

Conflict of Interest Inquiry Issues Report, Muddies the Water

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On October 03, 2011, after months of hearings, Justice J. Douglas Cunningham as Commissioner released the report of the City of Mississauga judicial inquiry into a failed downtown development project.

The City ordered the inquiry two years ago in a resolution passed in November 2009 pursuant to s. 274 of the Ontario *Municipal Act, 2001*. The inquiry was asked to look into two matters, including the City's acquisition of 8.5 acres of land in the city center following a failed transaction by a company (World Class Developments, or WCD) formed by the mayor's son, in which he was a shareholder and the company's real estate agent.

The report, titled *Updating the Ethical Infrastructure*, concluded that with respect to the first matter, no extensive recommendations were warranted. As for the actions of the mayor in relation to the city center land and the WCD project, the Commissioner found that these raised "significant concerns and require substantial recommendations." "[S]ubstantial legislative reforms are necessary at the provincial level," he added, and he also recommended changes to the City's own Code of Conduct.

Hazel McCallion, 90, has been the mayor of Mississauga since 1978. She had long envisioned a convention center and an upscale hotel as part of the city center (Mississauga is home to 61 Fortune 500 and 50 Fortune Global 500 Canadian head offices or major divisional head offices, but visiting executives often stayed in nearby Toronto's luxury hotels instead of in the city). The WCD land matter arose out of proposal that Peter McCallion launched in 2004 to secure a downtown parcel of land and work with investors to develop a hotel, condominiums and a convention center. Early in 2007, the landowners executed an agreement of purchase and sale (APS). While the hotel remained a "key requirement for all stakeholders," WCD had difficulty in securing a hotel operator and the APS was terminated in early 2009, with the owner-vendors suing WCD and WCD countersuing. While that litigation was pending, the City decided to purchase the land for a college, with the then-owners agreeing to defend and indemnify the City in respect of any action brought by WCD. The WCD litigation was settled for a payment of $4M by the vendors to WCD in September 2009.

The report to City Council in 2009 respecting the proposed sale to the City referenced an affidavit by Mr. McCallion in connection with the litigation, and revealed that he was one of the "principals of WCD." On the advice of his mother, he said, Peter McCallion later swore another affidavit contradicting the first one. The Commissioner's report indicated that in 2007, the mayor witnessed her son's signatures on a loan agreement involving the WCD and a declaration of trust making him the beneficiary of WCD shares. In addition, the mayor had been involved in promoting the land sale to WCD and in seeking to have the hotel condition waived. She testified she was unaware that her son had an equity interest in WCD and assumed he was acting as an agent. She had disclosed a conflict of interest before Council in 2008, when WCD had been involved with the City in a site plan application. Referencing the legislation in place, she maintained that, while she was required to declare a conflict of interest in legislative or deliberative meetings and could not discuss the matter with city officials or staff, she was not precluded from advocating or intervening for the WCD project outside of city council.

The Report, however, concluded that the propriety of the mayor's conduct was to be assessed not only in light of the statutory framework, the *Municipal Conflict of Interest Act* (MCIA), but by reference to the *common law* of conflict of interest. The evidence, the Commissioner felt, meant the mayor knew of her son's pecuniary interest in the project "from the onset," and, to the extent that the mayor acted in her official capacity in relation to the land deal, "a real conflict of interest existed" as a result of her son's pecuniary interest in WCD. While there was no evidence that City staff had acted improperly, or that the mayor acted improperly in interacting with City staff in relation to the WCD project before the APS terminated, the Commissioner concluded there had been a number of interventions with the vendor-owners on behalf of WCD to influence them or to obtain concessions for WCD, and the mayor was also involved in the internal affairs of WCD. "It is no answer for the mayor to say that her actions were done for the benefit of the City... when her son stood to make millions of dollars if the deal was concluded. Once the mayor learned of her son's pecuniary interest in WCD (which she knew from the onset) she should have refrained from all further involvement in the transaction, and not simply withdrawn from her legislative role." While there was no formal mechanism in place for her to advise the council of her son's interest, she should have disclosed, at the very least, the extent of her intervention.

Significantly, the Report cleared the mayor of any wrongdoing under the MCIA. However, among the Report's many recommendations—which likely will have repercussions for municipalities across Ontario —are several

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2011 U.S. LEXIS 5204 (U.S. Sept. 27, 2011) (No. 10-1018), on the question of whether outside counsel, retained to work with city employees to conduct an internal affairs investigation, was precluded from asserting qualified immunity solely because of his status as a private lawyer and not that of a government employee. In that case, the attorney, Filasky, acting on the instructions of the fire chief, ordered the plaintiff firefighter to produce certain items at his home for inspection. The plaintiff alleged this was a violation of his Fourth and Fourteenth Amendment rights. The Ninth Circuit found Delia's constitutional right under the Fourth Amendment, to be protected from a warrantless, unreasonable compelled search of his home, was violated. However, because this right, under these or similar facts, was not clearly established at the time of the constitutional violation, it affirmed the district court's order granting qualified immunity to the individual City defendants, but reversed the grant of qualified immunity to Filarsky and remanded. The appellate court stated it was bound by circuit precedent, *Gonzalez v. Spencer*, 336 F.3d 832 (9th Cir. 2003), where the Ninth Circuit had ruled a private attorney representing a county was not entitled to qualified immunity. M.

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client is a corporation); MacKenzie-Childs LLC v. MacKenzie-Childs, 262 F.R.D 241, 248 (W.D.N.Y. 2009) (privilege attaching to communications on corporate matters between corporate employees and corporate counsel belongs to the corporation and not to the individual employee).

14. Hopper v. Frank, 16 F.3d 92, 96 (5th Cir. 1994) ("There is no logical reason to distinguish partnerships from corporations or *other legal entities* in determining the client a lawyer represents.") (emphasis added).

15. Geoffrey C. Hazard, Jr, *Symposium: Legal Ethics for Government Lawyers: Straight Talk For Tough Times: Conflicts of Interest in Representation of Public Agencies in Civil Matters*, 9 WIDENER J. PUB. L. 211, 215-217 (2000).

16. There is a general duty in public service calling upon government employees and agencies to favor disclosure over concealment. In re Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 920 (8th Cir. 1997) ("We believe the strong public interest in honest government and in exposing wrongdoing by public officials would be ill-served by recognition of a governmental attorney-client privilege applicable in criminal proceedings inquiring into the actions of public officials. We also believe that to allow any part of the federal government to use its in-house attorneys as a shield against the production of information relevant to a federal criminal investigation would represent a gross misuse of public assets.").

17. United States v. Norris, 722 F. Supp. 2d 632, 637 (E.D. Pa. 2010). *Norris* lays out in excellent detail the five-part test from *In the matter of Bevill, Bresler & Schulman Asset Management Corp.*, 805 F.2d 120, 123 (3d Cir. 1986), for determining whether or not a private individual can claim attorney-client privilege, noting that the person claiming the privilege has the burden of proving the existence of each element of it.

18. For an individual to claim a privilege based on communications with corporate counsel, the individual corporate officer must indicate to the attorney that the advice sought is sought in his individual capacity. United States v. Dakota, 197 F.3d 821, 825 (6th Cir. 1999) ("Absent an indication that the lawyer should act in a capacity other than that of the company's lawyer, a corporate officer will not have a privilege"). *See also*, In re Grand Jury Proceedings, 570 F.2d 562, 563 (6th Cir. 1978), *aff'g* 434 F. Supp. 648, 650 (E.D. Mich. 1977) (court requires that the individual officer seeking a personal privilege clearly claim that he is seeking legal advice in his individual capacity).

19. Gregory W. Stepanicich, *supra* note 4. M.

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indicating changes to that Act. A preamble was needed to set out "broad overarching principles;" the Act should be extended to include "private interests" beyond the existing "pecuniary interests" covered by the Act; and the MCIA should be extended beyond the legislative and deliberative functions of a municipal council (for example, to apply to all meetings attended by council members in their official capacities). In addition, the conflict of interest sanctions in the MCIA needed to include lesser sanctions: suspensions and a form of probation for an elected member, a reprimand publicly made by a judge, and a requirement for a formal apology by the member. Standing to being action under the MCIA should be broadened, and, in the interest of procedural fairness, the Act should explicitly state that members were able to make submissions regarding findings in integrity commissioners' reports or a recommendation that a penalty be imposed under a municipality's own code of conduct. "I make these findings with a measure of regret, having regard to the mayor's unique history of public service," Justice Cunningham noted, but he concluded that all of Ontario's municipalities require "a better ethical infrastructure."

It remains to be seen to what extent the Ontario legislature (and that of any other province) incorporates these or similar recommendations into amended municipal legislation. Copies of the 386-page Report are available online at http://www.mississaugainquiry.ca. M.

