

SACK GOLDBLATT MITCHELL LLP

M E M O R A N D U M

TO: Ontario Public Service Employees Union
Service Employees International Union
Ontario Council of Hospital Unions
Ontario Health Coalition

FROM: Steven Shrybman (Ext. 2456)

DATE: May 8, 2007 Matter No: 06-643

RE: William Osler Health Centre P3

1. On April 26, 2007 the Ministry of Health and Long Term Care (the Ministry) filed the record of its approvals for the William Osler Health Centre (WOHC) P3 hospital with the Ontario Divisional Court despite the determined efforts by the private consortium involved in the P3 to prevent its details from being made public. These documents, now filed as part of the public court record, provide unprecedented insight into the details of a P3 hospital scheme.
2. This memo briefly describes the events leading up to this point in the litigation, and summarizes some important information about the P3 scheme that we can only now discuss with you.
3. In our view, the inevitable conclusion that must be drawn from assessing the full details of the WOHC P3 is that it represents a serious betrayal of the Ministry's obligation to manage the public purse, and to ensure that hospital services are provided in an efficient, transparent and accountable manner.
4. Not only are the costs of the WOHC P3 much higher than a public sector equivalent, but the structure of the scheme compromises the ability of the WOHC Hospital Board to meet the needs of patients where these conflict with the interests of private investors. This in turn is likely to compromise the Board's ability to ensure that hospital services are allocated in a manner that is consistent with the requirements of the *Canada Health Act*: ie. according to need, not ability to pay.

The WOHC P3 Scheme

5. In mid-2003, WOHC entered into a P3 hospital scheme with the Health Care Infrastructure Company of Canada (THICC) that was approved, and will be funded by the Ministry. Under the scheme, THICC is to design, construct, finance, operate, property

manage and maintain a hospital facility, and provide certain non-clinical services for the hospital.

6. As we know, the WOHC P3 represents a marked departure from the traditional model for funding and operating public hospitals in Ontario in two key respects:

i) capital financing for the hospital is being provided by the private sector, without the assistance of a capital grant from the provincial government;

ii) the hospital will lease the hospital premises from THICC, which is also to provide many non-clinical support services for a period of 25 years. The lease and services contracts cannot be severed without THICC's consent.

7. In September, 2003, we initiated judicial review proceedings to quash the approvals for the scheme given by the Minister under the *Public Hospitals Act*. The application asserts that the Ministerial approvals and Funding Agreement relating to the WOHC P3 scheme were unlawful for several reasons, including that:

(i) the highly complex commercial and investment structure of the P3 regime will substantially undermine the ability of the WOHC hospital board to govern, manage and supervise the P3 hospital;

(ii) the scheme accords a private consortium unprecedented control over the delivery of publicly funded hospital services;

(iii) it was patently unreasonable for the Minister to agree to fund the scheme because it is substantially more costly, but offers no advantage over the conventional model of public funding and control of such hospital facilities and services; and

(iv) it was also improper for the Minister to approve and fund the P3 scheme without requiring disclosure by WOHC and THICC of all documents describing the scheme, and the obligations and liabilities of the WOHC and THICC pursuant thereto.

THICC's Efforts to Prevent Public Access to Details of the WOHC P3 Scheme

8. Soon after the litigation was commenced, THICC intervened to prevent the Ministry from filing with the court an unexpurgated copies of the approvals at issue, as the Ministry was required to do under the *Judicial Review Procedure Act*. THICC asserted that certain aspects of P3 scheme were proprietary and confidential and threatened to sue the Ministry if it allowed public access to these documents, or produced copies for our review.

9. From the outset, THICC represented the principal opposition to disclosure of the details of the WOHC P3. To follow THICC's machinations to keep this information secret, it is important to understand that the documents at issue fell into four broad categories:
- (i) documents which represent the approvals and funding agreements issued or entered into by the Ministry for the WOHC P3 (the approvals documents);
 - (ii) documents prepared by the Ministry or WOHC prior to these approvals and funding arrangements being granted or authorized (the review documents);
 - (iii) the Project Agreement and leases relating to the WOHC P3 which were approved by the Ministry under the *Public Hospitals Act* (the Project Agreement); and
 - (iv) various documents, including services contracts, shareholder agreements, trust agreements, performance guarantees, and other documents which describe the complex commercial arrangements among the private investors and contractors involved in the P3 scheme (the Implementation Documents).
10. While THICC. was willing to produce these documents for our review, it did so on strict conditions of confidentiality and only for the purpose of allowing us to ascertain whether the documents were relevant to our case. As you know, these conditions prevented us from discussing the details of the scheme with you, and it is only at this time that we can do so.
11. When we ascertained that the details of the P3 scheme were clearly relevant to our case, THICC nevertheless insisted that they be kept confidential. Pursuant to your instructions, we then moved to have the matter of relevance judicially determined. That proceeding led to several others as THICC failed in successive efforts to preclude public access to the full details of P3 scheme¹. Its efforts culminated on March 15, 2007 when THICC abandoned its appeal to the Ontario Court of Appeal from the order of Justice Ferrier holding that the public interest in having open judicial processes outweighed any claim to business confidentiality that THICC had proven.
12. Thus it was on April 26, 2007, that the Ministry finally filed the approvals it had accorded the WOHC P3 hospital scheme several years earlier. Even so, certain information relating to the scheme has not yet been revealed, including:

¹ These involved various proceedings before Mr. Justice Winkler who had been assigned to manage our case; Master Polika to whom Justice Winkler had assigned certain questions relating to THICC confidentiality claims; and Justice Ferrier on THICC's appeal of the Master decision requiring the Ministry to largely comply with its obligations under the *Judicial Review Procedure Act*

- i) the details of the Ministry's cost sharing arrangement with the WOHC, which it was able to persuade the court would, if revealed, prejudice its ability to negotiate funding arrangements with other hospitals;² and
- ii) the implementation documents relating to the WOHC P3 scheme³, which as noted describe arrangements *inter-se* the members of the THICC consortium. These remain exclusively in the possession of THICC and ourselves, and their disposition remains a matter of contention. For present purposes, they are not referred to further.

[this excerpt in taken from a longer reporting memo of this date]

² On May 5, 2007 the Ministry advised that it was abandoning its position that this information be sealed in the Court record to prevent public disclosure, but it has yet to amend the judicial order sealing the record in this regard.

³ Schedule 1# to the Project Agreement defines "Implementation Documents" to include contracts, leases, guarantees, and other agreements. The definition is redacted to remove reference to certain Implementation Documents.