned not only with real but also apparent conflicts of interest. The Mayor and members of Council are required to avoid both real and apparent conflicts generally.[348] The Mayor and members of Council are also expected to perform their official duties and to organize their private affairs in such a manner that "promotes public confidence and respect and will bear close public scrutiny."[349]

224. It should be noted however, that the foregoing are expressions of principle and not specific prohibitions, although the commentary in the Code provides some helpful guidance on best practices. In that regard, the appointment of an Integrity Commissioner, who can assist and advise the Mayor and City Councillors on specific conflict of interest situations is also a welcome development.

225. However, from 156 and AIMCo's point of view, given the experience they have had, more is required. 156 and AIMCo specifically request that the Commissioner make recommendations that will enhance disclosure requirements, including:

(a) The adoption by the City of Mississauga of a publicly accessible registry of declared conflicts of interest, accessible online;[350]

(b) The addition to the Code of a provision requiring the Mayor and City Councillors to make reasonable inquiries of close family members regarding operating or planned businesses which may involve or engage Mississauga's municipal government. Results of these inquiries, including negative responses, should also be publicly accessible online;[351]

(c) A procedure by which third parties doing business with or in Mississauga may request disclosure of particular facts from the Mayor and City Councillors regarding their or their close relatives' particular interest or participation in a

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[347] City of Mississauga, *Code of Conduct* (29 September 2010), Rule 1b.
[348] City of Mississauga, *Code of Conduct* (29 September 2010), Rule 1b.
[349] City of Mississauga, *Code of Conduct* (29 September 2010), Rule 1c, 1h.
[350] Expert Panel Evidence (16 December 2010) at pp. 5973, 5980, 5991, 6124.
[351] Expert Panel Evidence (16 December 2010) at pp. 5978-5988.

particular project. Such disclosure could be in the form of a "comfort letter" provided by the City, as suggested by Dean Lorne Sossin in his expert testimony;[352] and

(d) In the alternative to a comfort letter approach, the Integrity Commissioner may be empowered to investigate the interest(s) of the Mayor or City Councillors or their close family members in projects with and in the City and report back to the interested third party.[353]

226. In suggesting the foregoing, 156 and AIMCo are sensitive to the cost of adopting these measures, but respectfully submit that the cost of inadequate regulation will ultimately be higher. Furthermore, 156 and AIMCo are not suggesting that the City or the Integrity Commissioner perform the due diligence that third parties can and should perform for themselves. Nor are 156 and AIMCo suggesting that the Integrity Commissioner or any other City official be expected to provide advice, legal or otherwise, to third parties transacting with or in the City. Rather, what is required is a mechanism for facts about possible conflicts of interest, real and apparent, to be ascertainable so that interested third parties can make informed decisions.

227. Mississauga's appointment of an Integrity Commissioner and its adoption of the new Code have the potential to serve an important public function. One extremely positive aspect is the Code's open-ended scope and the reference in the preamble of the Code that public officials must "uphold both the letter and spirit of the law including policies adopted by Council."[354] In this regard, 156 and AIMCo also commend the suggestion by the panel of experts that the Integrity Commissioner be charged with ethics outreach and education on real and apparent conflicts. This will promote the avoidance of conflict, real and apparent.

228. The need for greater regulation in the area of ethics was highlighted by the Mayor's own approach to these issues. Her position in this Inquiry has been that her only constraints were the prohibitions imposed on her by the MCIA, which required that she disclose a

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[352] Expert Panel Evidence, Lorne Sossin (15 December 2010) at pp. 5633-5635, 5717-5726; Expert Panel Evidence, Lorne Sossin (16 December 2010) at pp. 5973, 6006, 6101-6102.
[353] Expert Panel Evidence (15 December 2010) at pp. 5726-5729; Expert Panel Evidence (16 December 2010) at pp. 5995-6012.
[354] City of Mississauga, *Code of Conduct* (29 September 2010), preamble.

conflict and refrain from voting on matters related to WCD in Council. The Mayor noted in her testimony, which predated the adoption of the Code, that, "[W]e don't have one yet and when we have one I will follow it."[355] The opportunity thus exists to avoid a repetition of the type of conduct which led to this Inquiry through the operation of the Code and through the office of the Integrity Commissioner.

229. As Dean Sossin noted, and the other experts agreed, in crafting a code of conduct, it is difficult to account for every ethical issue that may present itself, which is why he preferred a "value-based" rather than "rules-based" approach to codes of conduct.[356] As AIMCo CEO Leo de Bever succinctly noted, "[I]f you need a policy to tell you what's good behaviour, you probably have bigger problems."[357] Outreach and education programs by the Integrity Commissioner would likely assist in this regard.

230. Furthermore, the report of this Inquiry will itself be significant. As noted by Justice Cory reviewing the Krever Commission on the Canadian Blood System, public inquiries can perform the role of education, illuminating how and why things went wrong in addition to recommending remedial policies.[358] 156 and AIMCo request that the Commissioner craft his report accordingly.

231. The way in which a municipality deals with conflicts of interest, both real and apparent, plays an important role in determining the risks when transacting with or in a municipality.[359] Such risks are an important factor that responsible investors and developers, such as AIMCo, carefully take into account. No responsible organization wants to be caught up in a conflict of interest controversy.

232. The way in which the City of Mississauga deals with conflicts of interest, both real and apparent, will very likely determine the nature and quality of the developers and investors that will be attracted to the City.

233. The less effective the system for dealing sufficiently with conflicts, the lower the quality of investor that will likely be attracted, and vice-versa.

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[355] Evidence of Hazel McCallion (21 September 2010) at p. 5062.
[356] Expert Panel Evidence, Lorne Sossin (15 December 2010) at pp. 5596-5597.
[357] Evidence of Leo de Bever (13 September 2010) at p. 4339.
[358] *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System)*, [1997] 3 S.C.R. 440 at paras. 30-31.
[359] Expert Panel Evidence, Lorne Sossin (15 December 2010) at p. 5634.

234. Accordingly, for the benefit of the City of Mississauga, its residents and taxpayers, and for the benefit of all those doing business with and in it, this Inquiry is urged to make recommendations that will enhance openness and prevent the sort of difficulties evidenced at this Inquiry.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 24th day of January, 2011.

"Don H. Jack"
Don H. Jack

"Adam S. Goodman"
Adam S. Goodman

Heenan Blaikie LLP

Lawyers for 156 Square One Limited and
Alberta Investment Management Corp.

CITY OF MISSISSAUGA JUDICIAL INQUIRY
THE HONOURABLE J. DOUGLAS CUNNINGHAM, COMMISSIONER
(PHASE II)

FINAL WRITTEN SUBMISSIONS OF 156 SQUARE ONE LIMITED AND ALBERTA INVESTMENT MANAGEMENT CORP.

Heenan Blaikie LLP
Bay Adelaide Centre
333 Bay Street, Suite 2900
P.O. Box 2900
Toronto, Ontario M5H 2T4

Don H. Jack LSUC#: 14307Q
Tel: (416) 643-6933

Adam S. Goodman LSUC#: 51031B
Tel: (416) 643-6857

Fax: (416) 360-8425

Lawyers for 156 Square One Limited and Alberta Investment Management Corp.