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**IN THE MATTER OF THE
TORONTO EXTERNAL CONTRACTS INQUIRY
SUBMISSIONS OF DELL CANADA INC.
(February 28, 2005)**

I. INTRODUCTION - THE DESKTOP PHASE OF TECI

1. The desktop phase of TECI is “not about goods, it’s about process and it’s about fair and transparent decision making”.¹ As Commission Counsel made clear in her Opening Statement, Commission Counsel were “not suggesting any wrongdoing on [the] part of Dell or anyone else; we are simply questioning the selection process for these desktops”.² Commission Counsel’s investigations had revealed “that Dell did give the City very competitive prices, they delivered on time, they provided excellent service to the City. Dell supplied exactly what it was asked to do, at the prices it had promised.”³

2. What is at issue in the desktop phase of TECI is how Dell Computer Corporation (“**Dell**”) bid on the combined hardware, software and services RFP issued by the City of Toronto in August 1998 (the “**August RFP**”), which had as its express objective the selection of a minimum of two “full service” vendors to supply hardware, software and various support services on a *non-exclusive* basis to the City until December 31, 2001,⁴ was not recommended as one of the “full service” vendors, but nonetheless went on to supply almost all of the desktops that were required to enable the City of Toronto to become Y2K compliant.⁵

3. In the course of the Commissioner’s investigation for the first Inquiry, the Toronto Computer Leasing Inquiry (“**TCLI**”), Commission Counsel had questioned how Dell became a supplier of the desktops to the City and the answers they received were “somewhat puzzling”.⁶ That led to City Council creating the Toronto External Contracts Inquiry (“**TECI**”)

¹ Opening Statement, November 22, 2004, p. 11, ll. 22 to 24

² Opening Statement, November 22, 2004, p. 8, ll. 8 to 11

³ Opening Statement, November 22, 2004, p. 11, ll. 12 to 16

⁴ August RFP, s. 1.4, TEC019416 at TEC019421, Exhibit 15, Volume 1, Tab 2

⁵ Opening Statement, November 22, 2004, p. 9, ll. 9 to 15; p. 11, ll. 17 to 18

⁶ Opening Statement, November 22, 2004, p. 7, ll. 5 to 10

on October 3, 2002. The complete TECI Terms of Reference are attached as Appendix “A” to these Closing Submissions.

4. The Report of the City Solicitor to City Council (attached as Appendix “B” hereto) that was relied upon in establishing the TECI Terms of Reference was opaque, stating only that “Commission Counsel would like to investigate and explore” two additional matters, including “the purchase of computers that then formed the basis of equipment which was basis of the [Leasing] RFQ.”⁷ A second report later that month revealed only that Commission Counsel had “raised a concern with respect to the specification of Dell as the desktop supplier”⁸ in the City’s Request for Quotations for leasing computer equipment and software information and technology products and services dated May 30, 1999 (the “**Leasing RFQ**”).

5. Commission Counsel’s concerns at that time included:

- (a) that the City had for months been asked to provide Commission Counsel with the paper work that would explain why Dell was awarded the desktop contract, and yet no piece of paper had been produced by the City to show how or why it happened. There should have been some documentary evidence to support the procurement decision but, apparently, nothing was available;
- (b) that the City could not explain how Dell came to be the supplier of the desktop computers;
- (c) that the computers were not described in the Report of the Corporate Services Committee that went to City Council⁹ to approve selection of the three, non-exclusive full service providers, known as “Value Added Resellers” or “**VARs**”; and
- (d) that there should have been a transparent process whereby the City chose Dell as the desktop supplier.

⁷ COT006104, Exhibit 15, Volume 2, Tab 15

⁸ Report of the City Solicitor dated October 3, 2002, p. 5; See also: Report of the City Solicitor dated October 28, 2002, Minutes of City Council, pp. 183 to 184. See Appendix “B” to these Closing Submissions

⁹ Clause 20 of Report 17 from the Corporate Services Committee to City Council recommending adoption of Report dated November 4, 1998 to Corporate Services Committee, COT014849, Exhibit 15, Volume 1, Tab 14

These concerns will be addressed and answered in these Closing Submissions. In addition, the “history” of the transaction will be given and the issue of Dell’s entertainment expenses will be addressed.

6. Dell has cooperated with Commission Counsel from the commencement of the investigation into the desktop selection process to the completion of the oral evidence in the desktop phase of TECI. Dell produced over 2,000 documents to Commission Counsel to assist in their investigation. Dell provided very thorough and detailed Affidavits (the “**Dell Affidavits**”) of three members of Dell’s Account Team for the City, Bruce Mortensen (“**Mortensen**”), David Kelly (“**Kelly**”) and David Toms (“**Toms**”), in an effort to assist the Commissioner in achieving the stated goal of an efficient and expeditious oral hearing. Dell remains committed to assisting the Commissioner to understand the process and the fair and transparent decision-making that actually occurred.

7. The Dell Affidavits dealt with matters that were still of interest to Commission Counsel after more than two years of their investigation. Because Dell has set out Dell’s facts, information and understanding of the relevant events in the Dell Affidavits, all those lengthy statements are not repeated in these Closing Submissions. However, the Dell Affidavits in their entirety are relied upon.

8. These Closing Submissions are generally organized as follows:

- (a) Dell and the Dell Business Model
- (b) Events Preceding the December Mini-RFQ
- (c) Why Dell Supplied the Y2K Desktops
- (d) Dell’s Entertainment of City Staff
- (e) Conclusions

These Closing Submissions do not attempt to summarize all of the evidence given during the desktop phase of TECI, nor all of the relevant evidence given during TCLI.

II. DELL AND THE DELL BUSINESS MODEL

A. DELL

9. Dell Canada Inc. (named Dell Computer Corporation at the relevant time) is a wholly owned subsidiary of Dell Inc. (which was also named Dell Computer Corporation at the relevant time). Dell Inc. is, and was at the relevant time, a widely held public company in the United States.¹⁰

10. As of January 31, 1998, Dell Inc. had become the second largest manufacturer and marketer of personal computers in the United States and number three worldwide.¹¹ In its Americas Region, it was the second-largest supplier of desk-top computers.¹² It had won numerous awards for its desktop computers.¹³ On June 10, 1998, Dell was recognized as an “Enterprise Tier” manufacturer, which is the date that the Gartner Group changed its classification system.¹⁴ “Enterprise Tier” was part of a new classification system which replaced Gartner’s former classifications of Tier 1, Tier 2 and Tier 3 vendors.¹⁵ Dell’s classification as an Enterprise Tier manufacturer is important, because the August RFP expressly required proponents to submit proposals on “Enterprise Tier computer systems defined in the Gartner Group’s Commercial Desktop Vendor Tiering: The Next Generation, June 10, 1998 Report.”¹⁶

¹⁰ Kelly Affidavit, paragraphs 1, 62; Dell Computer Corporation Annual Report, 1998, COT041040 at 41216, 41221

¹¹ Dell 1998 Annual Report, COT041040 at 41219

¹² Dell 1998 Annual Report, COT041040 at 41239

¹³ In 1997, Dell’s Optiplex and Dimension desktop computers garnered an unprecedented 174 awards for performance, reliability and service, including recognition as “Product of the Year” and “Most Valuable Product” awards from *PC Computing Magazine*, seven prestigious “Editor’s Choice” designations from PC Magazine in the United States, “MVP” by PC Computing Japan, and “Best Desktop PC” (Hong Kong) and “PC of the Year Australia” by PC World Online: Dell 1998 Annual Report, COT041040 at 41232.

¹⁴ Gartner Report, “Desktop Vendor Tiering: The Next Generation”, TEC057907 at 057911 to 057912

¹⁵ Gartner previously used tier designations of Consolidated Tier 1/Tier 2 and Tier 3 vendors, which tiering was desegregated as of June 10, 1998 into “Enterprise Tier Vendors”, “Middle Tier Vendors” and “Specialty or Segment Focussed Tier Vendors” (at p. 1), TEC057907

¹⁶ August RFP, Section 1.4, TEC019416 at 19421

B. THE DELL BUSINESS MODEL

11. The Dell Business Model was explained at length in the Dell Affidavits, particularly in Mortensen's Affidavit.¹⁷ As the Dell 1998 Annual Report, the Dell Affidavits and the evidence given during TECI illustrated, the Dell Business Model was not well understood in 1998.¹⁸ The Dell Business Model was relatively new in the marketplace in 1998, Dell Inc. having been established only in 1984.¹⁹

12. Over time, customers buying from Dell found that they could reduce their overall costs by buying the computer hardware from Dell, and buying the support services from another supplier. In this way, customers found they could avoid the mark-up on the hardware that a "value-added reseller" or VAR typically adds. Although the Dell Business Model is designed to enable Dell to deal directly with its customers, without the intervention of any third party intermediaries, it is not just about "dealing direct" so as to cut out the extra costs that may be incurred by a customer who purchases computer hardware through a VAR. The Dell Business Model is not just about price. More specifically, the Dell Business Model is premised on five basic tenets: Most Efficient Path to the Customer, Single Point of Accountability, Industry Standard Technology, Build to Order and Low Cost Leader, as described in the Mortensen Affidavit²⁰ and as elaborated upon during the oral hearing.

13. During the summer and fall of 1998, the Dell Business Model was not well understood at the City of Toronto.²¹ The employees of the City who were responsible for preparing the Business Case for the City-wide conversion of personal computers to Y2K compliant computers, for running the August RFP and the subsequent "mini-RFQ" in early December 1998, and ultimately for deciding to acquire the desktops required for the City to become Y2K compliant solely from Dell, being respectively Michael Franey ("**Franey**"),

¹⁷ Mortensen Affidavit, paragraphs 14 to 37; Kelly Affidavit, paragraphs 28 to 29

¹⁸ 1998 Dell Annual Report, COT041040 at 41228, paragraphs 1 to 3; Mortensen Affidavit, paragraphs 41 and 82; Toms Affidavit, paragraph 19

¹⁹ 1998 Dell Annual Report, COT041040 at 41220

²⁰ Mortensen Affidavit, paragraphs 14 to 37; See also: Dell 1998 Annual Report, COT041040 at COT041228, 41235, 41232, 41239, 41244

²¹ Kelly Affidavit, paragraphs 39, 40; Toms Affidavit, paragraph 19; Mortensen Affidavit, paragraph 41; See also: the discussion in paragraphs 56, 60, 85 to 89 of these Submissions

Kathryn Bulko (“**Bulko**”), and Lana Viinamae (“**Viinamae**”), were generally familiar with the Dell Business Model insofar as they knew Dell “sold direct”. Bulko and Franey were very familiar with the VAR delivery model which was in use at the City and formerly had been used at Metro.²² They also knew that Dell’s Tier 1 competitors, IBM and Compaq, each had special arrangements or agreements with a preferred VAR that resulted in differential pricing.²³ (IBM was the manufacturer preferred by GE and Compaq was the manufacturer preferred by SHL.²⁴)

14. The Executive Director of Information Technology for the City, Jim Andrew (“**Andrew**”) apparently believed²⁵ as of November 10, 1998 that Dell would simply sell its products to the City through the three full service vendors chosen following the August RFP, being Questech Services Inc. (“**Questech**”), SHL System Co. (“**SHL**”) and GE Capital IT Solutions (“**GE**”).²⁶

15. But in 1998, Dell did not sell to VARs, and VARs did not promote the purchase of Dell computers. The reason the VARs did not promote the sale of Dell products was simple: “They don’t make any money from it.”²⁷

16. There was, at least, some lack of understanding or confusion about how Dell operated²⁸ and some scepticism about whether Dell could handle this large Y2K project for the City. Dell faced a challenge educating the relevant City Staff members about the benefits of its revolutionary Business Model, and assuring this sceptical client that Dell could indeed implement the Y2K desktop conversion through its Direct Business Model.

²² Bulko, November 22, 2004, p. 69, ll. 3-19; p. 129, l. 19 to p. 130, l. 4; p. 132, l. 20 to p. 133, l. 10; Franey, November 30, 2004, p. 58, l. 18 to p. 59, l. 8

²³ Franey Affidavit, paragraphs 11 and 12; Franey, November 30, 2004, p. 66, ll. 3 to 8; Bulko, November 22, 2004, p. 134, l. 21 to p. 136, l. 12

²⁴ Franey, November 30, 2004, p. 58, l. 18 to p. 59, l. 8

²⁵ Andrew, January 25, 2005, p. 168, l. 18 to p. 169, l. 8

²⁶ TEC046612, Exhibit 15, Volume 1, Tab 12

²⁷ Kelly, November 24, 2004, p. 302, ll. 4 to 10; and see p. 300, l. 16 to p. 301, l. 1

²⁸ Andrew, January 26, 2005, p. 148, l. 20 to p. 152, l. 25; Toms Affidavit, paragraph 19; Toms, November 29, 2004, p. 275, ll. 7 to 25; Kelly Affidavit, paragraphs 30, 39; Mortensen, November 25, 2004, p. 157, l. 21 to p. 158, l. 8; Lyons, January 17, 2005, p. 250, l. 19 to p. 251, l. 19

C. DELL'S PRIOR BUSINESS WITH THE CITY AND ITS PREDECESSORS

17. Prior to the August RFP and indeed prior to amalgamation, the Municipality of Metropolitan Toronto (and particularly the Metro Works Department) was a significant customer of Dell, as explained by Mortensen in his Affidavit.²⁹ In fact, as of early March 1999, Dell had over 175 different “customers” in the New City, including Metro, the other pre-amalgamation municipalities, various departments and various Agencies, Boards and Commissions such as the Libraries and the TTC, all of which were designated the “City” in Dell’s “linked” account record.³⁰ Total sales by Dell to the “City” from February 1, 1998 to January 1999 were approximately \$1.88 million.³¹ Dell was clearly a “vendor of record” with the City prior to the August RFP.³²

18. Notwithstanding these sales to the City, Dell seemed to be missing the major purchase orders that were going to its competitors, IBM and Compaq.³³ As some of the City’s employees and former employees confirmed during TECI, IBM was seen as the incumbent at the City of Toronto,³⁴ Compaq was seen as the incumbent at Metro,³⁵ and Dell was seen as the preferred supplier to the Works and Emergency Services Department of Metro.³⁶

D. DELL ESTABLISHES A PUBLIC SECTOR BUSINESS SEGMENT IN MARCH 1998

19. In March 1998, Dell Canada, emulating the success of its parent corporation, created a new business segment known as the “Public Sector”.³⁷ David Toms became the

²⁹ Mortensen Affidavit, paragraph 9

³⁰ Mortensen Affidavit, paragraph 8 and Exhibit 1 thereto, TEC046727-730

³¹ Mortensen Affidavit, paragraph 10; Dell Forecast, TEC046823 at TEC046824, Exhibit 15, Volume 1, Tab 66

³² Toms Affidavit, paragraph 5; Mortensen Affidavit, paragraph 10; See eg. TEC027944, Exhibit 15, Volume 3, Tab 40

³³ Mortensen Affidavit, paragraph 9

³⁴ Viinamae December 8, 2004, p. 31, l. 22 to p. 32, l. 20

³⁵ *Ibid* ; Andrew, January 25, 2005, p. 137, ll. 9-13

³⁶ Franey, November 30, 2004, p. 235, ll. 11 to 12; Bulko Affidavit, paragraph 13

³⁷ Toms Affidavit, paragraphs 1, 8, 9

Director of the Public Sector upon its creation. David Kelly became the Regional Sales Manager for Ontario and Western Canada in June 1998.³⁸

20. With the creation of the “Public Sector”, Dell began to focus its efforts on developing business opportunities in the Public Sector in Canada. Research was conducted. Contacts were made. Dedicated account teams were set up for significant Public Sector customers, including the City of Toronto.³⁹

E. DELL’S ACCOUNT TEAM FOR THE CITY

21. During the period 1998 - 1999, the Dell Account Team for the City was primarily comprised of Julianne Clyde (Account Executive) and later Bruce Mortensen (Account Executive), David Kelly (Regional Sales Manager, Public West) and David Toms (Director, Public).⁴⁰ The complete Dell Account Team was larger.⁴¹ In fact, more than 75 Dell employees actually participated in the manufacture and delivery of the desktops that enabled the City to become Y2K compliant over the course of the 11 month rollout.⁴²

III. UNRAVELLING THE PUZZLE

A. The Documentary Evidence

22. The mandate of the Commissioner, as set out the TECI Terms of Reference⁴³, is to “[t]o investigate and inquire into all aspects of the purchase of the computer hardware and software that *subsequently formed the basis for the computer leasing RFQ*”, ... “*their history and their impact on the ratepayers of the City of Toronto as they relate to the good government of the municipality, or the conduct of its public business*, and to make any recommendations which the Commissioner may deem appropriate and in the public interest as a result of her inquiry.” The Commissioner was expressly empowered to examine “the basis of and reasons for making the

³⁸ Toms Affidavit, paragraphs 1, 6

³⁹ Toms Affidavit, paragraphs 8 to 11

⁴⁰ Toms Affidavit, paragraph 4

⁴¹ Account Team List, TEC047193, Exhibit 15, Volume 3, Tab 50; Dell’s Response, COT041040 at 41045, Exhibit 15, Volume 1, Tab 6

⁴² Kelly Affidavit, paragraph 16

⁴³ *Terms of Reference – Toronto External Contracts Inquiry*, paragraphs 5 and 6, p. 3 (“TECI Terms of Reference”).

recommendations or entering into the subject transactions and the basis of the decisions taken in respect of these matters”.

23. When the desktop phase of TECI was authorized by City Council on October 3, 2002, the 7-month long investigation in TCLI had apparently failed to generate any paperwork from the City to show why Dell had been selected as the supplier of the desktops that the City required in order to become Y2K compliant. If there had been no documentary record at all to explain the basis of the recommendations and decisions, that could have created a perception, at least, that a proper process had not been followed.

24. In fact, the City had and subsequently produced hundreds of documents relevant to the desktop acquisition. These documents showed how the “Special Bid Pricing Request” or “Mini-RFQ” had been conducted in December 1998 and how acquiring the desktops solely from Dell, which had bid the lowest price, was forecast to save the taxpayers over \$710,000. Numerous additional documents generally relevant to the history of the transaction, and the bases for issuing a Special Bid Pricing Request for a desktop computer with up-to-date specifications and for continuing with Dell through-out the Y2K rollout and the reasons for entering into the transactions with Dell were also produced by the City.

25. These documents provide most of the answers to the “puzzle” of why Dell was selected as the sole supplier of desktops. In particular:

- (a) By November 26, 2002,⁴⁴ Bulko, who had been tasked with the job of putting together the Dell explanation⁴⁵ and providing the documents, had provided the Commission with documents that included:
 - (i) the e-mail dated December 7, 1998 for “Special Bid Pricing”⁴⁶ which had been sent to the three Enterprise Tier manufacturers (IBM, Compaq and Dell) and to the three value-added resellers (GE, Questech and SHL) asking them to quote on an up-to-date desktop with the features the City required (the “**December Mini-RFQ**”);

⁴⁴ This is the date of delivery of CD by Platinum.

⁴⁵ COT040930 to COT041023

⁴⁶ COT040951, Exhibit 15, Volume 1, Tab 21

- (ii) the e-mail dated December 8, 1998 for a “Value Added Services Quote” from the VARs;⁴⁷
 - (iii) the text version of Dell’s response to the December Mini-RFQ;⁴⁸
 - (iv) the letter from Bulko to Dell dated January 21, 1999 confirming that “as a result of the special bid pricing request” the City has “standardized on Dell computers for the Year 2000 initiative” (the “**Award Letter**”);⁴⁹ and
 - (v) Bulko’s financial analysis of the desktop prices received from IBM, Compaq and Dell, which analysis clearly illustrated that purchasing the desktops only from Dell (as opposed to splitting the purchases equally among 3 Enterprise Tier manufacturers) was forecast to save the City over **\$710,000** on only the first 4,000 computers being replaced.⁵⁰
- (b) Approximately 2 years later, between December 9, 2004 and January 7, 2005, the City provided the Commission with other documents highly relevant to the history of this transaction, including:
- (i) the Response of SHL to the December Mini-RFQ dated December 9, 1998, with the prices for desktops that SHL had received from IBM and Compaq and other terms imposed by these manufacturers;⁵¹
 - (ii) a draft of the Report to the Economic Development Committee on the letterhead of the Commissioner of Corporate Services, Margaret Rodrigues, created February 28, 1999, being the report required by the

⁴⁷ COT040953, Exhibit 15, Volume 1, Tab 22

⁴⁸ COT041016, Exhibit 15, Volume 3, Tab 42

⁴⁹ COT040955 (for City’s Copy); See TEC031488, Exhibit 15, Volume 1, Tab 33 for the letter as received by Dell

⁵⁰ TEC052889 and COT040954, Exhibit 15, Volume 1, Tabs 23 and 24

⁵¹ December 9, 1998 e-mail, TEC057478, Exhibit 15, Volume 6, Tab 23. Bulko had previously testified that “I have reviewed my files and every location where documents like these emails might exist and I have not located them.”: Bulko Affidavit, paragraph 32. This email was found either in the files on her credenza in her office or in her computer. Bulko, January 19, 2005, p. 10, l. 17 to p. 11, l. 18; p. 12, l. 14 to p. 6, l. 13; p. 128, ll. 4 to 22

Amendment of the key City Council resolution passed at the November 1998 Council meeting;⁵²

(iii) Bulko's two Desktop Notebooks, providing a contemporaneous business record of the events;⁵³ and

(iv) approximately 124 additional relevant documents.⁵⁴

26. Clearly, there were documents available at the City to explain the decision. However, the City's documents did not provide all the answers. As a result, the Commissioner heard evidence from 11 witnesses over 14 days of public hearings in the desktop phase of TECI.

B. BACKGROUND – EVENTS PRECEDING DECEMBER MINI-RFQ

1. The City is Late Implementing its Y2K Readiness Program

27. The amalgamation and continuation of the old City of Toronto, the Municipality of Metropolitan Toronto and five other pre-amalgamation cities into the City of Toronto (herein the “**City**” or sometimes, the “**New City**”) was effective January 1, 1998.

28. With all the pressures of amalgamation, some things fell behind. Developing an effective and affordable strategy for addressing the City's Year 2000 issues was one of them. In a report from the Commissioner of Corporate Services to the Corporate Services Committee dated June 8, 1998,⁵⁵ the Commissioner provided a recommended strategy and sought interim funding for a Year 2000 Action Plan. Included in the recommendations was a requirement for the Chief Administrative Officer (“**CAO**”) to declare the Year 2000 issue “a top priority of the City after delivery of existing services, including the suspension of activities deemed non-

⁵² Typed EDC Report, TEC057484, Exhibit 15, Volume 6, Tab 25

⁵³ TEC057144, Exhibit 15, Volume 7, and TEC057376, Exhibit 15, Volume 6, Tab 11. Three pages from the 1998 Notebook had been produced just prior to the commencement of the November 22, 2004 hearing: Begdoc not assigned, Exhibit 15, Volume 5, Tab 1

⁵⁴ Bulko, January 19, 2005, p. 12, ll. 15 to 22

⁵⁵ COT001854 or COT014805, TCLI Exhibits

critical, in order to free up resources for deployment on Year 2000 initiatives, if and when necessary”.⁵⁶

29. At its meeting of July 29, 30 and 31, 1998, City Council received the joint report on Y2K Readiness from the Corporate Services Committee and the Budget Committee.⁵⁷ That report was amended by, among other things, directing that the Year 2000 Action Plan become the number one priority of the Mayor as well. Minimal interim funding was provided, and staff was sent back to develop a better Year 2000 Action Plan.⁵⁸

30. The Year 2000 Business Continuity Plan was ultimately adopted by City Council in November 1998.⁵⁹ Pending Council approval of financing of the entire 1999 Capital Program, the Year 2000 Project required and received interim funding from Council.⁶⁰

2. **The August RFP**

31. The August RFP was issued on August 25, 1998, requesting proposals for the supply of hardware, software and related services.⁶¹ Dell was one of 87 companies invited to bid.⁶² Dell had received a copy of the August RFP by September 3, 1998.⁶³ The August RFP closed on September 17, 1998.⁶⁴

32. Kathryn Bulko and Kathy Savage (who held a position at Metro similar to Bulko’s position), drafted the August RFP.⁶⁵ They sat down with two precedents: a document used in the former City and a similar one from the former Metro.⁶⁶ However, key sections of the

⁵⁶ *Ibid*, Recommendation 2, p. 2

⁵⁷ COT032650, TCLI Exhibits

⁵⁸ *Ibid*

⁵⁹ COT030963, Exhibit 15, Volume 4, Tab 3

⁶⁰ COT001389, TCLI Exhibit 2A, Tab 92

⁶¹ TEC019416, Exhibit 15, Volume 1, Tab 2

⁶² November 4, 1998 Report, TEC046612, Exhibit 15, Volume 1, Tab 12

⁶³ TEC046568, Exhibit 15, Volume 1, Tab 3

⁶⁴ TEC019416, Exhibit 15, Volume 1, Tab 2

⁶⁵ Bulko, November 22, 2004, p. 49, l. 22 to p. 50, l. 20

⁶⁶ Bulko, November 22, 2004, p. 51, ll. 6 to 14

August RFP, including sections on the Proponent's Information, Proponent's Questions, Communication and Selection and Evaluation Procedures, were provided by Purchasing or Legal, with only the variables or the details of the procurement process, being the responsibility of Bulko.⁶⁷ Purchasing added the purchasing piece and Legal put in the legal terms and conditions.⁶⁸ Legal took the lead in terms of conditions.⁶⁹ One of the solicitors reviewed the final draft.⁷⁰

33. There is no question but that the August RFP was designed in favour of a proponent who could provide both the hardware and the services necessary to install the hardware and to render the computers usable: the express objective of the August RFP was stated to be "to select a minimum of 2 "full service" vendors to supply hardware, software and various support services on a non-exclusive basis to the City until December 31, 2001".⁷¹ Potential proponents were also advised in the August RFP that preference may be given to the vendor(s) who represents multiple Enterprise Tier manufacturers.⁷²

34. It is submitted that the August RFP favoured the selection of VARs, especially SHL and GE who were already providing these services to the former municipalities (to the old City of Toronto in the case of GE and to Metro in the case of SHL),⁷³ because the City was very familiar with the VAR model that had been used in the past.⁷⁴ That is also why the VAR model was the model recommended in the IBM/City of Toronto Business Case for Desktops.⁷⁵

⁶⁷ Bulko, November 22, 2004, p. 57, l. 6 to p. 59, l. 3; p. 58; p. 59, ll. 16 to 18

⁶⁸ Bulko, November 22, 2004, p. 53, ll. 2 to 16; p. 54, ll. 17 to 22

⁶⁹ Bulko, November 22, 2004, p. 60, ll. 6 to 8

⁷⁰ Bulko, November 22, 2004, p. 50, ll. 24 to 25

⁷¹ August RFP, s. 1.4, TEC019416 at 421, Exhibit 15, Volume 1, Tab 2; Bulko Affidavit, paragraph 9; Bulko, November 22, 2004, p. 69, l. 20 to p. 70, l. 6; Franey Affidavit, paragraph 5

⁷² August RFP, s. 1.4, TEC019416 at 421, Exhibit 15, Volume 1, Tab 2

⁷³ Franey Affidavit, paragraph 8; Franey, November 30, 2004, p. 59, ll. 1 to 8; Franey also testified that the City may have been using Compugen; Franey, November 30, 2004, p. 37, ll. 4 to 5

⁷⁴ Bulko, November 22, 2004, p. 51, ll. 6 to 14; Toms, November 29, 2004, p. 140, l. 13 to p. 141, l. 1

⁷⁵ IBM Transformation 2000 Business Case, COT074872 at 874, Exhibit 15, Volume 4, Tab 4; Franey, November 30, 2004, p. 36, ll. 8 to 14; p. 37, ll. 2 to 13

35. Dell knew, prior to submitting its response to the August RFP (the “**Dell Response**”), that the RFP was geared to VARs.⁷⁶ Nonetheless, Dell wanted to be the sole vendor of computer hardware to the City and Dell believed that its response would make it financially impossible for the City to award any part of the contract to anyone else, because of the Dell Business Model.⁷⁷

36. The personal computer requirements in the August RFP were estimated at “approximately 10,000 systems”.⁷⁸ Dell’s Account Executive at the time understood that the 10,000 systems were made up of approximately 90% desktops (i.e. 9,000 desktops) and 10% notebooks (1,000) to be purchased before December 1999, being an opportunity worth approximately \$30 million.⁷⁹

37. There was nothing in the August RFP that obligated the City to buy any specific brand of desktop computers, or even desktops with the minimum specifications given. Instead, in Section 2.5 the City had provided that a proponent could answer with a proposal that may be different or alternative to the configurations specified.⁸⁰

38. There was nothing in the August RFP that obligated the City to buy *any* desktop computers. Instead, Section 3.3 provided that, as a result of the RFP and selection process, the City may decide “to acquire products or services *other than* as proposed by the proponent”, “to delay or postpone the implementation of any products or services...indefinitely” and, finally, “*not to acquire any products or services at all.*”⁸¹ (emphasis added)

⁷⁶ Toms, November 29, 2004 p. 248, l. 21 to p. 249, l. 2; p. 140, l. 7 to p. 141, l. 11; Kelly, November 24, 2004, p. 31, l. 24 to p. 32, l. 6

⁷⁷ September 16, 1998 memo to file, TEC057087 at TEC057088, Exhibit 15, Volume 4, Tab 24, p. 2; Kelly, November 24, 2004, p. 49, l. 20 to p. 50, l. 16

⁷⁸ August RFP, s. 1.3, TEC019416 at 421

⁷⁹ September 3, 1998 e-mail, TEC046570, Exhibit 15, Volume 1, Tab 4

⁸⁰ August RFP, section 2.5, TEC019416 at TEC019423, Volume 1, Tab 2

⁸¹ August RFP, section 3.3, TEC019416 at TEC019425, Volume 1, Tab 2; Bulko, November 23, 2004 p. 40, l. 12 to p. 42, l. 9

39. Purchasing had taken care of the Proposal Submission Form so that it would not be legally binding.⁸²

40. Bulko agreed that this August RFP that she had written gave the City the discretion not to go ahead at all, and that everyone who answered knew those were the ground rules.⁸³

41. It was therefore clearly never intended that the August RFP or the selection of the VARs based the responses to the August RFP would require the City to purchase the products or services described in the responses of the selected winners. It was also clearly never intended that the City would be obliged to buy the now obsolete equipment that had been referred to in the August RFP, or that the City would be prevented over the intended 3 year life of the contracts with the VARs from going to the market at any time to obtain up-to-date equipment and up-to-date prices for its computer hardware.

42. There was nothing in the August RFP prohibiting the City from choosing any one of the four Enterprise Tier manufacturers or all of the Enterprise Tier manufacturers as the suppliers of the desktops and other computer hardware, either directly or through the VARs.⁸⁴

43. Bulko further agreed that under the terms of the August RFP, the City had reserved the full right to use one, two or **none** of the VARs selected as a result of the August RFP, and that a VAR had no right to the work if the City did not want to use that VAR (using GE as an example).⁸⁵ Bulko understood that when City Council agreed to the three VARs who were actually selected, the VARs did not have any right to provide **any** hardware.⁸⁶

44. Since no one was called from Purchasing or Legal to explain the purpose of certain key sections of the August RFP where Purchasing and Legal had had the drafting responsibility,⁸⁷ there is no evidence about their purpose. However, Dell submits that competent

⁸² Bulko, November 22, 2004, p. 60, l. 23 to p. 61, l. 1

⁸³ Bulko, November 23, 2004 p. 42, ll. 2 to 12

⁸⁴ Bulko, November 23, 2004 p. 42, ll. 2 to 12

⁸⁵ Bulko, January 19, 2005, p. 112, l. 21 to p. 113, l. 7

⁸⁶ Bulko, November 23, 2004 p. 42, ll. 14 to 17

⁸⁷ Bulko, November 22, 2004, p. 53, ll. 2 to 16; p. 60, ll. 6 to 8

and experienced City lawyers and Metro lawyers at some point probably exercised great care in drafting terms and conditions in Metro's precedent RFP and in the City's precedent RFP that would provide the relevant municipality with a number of "privileges", and which would enable the municipality to avoid any contractual obligation unless and until the municipality was actually willing to enter into a contract.

45. There was no "blackout period" in this particular RFP.⁸⁸

46. Communication with a proponent was not prohibited; indeed, it was expressly permitted by section 2.7 of the August RFP. In order to avoid the well established law applied in a "tender" situation, where the initiating party will breach its duty of fairness if it allows a proponent to change its initial bid after submission,⁸⁹ this August RFP expressly gave the City the right to do so:

2.7 Negotiations

The City reserves the right **to enter into negotiations** with any proponent to **change** or clarify its submitted proposals...⁹⁰

Bulko understood this term gave the City the right to speak to any proponent about what was in a proposal.⁹¹

47. Based on her experience with Purchasing and with RFPs, Bulko is aware that in some cases, an RFP or a tender document will say that any contact with anyone else other than a named individual could disqualify the proponent. However, she quickly added that she did not think "that language was put into our proposal".⁹² It was not.

⁸⁸ August RFP, *in passim*, TEC019416, Exhibit 15, Volume 1, Tab 2, and in particular Section 2.7 "Negotiations" at TEC019416; Bulko, November 23, 2004, p. 38, ll. 4 to 16; Bulko, January 19, 2005, p. 121, l. 21 to p. 122, l. 6; Toms, November 29, 2004, p. 292, l. 13 to p. 293, l. 4; p. 294, l. 16 to p. 295, l. 25; Examination-in-chief of Toms, November 29, 2004, p. 120, ll. 13 to 19; p. 121, l. 9 to 17

⁸⁹ See eg: *Bradscot (MCL) Ltd. v. The Hamilton Wentworth Catholic School Board* (1999), 42 O.R. (3d) 723 (Ont. C.A.), at paragraphs 6, 16

⁹⁰ August RFP, TEC019416 at 19424

⁹¹ Bulko, November 23, 2004, p. 38, ll. 4 to 16; Bulko, January 19, 2005; p. 176, ll. 18 to 20

⁹² Bulko, January 19, 2005, p. 121, l. 21 to p. 122, l. 6

48. Dell submits that when drafting the terms of an RFP or an RFQ, a public authority has an unlimited and unrestrained power to stipulate the precise terms that it requests all respondents to accept. Dell further submits because of the complexity of the government procurement and tendering process, it would be inappropriate for the Commissioner to find that there were any unwritten terms or any mere understanding about a “blackout period” that governed this particular August RFP, for the same reasons that Commissioner Parker was found to have no jurisdiction to define “conflict of interest” in the Sinclair Stevens Inquiry.⁹³

3. **The City Specified End of Life Equipment in the August RFP**

49. The August RFP expressly provided that proponents should submit proposals on “Enterprise Tier” computer systems,⁹⁴ and provided the minimum specifications for the Standard Entry Level Desktop Configuration, being a personal computer with a Pentium II 300 mhz processor and only 32 mb of memory (among other things),⁹⁵ while at the same time allowing alternates to be proposed.⁹⁶

50. The 300 mhz processor was expected to be an “end of life” product by November 1998 when the Y2K desktop rollout was predicted to start. Dell concluded that by specifying “N-1” technology in the August RFP, the City would be acquiring technology that was at risk of obsolescence. Had the City proceeded with their initial specifications, they would have received outdated technology which would have been bad for taxpayers.⁹⁷

51. Kelly explained, in detail, the problems the City would have faced if it had purchased end of life computers for the Y2K rollout.⁹⁸ In summary, because the computers specified (Pentium II 300 mhz) would not be available throughout the 11 month rollout, the City would not have a stable rollout with the exact same image being deployed on the exact same machine in each of the locations. If the Intel chip changed part way through the rollout, the City

⁹³ *Canada v. Stevens*, 2004 F.C.J. No. 2116

⁹⁴ August RFP, Section 1.4, TEC019416 at 19421

⁹⁵ August RFP, TEC019416, at TEC019454, Volume 1, Tab 2, p. 39

⁹⁶ August RFP, section 2.5, TEC019416 at TEC019423

⁹⁷ Kelly Affidavit, paragraph 25

⁹⁸ Kelly, November 24, 2004, p. 13 to p. 16, l. 18

would have to re-certify the application, re-certify any network drivers and re-certify the system drivers. If there had been such an interruption during the Y2K desktop rollout, it could have been catastrophic.⁹⁹

52. Consequently, Dell decided to quote on a different configuration with technology that would be available throughout the anticipated rollout period, and to warn the City about the pending problem. At page 55 of Dell's Response to the August RFP,¹⁰⁰ Dell noted:

The City of Toronto is planning purchasing equipment in November. The Pentium II 300 will be end of life at that time, and would cause the City of Toronto to needlessly change processors, thereby increasing your total cost of ownership. Therefore, Dell is recommending an Intel based Pentium II 350. In addition, based on recommendations from Microsoft to run NT, Dell has included an additional 32mb of memory (totalling 64mb).¹⁰¹

53. Kelly explained at the hearing why the additional 32 mb of memory was required.¹⁰² Dell had that information from Microsoft. Kelly did not know if that information would be generally available to the City.¹⁰³

4. **The Evaluation and Staff Recommendation**

54. The City's Evaluation Committee¹⁰⁴ received and considered the 13 responses to the August RFP.¹⁰⁵ As a result of the work of the Evaluation Committee, Questech, GE and SHL were each recommended to be awarded a contract as a "full service" vendor, and Dell was not recommended.¹⁰⁶

⁹⁹ *Ibid*

¹⁰⁰ COT041040 at COT041077, Volume 1, Tab 6, p. 38

¹⁰¹ Kelly Affidavit, paragraph 26

¹⁰² Kelly, November 24, 2004, pp. 13 to 18

¹⁰³ Kelly, November 24, 2004, p. 19, l. 8 to p. 20, l. 8; p. 23, l. 25 to p. 24, l. 12

¹⁰⁴ Kathy Savage (Metropolitan Toronto IT), Graeme Reading (Scarborough Manager, Desktop Support), Zelina Mararaj, Connie McCutcheon (North York IT), Sandy Campbell (Toronto, formerly Metro, Works and Emergency Services) and Bulko: TEC019478 at 479 and Bulko, November 22, 2004, p. 64, l. 7 to p. 65, l. 3

¹⁰⁵ TEC019478 at 479, Exhibit 15, Volume 1, Tab 9. The parties who responded to the August RFP and who were considered are: Questech, GE Capital, SHL, Microbus, Micro Express, Hypertech, Softcom, MIT, Compugen, Dell, Micromart, Irene Network and Compu-Centre.

¹⁰⁶ TEC019478-479, Exhibit 15, Volume 1, Tab 9

55. In accordance with the evaluation criteria set out in section 3 of the August RFP,¹⁰⁷ the degree to which a proponent could provide the services being requested was only one factor to be weighed in the final result i.e. the degree to which a proponent could provide services would not disqualify the proponent but it may lead to a lower total value being ascribed to that response.¹⁰⁸ Dell was not disqualified, as shown by the Evaluation Report which Bulko sent to Frank Spizarsky in Purchasing on October 14, 1998,¹⁰⁹ in contrast to other proponents who were disqualified in Phase I and Phase II of the evaluation process.¹¹⁰ Bulko agreed during cross-examination that when she said in her Affidavit that Dell was “disqualified”, she had overstated it.¹¹¹ Instead, Dell did not make the short list during Phase III (which was when the Committee analyzed the viability, credibility and evaluated costs) Because of the Evaluation Team’s assessment of overall costs, Dell appeared to be a higher cost provider than the other competitive bidders.¹¹²

56. It is apparent on the face of the Evaluation Report that the Evaluation Committee was evaluating the cost of a “Compaq EN” and an “IBM 300PL” desktop unit, and that the fact that Dell had quoted an alternative 350 mhz computer which would not be “end of life” in November 1998 was not in the Evaluation Report.¹¹³

57. Franey understood that Dell was not selected because it was not a full service vendor capable of meeting all the City’s needs.¹¹⁴ Kelly¹¹⁵ and Toms¹¹⁶ had the same understanding.

¹⁰⁷ TEC019416 at 425-426, especially section 3.6 at TEC019426

¹⁰⁸ Bulko, November 23, 2004, p. 43, ll. 1 to 20

¹⁰⁹ TEC019478-479

¹¹⁰ Bulko, November 23, 2004, p. 45, l. 24 to p. 48, l. 11

¹¹¹ Bulko, November 22, 2004, p. 79, ll. 3 to 1; Bulko, November 23, 2004, p. 49, ll. 7 to 15

¹¹² Bulko, November 23, 2004, p. 48, l. 21 to p. 49, l. 15

¹¹³ Evaluation Report, TEC019478 at 482; See also: Bulko, November 23, 2004 p. 53, l. 20 to p. 54, l. 21; Bulko, November 23, 2004, p. 210, ll. 2 to 19; Franey, November 30, 2004, p. 229, ll. 13 to 20; p. 231, ll. 3 to 25

¹¹⁴ Franey Affidavit, paragraph 7; Franey, November 30, 2004, p. 8, ll. 16 to 19

¹¹⁵ Kelly Affidavit, paragraph 39

¹¹⁶ Toms Affidavit, paragraph 19

58. Even though Dell was not recommended to be awarded a full service contract, the Evaluation Report expressly included, as part of its recommendation, that “Dell computer systems may be acquired directly from Dell and shipped to one of the recommended full-service vendors for added value services”.¹¹⁷

59. Bulko testified that the City’s intention always was to continue purchasing Dell-branded hardware directly from Dell because several departments within the City, primarily the former Metro Works Department, already had a number of Dell PCs.¹¹⁸ Franey confirmed that while Metro was not “a big Dell shop”, the Metro Works Department was¹¹⁹ and that knowing that Sandy Campbell, representing the Works Department, was on the Evaluation Committee helped to explain why the evaluation report expressly stated that Dell computer systems may be acquired directly from Dell and shipped to one of the recommended full-service vendors for value added services.¹²⁰

60. It is respectfully submitted that Bulko and the other members of the Evaluation Committee did not fully understand the Dell Business Model when they recommended that Dell ship the computers to one of the VARs. One of the main benefits of the Dell Business Model is that software and peripherals can be integrated into the computer system at the Dell factory under Dell’s “build to order” system. Perhaps the most distinctive “value added service” provided by Dell is its ability to custom configure hardware and software as it builds each computer system, one order at a time.¹²¹

5. **IBM Business Case Document for Desktop Environment: October 1998**

61. Even the “IBM/City of Toronto Transformation 2000 Business Case Document for the Desktop Environment”,¹²² that stipulated only Enterprise Tier vendor products would be

¹¹⁷ Evaluation Report, TEC019478 at 479

¹¹⁸ Bulko Affidavit, paragraph 15

¹¹⁹ Franey, December 1, 2004, p. 54, ll. 24 to 25

¹²⁰ Franey, November 30, 2004, p. 235, ll. 2 to 18

¹²¹ Mortensen Affidavit, paragraph 29; see also paragraphs 25 to 33 for a more complete discussion of the ‘build to order’ concept.

¹²² IBM Transformation 2000 Business Case, COT074872, Exhibit 15, Volume 4, Tab 4; Franey, November 30, 2004, p. 36, ll. 8 to 14; p. 37, ll. 2 to 13

acquired, included the Dell products.¹²³ That document was drafted by Franey with the assistance of the IBM Global Services Project Team¹²⁴ based on an extensive assessment of what was done throughout the whole City, in order to develop the baseline.¹²⁵ That Business Case Document was developed as part of a process wholly separate and apart from the August RFP.¹²⁶

6. **Compugen Warns City About Obsolete Desktops: October 28-November 6, 1998**

62. Bulko met with Lisa Carroll, Compugen Account Manager, on October 28, 1998.¹²⁷ The contemporaneous record of this meeting shows that Carroll raised the issue of why Compugen had not been recommended to be selected as a result of the August RFP, as well as Compugen's concern that other vendors had "low-balled" the desktop pricing, because the standard entry level minimum desktop configuration "would be obsolete" by the time the desktop contract was awarded.¹²⁸ Bulko has no specific recollection of the meeting.¹²⁹ Bulko testified that she received Lisa Carroll's concerns and directed Carroll to speak with Purchasing.¹³⁰

63. A subsequent meeting was held with representatives of Compugen, Bulko and Purchasing (David Beattie and Frank Spizarsky) on November 6, 1998.¹³¹ Compugen had prepared a document for discussion with the City on or after November 4, 1998,¹³² expressing its concerns, specifically addressing certain sections of the August RFP, the product pricing and the

¹²³ *Ibid*, at 74874

¹²⁴ Franey Affidavit, paragraph 2

¹²⁵ Franey, November 30, 2004, p. 35, ll. 1 to 5

¹²⁶ Franey, November 30, 2004, p. 34, l. 5 to p. 35, l. 7

¹²⁷ Bulko, January 19, 2005, p. 34, ll. 2 to 5

¹²⁸ Compugen – RFP Response, TEC057538, Exhibit 15, Volume 6, Tab 18

¹²⁹ Bulko, January 19, 2005, p. 34, ll. 10 to 19

¹³⁰ Bulko, January 19, 2005, p. 25, l. 23 to p. 26, l. 21; p. 30, l. 11 to p. 33, l. 5; p. 33, l. 17 to p. 34, l. 5

¹³¹ Bulko, January 19, 2005, p. 124, l. 10 to p. 126, l. 3; undated letter from Compugen to Frank Spizarsky, referring to the meeting "last week", TEC057793, Exhibit 15, Volume 6, Tab 21

¹³² "Concerns from Compugen/Qualifications for Bid", undated but prepared on or after November 4, 1998, TEC057991, Exhibit 15, Volume 6, tab 20; Bulko, January 19, 2005, p. 124, ll. 10 to 21

fact that desktops quoted upon were “now not available” and that the replacement desktop would cost \$600 more.¹³³

64. Andrew had a meeting scheduled with Harry Zarek, President of Compugen, on November 5, 1998.¹³⁴ Andrew testified that he probably met with Zarek on that date.¹³⁵ Although Andrew has no specific recollection of that meeting, he agreed that it would be reasonable to conclude that if the President of Compugen had a meeting with the Chief Information Officer and Executive Director of IT for the City within days of the conversation that Compugen’s employee had with Bulko and the day before Compugen’s meeting with Bulko and Spizarsky, the President of Compugen would likely bring up the very same topics that were troubling the other people in his organization.¹³⁶ The documents found in Bulko’s files included Compugen’s expressed concern about low ball pricing by other proponents, and the expected \$600 increase in the cost of the replacement equipment.¹³⁷ However, Andrew testified that the issues of obsolete equipment and the higher expected cost of the replacement equipment were not raised with him.¹³⁸

7. **Corporate Services Committee Meeting: November 9, 1998**

65. On November 9, 1998, the Corporate Services Committee of City Council met to consider the recommendation of staff that the City enter into contracts with the three recommended VARs: Questech, SHL and GE.¹³⁹

66. Bulko and Andrew prepared the Staff Report of the results of the August RFP that was presented to and considered by the Corporate Services Committee.¹⁴⁰ Bulko had no

¹³³ Concerns of Compugen/Qualifications for Bid, TEC057791; Bulko, January 19, 2005, p. 122, l. 11 to p. 124, l. 5; p. 125, ll. 13 to 18

¹³⁴ TEC057870 at TEC057900

¹³⁵ Andrew, January 26, 2005, p. 39, ll. 3 to 14

¹³⁶ Andrew, January 26, 2005, p. 41, l. 4 to p. 42, l. 8

¹³⁷ Concerns of Compugen/Qualifications for Bid, TEC057991, Exhibit 15, Volume 6, Tab 20

¹³⁸ Andrew, January 26, 2005, p. 39, l. 18 to p. 40, l. 17; see also: January 25, 2005, p. 189, l. 19 to p. 190, l. 22

¹³⁹ November 4, 1998 Report, TEC046612, Exhibit 15, Volume 1, Tab 12; Bulko Affidavit, paragraph 17; Bulko, November 22, 2004, p. 96, ll. 7 to 13

¹⁴⁰ Bulko November 22, 2004 p. 65, l. 17 to p. 66, l. 1

explanation for why the specific reference to the purchase of computers directly from Dell was omitted in the November 4, 1998 Staff Report, as presented to the Corporate Services Committee.¹⁴¹

67. The staff recommendation that the City enter into contracts with the three recommended VARs, Questech, SHL and GE, was adopted by the Corporate Services Committee without any debate or comment.¹⁴²

68. There was nothing in the Report to or from the Corporate Services Committee that stipulated or even indicated which manufacturer's desktops were going to be acquired.¹⁴³ There was nothing in the Corporate Services Committee Report, as adopted by City Council, prohibiting the Bulko's Y2K Desktop Team from choosing any one of the three Tier 1 manufacturers or from choosing all three of the manufacturers.¹⁴⁴

69. Franey's interpretation of this Report was that such a report would not have permitted the City to issue a purchase order to actually procure anything. So, at some point, the City would actually have had to issue a call or sole source.¹⁴⁵

70. Jeffrey Lyons ("**Lyons**") testified that "it's possible" he may have been at the Corporate Services Committee meeting on November 9, 1998,¹⁴⁶ even though he was not retained by Dell until November 12, 1998.¹⁴⁷ "It's possible" that he saw Andrew there.¹⁴⁸

¹⁴¹ TEC046612, Exhibit 15, Volume 1, Tab 12; Bulko Affidavit, paragraph 15; Bulko November 22, 2004 p. 85, l. 11 to p. 86, l. 22

¹⁴² Bulko Affidavit, paragraph 18

¹⁴³ Retainer Letter TEC031605-606; Exhibit 15, Volume 1, Tab 13; Dell Canada Non-Disclosure Agreement with Morrison, Brown Sosnovitch November 12, 1998, TEC057093, Exhibit 15, Volume 4, Tab 25

¹⁴⁴ Bulko, November 23, 2004, p. 64, ll. 14 to 23

¹⁴⁵ Franey, November 30, 2004, p. 61, l. 13 to p. 62, l. 7

¹⁴⁶ Lyons, January 17, 2005, p. 55, ll. 6 to 8

¹⁴⁷ Kelly, November 24, 1998 p. 325 l. 17 to p. 327 l. 5; Lyons Affidavit paragraphs 12 and 13; Dell Retainer Letter TEC031605, paragraph 2; Exhibit 15, Volume 1, Tab 13; Dell Canada Non-Disclosure Agreement dated November 12, 1998, TEC057093, Exhibit 15, Volume 4, Tab 25

¹⁴⁸ Lyons, January 17, 2005, p. 56, ll. 14 to 17

Bulko's evidence on this point was somewhat inconsistent¹⁴⁹ and Andrew's evidence was sketchy and inconsistent.¹⁵⁰

71. Three documents related to Dell's retainer of Lyons were produced by Lyons to the Commission and the parties with standing approximately 2 years after Lyons had been given standing at TCLI and TECI, and after Lyons had denied on oath having any files related to DFS or Dell.¹⁵¹ During TCLI, Lyons proved to be an unreliable witness. Therefore, it is submitted that no weight should be placed on Lyons' evidence given during the desktop phase of TECI unless it is supported by a contemporaneous document or corroborated by another witness.

72. Whether or not he was present at the meeting, Lyons knew about the result of this Committee meeting by no later than the following day. Lyons reported in writing to Mortensen that he had had "several discussions" with Andrew as of November 10, 1998,¹⁵² with respect to the November 4, 1998 staff report to the Corporate Services Committee. Lyons testified that he does not recall specifically when he spoke to Andrew but he believes he phoned him in early November 1998 and that the phone call could have occurred prior to his retainer with Dell being formally concluded.¹⁵³

73. Andrew testified that he advised Lyons that Dell should sell through one of the VARs,¹⁵⁴ and that is the only recollection he has of any discussion with Lyons.¹⁵⁵

8. **Dell's Retainer of Lyons: November 12, 1998**

74. On November 12, Dell retained Lyons' law firm, Morrison, Brown & Sosnovich ("MBS"), for a period of six months.¹⁵⁶ Kelly signed the retainer letter on Toms' behalf and

¹⁴⁹ Bulko, November 22, 1994, p. 98, l. 20 to p. 99, l. 18; pp. 102 to 113

¹⁵⁰ Andrew Affidavit, paragraph 116; Andrew January 25, 2004, p. 161, l. 24 to p. 163, l. 1; p. 164, ll. 18 to p. 165, l. 7

¹⁵¹ See evidence summarized in the City's Closing Submissions following TCLI, Chapter 27, paragraphs 11 and 12

¹⁵² TEC057089, Exhibit 15, Volume 4, Tab 33; Lyons, January 17, 2005, p. 55, l. 25 to p. 56, l. 5

¹⁵³ Lyons Affidavit, paragraphs 19, 20; Lyons Examination, p. 70, l. 3 to p. 72, l. 23; Andrew, January 26, 2005, p. 148, ll. 1-6

¹⁵⁴ Andrew, January 26, 2005, p. 150, ll. 9 to 21

¹⁵⁵ Andrew Affidavit, paragraph 115; Andrew, January 25, 2005, p. 164, ll. 6 to 7; p. 164, l. 18 to p. 165, l. 18; p. 165, l. 24 to l. 166, l. 18; p. 167, ll. 17 to 23; p. 168, l. 18 to p. 169, l. 8

with Dell's authority,¹⁵⁷ on November 12, 1998.¹⁵⁸ Lyons signed on behalf of MBS.¹⁵⁹ There was no success fee agreed upon or paid.¹⁶⁰

75. Dell had considered for some time whether to retain a lobbyist.¹⁶¹ Although Kelly met with Lyons on September 16, 1998, being the day before the closing date of the August RFP, that was purely coincidental.¹⁶² Once Dell learned the RFP was going to be awarded to somebody else, Dell retained Lyons to help Dell get its message across.¹⁶³

76. Dell retained Lyons on a direct referral from Andrew.¹⁶⁴

77. On a date he can no longer recall, Toms spoke to Andrew about Dell's business at the City and Dell's goal to increase that business.¹⁶⁵ The general nature of the discussion was that Dell was not well known at the City (where IBM and Sun were the incumbents) and that Dell really did not understand the process for the award of major contracts by the New City. Toms asked Andrew, in substance, what he thought Dell should do to try to improve its position as a supplier at the City. The substance of Andrew's response (but not necessarily his exact words) was that if Dell needed help understanding how to best approach the City, Dell might consider hiring Lyons because Lyons knew the City's business and he knew the people, that Lyons understood the City and all the City Departments very well and that Lyons could help Dell

¹⁵⁶ Retainer Letter, TEC031605, Exhibit 15, Volume 1, Tab 13; Dell Canada Non-Disclosure Agreement dated November 12, 1998, Exhibit 15, Volume 4, Tab 25

¹⁵⁷ Kelly Affidavit, paragraph 41

¹⁵⁸ Kelly, November 24, 1998, p. 325, l. 17 to p. 326, l. 8

¹⁵⁹ TEC031605, Exhibit 15, Volume 1, Tab 13

¹⁶⁰ Kelly Affidavit, paragraph 46

¹⁶¹ Toms Affidavit, paragraphs 21, 26 to 27; Kelly Affidavit, paragraphs 32 to 36; TEC046591, Exhibit 15, Volume 1, Tab 5

¹⁶² Kelly Affidavit, paragraphs 31 and 32

¹⁶³ Kelly, November 24, 2004, p. 83, l. 20 to p. 86, l. 4

¹⁶⁴ Toms Affidavit, paragraph 25

¹⁶⁵ Toms Affidavit, paragraph 24, sentence 1. Prior to this discussion, Toms had spoken to Andrew on at least two other occasions after Toms had joined Dell: Toms Affidavit, paragraphs 22, 23

better understand the City's processes with regards to IT procurement.¹⁶⁶ Andrew's recommendation indicated to Toms that Lyons had credibility at the City.¹⁶⁷

78. Before Andrew saw Toms' Affidavit (which was sworn after Andrew's Affidavit), Andrew denied recommending that Dell should retain a lobbyist and he denied recommending Lyons as a prospective lobbyist.¹⁶⁸ Toms specifically disagreed with that evidence:

"My response is that I did not know Jeff Lyons prior to joining Dell and I would not have thought of this person as a lobbyist candidate, if it had not been for Jim Andrew mentioning his name to me. Mr. Lyons was a direct referral from Jim Andrew, who was the CIO of one of the top five public entities in Canada. His advice was worth considering, and I did consider it. I agree he did not 'tell' me to do it but I did get the advice from him."¹⁶⁹

79. Both Toms and Andrew testified to the effect that Andrew did not tell Toms "hire Lyons".¹⁷⁰ When Andrew was orally examined during the desktop phase of TECI, Andrew said it was "entirely possible" that he had mentioned Lyons to Toms, but he did not think they got into a great level of detail.¹⁷¹ When he was cross-examined on the substance of the advice, he did not disagree with any part of Toms' evidence concerning the referral.¹⁷²

80. Andrew had known Lyons since about 1995 or 1996.¹⁷³ From his own prior dealings and discussions with Lyons, Andrew knew that Lyons was well known at the City of Toronto, that he was well known by City Councillors, and that Lyons had a great institutional knowledge of the City of Toronto.¹⁷⁴ Andrew agreed that those attributes would make Lyons an

¹⁶⁶ Toms Affidavit, paragraph 24

¹⁶⁷ Toms, November 29, 2004, p. 254, ll. 16 to 21; p. 255, ll. 3 to 6

¹⁶⁸ Andrew Affidavit sworn September 22, 2004, paragraph 108

¹⁶⁹ Toms Affidavit, paragraph 25

¹⁷⁰ Toms Affidavit, paragraph 25, final sentence; Toms, November 29, 2004, p. 256, ll. 8 to 23; p. 257, l. 9 to p. 258, l. 11; Andrew, January 25, 2004 p. 144, ll. 5 to 13; Andrew, January 26, 2004 p. 12, ll. 12 to 18; p. 13, ll. 3 to 11

¹⁷¹ Andrew, January 25, 2005, p. 144, ll. 5 to 22

¹⁷² Andrew, January 26, 2005, p. 12, l. 9 to p. 14, l. 7 where he agreed with the substantive elements of Toms' evidence in paragraph 24 of Toms' Affidavit

¹⁷³ Andrew, January 25, 2005, p. 141, ll. 18 to 21

¹⁷⁴ Andrew, January 26, 2005, p. 13, ll. 12 to 24

ideal person to speak to for a supplier who wanted to understand how the newly amalgamated City of Toronto was operating, particularly if that supplier didn't have much knowledge of City Council or the City Councillors.¹⁷⁵ As the contemporaneous memo to file of Suzanne Cross (“**Cross**”) indicates, on September 16, 1998 Kelly had told Lyons that Dell did not even know who the 56 City Councillors were.¹⁷⁶

81. Dell expected Lyons to convey to the City that the City was about to purchase end-of-life desktops, at unnecessarily high prices.¹⁷⁷ Given Lyons' understanding of the City – City Council and the process piece – Dell had confidence Lyons would know what to do and who to speak to.¹⁷⁸

9. **Meeting of Andrew, Toms and Lyons: November 16, 1998**

82. At some point after November 12, 1998, Lyons coordinated a meeting held among himself, Andrew and representatives of Dell.¹⁷⁹ Although neither Toms nor Lyons could recall the exact date of the meeting, both of them believed it was after November 12, 1998.¹⁸⁰ With the benefit of Andrew's November 1998 calendar which was produced for the first time to the Inquiry and the parties with standing on November 24, 2004 (after all the Affidavits had been filed and after two days of evidence),¹⁸¹ Toms and Andrew testified that this meeting probably occurred or could have occurred on November 16, 1998 at 3:30 p.m.¹⁸² Lyons agreed that it seemed “reasonably accurate” to place the approximate date of the meeting either at November 16 or sometime between November 12 and 28, 1998.¹⁸³

¹⁷⁵ Andrew, January 26, 2005, p. 13, l. 25 to p. 14, l. 8

¹⁷⁶ TEC0570870, Exhibit 15, Volume 4, Tab 24; Kelly Affidavit, paragraph 34

¹⁷⁷ Toms Affidavit, paragraph 36

¹⁷⁸ Toms, November 29, 2004, p. 147, l. 13 to p. 148, l. 12

¹⁷⁹ Lyons Affidavit, paragraphs 18(b) and 22; Lyons, January 17, 2005, p. 74, l. 18 to p. 76, l. 19

¹⁸⁰ Lyons Affidavit, paragraph 22; Toms Affidavit, paragraph 25

¹⁸¹ TEC057870, Exhibit 15, Volume 5, Tab 37 and coversheet from H. Hogan

¹⁸² TEC057870 at TEC057901 (p. 168); Toms, November 29, 2004, p. 274, ll. 2 to 25; Andrew, January 25, 2005, p. 169 to p. 170, l. 5

¹⁸³ Lyons, January 17, 2005, p. 75, ll. 7 to 11

83. The meeting was held at Metro Hall, either in Andrew's office or in a breakout room.¹⁸⁴ At this meeting, Dell not only wanted to understand why Dell had not been on the short list to be recommended to Council but also to "sell Dell" to the City and to have Dell win.¹⁸⁵ Dell was essentially trying to encourage Andrew and the City to reconsider and to keep Dell in the running.¹⁸⁶

84. Toms was the person making the pitch about the benefits of the Dell Business Model and how it would be good for the City if the City was able to purchase Dell hardware to fulfil its need to become Y2K compliant.¹⁸⁷ Lyons' role at the meeting was to be there so that Dell could understand what vehicles could be used or what the next steps would be if Andrew or his team decided to explore some areas further.¹⁸⁸ Lyons' value was that he had a much more specific understanding of the Council process and the final steps of how the proposals would be reviewed and either accepted or put back for any changes.¹⁸⁹ While some points were made by Lyons during the meeting, probably 75 percent of the discussion was about Dell-driven topics, the topics that Dell wanted to make sure were heard.¹⁹⁰

85. Toms was concerned that the Dell message and the Dell Business Model were not adequately understood at the City.¹⁹¹ It appeared to Toms that Andrew did not really understand how the Dell Business Model worked.¹⁹² At the early part of the meeting, Toms concluded that Andrew did not think there was much of a sense of urgency, because it was assumed that Dell would sell computers through the re-sellers.¹⁹³ Toms thought that someone lower down in the City's IT organization had made the assumption that Dell would simply sell to the City through

¹⁸⁴ Toms Affidavit, paragraph 34; Toms, November 29, 2004, p. 133, ll. 7 to 10

¹⁸⁵ Toms, November 29, 2004, p. 134, l. 12 to p. 135, l. 10

¹⁸⁶ Toms, November 29, 2004, p. 138, l. 25 to p. 139, l. 6

¹⁸⁷ Toms Affidavit, paragraph 35

¹⁸⁸ Toms, November 29, 2004, p. 142, l. 13 to p. 143, l. 1

¹⁸⁹ Toms, November 29, 2004, p. 146, ll. 4 to 17

¹⁹⁰ Toms, November 29, 2004, p. 144, ll. 2 to 17

¹⁹¹ Toms Affidavit, paragraph 35; Toms, November 29, 2004, pp. 133 to 142

¹⁹² Toms Affidavit, paragraph 35

¹⁹³ Toms, November 29, 2004, p. 143, ll. 2 to 17

the re-sellers.¹⁹⁴ But that was not how the Dell Model worked. Andrew did not seem to understand that Dell's computers would not be supplied to the City because Dell generally does not sell to VARs and VARs don't purchase from Dell.¹⁹⁵ Toms made the point clear that Dell did not sell through re-sellers. Therefore, the City would not receive the benefit of the lower cost equipment or any of the other benefits inherent in the Dell Business Model in respect of the Y2K project that had been the subject of the August RFP.¹⁹⁶ Unless something happened, Dell would not be supplying the computers the City needed to become Y2K compliant because it was not likely that the VARs would use Dell.¹⁹⁷

86. At this meeting, they talked specifically about the benefits to the City, the savings to be effected and levelling the playing field, by breaking services apart from the price of computers, which was critical.¹⁹⁸ There were significant advantages to the Dell Model. Dell was quite shocked that the re-seller model was seen as being more financially beneficial.¹⁹⁹ Toms said he would have gone into detail about how Dell could expect to be successful, given its business model.²⁰⁰

87. Because of the economic benefits of the Dell Business Model, Dell was confident that Dell's desktops would be the lowest cost desktop and would reflect the most recent advances in technology.²⁰¹ An essential part of the Dell Business Model is that Dell offers its customers the most up-to-date, technologically advanced hardware and value-added services at the lowest cost for comparable products.²⁰² Dell encourages standardization and open standards, which in turn leads to lower prices, whereas its competitors tend to favour proprietary technology.²⁰³

¹⁹⁴ Toms, November 29, 2004, p. 275, ll. 7 to 19

¹⁹⁵ Toms Affidavit, paragraph 35

¹⁹⁶ Toms Affidavit, paragraph 35

¹⁹⁷ Toms, November 29, 2004, p. 137, l. 7 to p. 138, l. 18

¹⁹⁸ Toms, November 29, 2004, p. 139, l. 14 to p. 140, l. 6; p. 141, l. 24 to p. 142, l. 8

¹⁹⁹ Toms, November 29, 2004, p. 133, l. 20 to p. 134, l. 12

²⁰⁰ Toms, November 29, 2004, p. 249, l. 13 to p. 250, l. 5

²⁰¹ Toms Affidavit, paragraph 18

²⁰² Mortensen Affidavit, paragraph 14

²⁰³ Mortensen Affidavit, paragraphs 20-23

88. Toms does not recall how the meeting ended, but he does believe he had conveyed the benefits of the Dell Business Model to Andrew and that Andrew understood the issues.²⁰⁴

89. Lyons testified he doesn't "remember much about the meeting",²⁰⁵ and he had no recollection of various specific events.²⁰⁶ Based on this poor level of recollection, Lyons believes Toms probably did talk about the Dell Business Model.²⁰⁷ Putting the meeting in context, Lyons believes they "had to sort of know what his [Andrew's] position was because I had to...you have to sort of try and turn this around."²⁰⁸ The fact that an amendment was needed "could have been" part of the discussions, but "I just don't remember".²⁰⁹ Lyons testified that it is "possible" that he did not disabuse Andrew of the notion that Dell might sell through VARs.²¹⁰

90. Lyons does not presently recall discussing the "end of life" issue at the meeting or with Dell,²¹¹ but if Dell told him the specification was out of date, that's something he likely put forward to Andrew.²¹² Lyons was an advocate and he was accustomed to putting the best points forward on behalf of a client.²¹³ Lyons knew, generally, that Dell sold computers with the most up-to-date technology whereas the VARs might be selling equipment that was 6 months old.²¹⁴ Lyons had a copy of the November 30 e-mail from Mortensen to Bulko wherein Mortensen suggested a non-proprietary specification for current technology, which by November 1998 was

²⁰⁴ Toms Affidavit, paragraph 35, last sentence

²⁰⁵ Lyons, January 17, 2005, p. 76, ll. 5 to 7

²⁰⁶ Lyons, January 27, 2005, p. 102, ll. 19 to 24; p. 104, ll. 15 to 23; p. 178, ll. 10 to 20; p. 250, l. 19 to p. 251, l. 5; p. 251, l. 20 to p. 252, l. 6

²⁰⁷ Lyons, January 17, 2005, p. 76, ll. 5 to 18

²⁰⁸ Lyons, January 17, 2005, p. 76, ll. 5 to 18

²⁰⁹ Lyons, January 17, 2005, p. 252, ll. 1 to 9

²¹⁰ Lyons, January 27, 2005, p. 250, l. 19 to p. 251, l. 5; p. 251, l. 20 to p. 252, l. 6

²¹¹ Lyons, January 17, 2005, p. 190, l. 13, to p. 191, l. 24

²¹² Lyons, January 17, 2005, p. 193, ll. 17 to 25

²¹³ Lyons, January 17, 2005, p. 191, l. 25 to p. 193, l. 25

²¹⁴ Lyons, January 17, 2005, p. 191, l. 25 to p. 193, l. 25

Intel Pentium II 400 mhz.²¹⁵ So Lyons had access to the recommended change in specifications *at least* on or about November 30, 1998, and thereafter.

91. As of September 22, 2004 when his Affidavit was sworn,²¹⁶ Andrew had no recollection of any meeting that he had with Lyons between November 12, 1998 and January 28, 1999.²¹⁷ After being confronted with the sworn evidence of Toms and Lyons about the meeting that had taken place, Andrew conceded that the meeting “could have taken place” but he maintained throughout his testimony he still didn’t recall the meeting or remember “the specifics of a meeting at that time”.²¹⁸

92. Since neither Andrew nor Lyons had any specific recollection of what had been discussed at the November 16 meeting (and indeed Andrew had initially denied such a meeting was held), the evidence from both of them of what could have happened at this meeting is wholly speculative.

93. Lyons testified that he doesn’t know if it was at the November 16 meeting or in subsequent discussions that he “got the sense that Andrew was going to help re-open it so that Dell could bid.”²¹⁹ According to Lyons, staff was in one way or another going to find a way to let Dell back into the picture, to let Dell bid again.²²⁰ Lyons testified that no “solution” was ever disclosed to him by Andrew.²²¹

94. Andrew was not specifically asked whether a “solution” was discussed at the November 16, 1998 meeting (which, of course, he has no recollection of attending). When asked about any subsequent discussions with Lyons, Andrew denied ever suggesting to Lyons that a

²¹⁵ TEC057094, Exhibit 15, Volume 4, Tab 26. This e-mail was provided by Lyons to the Commission only on November 10, 2004, which was more than 2 years after TECI was established and just prior to the oral hearing. It is obvious on the face of the November 30 e-mail that a copy was sent to Morrison, Brown, Sosnovitch, the law firm where Lyons was then working.

²¹⁶ Andrew Affidavit, sworn September 22, 2004, read into evidence January 24, 2005

²¹⁷ Andrew Affidavit, paragraph 114

²¹⁸ Andrew, January 25, 2005, p. 169, l. 9 to p. 170, l. 5; Andrew, January 26, 2005, p. 150, ll. 7 to 13

²¹⁹ Lyons, January 17, 2005, p. 253, ll. 2 to 9

²²⁰ Lyons, January 17, 2005, p. 253, ll. 10 to 16

²²¹ Lyons, January 17, 2005, p. 253, l. 5. Lyons just got the sense that he was going to help re-open it and “that they were going to find an answer to it”.

solution could be that the City had to have a price refresh on up-to-date equipment and that Dell should put a price in when the price refresh came out.²²²

10. **Meeting of Andrew, Powers, Wong and Franey – November 17, 1998**

95. On November 17, 1998 at 9:30 a.m., being the morning after Andrew's meeting with Lyons and Toms, a meeting was scheduled for Andrew with Mike Franey, Steven Wong and Rick Powers "to brief you on the hardware RFQ", and in his calendar Andrew was advised they would try to grab him for about one half hour.²²³

96. Andrew testified it was just a coincidence that this meeting for the purpose of briefing him on "the hardware RFQ" was held within 24 hours of his meeting with Lyons and Toms, when Dell's issues had been discussed.²²⁴ Andrew also testified he could not help the Commissioner by providing any evidence of what happened at this meeting.²²⁵

97. In the absence of any documentary evidence and even though Franey²²⁶ and Andrew²²⁷ each admitted that they have no real recollection of the meeting, Franey and Andrew each testified that they believed the meeting held 6 years earlier, on the morning of November 17, 1998, related to a discussion about servers for the SAP project because Steven Wong and Rick Powers were scheduled to be at the meeting.²²⁸

98. Andrew was not aware of any hardware RFQ ever being issued for the SAP project.²²⁹ There is no documentary evidence to suggest that there was any "hardware RFQ" in existence as of November 17, 1998, other than the "August RFP" for hardware, software and services. There was no "hardware RFQ" in contemplation at that time, other than possibly the

²²² Andrew, January 26, 2005, p. 108, l. 25 to p. 109, l. 23

²²³ Andrew Calendar, November 17, 1998, COT039906

²²⁴ Andrew, January 26, 2005 p. 45, l. 24 to p. 46, l. 8; Andrew January 25, 2004, p. 171, l. 13 to p. 172, l. 4

²²⁵ Andrew, January 25, 2005 p. 171, l. 13 to p. 172, l. 4

²²⁶ Franey, November 30, 2004, p. 99, l. 21 to p. 100, l. 3

²²⁷ Andrew, January 26, 2005 p. 46, ll. 5 to 8

²²⁸ Andrew, January 26, 2005 p. 45, ll. 7 to 10; Franey, November 30, 2004, p. 99, l. 21 to p. 100, l. 13

²²⁹ Andrew, January 26, 2005 p. 45 ll. 11 to 23

December Mini-RFQ for desktops only²³⁰ and a Digital Data Storage Solution RFP that was released on December 3, 1998.²³¹

99. Dell and Compugen had conveyed to the City by November 17, 1998 that the City was about to buy “end of life” or “obsolete” equipment, as shown by the contemporaneous documents referred to above. In light of the meetings that Andrew admits he had with the President of Compugen and with the Director Public of Dell on November 5, 1998 and November 16, 1998, respectively, it is submitted that the Executive Director of IT likely knew by November 17 that the City had provided a minimum specification for desktops for the Y2K conversion that stipulated technology that was obsolete in November 1998 and that would not be available to the City for the duration of the Y2K desktop rollout. It is submitted that despite Andrew’s evidence that he was not told that the specified desktop computers were already obsolete,²³² the Commissioner should find that he knew this material fact.

11. **Other Discussions with Staff**

(a) **Bulko**

100. On November 19, 1998 at 9:30 a.m. according to Bulko’s calendar,²³³ Bulko and Mortensen met. Both agreed that the meeting was probably held on the date shown in her calendar.²³⁴ This was an introductory meeting where business cards, including email addresses, were in all likelihood exchanged.²³⁵

²³⁰ It is not clear on the evidence when City staff first contemplated having a price refresh or a Mini-RFQ for the desktops.

²³¹ Digital Data Storage Solution RFP may have been at least under consideration in November 1998, since it was released December 3, 1998 according to COT015517. It was written by Rudy Lippens and Max Purkal, the final copy was approved by Mike Franey and Dave Beatty and a report was made to Andrew about it on December 24, 1998, according to COT015517. Additional RFQs that are referred to in the TCLI/TECI database are the Leasing RFQ that was the subject matter of TCLI, the RFQ on voting machines (COT020070), the RFQ for leasing photocopiers (see for example COT066880), various personnel RFPs, such as the Application Trainer RFP (TEC007146), the Network Analyst RFP (TEC007197), the Contractual Services RFP (TEC007204), the Senior Business Analyst RFP (TEC007210), the Vehicle Leasing RFP (COT057066), the Systems Integrator-Infrastructure RFP (TEC048606), the Year 2000 Project Office RFP (TEC047885), and a Corporate Electronic Messaging RFP (TEC046649).

²³² Andrew, January 26, 2005, p. 39, l. 24 to p. 40, l. 17; January 25, 2005, p. 189, l. 19 to p. 190, l. 22

²³³ TEC057914 at 916

²³⁴ Bulko, November 23, 2004, p. 164, l. 11 to p. 165, l. 5; Mortensen, November 25, 2004 p. 113, ll. 3 to 14

²³⁵ Bulko, November 23, 2004, p. 164, ll. 11 to 16; Mortensen, November 25, 2004 p. 113, ll. 21 to 25

101. On November 26, 1998, Mortensen had a telephone conversation with Bulko, and she received an e-mail about the upcoming RFQ from Mortensen dated November 30, 1998.²³⁶ Mortensen's November 30, 1998 e-mail to Bulko refers to "our telephone conversation" of "Thursday", and the previous Thursday was November 26, 1998.²³⁷ The inference from this contemporaneous business record is that the decision had been made by the City to request prices in the "Upcoming RFQ" by no later than Thursday, November 26, 1998, and certainly by November 30, 1998 at 5:00 p.m.²³⁸ (The substance of this e-mail is discussed later in these Submissions.) Mortensen did not necessarily learn about the upcoming RFQ in that telephone conversation; he's not sure how he learned about it, because it was a discussion going around at the time.²³⁹

102. Viinamae denied Bulko's suggestion²⁴⁰ that Mortensen's e-mail referred to a telephone discussion on November 26 with Viinamae, rather than Bulko.²⁴¹

103. Within seven days of the meeting and telephone discussion with Mortensen, Bulko also had meetings scheduled with Lisa Carroll of Compugen, Dan Loney of GE and Diane Lara of Questech.²⁴² No one asked her if she discussed the upcoming RFP with any of them.

104. Bulko had difficulty explaining why in her Affidavit²⁴³ and earlier oral evidence,²⁴⁴ she had testified that Viinamae had given her Dell's address when Viinamae had allegedly requested that Bulko include Dell in the Mini-RFQ, given that she had met with

²³⁶ Bulko, November 23, 2004, p. 79, ll. 17 to 25

²³⁷ Email re "Upcoming RFQ", TEC057094, Exhibit 15, Volume 4, Tab 26 and Exhibit 2 to Mortensen Affidavit

²³⁸ TEC057094, Exhibit 15, Volume 4, Tab 26

²³⁹ Mortensen, November 25, 2004, p. 303, ll. 14 to 19; p. 304, ll. 2 to 6

²⁴⁰ Bulko, November 22, 2004 p. 163 ll. 15 to 23; November 23, 2004, p. 162, ll. 1 to 6

²⁴¹ Viinamae, December 8, 2004, p. 44, l. 9 to p. 45, l. 24

²⁴² Bulko November Calendar, TEC057914 at 916

²⁴³ Bulko Affidavit, paragraphs 24 and 28

²⁴⁴ Bulko, November 22, 2004, p. 161 ll. 12 to 19; November 23, 2004, p. 160, l. 24 to p. 161, l. 8

Mortensen and received his business card approximately 2 weeks earlier and she had received an email from Mortensen on November 30, 1998.²⁴⁵

(b) **Viinamae**

105. Toms knew Viinamae from his previous career at Novell.²⁴⁶ Toms recalled having lunch with Viinamae on September 11, 1998.²⁴⁷ Toms had no reason to believe that Viinamae was directly involved in the August RFP process.²⁴⁸ The purpose of the meeting that Julianne Clyde had scheduled was two-fold: relationship building with Viinamae and showing Dell management's commitment to getting the job done for the City.²⁴⁹ It was not set-up to discuss the RFP, in particular.²⁵⁰ However, the RFP was discussed.²⁵¹ While Toms has no specific recollection of the discussion,²⁵² Toms generally recalls discussing the RFP with Viinamae at a high level and not getting into any level of detail.²⁵³ It wouldn't be surprising if the Dell Business Model was also discussed.²⁵⁴

106. Viinamae cannot even recall being at this September 11 meeting.²⁵⁵ If it was held, she said the discussion probably centered around servers.²⁵⁶ A number of things could have been discussed at this meeting, including notebooks, desktops and the business relationship with Dell that existed at the time.²⁵⁷

²⁴⁵ Bulko, November 23, 2004, p. 160, l. 24 to p. 161, l. 14; p. 162, l. 22 to p. 163, l. 2; p. 164, l. 11 to p. 165, l. 12; p. 165, l. 23 to p. 166, l. 21

²⁴⁶ Toms, November 29, 2004 p. 39, ll. 4 to 13; Viinamae Affidavit, paragraph 16

²⁴⁷ Toms, November 29, 2004 p. 39, ll. 4 to 17; Toms Affidavit, paragraph 48(b)

²⁴⁸ Toms, November 29, 2004, p. 226, ll. 1 to 11

²⁴⁹ Toms, November 29, 2004, p. 209, l. 11 to p. 210, l. 6

²⁵⁰ Toms, November 29, 2004, p. 245, l. 22 to p. 246, l. 2; p. 246, ll. 16 to 23

²⁵¹ Toms, November 29, 2004, p. 243, l. 2 to 10; p. 243, l. 23 to p. 245, l. 1

²⁵² Toms, November 29, 2004, p. 245, ll. 9 to 11

²⁵³ Toms, November 29, 2004, p. 208, ll. 6 to 20; p. 210, ll. 7 to 14

²⁵⁴ Toms, November 29, 2004, p. 210, l. 20 to p. 211, l. 4; Toms, p. 247, l. 1 to p. 248, l. 17

²⁵⁵ Viinamae, December 8, 2004, p. 12, ll. 5 to 14

²⁵⁶ Viinamae, December 8, 2004, p. 11, l. 9 to p. 12, l. 4

²⁵⁷ Viinamae, December 7, 2004, p. 217, l. 25 to p. 218, l. 7

107. Viinamae also had a meeting scheduled with IBM on September 10, 1998 concerning the “Proposal Presentation: IBM Platform”, which she testified was with regard to server road maps,²⁵⁸ and on September 11(for no stated purpose).²⁵⁹ She had a meeting with Terry Pacheco of Digital/Compaq on September 11, 1998.²⁶⁰ She met with Compugen and SHL, both of which are VARs, two hours after the scheduled meeting with Clyde and Toms.²⁶¹

108. Viinamae had meetings scheduled, at least, with Dell, IBM, SHL, Compaq, Compugen, and SHL between August 18, 1998 and November 9, 1998.²⁶² Viinamae testified that while the August RFP was on the street and before it went to the Corporate Services Committee, she had 3 meetings with representatives of SHL and 4 meetings with Larry Blight, the Relationship Manager of IBM.²⁶³ IBM was a manufacturer who was supplying computer hardware and services to the City and who was trying to supply desktops to the City. Viinamae did not think it was inappropriate to meet with the VARs or IBM,²⁶⁴ and it was not, because there was no “black-out” period in the August RFP.²⁶⁵

109. Although Viinamae’s calendar²⁶⁶ showed a lunch meeting scheduled with Jeff Lions [sic] on November 26, 1998, the notes of Cross show a request from Line Marks to Lyons’ office to switch the November 26 date.²⁶⁷ Viinamae testified the lunch meeting never occurred.²⁶⁸ Lyons can’t remember the lunch and testified that most of the time when he met with Viinamae, it was usually with another client and “it had nothing to do with Dell”.²⁶⁹

²⁵⁸ Viinamae, December 7, 2004, p. 208, l. 23 to p. 210, l. 12

²⁵⁹ Viinamae Calendar, September 11, 1998, COT039879 at 883, Exhibit 15, Volume 5, Tab 16

²⁶⁰ Viinamae, December 7, 2004, p. 210, l. 19 to p. 211, l. 9; p. 211, ll. 17 to 19

²⁶¹ Viinamae, December 8, 2004, p. 214, l. 16 to p. 215, l. 5

²⁶² Summary of Scheduled Contact prepared by Counsel, TEC057814, Exhibit 15, Volume 6, Tab 9

²⁶³ Viinamae, December 8, 2004, p. 17, l. 24 to p. 18, l. 12; p. 19, l. 18 to p. 21, l. 5; p. 21, l. 25 to p. 22, l. 9.

²⁶⁴ *Ibid*, p. 22, ll. 6 to 9

²⁶⁵ See paragraphs 44 to 48

²⁶⁶ Viinamae Calendar for November 1998, COT039901 at 908, Exhibit 15, Volume 5, Tab 17A

²⁶⁷ COT061468; Exhibit 15, Volume 1, Tab 15

²⁶⁸ Viinamae, December 8, 2004, p. 47, ll. 15 to 22

²⁶⁹ Lyons, January 17, 2005, p. 86, ll. 6 to 18

Viinamae was certain she had not met Lyons as of November 26, and that the first time she discussed Dell with Lyons was a brief discussion at the April 23, 1999 drop-in lunch for Rick Zwarun at the Indian Motorcycle Club.²⁷⁰

110. The December 23, 1998 meeting was Mortensen's first introduction to Viinamae.²⁷¹ Kelly had not met Viinamae as of this date, unless it was a casual meeting.²⁷²

(c) **Andrew**

111. In addition to the meeting with Andrew and Toms on November 16, on November 25, 1998, Mortensen had lunch with Andrew.²⁷³ Mortensen thought Toms might have been present²⁷⁴ but Tom was not.²⁷⁵ Neither Clyde nor Lyons were at this lunch.²⁷⁶ Mortensen believes this was likely an introduction meeting, as he was the recently appointed Account Executive for the City's account.²⁷⁷

112. Andrew has no recollection of the November 25 lunch meeting.²⁷⁸

113. Mortensen has no specific recollection of what was discussed at this meeting, and he cannot specifically recall whether he questioned Andrew about what was happening at the City Council meeting that day. However, he testified that he probably would have been inquisitive about what was happening in terms of the overall process, and he doesn't think he would have passed up an opportunity to go to lunch with the CIO and ask him such questions, but he cannot actually recall doing so or getting any information.²⁷⁹ He likely would have been

²⁷⁰ Viinamae, December 8, 2004, p. 49, l. 2 to p. 50, l. 13

²⁷¹ Mortensen Affidavit, paragraph 60, sentence 1; Viinamae, Affidavit, paragraph 47; Viinamae, December 8, 2004, p. 45, ll. 21 to 22 confirms first meeting of December 23; December 8, 2004 p. 47, ll. 15 to 21

²⁷² Kelly, November 24, 2004, p. 109 ll. 4 to 9

²⁷³ Mortensen Affidavit, paragraph 111(c)

²⁷⁴ Mortensen, November 5, 2004, p. 297 ll. 6 to 17

²⁷⁵ Toms, November 29, 2004, p. 130, l. 22 to p. 131, l. 23

²⁷⁶ Mortensen, November 25, 2004, p. 297, ll. 6 to 17

²⁷⁷ Mortensen Affidavit, paragraph 111

²⁷⁸ Andrew, January 25, 2005, p. 175, l. 13 to p. 176, l. 5

²⁷⁹ Mortensen November 25, 2004 p. 118, ll. 6 to 22; p. 119, l. 24 to p. 121, l. 22; p. 300, l. 17 to p. 301, l. 1; p. 302, ll. 5 to 11

trying to sell Andrew on the Dell product and as part of his strategy, to get Dell back in the door.²⁸⁰

114. Andrew testified that he cannot recall if he met with Toms on September 23, 1998, and that it was “possible” that he met with Toms on October 5, 1998.²⁸¹ Toms has no recollection of those meetings.²⁸²

115. The notes that Cross prepared following Kelly’s meeting with Lyons on September 16, 1998 included the statement that: “David acknowledged that Jim Andrew wants Dell to succeed.”²⁸³ None of Kelly, Andrew or Lyons could cast any light on the subjective meaning of Cross’ note.²⁸⁴ Andrew never expressed any view like that to Franey.²⁸⁵ Kelly recalled that Andrew was neutral. The objective facts, as recalled by Franey, included the fact that after amalgamation, Andrew had been persuaded by the former account executive, Julianne Clyde, to purchase some laptops for the City from Dell, but there had been some problems with these laptops and, as a result, Viinamae, Franey and Rick Zwarun were not positive about Dell.²⁸⁶

(d) **Franey**

116. Mortensen met with or had lunch with Franey and Zwarun on October 22, 1998, and he had lunch with Franey on November 6, 1998.²⁸⁷ He doesn’t recall any specifics of any discussion with Franey about the desktop issue, but he is sure he would have brought it up in the conversation.²⁸⁸

²⁸⁰ Mortensen, November 25, 2004, p. 301, ll. 2 to 11

²⁸¹ Andrew, January 25, 2005, p. 140, ll. 7 to 20

²⁸² Toms, November 29, 2004, p. 129, ll. 8 to 18; p. 130, ll. 8 to 14

²⁸³ TEC057087, Exhibit 15, Volume 4, Tab 24

²⁸⁴ Kelly, November 24, 2004, p. 50, l. 17 to p. 51, l. 23; Andrew, January 25, 2005, p. 147, l. 19 to p. 148, l. 7; Lyons, January 17, 2005, p. 45, l. 14 to p. 46, l. 3; p. 181, ll. 12 to 18

²⁸⁵ Franey, November 30, 2004, p. 97, ll. 7 to 24

²⁸⁶ Franey, November 30, 2004, p. 139, ll. 1 to 19

²⁸⁷ Mortensen, Affidavit paragraph 111(a); Mortensen, November 25, 2004, p. 293, l. 18 to l. 24

²⁸⁸ Mortensen, p. 294, ll. 4 to 12

(e) **Mortensen's Understanding About Lyons' Contacts with Staff**

117. Mortensen's relatively contemporaneous e-mail dated March 19, 1999,²⁸⁹ which was based in part on a discussion at about that time with Lyons,²⁹⁰ shows that his understanding in March 1999 was that "within days of having Lyons as a Dell advocate" Lyons "managed to wield his clout with both Staff and Politicians just enough to allow Dell to be added to the Council Resolution as a Hardware Supplier ONLY."²⁹¹ In this email, Mortensen provided Toms and others at Dell with his general understanding of what Lyons had done.²⁹² Toms expected Mortensen to be honest and accurate when responding to the request for information from Toms, his "ultimate boss".²⁹³

118. With respect to Lyons' discussions with City Staff, Andrew only admits to the telephone conversation and the November 16 meeting referred to above.²⁹⁴ Lyons takes credit for helping to "turn it around" based solely on his discussions with Andrew.²⁹⁵ Bulko,²⁹⁶ Viinamae,²⁹⁷ and Franey²⁹⁸ each denied having any discussions with Lyons prior to the City Council meeting.

12. **Discussions with Councillors: Before the November Council Meeting**

119. Mortensen's relatively contemporaneous e-mail dated March 19, 1999²⁹⁹ also revealed that Mortensen understood that Lyons had managed to wield his clout with

²⁸⁹ TEC046780, Exhibit 15, Volume 1, Tab 62

²⁹⁰ Mortensen, November 25, 2004, p. 181, l. 23 to p. 182, l. 3; Lyons, January 17, 2005, p. 196, ll. 14 to 22, but Lyons denied giving Mortensen various items of information in the e-mail; see p. 99, l. 20 to p. 102, l. 23

²⁹¹ TEC046780, Exhibit 15, Volume 1, Tab 62

²⁹² Toms, November 29, 2004, p. 310, ll. 18 to 25

²⁹³ Toms, November 29, 2004, p. 310, ll. 2 to 17

²⁹⁴ Andrew, January 26, 2005, p. 42, ll. 9 to 20; p. 107, ll. 10 to 17

²⁹⁵ Lyons, January 17, 2005, p. 100, ll. 2 to 25; p. 101, ll. 19 to 25

²⁹⁶ Bulko Affidavit, paragraph 63; Bulko, November 22, 2004, p. 102, l. 23 to p. 103, l. 5

²⁹⁷ Viinamae, December 8, 2004, p. 49, l. 2 to p. 50, l. 13

²⁹⁸ Franey Affidavit, paragraph 27; Franey, November 30, 2004, p. 78, l. 24 to p. 79, l. 9; December 1, 2004, p. 71, ll. 17 to 20

²⁹⁹ TEC046780, Exhibit 15, Volume 1, Tab 62

“Politicians”. Although Commission Counsel and the City’s counsel had access to the various City Councillors who were serving in 1998-1999, no evidence, other than Mortensen’s e-mail, Councillor Shiner’s recollections and Lyons’ recollections, was adduced at the hearing to support or contradict Mortensen’s information and understanding.

120. Dell knew at the time that the recommendation from the Council Committee would go to City Council as a whole for consideration.³⁰⁰

121. No one from Dell had any discussions or meetings with City Councillors with respect to the August RFP.³⁰¹

122. Toms expected that as part of Lyons’ retainer, Lyons would speak to City Councillors to convey to the City that the City was about to purchase end-of-life desktops, at unnecessarily high prices, and that there was a method available to the City to get the benefit of both approaches--the services of the VARs and the lower priced, technologically advanced products from Dell--by unbundling the services and the hardware purchasing decisions.³⁰² Mortensen³⁰³ and Kelly³⁰⁴ assumed that Lyons was having discussions with City Councillors.

123. As the Council meeting of November 25 approached, Mortensen does not specifically recall any discussions with Lyons, focusing on strategy and involving an amendment, but he “would have to believe there was” such discussions.³⁰⁵

124. Lyons testified that he does not recollect “doing much in that regard”.³⁰⁶ It’s “possible” that he might have spoken to one or two Councillors to tell them he was working on this.³⁰⁷ He didn’t recollect doing any active work on the Councillors for Dell with respect to the

³⁰⁰ Toms Affidavit, paragraph 36; Cross memo, TEC057087, Exhibit 15, Volume 4, Tab 24, p. 1, final paragraph

³⁰¹ Kelly Affidavit, paragraph 44, sentence 1; paragraph 77, sentence 3; Kelly, November 24, 2004 p. 154, l. 12 to p. 156, l. 23; Toms Affidavit, paragraph 39, second sentence; Mortensen Affidavit, paragraph 108, first sentence

³⁰² Toms Affidavit, paragraph 36

³⁰³ Mortensen Affidavit, paragraph 108

³⁰⁴ Kelly Affidavit, paragraph 49

³⁰⁵ Mortensen, November 25, 2004, p. 122, l. 9 to p. 124, l. 2

³⁰⁶ Lyons, January 17, 2005 p. 78, ll. 2 to 3

³⁰⁷ Lyons, January 17, 2005 p. 78, l. 3; p. 82, ll. 14 to 23

November 25 meeting, other than he might have mentioned to a couple of them “which was, sort of, just heads up” and not a campaign.³⁰⁸ If he saw them standing somewhere, he was always big on making sure, if he got a moment of opportunity, to use it and maybe he used the opportunity to give them information that he was involved with this.³⁰⁹

125. Lyons testified that if getting an amendment to the Staff Report or delaying the Staff Report was part of the process, it was something he would have done; however, in this instance, Lyons testified that he thought he had received a favourable reaction from Andrew, the head of the IT Department, so he wasn’t going to start going to Councillors and ask them to take a contrary position.³¹⁰

126. Councillor David Shiner (“**Shiner**”) testified that he was not one of the councillors referred to in Mortensen’s March 19, 1999 e-mail.³¹¹

127. As of the date of his Affidavit (October 13, 2004), Shiner did not recall Lyons introducing him to any representatives of Dell although he said it was “possible” that he had.³¹² By the time of the oral hearing 2 months later, Councillor Shiner purported to have a recollection of Lyons introducing Shiner to someone from “Dell”.³¹³ Shiner cannot recall who he met but whoever it was, it would have been only an “hello”.³¹⁴

128. Shiner was never aware of any difference between Dell Computer Corporation and Dell Financial Services Limited (“**DFS**”).³¹⁵ When asked if the Dell representative could have been Scott Marentette of DFS, he answered: “It could have been a number of people”.³¹⁶

³⁰⁸ Lyons, January 17, 2005, p. 82, l. 14 to p. 83, l. 2

³⁰⁹ Lyons, January 17, 2005 p. 78, ll. 1 to 14; see also p. 79 ll. 3 to 16

³¹⁰ Lyons, January 17, 2005, p. 80, l. 10 to p. 81, l. 3; See also: Lyons, January 17, 2005, p. 81, ll. 1 to 3; p. 81, l. 10 to p. 82, l. 13

³¹¹ Shiner, December 1, 2004, p. 229, ll. 5 to 21

³¹² Shiner Affidavit, sworn October 13, 2004, paragraph 24, read into evidence December 1, 2004, pp. 102 to 109

³¹³ Shiner, December 1, 2004, p. 213, ll. 5 to 13

³¹⁴ Shiner, December 1, 2004 p. 213, ll. 10 to 23

³¹⁵ Shiner, December 1, 2004, p. 208, ll. 11 to 25

³¹⁶ *Ibid*, p. 214, ll. 14 to 23

Dell submits that if Councillor Shiner was introduced by Lyons to anyone from “Dell” (noting again that in his Affidavit he testified on oath that he had no recollection of such a meeting),³¹⁷ it was more likely an introduction to Scott Marentette of DFS, who was taken to City Hall by Lyons to meet Tom Jakobek on May 25, 1999³¹⁸ and who was at least scheduled to attend a Policy and Finance Committee meeting with Lyons or Suzanne Cross on July 20, 1999.³¹⁹

13. **City Council Meeting: November 25, 26 and 27, 1998**

129. At the Council meeting of November 25, 26 and 27, 1998 (the “**November Council meeting**”), City Council adopted Clause 20 of Report No. 17 of the 1998 Corporate Services Committee Report recommending the selection of the VARs, but with an amendment (the “**Amendment**”).³²⁰

130. At the outset of the November Council meeting, the Corporate Services Committee Report had held down because some Councillors had concerns.³²¹ It was ultimately adopted on Friday, November 27, 1998.

131. Bulko testified that she was at the November Council meeting for all three days waiting for something to happen.³²² Andrew testified that he was at the November Council meeting, and that he would have been involved in the discussion about why the Report was held but he cannot recall talking to Shiner about the Amendment.³²³ Andrew further testified that he and Bulko were the only two IT personnel at the November Council Meeting³²⁴ and that the

³¹⁷ Shiner Affidavit, paragraphs 24, 25

³¹⁸ COT075424, Recall Exhibits, MBS Binder, Volume 1, Tab 4

³¹⁹ Cross note read into record, Cross May 6, 2003, p. 75, ll. 11 to 19; p.76, ll. 12 to 21

³²⁰ COT014849, Exhibit 15, Volume 1, Tab 14

³²¹ Bulko, November 23, 2004, p. 68, ll. 6-19, p. 70, ll. 11-24; Shiner, December 1, 2004, p. 130, l. 24 to p. 131, l. 2; Andrew, January 25, 2005, p. 172, ll. 8 to 16

³²² Bulko, November 23, 2004, p. 77, ll. 18 to 23; See also p. 77, ll. 2 to 8

³²³ Andrew, January 25, 2005, p. 179, ll. 1 to 11

³²⁴ Andrew, January 26, 2005, p. 60, ll. 5 to 13

Commissioner of Corporate Services, Margaret Rodrigues, would not have sufficient knowledge or understanding to give the Councillor specific wording.³²⁵

132. Lyons testified that he “can’t recollect” if he was at the November Council meeting but said he “could have been”.³²⁶ Lyons testified he had no recollection about the Report being held down or about any conversations involving Andrew, Rodrigues, Shiner or Ashton.³²⁷

133. Mortensen was not at the City Council meeting, so either Lyons or his assistant, Sue Cross, must have reported the result to him. Mortensen has no specific recollection of what was discussed or who it was that called him to report what he considered to be Lyons’ success.³²⁸ Mortensen agreed that his ability to appreciate the significance of the Amendment and his belief in the meaning was derivative, in the sense that he depended on someone else to help him understand the significance of the Amendment.³²⁹

134. Kelly did not attend the Council meeting and believes he learned of the Amendment from Mortensen.³³⁰ Toms did not attend the Council meeting, and believes he learned of the Amendment from Mortensen or Kelly.³³¹ Councillor Shiner had no basis for saying that the evidence of the Dell employees not attending the November Council meeting, as set out above, was true or not true.³³²

³²⁵ Andrew, January 26, 2005, p. 59, ll. 15 to 20

³²⁶ Lyons, January 17, 2005, p. 83, l. 24 to p. 84, l. 2

³²⁷ Lyons, January 17, 2005, p. 85, ll. 12 to 19

³²⁸ Mortensen Affidavit, paragraph 49; Mortensen November 25, 2004, p. 126, l. 20 to p. 127, l. 1

³²⁹ Mortensen, November 25, 2004, p. 127, ll. 15 to 22; p. 129, ll. 10 to 19

³³⁰ Kelly Affidavit, paragraph 48; Kelly, November 24, 2004, p. 101, l. 21 to p. 102, l. 9

³³¹ Toms Affidavit, paragraph 39 and 40

³³² Shiner, December 1, 2004 p. 213, ll. 1 to 4

(a) **The Amendment**

135. Councillor Shiner moved the Amendment. It was brief. It said only: “It is further recommended that the Commissioner of Corporate Services be requested to submit a further report to the Economic Development Committee on the hardware and systems configuration.”³³³

(b) **The Source of the Words “hardware and systems configuration”**

136. Shiner testified that he “honestly cannot recall” what he did after the Committee Report was held.³³⁴ He has no specific recollection of speaking to Mr. Andrew or with any person from the IT Department,³³⁵ yet he believes he “would have most likely spoken to staff about my concern” and received the specific wording “hardware and systems configuration” from an IT staff member, because “I had to get those words from someone”.³³⁶

137. Andrew does not believe he gave the specific wording to Shiner.³³⁷ He testified that “I really don’t know” what the Amendment accomplished, and then offered his subjective judgment that concurred with a part of Shiner’s testimony³³⁸ that he later agreed was a “preposterous” objective.³³⁹

138. Andrew testified that he did not discuss with Shiner the Councillor’s expectation that staff report back on specific costs for different units,³⁴⁰ and that he did not discuss Shiner’s stated concern that staff should report back on what equipment they were going with, which

³³³ COT001412 at COT001413, Exhibit 15, Volume 4, Tab 11; see TEC046612, Exhibit 15, Volume 1, Tab 12 for the Staff Report

³³⁴ Shiner, December 1, 2004, p. 136, ll. 17 to 18

³³⁵ Shiner, December 1, 2004, p. 140, l. 24 to p. 141, l. 18

³³⁶ Shiner, December 1, 2004, p. 141, ll. 17 to 18

³³⁷ Andrew, January 26, 2005, p. 58, l. 19 to p. 59, l. 10

³³⁸ Andrew, January 25, 2005, p.179, l.15 to p. 180, l. 10

³³⁹ Shiner, December 1, 2004, p. 143, ll. 7 to 15; p. 144, ll. 2 to 8

³⁴⁰ Andrew, January 26, 2005, p. 61, l. 23 to p. 62, l. 5

“was the heart of what [Shiner] was looking for”.³⁴¹ Bulko cannot recall if Andrew discussed the configuration issue with her, but she cannot say the issue never came up.³⁴²

139. Lyons testified that he had not spoken to Councillor Shiner, based on the statement allegedly made in Shiner’s Affidavit³⁴³ that “Lyons did not speak to him about Dell **prior to** moving the Amendment”.³⁴⁴ However, between the date of his Affidavit (October 13, 2004) when he had no specific recollection, and his oral testimony (December 1, 2004), Shiner had another new recollection: he testified during the oral hearing that Lyons had spoken to him and that his “best recollection”³⁴⁵ or “best guess”³⁴⁶ is that Lyons told him he was representing Dell (but that they had not discussed Dell’s products),³⁴⁷ and the discussion “most likely”³⁴⁸ was prior to the November Council meeting but that he does not recall the actual time.³⁴⁹ However, he also testified at the hearing that he doesn’t know if he knew Lyons was representing Dell at this November Council meeting,³⁵⁰ that he “couldn’t put the two together”,³⁵¹ that he does not remember when he was introduced to someone from “Dell”,³⁵² that it was not a meeting he had necessarily had at³⁵³ or prior to³⁵⁴ the November 1998 Council meeting, that he doesn’t recall when³⁵⁵ he knew Lyons was representing Dell and that he is not 100 percent certain³⁵⁶ the

³⁴¹ Shiner, December 1, 2004, p. 138, l. 23 to p. 139, l. 2; Shiner Affidavit, paragraphs 14 and 15; Andrew, January 26, 2005, p. 55, l. 9 to p. 56, l. 8; p. 57, l. 11 to p. 58, l. 4

³⁴² Bulko, November 23, 2004, p. 70, l. 20 to p. 71, l. 18

³⁴³ Shiner Affidavit, paragraph 27 was referred to by Commission Counsel. See paragraphs 24 and 27

³⁴⁴ Lyons, January 17, 2005, p. 83, ll. 3 to 16; p. 87, ll. 18 to p. 88, l. 5

³⁴⁵ *Ibid*, p. 173, l. 13, p. 178, l. 24

³⁴⁶ *Ibid*, p. 178, l. 25

³⁴⁷ *Ibid*, p. 174, ll. 8 to 22; p. 175, ll. 5 to 18; See also Shiner, December 1, 2004, p. 172, ll. 16 to p. 173, l. 13

³⁴⁸ *Ibid*, p. 177, l. 25 to p. 178, l. 4

³⁴⁹ *Ibid*, p. 176, l. 24 to p. 178, l. 6

³⁵⁰ *Ibid*, p. 175, ll. 5 to 13; p. 175, l. 19 to p. 176, l. 12; p. 177, ll. 7 to 9

³⁵¹ *Ibid*, p. 175, ll. 19 to 22

³⁵² *Ibid*, p. 172, l. 25 to p. 173, l. 2

³⁵³ *Ibid* p. 213, l. 5 to p. 214, l. 13

³⁵⁴ Shiner Affidavit, paragraph 24; Shiner, December 1, 2004, p. 172, ll. 16 to 22

³⁵⁵ Shiner, December 1, 2004, p. 176, ll. 9 to 12, p. 177, ll. 7 to 9

“introduction” took place before the City Council meeting but his “best guess” is that he did know that Lyons was representing Dell from an introduction to a Dell representative made by Lyons.³⁵⁷

140. Councillor Shiner testified that Lyons never talked to him about the Amendment,³⁵⁸ and that Lyons did not influence him to move the Amendment.³⁵⁹

(c) **The Draft Reports are the Best Evidence of the Intended Meaning of the Amendment**

141. Contrary to Mortensen’s information or understanding as of March 19, 1999, there never was a Council Resolution passed “directing staff to purchase ONLY Compaq and IBM through SHL, GE and Questech!”³⁶⁰. The Amendment did not expressly “allow Dell to be added to the Council Resolution as a Hardware Supplier ONLY.”³⁶¹ Those words were not in the Resolution or Amendment. At the time, Mortensen believed the Amendment effectively opened the door for Dell even though that was not apparent on the face of the resolution.³⁶²

142. The draft Reports to the Economic Development Committee which surfaced after Mortensen testified -- indeed after 8 witnesses had testified during the desktop phase of TECI-- support Mortensen’s understanding that the Amendment “effectively opened the door for the City to issue the December 1998 price refresh request for desktops”.³⁶³ At the very least, these Reports show that it was only the desktops and the desktop operating system that were ever intended to be part of any Report to the Economic Development Committee (“EDC”).

³⁵⁶ *Ibid*, p. 173, ll. 10 to 13

³⁵⁷ Shiner, December 1, 2004, p. 177, l. 15 to p. 179, l. 11

³⁵⁸ Shiner, December 1, 2004, p. 181, ll. 3-11; p. 181, ll. 16-18

³⁵⁹ Shiner Affidavit, paragraph 26; Shiner, December 1, 2004, p. 181, ll. 22-25; p. 198, l. 22 to p. 199, l. 4; p. 202, ll. 8-13

³⁶⁰ TEC046280, Exhibit 15, Volume 1, Tab 62

³⁶¹ TEC046780, Exhibit 15, Volume 1, Tab 62

³⁶² Mortensen Affidavit, paragraphs 48, 49; Mortensen, November 25, 2004, p. 128, l. 12 to p. 129, l. 12

³⁶³ Mortensen Affidavit, paragraph 48

143. The Corporate Services Committee Report, as amended by Council, had been sent to the Commissioner of Corporate Services by the City Clerk on December 8, 1998, with a cover memo specifically directing her attention to the Amendment.³⁶⁴ The amended Report was then sent by the Commissioner of Corporate Services to Andrew and Viinamae on December 16, 1998.³⁶⁵ Andrew agreed it was reasonable to conclude that he read the Amendment, that he saw that his boss had to make a report, and that the task would be delegated to him as the head of Information Technology.³⁶⁶ Viinamae had no recollection of receiving that memo and she did not direct Bulko to do the EDC Report.³⁶⁷

144. The task of preparing the Report to the EDC was clearly delegated to Bulko, even though she has no present recollection of it,³⁶⁸ because:

- (a) the task of preparing a “report” or a “letter” to the EDC was found in her handwritten, Desktop Notebook in a “to do” list and as an outstanding matter to be done on January 19, 1999 and February 9, 1999, respectively;³⁶⁹
- (b) Bulko prepared a draft report to the EDC in handwriting on February 23 or February 24, 1999;³⁷⁰ and
- (c) the type-written version of the Report to the EDC created on Sunday, February 28, 1999, and placed on the letterhead of Commissioner Rodriguez, was found on Bulko’s computer.³⁷¹

³⁶⁴ COT001412 at COT001413, Exhibit 15, Volume 4, Tab 11

³⁶⁵ COT001412, Exhibit 15, Volume 4, Tab 11

³⁶⁶ Andrew, January 26, 2005, p. 64, l. 24 to p. 65, l. 10

³⁶⁷ Viinamae, January 27, 2005, p.14, ll. 8-16; p.14, l.24 to p. 15, l. 15; p. 19, ll. 2-21

³⁶⁸ Bulko, January 19, 2005, p. 68, l. 19 to p. 69, l. 3; p. 70, l. 20 to p. 71, l. 1. She initially denied being asked to follow upon it, or knowing why there was no Report: Bulko, November 23, 2004, p. 219, l. 13 to p. 221, l. 1

³⁶⁹ TEC057144, Exhibit 15, Volume 7, at p. 40 and 59; Bulko, January 19, 2005, p. 56, ll. 8 to 19; p. 59, ll. 6 to 10

³⁷⁰ Handwritten Draft Report, TEC057144 TEC057224; Bulko, January 19, 2005, p. 85, ll. 6 to 19

³⁷¹ This was version 5, and although it is possible that another document was used as a template, the City has not produced version 4 or any other version which would enable the Commissioner to separate speculation from fact.

145. The outline of the draft report in Bulko's Notebook contemplated advising the EDC about the "Purpose", "Source of Funds", the "Recommendation" (presumably of staff), "Council Reference", "Background History", "Amendment to Report Clause" and the "Conclusion".³⁷² The intention as of February 24, 1999 was to refer to the Amendment made on November 27, 1998.³⁷³ For unknown reasons, since Ms. Bulko remembers "absolutely nothing" about any draft report³⁷⁴ or about why no Report was done,³⁷⁵ specific reference to the "Amendment to Report Clause" was not contained in the final version of the type-written report found on Bulko's computer.³⁷⁶

146. Bulko agreed that the intent as of February 23 or 24, 1999 was to report back to the Committee, as directed by City Council, on the recommended configuration of computers, and precisely what configuration the City was going with.³⁷⁷

147. Bulko's handwritten draft report to the EDC from the "Executive Director of IT" stated, in the key paragraphs of "Purpose" and "Recommendation", as follows:

Feb. 24/99

To: Economic Development Committee

From: **Executive Director of IT**

Subject: Hardware & Software Config.

Purpose

The purpose of this is to ~~report~~ advise the Ec De. Committee on the current h/w & s/w configuration ~~as requested~~.

...

Recommendation

³⁷² Handwritten Draft Report, TEC057144 at TEC057224 to 225

³⁷³ *Ibid*, Bulko, January 19, 2005, p. 85, l. 25 to p. 86, l. 9

³⁷⁴ Bulko, January 19, 2005, p. 68, l. 19 to p. 69, l. 3; p. 70, l. 20 to p. 71, l. 2

³⁷⁵ Bulko, January 19, 2005, p. 90, ll. 3 to 18; Bulko, November 23, 2004, p. 220, ll. 10 to 16

³⁷⁶ Typewritten Draft Report, TEC057484, Exhibit 15, Volume 6, Tab 25; Bulko, January 19, 2004, p. 75, ll. 6 to 10

³⁷⁷ Bulko, January 19, 2005, p. 88, ll. 9 to 24

~~the~~ It is recommended that the City acquire ~~P~~ computers w a Pentium II processor running at 400 mhz with a 64 mb of memory, 6.4 gb hard drive, 32 x CD Rom, integrated sound and Ethernet card.³⁷⁸

.....

148. In the only type-written version of the Report to the EDC available, the Recommendation was: “It is recommended that the City Departments, as well as Agencies, Boards and Commissions, acquire a Pentium II computer running Windows NT with the following minimum components: a processing speed of 400 mhz, 64 mb of memory, a 6 gb hard drive, 32 x CD-Rom, integrated sound card and integrated network adaptor.”³⁷⁹ (underlining added to show differences)

149. Nowhere after February 28, 1999 is there another “to do” note or other reminder in Bulko’s Notebook to prepare the Report to the EDC.³⁸⁰ The list of outstanding reports due from the Commissioners to the EDC as of March 11, 1999 included a number of reports required by Council at the same November Council meeting, but not this key report.³⁸¹

150. Now that the Report from the Commissioner of Corporate Services to the EDC has finally been produced (even if only an unsigned type-written report³⁸² and a handwritten outline and draft of the Report),³⁸³ it is clear that it was understood in February 1999 that the purpose of the Amendment was to require a report only on the specifications of the desktops and only on the desktop systems being acquired by the City.

151. It is submitted that these two Reports are the most reliable evidence of the meaning of the Amendment because they show the Report that was intended to be made, in relatively contemporaneous documents written before there was any accusation of potential misconduct or any concern about a fair and transparent procurement process being followed, and

³⁷⁸ TEC057144 at TEC057224; Bulko, January 19, 2005, p. 86, l. 13 to p. 87, l. 16

³⁷⁹ TEC057484, Exhibit 15, Volume 6, Tab 25

³⁸⁰ Bulko, January 19, 2005, p. 90, ll. 3-20

³⁸¹ TEC057974, Exhibit 15, Volume 9, Tab 13; Lewis confirmation of its date: January 19, 2005, p. 119, ll. 5-17

³⁸² TEC057484, Exhibit 15, Volume 6, Tab 25

³⁸³ TEC057144 at TEC057224-225

they were prepared by a witness who had no conceivable reason to misstate or to limit the information going back to City Council in February 1999.

152. Furthermore, by analogy to a well accepted principle of contractual interpretation applied when there is an ambiguity in a contract, it is permissible to examine the parties' subsequent conduct to assist in determining their intention. This is because "there is no better way of determining what the parties intended than to look to what they did under it".³⁸⁴

(d) **The Alleged Purposes of the Amendment**

153. Councillor Shiner was cross-examined at length by Commission Counsel³⁸⁵ to explain the purpose of his Amendment and to explain how the precise wording of the Amendment could achieve the stated purpose.

(i) **Purpose 1: To Obtain a Report on Exactly What Equipment was to Be Purchased and at What Cost**

154. Several times Commissioner Shiner testified that he wanted to know "the "cost", "cost of the average unit", or "average cost".³⁸⁶ Near the end of his testimony on this issue, Councillor Shiner was asked again, "just to be clear", what was intended by his Amendment:

Q: In your mind that included **not simply the technical specs**; this is the processor speed, this is the amount of memory, this is the size of the screen. You wanted – you want – in addition to those technical specifications, you wanted to know what equipment staff were buying, at roughly what price and from whom?

Answer: Yes.³⁸⁷ (emphasis added)

155. Yet it is abundantly clear from the two drafts of the Report prepared for the EDC that the IT staff intended to report only on the technical specifications - the processor speed, the amount of memory and the hard drive capacity of the desktops- and to report in exactly the same

³⁸⁴ *Montreal Trust Co. of Canada v. Birmingham Lodge Ltd.* (1995), 24 O.R. (3d) 97 (C.A.); See also: *978011 Ontario Ltd. v. Cornell Engineering Co.* (2001), 53 O.R. (3d) 783 (C.A.) (lv. to app. to S.C.C. dismissed) [2001] S.C.C.A. No. 315

³⁸⁵ Shiner, December 1, 2004, pp. 127 to 130; 135 to 163

³⁸⁶ Shiner, December 1, 2004, p. 148, ll. 11 to 13; p. 150, l. 17 to p. 151, l. 3; p. 126, l. 11 to p. 127, l. 15; p. 149, l. 21 to p. 150, l. 12; p. 153, l. 18 to p. 154, l. 9

³⁸⁷ Shiner, December 1, 2004, p. 162, l. 22 to p. 163, l. 9

terms of these features as specified by Bulko in the December Mini-RFQ.³⁸⁸ The typed draft Report to the EDC also refers to the Windows NT operating system,³⁸⁹ and 64 mb of memory. (Recall that Dell had advised the City that an upgrade in memory from 32 mb to 64 mb would be required to run Windows NT.³⁹⁰)

156. Most significantly, the two draft Reports to the EDC:

- (a) do not report on the “cost”, “cost of the average unit”, or “average cost” of any computer hardware or systems;³⁹¹
- (b) do not report on the prices to be paid or actually paid, which prices Shiner believed the staff already had for hardware, software and services as of November 25, 1998 and which prices Shiner testified he wanted from staff, who he expected to report on “what equipment staff were buying, at roughly what price, from whom”;³⁹²
- (c) do not report on the specifications for the laptops, monitors, Lexmark laser printers, Lexmark accessories, Toshiba accessories or colour scanners to be acquired or which were then in the process of being acquired, even though (1) all of this hardware was expressly listed in the August RFP and every proponent was required to provide a price for such computer hardware³⁹³ and (2) Shiner testified that he expected the report to include “more than simply desktops”, and that it would include “other pieces of IT equipment as well, such as servers or

³⁸⁸ COT040951, Exhibit 15, Volume 1, Tab 21

³⁸⁹ TEC057484, Exhibit 15, Volume 6, Tab 26

³⁹⁰ Dell Response, COT041040 at 77, Exhibit 15, Volume 1, Tab 6; Kelly evidence, *supra*

³⁹¹ Shiner, December 1, 2004, p. 148, ll. 11 to 13; p. 150, l. 17 to p. 151, l. 3; p. 126, l. 11 to p. 127, l. 15; p. 149, l. 21 to p. 150, l. 12; p. 153, l. 18 to p. 154, l. 9

³⁹² Shiner, December 1, 2004, p. 162, l. 22 to p. 163, l. 9; p. 150, l. 17 to p. 151, l. 3; p. 153, ll. 18 to 21; p. 157, l. 14 to p. 158, l. 2; p. 158, ll. 19 to 24

³⁹³ August RFP, TEC019416 at 19454-55

laptops”,³⁹⁴ together with the average cost of a different kind of configuration for each unit;³⁹⁵

- (d) do not report on the price of software, even though the August RFP required each proponent to provide pricing for Microsoft Office (Professional Edition and Standard Edition), Front Page Project, as well as the NT upgrade license;³⁹⁶
- (e) do not report on any “services”, even though (1) the August RFP required each proponent to provide prices for the supply of costed services “per system” consistent with the requirements of the August RFP³⁹⁷ and (2) the prices for services were also subject to a price refresh or mini-RFQ in December 1998, and those prices would impact on the total cost of the “systems” being acquired; and
- (f) do not fully report on “what equipment” or the “specifications of equipment” or “what they were going to buy” or “what you’re buying”³⁹⁸ for anything other than the desktops.

157. If the Amendment had truly been motivated by a concern that staff had not reported on “what equipment” the City was actually purchasing and “at what price and from whom” and if that concern had been communicated by Councillor Shiner to the IT Staff, then Bulko’s draft Reports in February 1999 would have at least referred to all of the hardware, software and services described in the August RFP.

158. If the Amendment was totally divorced from the subsequent “Special Bid Pricing”,³⁹⁹ or “December Mini-RFQ” for the desktops, why didn’t the City go back to the market to obtain new pricing on an upgrade for the laptops? (The minimum processing speed

³⁹⁴ Shiner, December 1, 2004, p. 153, ll. 13 to 22

³⁹⁵ Shiner, December 1, 2004, p. 153, ll. 18 to 22

³⁹⁶ *Ibid* at TEC019451

³⁹⁷ *Ibid* at TEC019457

³⁹⁸ Shiner, December 1, 2004, p. 128, l. 25 to p. 129, l. 2; p. 129, ll. 22 to 23; p. 130, ll. 13 to 14; p. 142, ll. 6 to 7; p. 148, ll. 11 to 13; Shiner Affidavit, paragraphs 14 and 15

³⁹⁹ COT040951, Exhibit 15, Volume 1, Tab 21

specification for laptops in the August RFP was only 233 mhz.⁴⁰⁰) Despite finding numerous additional documents in Ms. Bulko's office and on her computer, no "price refresh" for the Toshiba laptops or any other hardware has been produced.

159. The other major committee report being considered by City Council at the same November Council meeting was the Year 2000 Business Continuity Report.⁴⁰¹ On November 25⁴⁰², Council approved that report with the contemplated cost of \$149.9 million, including \$20.8 million for desktops.⁴⁰³ That Report required the Y2K Director to report each and every month to the Strategic Policies and Procedures Committee ("SPPC"), and for the SPPC to report to Council every month on how much money had been spent the previous month, and the progress of the various Y2K initiatives.⁴⁰⁴

160. Viinamae agreed that it is reasonable to conclude that anyone at the November Council meeting would know that there would be detailed reporting back to City Council, through the SPPC, about "what was being purchased" and the total price, because that was part of the reporting required on the Year 2000 Business Continuity Plan.⁴⁰⁵ As can be seen from the monthly reports prepared by the Y2K Project Office and submitted to the SPPC by Viinamae, the Y2K Project Office did report in a general way on the type of equipment being purchased, the cost incurred to the date of each report and the cost incurred as against the budgeted amount for each category of equipment.⁴⁰⁶ Therefore, it is submitted that the Amendment was not needed for the purpose stated.

⁴⁰⁰ August RFP, TEC019416 at 454

⁴⁰¹ Report dated November 3, 1998, as included in SPPC Report No. 24, Clause 2, adopted by Council November 25-26-27, 1998, COT030619, Exhibit 15, Volume 1, Tab 11

⁴⁰² See Press Release, November 26, 1998, COT001409, TCLI Exhibits, Volume 2A, Tab 90

⁴⁰³ COT030619, Exhibit 15, Volume 1, Tab 11

⁴⁰⁴ COT077369 at COT077371, Recommendation 12; Exhibit 15, Volume 1, Tab 16; Viinamae, December 8, 2004, p. 90, l. 22 to p. 91, l. 9

⁴⁰⁵ Viinamae, December 8, 2000, p. 91, ll. 14 to 18

⁴⁰⁶ See for example, the reports tabled in January 1999 and February 1999; COT00003 at 004-13; COT001323 at 323-343; in TCLI Exhibits. For the June 1999 Report see COT075965, Exhibit 15, Volume 1, Tab 42

161. Finally, all of the Y2K Business Cases were available, confidentially, for the review of Councillors at and prior to the November, 1998 Council meeting and staff were available to discuss them.⁴⁰⁷

(ii) **Purpose 2: To Allow the City to Negotiate with IBM**

162. As for Shiner's testimony about the second purpose of his Amendment, being to enable the Chair of the Economic Development Committee⁴⁰⁸ or staff of the Economic Development Committee or staff in the Economic Development Division⁴⁰⁹ or the Economic Development Committee itself,⁴¹⁰ but "more particularly for the Mayor's Office"⁴¹¹ and the Mayor as Chief Magistrate⁴¹² to see if there is "any way to encourage IBM to stay with a purchase as large as we have for computers",⁴¹³ it is submitted that this alleged purpose is preposterous⁴¹⁴ for a number of reasons:

- (a) First, it is clear that IBM was very accessible to City Staff not only because it had previously supplied computer hardware (including PCs and mainframes⁴¹⁵) and was continuing to supply computer hardware to the City, but IBM also had won the RFP for the Y2K Project Office.⁴¹⁶ The IBM Y2K Project personnel were in the City's offices on a daily basis, and Viinamae alone had 34 scheduled meetings with IBM during the period August 18, 1998 to November 9, 1998.⁴¹⁷ As a large supplier of equipment and services to the City, an Amendment to a Committee

⁴⁰⁷ *Ibid*, COT030619 at 637

⁴⁰⁸ Shiner, December 1, 2004, p. 144, ll. 9 to 10

⁴⁰⁹ Shiner, December 1, 2004, p. 144, ll. 11 to 12; p. 146, l. 1 to 6; p. 156, ll. 7 to 10

⁴¹⁰ Shiner, December 1, 2004, p. 148, ll. 14 to 19

⁴¹¹ Shiner, December 1, 2004, p. 156, ll. 7 to 12

⁴¹² Shiner, December 1, 2004, p. 157, ll. 3 to 13

⁴¹³ Shiner, December 1, 2004, p. 143, ll. 7 to 15; p. 144, ll. 2 to 8

⁴¹⁴ Andrew, January 26, 2005, p. 102, l. 18 to p. 103, l. 19

⁴¹⁵ Viinamae, December 8, 2004, p. 32, ll. 1 to 20

⁴¹⁶ Viinamae, December 6, 2004, p. 114, l. 14 to p. 115, l. 5

⁴¹⁷ Scheduled Contact, TEC 057814, at 820; Viinamae, December 7, 2004, p. 202, l. 23 to p. 203, l. 5

Report was not necessary to enable the Mayor (or anyone else) to have discussions with IBM.

- (b) Second, if Andrew's evidence is to be believed, the meeting with IBM was a "high level meeting", a "rush meeting" held either during the Council meeting or immediately thereafter.⁴¹⁸ Clearly, it was not necessary for any Report back to the EDC to be made first to give the Mayor the power or authority to speak to IBM.
- (c) Third, Councillor Shiner testified that he did not expect staff to report back on the different manufacturers who were being considered.⁴¹⁹ When pressed by Commission Counsel to explain how the Amendment could assist Economic Development to encourage IBM to stay within the City when the staff was not even going to report on who the different manufacturers were, Councillor Shiner's evidence was: "It's easy enough to ask the question, whose product is it that you're recommending, what's the price and what's the price difference?"⁴²⁰
- (d) Finally, if Shiner's intention was to have the City of Toronto support a company carrying on business in Toronto and a company paying property taxes in Toronto as he testified,⁴²¹ that consideration applied equally to Dell, whose head office was in Shiner's constituency.⁴²²

163. What is most remarkable and difficult to understand about Councillor Shiner's stated reasons for making the Amendment was that no Report to the EDC ever showed up and Councillor Shiner never asked what happened to it; he did not follow up to find out what desktops were being purchased or what savings were achieved.⁴²³ He does not recall ever getting

⁴¹⁸ Andrew, January 25, 2005, p. 174, l. 17 to p. 175, l. 1

⁴¹⁹ Shiner, December 1, 2004, p. 155, ll. 17 to 20

⁴²⁰ Shiner, December 1, 2004, p. 155, l. 21 to p. 156, l. 13

⁴²¹ Shiner, December 1, 2004, p. 145, ll. 11 to 24

⁴²² Shiner Affidavit, paragraph 25

⁴²³ Shiner, December 1, 2004, p. 164, ll. 5 to 16; p. 233, l. 25 to p. 234, l. 20

a report back, even informally, on the information that he wanted.⁴²⁴ The best that he could say was that if he let it go, he “probably heard something back somewhere but I don’t recall it particularly.”⁴²⁵

(e) **The Phantom Debate**

164. Contrary to the evidence given by Bulko in her Affidavit⁴²⁶ and during her examination in chief,⁴²⁷ Bulko did not see a “vigorous” debate at the November Council meeting about whether the City of Toronto should select IBM, because there was no debate at all. On January 19, 2005,⁴²⁸ Commission Counsel advised the Commissioner that there had been no such debate at the November Council meeting, as confirmed by Andrew Lewis, counsel for the City of Toronto, after someone had reviewed the tapes of that meeting.⁴²⁹

165. Bulko was perfectly clear in her testimony that she had not witnessed or been part of any discussions that were not held on the Council floor; rather in that regard, she was relying on information given to her by Andrew about the “private conversations” he had with the Councillors who had requested that the Report be held.⁴³⁰ Bulko was absolutely clear throughout three days of testimony that she had no discussions with any Councillors, and was relying in her testimony on what she was told by Andrew.⁴³¹

(f) **The Phantom Newspaper Article**

166. The evidence about a newspaper article prompting the IBM debate started with Bulko’s testimony at TECI.⁴³² It continued with Shiner,⁴³³ and Viinamae,⁴³⁴ until the story was

⁴²⁴ Shiner, December 1, 2004, p. 165, ll. 5 to 10

⁴²⁵ Shiner, December 1, 2004, p. 165, ll. 12 to 13

⁴²⁶ Bulko Affidavit, paragraph 19

⁴²⁷ Bulko, November 22, 2004, p. 115, ll. 3 to 12; p. 115, l. 20 to p. 116, l. 1; p. 117, l. 2

⁴²⁸ Butt, January 19, 2005, p. 64, ll. 2 to 19

⁴²⁹ Lewis, January 19, 2005, p. 64, ll. 6 to 19

⁴³⁰ Bulko, November 22, 2004, p. 117, l. 6 to p. 118, l. 15; Bulko, November 23, 2004, p. 69, l. 13 to p. 70, l. 10; p. 70, l. 20 to p. 71, l. 7

⁴³¹ Bulko, *in passim*

⁴³² Bulko, November 23, 2004, p. 224, ll. 7 to 15

closed down during Andrew's testimony on January 26, 2005.⁴³⁵ None of them had referred to any newspaper articles in their Affidavits filed in Exhibit 14.

167. Bulko testified in response to questions from the City's Counsel that what prompted the debate about IBM at the November Council meeting (subsequently proven to be a non-existent debate) was a newspaper article in that morning's paper,⁴³⁶ which was clarified during re-examination by Commission Counsel to be the morning of November 25, 1998.⁴³⁷

168. No article published November 25, 1998 could be found by Commission Counsel or by others.⁴³⁸ There was no such article in the morning newspaper on November 25, 1998.

169. When Bulko was recalled on January 19, 2005, she testified that she believed that the newspaper article was something Andrew told her about, and that she did not see the paper⁴³⁹ but she "still maintains" the discussion at Council was spawned by a newspaper article that day.⁴⁴⁰

170. When Andrew testified on January 25, 2005, he said Ms. Bulko was incorrect, that the issue did not come from the newspaper, but that IBM had given advance notice to the Economic Development Commissioner that they were in the process of looking for another location outside of Don Mills, and the early indication was that they would be moving out of Toronto. That allegedly caused quite a bit of a stir among the Councillors, leading Michael Garrett (CAO) to call a meeting with Joe Halstead (Commissioner of Economic Development), Ms. Lebrecht and Andrew. Andrew was asked to get the people from IBM to come to the

⁴³³ Shiner, December 1, 2004, p. 143, ll. 7 to 9; p. p. 148, l. 20 to p. 149, l. 7

⁴³⁴ Viinamae, December 7, 2004, p. 87, l. 11 to p. 88, l. 10

⁴³⁵ Butt Statement, January 2, 2005, p. p.172, l. 17 to 23; Andrew, January 25, 2005, p. 172, l. 24 to p. 174, l. 16

⁴³⁶ Bulko, November 23, 2004, p. 224, ll. 7 to 15

⁴³⁷ Bulko, November 23, 2004, p. 227, ll. 16 to 25

⁴³⁸ Dyer, January 19, 2005, p. 143, ll. 15 to 22; D. Butt January 25, 2005, p.172, ll. 17 to 23

⁴³⁹ Bulko, January 19, 2005, p. 63, l. 19 to p. 64, l. 1

⁴⁴⁰ Bulko, January 19, 2005, p. 145, l. 6 to p. 146, l. 5

meeting and Andrew attended the meeting. Andrew testified that the IBM representative in attendance was Bob Morin, the Senior Vice-President of Government Relations at IBM.⁴⁴¹

171. Interestingly, when Andrew gave his testimony during TCLI, he explained the context of a July 16, 1999 e-mail about IBM that he had sent to Commissioner Halstead and to Rod Phillips⁴⁴² in the Mayor's Office as follows: "the Mayor's Office and Economic Development were quite concerned about IBM *making* a decision to remove the software labs...out of the City".⁴⁴³ It was "a concern *around that time, maybe a little bit earlier...*"⁴⁴⁴, that IBM was going to move out of the City:

"So there was *at that point in time*, that the Mayor's Office was quite upset with IBM for doing that. I think the City spent a lot of time trying to find another location for it. There was meetings with IBM and senior people at the...the City to do with this...this move and I think Larry was calling to see if this...these *discussions that were going...going on* were a detrimental affect to IBM in the bidding process".⁴⁴⁵ (emphasis added)

(g) **Resolving the Inconsistencies**

172. The only published articles found were two articles published on Saturday, April 24, 1999,⁴⁴⁶ in *The Globe & Mail* and *The National Post*. Each article reported IBM Canada's announcement that IBM would be building a new research facility in Markham, Ontario, that it would be replacing three leased buildings scattered around Toronto and that Celestica would be expanding its manufacturing and administrative support functions into the space previously occupied by the IBM research facility (being a property and building that Celestica already owned).⁴⁴⁷

⁴⁴¹ Andrew, January 25, 2005, p. 172, l. 24 to p. 174, l. 16

⁴⁴² COT074526, Exhibit 63, Volume VIII, Tab 30

⁴⁴³ Andrew, October 1, 2003, p. 108, l. 18 to p. 109, l. 22

⁴⁴⁴ Andrew, October 9, 2003, p. 83, ll. 23 to 24

⁴⁴⁵ Andrew, October 9, 2003, p. 84, ll. 2 to 10

⁴⁴⁶ TEC057829 and TEC057830, Exhibit 15, Volume 6, Tab 2; Search for Articles: Dyer to Commissioner, January 19, 2005, p. 143, ll. 15 to 22

⁴⁴⁷ Articles, TEC057829, Exhibit 15, Volume 6, Tab 2

173. Although the Y2K Priority One projects⁴⁴⁸ had been approved at the Council meeting in late November 1998, it was not until the April 13-15, 1999 Council meeting that the CAO and the Y2K Director were given authority to enter into contracts that affected Priority 2 and Priority 3 Business Functions, at which time the CAO was again given special signing authority.⁴⁴⁹ The Staff Report dated February 9, 1999 which had identified the additional projects and recommended the additional contractual authority⁴⁵⁰ had been deferred from the March Council meeting to the April 13-15, 1999 meeting, at which time it was adopted.⁴⁵¹ The Y2K Project only had interim funding⁴⁵² until April 1999 when the capital budget was finally approved following a series of budget meetings, including Special Budget Committee Meetings held on several dates in April and a Special Council Meeting on April 26 and 27, 1999, the latter being the first business days after the publication of the newspaper articles.⁴⁵³

174. Andrew's calendar for the month of April 1999⁴⁵⁴ shows a scheduled meeting for himself, Ross Geiger (IBM) and Larry Blight (the IBM Relationship Account Manager) on April 28, 1999, which was three business days after the publication of the articles about IBM's intended move. Andrew's calendars for May, June and July⁴⁵⁵ reveal two scheduled meetings with Michael Garrett regarding Y2K,⁴⁵⁶ and a five hour meeting with IBM on May 20, 1999 (scheduled for the same day as a Corporate Services Committee Meeting).⁴⁵⁷ Andrew's calendar does not show any meeting with Bob Morin of IBM at any relevant time.⁴⁵⁸

⁴⁴⁸ Viinamae Affidavit, paragraphs 53, 54

⁴⁴⁹ April 13-15, 1999 Council Minutes, COT033563, TCLI Exhibits at 564-571

⁴⁵⁰ SPPC Report 5, Clause 8, COT001323, TCLI Exhibits

⁴⁵¹ *Ibid*; see also SPPC Report No. 6 Clause 1, part of COT033563 at COT033570

⁴⁵² COT001389, TCLI Exhibit 2A, Tab 92

⁴⁵³ TEC057831, Council Schedule, Exhibit 15, Volume 6, Tab 1

⁴⁵⁴ COT053076 at 53083; Exhibit 15, Volume 5, Tab 5

⁴⁵⁵ May 1999 COT053085, Volume 5, Tab 6; June 1999 COT053093, Volume 5, Tab 7; July 1999 COT053102, Volume 5, Tab 8

⁴⁵⁶ May 14, 1999, COT053085 at 53087, Volume 5, Tab 6, June 14, 1999, COT053093 at 53097, Volume 5, Tab 7

⁴⁵⁷ COT053085 at 53089, Volume 5, Tab 6

⁴⁵⁸ Andrew Calendar, Exhibit 15, Volume 5, Tabs 2 to 9, 14 and 37

175. It is submitted that given the two stages of City Council approval for the Year 2000 Business Continuity Plan, first in late November 1998 and then in mid-April 1999, and given the passage of almost 6 years from the November 1998 and April 1999 Council meetings to the dates of their testimony at TECI, Councillor Shiner, Bulko, Viinamae and Andrew are mistaken about the date of the Council meeting at which the rumour about IBM moving its research lab and other offices out of the City of Toronto was being discussed.

176. Given the publication of the two newspaper articles only on April 24, 1999 and the e-mail to Halstead and Phillips dated July 16, 1999, it is submitted that it is more likely than not that the discussions about the move of the IBM Research Lab and the relocation of IBM employees from leased premises to the Town of Markham occurred in April 1999 and in the summer of 1999, and not during the period November 25-27, 1998.

C. WHY DELL SUPPLIED THE Y2K DESKTOPS

1. The December Mini-RFQ

177. As a result of communicating with Dell and Compugen before actually purchasing the desktops needed to enable the City to become Y2K compliant, the City was able to avoid purchasing personal computers that were already end-of-life or obsolete before the rollout started. By going back to the market in the December Mini-RFQ for new pricing based on up to date technology specifications, the City was able to save the ratepayers over \$710,000 on the first 4,000 units only.⁴⁵⁹

178. Contrary to the limited information known at the time that the desktop phase of TECI was authorized by City Council, the December Mini-RFQ was not conducted by telephone, it was conducted in writing:

- (a) On December 7, 1998, Bulko sent Dell, Compaq and IBM an e-mail on the subject "Special Bid Pricing" (with a copy to GE Capital, Questech and SHL) wherein the City requested prices from the manufacturers, to be given to the

⁴⁵⁹ Bulko Analysis, TEC052889, Exhibit 15, Volume 1, Tab 23; Bulko, November 23, 2004, p. 61, l. 22 to p. 62, l. 16

VAR's, on a desktop computer with the latest technology, now the Pentium II 400 mhz computer.⁴⁶⁰

- (b) Dell responded in writing to the December Mini RFQ. The City still has the text version of Dell's response to the December Mini RFQ.⁴⁶¹
- (c) SHL responded in writing to the December Mini-RFQ in a memo dated December 9, 1998, giving the prices for desktops manufactured by IBM and Compaq and other terms imposed by these manufacturers.⁴⁶²
- (d) The "Value Added Services" price refresh for separate pricing from the VARs was done by e-mail dated December 8, 1998.⁴⁶³
- (e) Bulko prepared a written analysis of the desktop prices offered by IBM, Compaq and Dell which clearly illustrated that purchasing the desktops only from Dell (as opposed to splitting the purchases equally among the 3 Enterprise Tier manufacturers) was forecast to save the City over \$710,000 on only the first 4,000 computers replaced.⁴⁶⁴
- (f) The responses to the December Mini-RFQ received from GE Capital and Questech have never been produced, but it is submitted that there is no reason to doubt that prices were received and that the prices of the desktops quoted by GE Capital and Questech are in the amounts set out in Ms. Bulko's financial analysis of December 1998.⁴⁶⁵
- (g) Bulko sent an e-mail to Frank Spizarsky in Purchasing, outlining the intent to go with Dell. She does not know for certain if she sent him the chart with the

⁴⁶⁰ Email, COT040951, Exhibit 15, Volume 1, Tab 21; Mortensen Affidavit, paragraphs 53 and 54

⁴⁶¹ COT041016, Exhibit 15, Volume 3, Tab 42

⁴⁶² Ekins December 9, 1998 e-mail, TEC057478, Exhibit 15, Volume 6, Tab 23. [This e-mail was only produced to the Commission in January 2005]

⁴⁶³ COT04953, Exhibit 15, Volume 1, Tab 22

⁴⁶⁴ COT040954, Exhibit 15, Volume 1, Tab 24, TEC052889 Exhibit 15, Volume 1, Tab 23; Bulko, November 23, 2004, p. 82, ll. 4 to 18

⁴⁶⁵ *Ibid*

financial analysis, but she is certain that she cleared the decision with Spizarsky and that she got his approval in writing before proceeding, even though she cannot find the documents.⁴⁶⁶

- (h) The Y2K Desktop Team processed and obtained approval for a Change Order, to implement the change in strategy from refurbishment to replacement, and that change in strategy was approved by the Y2K Steering Committee.⁴⁶⁷

2. **The City Changes the Desktop Specification to a Require Current Technology**

179. As set out above, Dell had warned the City in the Dell Response that the specified desktop would be “end of life” as of November 1998 when the rollout was scheduled to start. None of the other companies responding to the August RFP had advised the City in their responses that the specified desktops were “end of life”, or that they would be obsolete by November 1998.⁴⁶⁸ However, by no later than October 28, 1998, another respondent, Compugen, had advised Bulko that the minimum desktop configuration would be obsolete by the time the contract is awarded.⁴⁶⁹ Compugen advised the City Purchasing Department and Bulko on November 6, 1998⁴⁷⁰ that the Compaq and IBM desktops that had been used by the City when evaluating responses⁴⁷¹ were “now not available”,⁴⁷² and that the replacement product would involve a cost increase of more than \$600.00.⁴⁷³

180. As of September 29, 1998, the City’s Y2K Desktop Team had begun to investigate the cost of a 32 mb upgrade to memory.⁴⁷⁴ That upgrade was necessary to run Windows NT which the City wished to acquire, as Dell had advised in the Dell Response.⁴⁷⁵

⁴⁶⁶ Bulko Affidavit, paragraph 35; Bulko, November 22, 2004, p. 176, ll. 12 to 19

⁴⁶⁷ COT04963, Exhibit 15, Volume 1, Tab 36

⁴⁶⁸ Bulko, November 23, 2004, p. 53, l. 3 to p. 54, l. 5; p. 54, ll. 22 to 25

⁴⁶⁹ Compugen – RFP Response, TEC057538, Exhibit 15, Volume 6, Tab 18

⁴⁷⁰ Bulko, January 19, 2005, p. 36, ll. 10 to 22

⁴⁷¹ Evaluation report, TEC019479 at TEC019481, Exhibit 15, Volume 1, Tab 9

⁴⁷² Concerns of Compugen, TEC057791, Exhibit 15, Volume 6, Tab 20

⁴⁷³ *Ibid*; Bulko, January 19, 2005, p. 123, l. 12 to p. 124, l. 5

⁴⁷⁴ Bulko Notebook, TEC057144 at TEC057151; Bulko, January 19, 2005, p. 134, l. 3 to p. 136, l. 2

181. On an unknown date, the technical members of the City's Y2K Desktop Team,⁴⁷⁶ John Trikas, Leo Franzoi and Daryl Land, decided to change the minimum specifications for the desktops.⁴⁷⁷ Apparently by November 27, 1998⁴⁷⁸ (or at least by November 1998⁴⁷⁹), the standard hardware configuration for the replacement desktops adopted by the City's Y2K Desktop Team was essentially what Dell had suggested in the Dell Response to the August RFP: a desktop with a Pentium II **350 mhz** processor, a **4.2 GB** hard drive (minimum) and with **64 mb** memory (minimum) (among other things).⁴⁸⁰

182. Before the City proceeded with the price refresh in its "Special Bid Pricing" e-mail⁴⁸¹ (commonly referred to as the December Mini-RFQ), Bulko had received⁴⁸² the November 30 e-mail from Mortensen wherein Mortensen suggested an even more up-to-date configuration for the desktop computers.⁴⁸³ In his November 30, 1998 e-mail to Bulko, Mortensen gave Bulko a suggestion for a non-proprietary specification for current technology, which by November 1998 was Intel Pentium II **400 mhz** (as opposed to the Pentium II 300 mhz that had been specified in the August RFP and the 350 mhz processor included in Dell's Response to the RFP) and a **6.4 G EIDE** Hard Drive (as opposed to the 2 GB hard drive that had been specified in the August RFP and the 4.3 GB hard drive included in Dell's Response to the

⁴⁷⁵ August RFP, s. 10.6.2, TEC019416 at TEC019454, Exhibit 15, Volume 1, Tab 2

⁴⁷⁶ Bulko, November 23, 2004, p. 58, ll. 15 to 23

⁴⁷⁷ Bulko, November 23, 2004, p. 57, ll. 13 to p. 59, l. 9

⁴⁷⁸ This assumption is based on the reference to "Council Approval – November 27, 1998" in TEC052879 at TEC052887, Exhibit 15, Volume 1, Tab 17, but it is not known whether that was the target date for approval or a subsequent report of the actual date of approval. Nor is it clear that every page of this Powerpoint presentation was completed as of November 27, 1998 and not changed thereafter. The presentations is dated simply "November 1998".

⁴⁷⁹ This assumption is based on the date on the Power Point presentation and on Bulko, November 23, 2004, p. 58, l. 24 to p. 59, l. 9.

⁴⁸⁰ TEC052879 at 883; Exhibit 15, Volume 1, Tab 17; Bulko, November 23, 2004, p. 58, ll. 2 to 14

⁴⁸¹ December 7 e-mail, COT040951, Exhibit 15, Volume 1, Tab 21

⁴⁸² Bulko, November 23, 2004, p. 79, ll. 3 to 25

⁴⁸³ November 30 e-mail, TEC057094, Exhibit 15, Volume 4, Tab 26

RFP.) This too was consistent with the Dell Business Model *i.e.* Dell offers its customers the most up-to-date, technologically advanced hardware, with non-proprietary components.⁴⁸⁴

183. Mortensen testified at length about the similarity between the specifications in his November 30, 1998 e-mail and the personal computers actually specified in the Special Bid Pricing e-mail that Bulko sent directly to the 3 Enterprise Tier manufacturers (Dell, IBM and Compaq) and to the 3 approved VARs.⁴⁸⁵ The specifications for personal computers in the December Mini-RFQ and the specifications suggested by Mortensen in his November 30, 1998 e-mail are virtually the same, and Mortensen's evidence should be preferred on the issue of the source of the specifications used in the December Mini-RFQ.⁴⁸⁶

184. In any event, what is obvious is that the specifications used by Bulko in the December Mini-RFQ had changed from a 350 mhz processor to a 400 mhz processor, and from a hardware drive with 4.2 GB to a 6.4 GB hard drive, both of which were changes to the specifications being recommended by the Y2K Desktop Team as of approximately November 27, 1998. Bulko attributed the changes to the technical personnel on the Y2K Desktop Team.⁴⁸⁷ None of them were asked to give evidence during the desktop phase of TECI.

3. **Why The City Issued the December Mini-RFQ for Up to Date Desktops: December 7, 1998**

185. The "Special Bid Pricing" e-mail requested price quotes on desktops only, in a process Bulko described as a "mini-RFQ"⁴⁸⁸ and which Mortensen described as a "price refresh".⁴⁸⁹ This price refresh was needed because the City's Y2K Desktop Team Technical Specialists had changed the minimum specification from the minimum standard desktop configuration set out in the August RFQ to a more up to date configuration by at least the end of

⁴⁸⁴ Mortensen Affidavit, paragraph 52

⁴⁸⁵ Mortensen, November 25, 2004, p. 149, l. 10 to p. 154, l. 16; p. 155, l. 16 to p. 156, l. 20; p. 158, ll. 9 to 23

⁴⁸⁶ Mortensen, November 25, 2004, p. 151, l. 17 to p. 152, l. 9; p. 152, ll. 14 to 20; p. 153, ll. 15 to 25; p. 155, l. 22 to p. 157, l. 11; p. 158, ll. 9 to 23; p. 159, ll. 4 to 12. In contrast, see Bulko, November 23, 2004, p. 166, l. 7 to p. 168, l. 20

⁴⁸⁷ Bulko, November 22, 2004, p. 168, ll. 16 to 20

⁴⁸⁸ December 7 e-mail, COT040951, Exhibit 15, Volume 1, Tab 21

⁴⁸⁹ March 19, 1999 e-mail TEC046780, paragraphs 4, 5; Exhibit 15, Volume 1, Tab 62

November 1998. As Bulko testified, whenever the products change, it is appropriate to update the prices.⁴⁹⁰ If the scope changes,⁴⁹¹ the bidding can be reopened.

186. Franey also testified that the past practice at Metro, when Metro was doing a large acquisition, was that Metro went back to Compaq to get what was known as “special bid pricing”.⁴⁹² The same occurred at Metro when there were two manufacturers that Metro knew was going to be working with.⁴⁹³

187. Bulko testified it was always the City’s intent to split out the hardware from services as part of the December Mini-RFQ.⁴⁹⁴ The strategy was to have the manufacturers provide one consistent price to the re-sellers and for the re-sellers to quote on the services that the City had picked them to be responsible for,⁴⁹⁵ being the various items shown in the December 8 e-mail sent to the VAR’s only entitled “Value Added Services”.⁴⁹⁶

188. There was no request to the VARs to provide pricing for marking up the manufacturer’s “box” price because that is not what the City wanted as of December 8, 1998.⁴⁹⁷ Bulko realized that the advantage of getting prices from the manufacturer, either directly to the City or to the City through the VARs, was that there was no opportunity for a mark-up on the base price.⁴⁹⁸

189. Mortensen’s relatively contemporaneous record of events (being his e-mail of March 19,1999 sent to David Toms and others in response to Toms’ request for information) records that:

⁴⁹⁰ Bulko, November 22, 2004, p. 73, ll. 4 to 10

⁴⁹¹ Bulko, November 22, 2004, p. 201, ll. 13 to 16

⁴⁹² Franey, November 30, 2004, p. 60, ll. 9 to 13;

⁴⁹³ Franey, November 30, 2004, p.60, ll. 14 to 21

⁴⁹⁴ Bulko, November 23, 2004, p. 83, ll. 10 to 18

⁴⁹⁵ Bulko, November 23, 2004, p. 82, l. 4 to l. 23; p. 83, l. 10 to p. 84, l. 20

⁴⁹⁶ COT040953, Exhibit 15, Volume 1, Tab 22

⁴⁹⁷ Bulko, November 23, 2004, p. 84, ll. 14 to 20

⁴⁹⁸ Bulko, November 23, 2004, p. 84, l. 21 to p. 85, l. 2

“Now that we had our foot back in the door, our Team managed to convince City Staff that the configuration in the original bid would be obsolete once they actually started acquiring product. Together, we convinced them to refresh the price based on a spec. that would be available throughout their rollout schedule.”⁴⁹⁹

190. In this relatively contemporaneous e-mail, Mortensen took credit for the Dell Team being able to convince the City “to refresh the price based on a spec that would be available throughout their rollout schedule.”⁵⁰⁰ This e-mail referred to the recommendation of the PII 400 and the issuance of a the price refresh utilizing the PII 400.⁵⁰¹ This March 1999 e-mail is entirely consistent with Mortensen’s November 30, 1998 e-mail to Bulko, which is also a contemporaneous record of events. Both of these e-mails were prepared by Mortensen at a time when no investigation was underway, and when no allegations of an improper procurement process had been made. Accordingly, they should be given greater weight than the 6 year old memories of events that were not at all out of the ordinary at the time.

191. Dell also credited Lyons with helping to get the message across to the City that the City was about to purchase end-of-life desktops, at unnecessarily high prices, and that there was a method available to the City to get the benefit of the services of both the services of the VARs and the lower priced, technologically advanced products from Dell, by unbundling the services and hardware purchasing decisions.⁵⁰² Lyons apparently had no such discussions with Franey,⁵⁰³ Bulko,⁵⁰⁴ or Viinamae,⁵⁰⁵ but he was at least present at the November 16 meeting with Andrew and Toms.⁵⁰⁶

⁴⁹⁹ TEC046780, Exhibit 15, Volume 1, Tab 62; Kelly, November 23, 2004, p. 96, l. 10 to p. 98, l. 23

⁵⁰⁰ *Ibid*

⁵⁰¹ *Ibid*

⁵⁰² *Ibid*, Toms Affidavit, paragraphs 36 to 37 and 28 to 31; Kelly Affidavit, paragraphs 33 to 34, 40 to 45

⁵⁰³ Franey, December 1, 2004, p. 74, ll. 7 to 21

⁵⁰⁴ Bulko Affidavit, paragraph 63

⁵⁰⁵ Viinamae, December 8, 2004, p. 47, ll. 15 to 22; p. 49, l. 2 to p. 50, l. 13

⁵⁰⁶ Lyons, January 17, 2005, p. 249 ll. 17 to 21

4. **Why the City issued a Separate Request for Prices on “Value-Added Services”: December 8, 1998**

192. The decision to ask the VARs to quote on services only and to break out the separate services into six different line items was something that Bulko and the Desktop Project Manager, Peter Somerville, had discussed.⁵⁰⁷ The re-sellers were supposed to add a quote on the services that Bulko and Somerville has picked out and that the City wanted them to be responsible for.⁵⁰⁸ Bulko testified Franey knew about splitting hardware from services because “that was always our intent”.⁵⁰⁹ According to Bulko, she and Franey discussed the concept that the RFQ for Dell, IBM and Compaq should be done on a basis that required “separate line items”. That could refer to breaking out the hardware from the services or it could refer to line items for the configuration.⁵¹⁰

193. In his November 30, 1998 e-mail to Bulko, Mortensen had also suggested that Bulko solicit hardware prices separately from the other services that the VARs would be providing. As he explained in this e-mail:

“In effect, this should allow you to compare exact hardware prices for exact configurations from each of the hardware manufacturers. If the VARs choose to mark up the hardware prices or include services, these items would separate and individually [be] identifiable from the basic hardware prices. I would ask that you not include in this price request the following items:

- Image loading
- Installation
- On-site personal [sic]

By doing so, Dell will be given an opportunity to quote on a level playing field. It will also ensure that the lowest price for hardware is received by the City of Toronto.”

In other words, Mortensen was asking Bulko to “peel back the onion”; to get the right information so that the real financial benefit of choosing Dell would be obvious to the City.⁵¹¹

⁵⁰⁷ Bulko, November 23, 2004, p. 82, l. 8 to p. 83, l. 9

⁵⁰⁸ Bulko, November 23, 2004, p. 83, l. 24 to p. 84, l. 6

⁵⁰⁹ Bulko, November 23, 2004, p. 83, ll. 10 to 18; p. 84, ll. 11 to 13

⁵¹⁰ Bulko, November 23, 2004, p. 81, l. 23 to p. 82, l. 3

⁵¹¹ Mortensen Affidavit, paragraph 51

194. When Mortensen's saw the "value added services" e-mail to the VARs in the course of this Inquiry, he realized that his suggestion had been accepted: that was exactly what Dell had hoped for. That is what he had been telling any number of people in his discussions: if you want to get the best price, separate out the hardware from the services and figure out the best prices for each.⁵¹² The two e-mails from Bulko dated December 7 and December 8 separated the quote of hardware prices from the quote for value added services.⁵¹³

195. Bulko testified that this e-mail from Mortensen did not influence her thinking, or anyone else's thinking, about separating the quote for hardware prices from the quote for value added services.⁵¹⁴

5. **The Decision or Direction to Proceed with the December Mini-RFQ**

196. Once the Corporate Services Committee approval was obtained on November 9, 1998, the strategizing on implementation started.⁵¹⁵

197. On November 30, 1998, Bulko noted a task in her "to do list" as "Do Mini RFQ", a fact confirmed during her testimony.⁵¹⁶ On Wednesday, December 1, 1998, Bulko met with Mike Franey and they discussed the "RFQ for Dell/IBM/ Compaq", as noted in her Desktop Notebook,⁵¹⁷ and as confirmed in the testimony.⁵¹⁸

198. Viinamae asked Bulko to do the mini-RFQ and to contact the manufacturers to get standard pricing.⁵¹⁹ Viinamae denies instructing Bulko to go to Dell specifically⁵²⁰ and she

⁵¹² Mortensen, November 25, 2004, p. 304, l. 7 to p. 305, l. 5

⁵¹³ Mortensen Affidavit, paragraph 55

⁵¹⁴ Bulko, November 23, 2004 p. 7, l. 20 to p. 8, l. 14; see also: Bulko, November 23, 2004, p. 10, ll. 2 to 17

⁵¹⁵ Franey, November 30, 2004, p. 50, l. 18 to p. 51, l. 6; see also meetings scheduled with IBM, Questech and GE in Bulko calendar for November 1998, COT062026 and in Viinamae calendar, COT039901 at 904, 905

⁵¹⁶ TEC057144 at TEC057161, Exhibit 15, Volume 7, Tab 1, p. 1; Bulko-in-Chief, November 22, 2004 p. 144, ll. 2 to 8

⁵¹⁷ TEC057144 at TEC057161, Exhibit 15, Volume 7, Tab 1, p. 1; Bulko, January 19, 2005, p. 166, l. 22 to p. 167, l. 21; Franey, November 30, 2004, p. 75 l. 3 to p. 76. l. 8

⁵¹⁸ Bulko, November 23, 2004, p. 80, ll. 11 to 12; p. 81, ll. 4 to 10 and ll. 17 to 22; Bulko, November 22, at p. 160, l. 11

⁵¹⁹ Viinamae, December 6, 2004, p. 99, ll. 6 to 18

⁵²⁰ Viinamae Affidavit paragraph 10; Viinamae, December 6, 2004 p. 99 ll. 19 to 21

denies having a conversation with Franey directing Franey to include Dell.⁵²¹ She has no recollection at all of telling Franey about having spoken to Lyons.⁵²²

199. There was no need to give a specific direction to Bulko or Franey to include Dell, because the Evaluation Committee had already recommended continuing to buy computers from Dell,⁵²³ Dell computers had been specified by the Y2K Desktop Technical Team in the City's standard configuration as of November 1998⁵²⁴ and a direction to go to the Tier 1 manufacturers would automatically include Dell.

6. **Why Dell Won the December Mini-RFQ**

200. Dell won the December 1998 Mini-RFQ hands-down. The financial analysis prepared by Bulko⁵²⁵ showed that buying the first 4,000 desktops exclusively from Dell would save the City **\$710,703.00**. (Applying the same price differential to the 11,318 desktops actually supplied by Dell in calendar year 1999,⁵²⁶ the saving to the City's taxpayers was over \$2.0 million, before considering the \$200 price reduction agreed to by Dell in June 1999 and the further \$450 reduction that resulted from the September Mini-RFQ.)

201. Dell's quote was \$200.00 lower per unit. Bulko frankly acknowledged that: "there's no way we could have deployed with the higher priced models. And that's when the decision was made to go with Dell."⁵²⁷ Bulko agreed that the answer was "easy" and, indeed, that it was a "no brainer":

Q: Is it fair to say that when you say a savings to the taxpayer of seven hundred and ten thousand seven hundred three dollars (\$710,703) the decision became easy as to how you were going to source these...desktops?

A: Yes.

⁵²¹ Viinamae, December 6, 2004, p. 99, ll. 19 to 24; November 30, 2004, p. 76, l. 7 to p. 78, l. 23

⁵²² Viinamae, December 6, 2004, p. 99, l. 25 to p. 100, l. 3

⁵²³ Viinamae, December 8, 2004 p. 52, ll. 4 to 16

⁵²⁴ TEC052879 at 883, Exhibit 15, Volume 1, Tab 17

⁵²⁵ TEC052889, Exhibit 15, Volume 1, Tab 23; Bulko paragraph 35; Bulko, November 22, 2004 p. 61, l. 16 to p. 62, l. 8

⁵²⁶ Spreadsheet, Exhibit 18

⁵²⁷ Bulko, November 22, 2004, p. 179, l. 9 to p. 180, l. 2

...

Q: Would you agree that it would be a no brainer to spend seven hundred and ten thousand dollars (\$710,000) that you didn't have to spend?

A: Yes.⁵²⁸

202. Franey agreed that the decision to go with Dell was based on the fact that Dell had quoted \$200 less per box than IBM on the first 1,000 units and more than \$400 less per box than Compaq had offered.⁵²⁹ As a result, there really was no discussion, it was such an obvious decision, "it stuck out like a sore thumb".⁵³⁰ Franey thinks it was a good decision.⁵³¹

7. **Who Decided Dell Should Win the December Mini-RFQ?**

203. Bulko testified that the decision in December 1998 to "go with Dell exclusively" was made during a discussion with Lana Viinamae and Michael Franey,⁵³² or perhaps just in a discussion she had with Viinamae, and that Viinamae made the decision.⁵³³ Bulko's Affidavit evidence was that she did not make a recommendation either way on the results of the December 1998 Mini-RFQ, and she reiterated this evidence during her oral testimony.⁵³⁴ Franey acknowledged that he was part of the group of three people – Viinamae, Bulko and himself– who discussed the results of the December Mini-RFQ and made the decision to go with Dell.⁵³⁵ Viinamae says she learned of the decision to go with Dell from Bulko in a hallway discussion, and that Franey was not present.⁵³⁶ There is no evidence in the record that Andrew had any role

⁵²⁸ Bulko, November 23, 2004 p. 62, ll. 11 to 16; p. 63, ll. 6 to 9

⁵²⁹ Franey, November 30, 2004, p. 245, l. 18 to p. 246, l. 10

⁵³⁰ Franey, November 30, 2004, p. 246, ll. 11 to 13

⁵³¹ Franey, November 30, 2004, p. 246, ll. 14 to 23; p. 247, ll. 6 to 8

⁵³² Bulko, November 22, 2004, p. 180, ll. 8 to 16; see also p. 179, l. 9 to p. 180, l. 7; Franey Affidavit, paragraph 17

⁵³³ Bulko, November 23, 2004, p. 62, l. 17 to p. 63, l. 5

⁵³⁴ Bulko Affidavit, paragraph 34; Bulko, November 22, 2004, p. 179, l. 22 to p. 180, l. 2; p. 180, ll. 8 to 20; November 23, 2004, p. 26, ll. 10 to 21

⁵³⁵ Franey, November 30, 2004, p. 246, ll. 14 to 23

⁵³⁶ Viinamae, December 8, 2004, p. 55, ll. 5 to 15. She also testified it was not much of a discussion; December 8, 2004, p. 57, ll. 5 to 16

in the decision made to choose Dell as a result of the December Mini-RFQ, and he denies having any such role.⁵³⁷

204. Bulko⁵³⁸ and Franey⁵³⁹ each testified that Viinamae made the decision to sign the purchase requisition. Viinamae agrees: Viinamae actually wrote up the first purchase requisition for the first 200 desktop units needed for the Project Management Office.⁵⁴⁰ She was satisfied before signing it that Dell was the low cost bidder.⁵⁴¹ She signed the purchase requisition at the end of the December 23, 1998 meeting “to signify [her] approval [to] the choice of Dell as the desktop supplier to the City of Toronto.”⁵⁴² Viinamae agreed that she had to exercise her discretion to sign the purchase requisition.⁵⁴³

205. Bulko sent the recommendation to purchase solely from Dell to Purchasing, and Purchasing did not disagree with the decision to sole source from Dell and save the taxpayers \$710,000.⁵⁴⁴ In fact, as Viinamae pointed out, if Purchasing was not comfortable that due process had been followed, a purchase order would not have issued; the evidence that Purchasing had approved Dell as the supplier is the fact that a purchase order was issued.⁵⁴⁵

206. Viinamae had the overall accountability and responsibility for overseeing and guiding all Year 2000 projects,⁵⁴⁶ including the desktop project.⁵⁴⁷ However the decision to award the business to Dell was actually made, Viinamae is accountable for that decision; she also

⁵³⁷ Andrew Affidavit, paragraph 117 to 119

⁵³⁸ Bulko, November 22, 2004; Bulko, November 23, 2004, p. 62, ll. 22 to 25

⁵³⁹ Franey, November 30, 2004, pp. 120 to p. 121, l. 2

⁵⁴⁰ Viinamae, December 8, 2004, p. 77, ll. 18 to 22; p. 81, l. 16 to p. 82, l. 23; p. 85, l. 22 to p. 86, l. 11

⁵⁴¹ Viinamae, December 8, 2004, p. 56, ll. 5 to 8

⁵⁴² Viinamae, December 8, 2004, p. 59, ll. 21 to 24

⁵⁴³ Viinamae, December 8, 2004, p. 57, l. 17 to p. 58, l. 6; p. 58, l. 20 to p. 59, l. 24

⁵⁴⁴ Bulko, November 23, 2004 p. 63, ll. 10 to 19

⁵⁴⁵ Viinamae, December 8, 2004, p. 56, ll. 12 to 22

⁵⁴⁶ Viinamae, December 7, 2004 p. 206, ll. 5 to 18

⁵⁴⁷ Viinamae, December 7, 2004, p. 207, ll. 5 to 10

gets the credit for leading the team that delivered the Y2K Project on time and under budget, including saving the ratepayers of Toronto at least \$710,000 on the desktop acquisition.⁵⁴⁸

8. **When Dell Won the December Mini-RFQ**

207. The contemporaneous notes in Bulko's Desktop Notebook show that Desktop Status Meetings were held on December 21 and December 22, 1998.⁵⁴⁹ On December 21, 1998 the "1st rollout-200 PCs for 2nd floor-Y2K office" was noted.⁵⁵⁰ By the following day, the notes record "Dell as sole manufacturer through three re-sellers,"⁵⁵¹ among other things. Hence, as of December 22, 1998, the City's contemporaneous business record indicates that the decision that Dell would be the sole supplier had been made, and that the decision or result was being discussed at the Y2K Desktop Team meeting.⁵⁵²

9. **Communication of the Win to Dell: December 23, 1998**

208. On December 23, 1998 Mortensen and Kelly attended a meeting with Viinamäe at which time Viinamäe told Dell that it had been the successful bidder for this contract.⁵⁵³ Mortensen says that it is possible that Bulko informed him that Dell had won prior to that meeting with Viinamäe, but he does not know that for sure.⁵⁵⁴

209. The purpose of the meeting was to advise Dell that it was the winner of the Mini-RFQ.⁵⁵⁵ Once Viinamäe understood the objective of the meeting, she took over.⁵⁵⁶

⁵⁴⁸ Viinamäe, December 7, 2000 p. 206, l. 19 to p. 207, l. 4; Bulko analysis TEC052889, Exhibit 15, Volume 1, Tab 23

⁵⁴⁹ TEC057144 at TEC057172 and TEC057173

⁵⁵⁰ TEC057144 at 172

⁵⁵¹ TEC057173; Bulko, January 19, 2005, p. 53, l. 15 to p. 54, l. 15; Note also that when Viinamäe first met the External Partners representatives on the Y2K Steering Committee on December 15, 1998, she did not know the results of the Mini-RFQ: Viinamäe, December 8, 2004, p. 65, ll. 13 to 21

⁵⁵² Also see Bulko, January 19, 2005, p. 53, ll. 15 to 21; p. 54, l. 21 to p. 55, l. 9

⁵⁵³ Mortensen Affidavit, paragraph 59, 60

⁵⁵⁴ Mortensen Affidavit, paragraph 59

⁵⁵⁵ Viinamäe, December 8, 2004, p. 75, ll. 19 to 23

⁵⁵⁶ Viinamäe, December 8, 2004, p. 75, ll. 3 to 15

210. It is beyond doubt that Viinamae communicated to Dell at the December 23 meeting that it was the low price bidder in the December Mini-RFQ,⁵⁵⁷ that the Year 2000 initiative was critical and that Dell better deliver the hardware as it represented it was capable of doing,⁵⁵⁸ working together with the VARs.⁵⁵⁹ Viinamae made her requirements and her concerns clear to Dell.⁵⁶⁰ The group discussed some of the deployment issues, the issue of certification, the standard of performance required and the fact that Dell was going to have to work with the VARs because Dell would be supplying the hardware only.⁵⁶¹

211. Viinamae told Mortensen and Kelly that although Dell had been the successful bidder for this big contract, Dell had to show that it could do a good job and deliver on time. Dell was told that it had to deliver 200 PCs by January 7, 1999. Viinamae made it very clear that if Dell made the slightest error in the execution of this delivery, Dell could lose all future business.⁵⁶² While Mortensen was excited by this opportunity to prove that Dell could execute the large order to the demanding standards of the City, he was very aware of how much was riding on these early January desktop deliveries.⁵⁶³

212. After discussing the City's requirements, Mortensen or Kelly asked Viinamae for a purchase requisition.⁵⁶⁴ At that point, Viinamae obtained a blank purchase requisition and wrote out an order for the 200 desktops needed for the Y2K office.⁵⁶⁵

213. Mortensen believed that as of December 23, Dell had won the Y2K desktop contract, provided Dell successfully executed by January 7, 1999, and it did. Kelly was more

⁵⁵⁷ Viinamae Affidavit, paragraph 18; Viinamae, December 8, 2004, p. 75, ll. 19 to 23; Mortensen Affidavit, paragraph 60; Kelly Affidavit, paragraph 52

⁵⁵⁸ *Ibid*, plus Viinamae, December 8, 2004, p. 76, l. 11 to p. 77, l. 7

⁵⁵⁹ Viinamae, December 8, 2004, p. 78, l. 23 to p. 79, l. 4

⁵⁶⁰ Viinamae, December 8, 2004, p. 76, l. 11 to p. 77, l. 7; Viinamae Affidavit, paragraphs 17, 18

⁵⁶¹ Viinamae, December 8, 2004, p. 78, l. 10 to p. 79, l. 1; p. 80, ll. 4 to 6

⁵⁶² Mortensen Affidavit, paragraph 53; Mortensen, November 25, 2004, p. 200, l. 10 to p. 204, l. 6; Viinamae, December 8, 2004, p. 83, ll. 7 to 14

⁵⁶³ Mortensen Affidavit, paragraph 60; Mortensen, November 25, 2004, p. 200, l. 14 to p. 201, l. 1; Kelly November 24, 2004, p. 108 to p. 116

⁵⁶⁴ Viinamae, December 8, 2004, p. 59, ll. 12 to 18

⁵⁶⁵ Viinamae, December 8, 2004, p. 74, ll. 2 to 4; p. 77, ll. 18 to 22

cautious about the win than Mortensen.⁵⁶⁶ Kelly testified that he left the meeting with a 200 unit purchase order; that too was correct.⁵⁶⁷

214. Mortensen has always considered the December 23rd notification from Viinamae as a win of the entire desktop contract, in whatever quantities the City decided to order, once Dell had shown that it could execute that 200 unit order flawlessly.⁵⁶⁸ Viinamae agreed that Mortensen fairly concluded from what she said at the December 23, 1998 meeting that Dell had won the contract for the Year 2000 Initiative, provided Dell successfully executed.⁵⁶⁹

10. **Dell Satisfies Viinamae's Conditions: January, 1999**

215. The Purchase Requisition from the City for the first 200 Y2K desktops was entered into Dell's computerized order management system ("DOMS") on December 24, 1998.⁵⁷⁰ Dell successfully executed the order for the 200 PCs by January 7, 1999, in accordance with Viinamae's requirements.⁵⁷¹

216. On January 5, 1999 Mortensen reported in a contemporaneous business record of Dell that "we were just awarded a huge win of 4,000 new desktops and many more to come at the City of Toronto".⁵⁷²

217. Bulko's contemporaneous notes in her Desktop Notebook record that on January 6, 1999, at a client service specialist meeting,⁵⁷³ this group was informed that: "Based on the results decided to *sole source* (one manuf./three resellers) thereby able to replace all

⁵⁶⁶ Kelly Affidavit, paragraph 53; Kelly, November 24, 2004, p. 111, ll. 15 to 18; p. 112, l. 20 to p. 113, l. 10

⁵⁶⁷ Viinamae, December 8, 2004, p. 82, l. 25 to p. 83, l. 6

⁵⁶⁸ Mortensen Affidavit, paragraph 63

⁵⁶⁹ Viinamae, December 8, 2004, p. 80, ll. 4 to 13; l. 19 to p. 81, l. 10

⁵⁷⁰ TEC057056, Exhibit 2 to Kelly Affidavit; Exhibit 15, Volume 4, Tab 32

⁵⁷¹ Mortensen Affidavit, paragraph 62; TEC057056, Exhibit 2 to Kelly Affidavit, Exhibit 15, Volume 4, Tab 32

⁵⁷² TEC046617 at 621; Exhibit 15, Volume 1, Tab 27

⁵⁷³ TEC057144 at TEC057178 to 79, Exhibit 15, Volume 1, Tab 7; Bulko, January 19, 2005, p. 55, l. 10 to p. 56, l. 7

clones...”.⁵⁷⁴ (emphasis added) This group was told on January 6 that the single manufacturer was Dell.⁵⁷⁵

218. As of January 6, 1999, Bulko had also reported the decision to “sole source” from Dell to the IT Directors of the various City Departments.⁵⁷⁶ All the senior staff in the Information and Technology Division of the City knew about sole sourcing with Dell as of January 6, 1999.⁵⁷⁷

11. **Official Notification of Decision to Standardize on Dell for the Y2K Rollout**

219. By letter dated January 21, 1999 from the City to Dell, prepared on Lana Viinamae’s letterhead but for the signature of Kathryn Bulko, and actually received by Dell (the “**Award Letter**”) Dell was advised that: “As a result of the special bid pricing request...we have *standardized on Dell computers for the Year 2000 Initiative*. It is anticipated that we may acquire *over 4,000 CPUs* by *September 1999*.”⁵⁷⁸ (emphasis added) Viinamae and Bulko knew when the letter was sent out that Dell computers could only be acquired from Dell.⁵⁷⁹

220. The Y2K Steering Committee meeting was being held on January 21, 1999. On the same day, January 21, Bulko prepared two documents:

- (a) a hand written draft of the official notification letter to Dell, as found in Bulko’s Desktop Notebook, and dated January 21, 1999;⁵⁸⁰ and
- (b) a short form list of points to make in support of the recommendation that the City replace more desktop units than originally scoped, and increasing the scope from

⁵⁷⁴ TEC057144 at TEC057179, Exhibit 15, Volume 1, Tab 7, (p. 33); Bulko, January 19, 2005, p. 139, l. 8 to p. 140, l. 3

⁵⁷⁵ Bulko, January 19, 2005, p. 140, ll. 5 to 9

⁵⁷⁶ Bulko, January 19, 2005, p. 140, l. 21 to p. 142, l. 22; Bulko continued to treat Dell as a sole source supplier until at least August 2000, TEC054080, Exhibit 15, Volume 3, Tab 36

⁵⁷⁷ Bulko, January 19, 2005, p. 141, l. 23 to p. 142, l. 1

⁵⁷⁸ January 21, 1999 award letter, TEC031488, Exhibit 15, Volume 1, Tab 33

⁵⁷⁹ Viinamae, December 8, 2004, p. 93, l. 25 to p. 94, l. 15

⁵⁸⁰ TEC057144 at 45, Exhibit 15, Volume 7, Tab 1

3,178 desktops to 8,780 replacement desktops “based on the low price from Dell”.⁵⁸¹

221. Thus, at the same time that Bulko was preparing the Award Letter to Dell advising of the City’s decision “to standardize on Dell desktops for the Year 2000 Initiative”, she was personally working on the recommendation to change the scope of replacement to 8,780 desktops.⁵⁸² The Minutes of the January 21, 1999 Y2K Steering Committee record that the strategy of replacing the additional units required a change request and that this strategy change request would be raised at the next meeting.⁵⁸³ So, clearly when the Award Letter was being prepared by Bulko, she knew (as did Viinamae and the Y2K Steering Committee) that the plan was to go forward with a change order request to replace more than 3,178 replacement desktops.⁵⁸⁴

222. In October 1998, the IBM/City of Toronto Business Case for Desktops had called for the replacement of “all non-Pentium class products” and an anticipated timeframe for completing the rollout of June 30, 1999.⁵⁸⁵ The Budget forecast documents as of December 1998⁵⁸⁶ had the target date for completion of the rollout of only 3178 units of “June 1999”.⁵⁸⁷ The December Mini-RFQ had contemplated the purchase of “anywhere from 1000 to 4000 desktops by April 1999”.⁵⁸⁸ Yet, the Award Letter established a new delivery time frame of “September 1999”.⁵⁸⁹

⁵⁸¹ TEC057481, Exhibit 15, Volume 6, Tab 24. The date of this document is shown on the “properties” page. Bulko, January 19, 2005, p. 131, l. 22 to p. 132, l. 10; p. 133, ll. 7 to 17

⁵⁸² Bulko, January 19, 2005, p. 133, l. 21 to p. 134, l. 2

⁵⁸³ COT000430 at 432, Exhibit 15, Volume 1, Tab 32

⁵⁸⁴ Viinamae, December 8, 2004, p. 95, ll. 3 to 17

⁵⁸⁵ COT074872 at 874, Exhibit 15, Volume 4, Tab 4

⁵⁸⁶ TEC052888, paragraph 1, Exhibit 15, Volume 1, Tab 20

⁵⁸⁷ COT000008, Exhibit 15, Volume 6, Tab 7; Viinamae, December 8, 2004, p. 109, ll. 16 to 22 *Ibid*, at p. 109, ll. 23 to 25

⁵⁸⁸ COT040951, Exhibit 15, Volume 1, Tab 21

⁵⁸⁹ TEC031488, Exhibit 15, Volume 1, Tab 33

223. It is submitted that Bulko's choice of the words "*over*" 4,000 CPUs and "*by September 1999*" in the Award Letter draw their meaning from the contemporaneous intention of the Y2K Desktop Team, the Y2K Director and the Y2K Steering Committee to increase the scope of replacement units to almost 9,000 units.

12. **Oversight of Y2K Steering Committee**

224. Under the special procedures established by City Council at the November Council Meeting when the Year 2000 Business Continuity Plan was approved, the Chief Administrative Officer was given authority to enter into agreements in support of the Year 2000 solutions for Priority One business functions and Citywide Initiatives until June 2000, reporting on a regular basis to the Strategic Policies and Priorities Committee.⁵⁹⁰ The Chief Administrative Officer delegated signing authority to Viinamae, subject to the oversight of the Y2K Steering Committee, such that the only two people who could sign contracts or purchase requisitions were Garrett and Viinamae.⁵⁹¹ Viinamae and the Y2K Steering Committee made the decisions.⁵⁹² Purchasing authorized the purchase orders when it had received whatever documents that Purchasing required.⁵⁹³

225. Because and only because of the low price offered by Dell in the December Mini-RFQ, the Y2K Desktop Team realized that the City could replace rather than refurbish more than 8,700 additional desktops. This decision to proceed with a change request and "to report replace versus refresh change" had also made as of December 22, 1998, according to Bulko's Desktop Notebook.⁵⁹⁴

226. On January 21, 1999 the Y2K Steering Committee⁵⁹⁵ met. Those present included Councillor O'Brien.⁵⁹⁶ At this meeting, it was reported that the Desktop Team

⁵⁹⁰ Year 2000 Business Continuity Plan as adopted by Council with an Amendment, COT077369 at 371, Volume 1, Tab 16 at p. 3; Viinamae, January 27, 2005, p. 27, l. 19 to p. 28, l. 2

⁵⁹¹ Viinamae, December 8, 2000, p. 55, l. 16 to p. 56, l. 4

⁵⁹² Viinamae, January 27, 2005, p. 27, l. 24 to p. 28, l. 5

⁵⁹³ Viinamae, January 27, 2005, p. 36, ll. 1-24

⁵⁹⁴ TEC057144 at TEC057173, Exhibit 15, Volume 7, Tab 1

⁵⁹⁵ Viinamae Affidavit, paragraphs 23-28

⁵⁹⁶ Minutes, COT000430, Exhibit 15, Volume 1, Tab 32; Viinamae Affidavit, paragraph 29

proposed replacing all clone PCs instead of repairing them, and that there was no increased cost associated with this change.⁵⁹⁷ Even though Dell is not mentioned by name in these Minutes, Viinamae⁵⁹⁸ agreed that it was only Dell's pricing that made this change of strategy possible. Viinamae confirmed that she had asked the Y2K Steering Committee for approval for the computer desktop standard to be rolled out including, among other things, the minimum hardware configuration.⁵⁹⁹ The Steering Committee was advised that the first major rollout will occur in two weeks. Viinamae testified that all the members of the Y2K Steering Committee at that meeting knew that Dell was the selected supplier.⁶⁰⁰

227. At the February 10, 1999 Y2K Steering Committee meeting, the minutes⁶⁰¹ record and Viinamae confirmed, that the External Partners' representatives were present.⁶⁰² The "external partners" present were executives from Bell Canada, Rogers Communication and the Royal Bank.⁶⁰³ It was reported to the Y2K Steering Committee that the desktop standards had been approved, as well as the change request to replace 4,000 cloned PCs instead of fixing them. The "external partners" felt this was a better alternative.⁶⁰⁴ In other words, the two things that the Steering Committee had wanted done, i.e. "approval" of the auditor of the change in the replacement strategy and discussion with the Senior Management Team about the minimum standards, had been completed as of February 10, 1999.⁶⁰⁵

228. Within a week of the February 10 Steering Committee meeting, Dell had received blanket orders for 1100 additional desktops.⁶⁰⁶

⁵⁹⁷ *Ibid*

⁵⁹⁸ Viinamae, January 27, 2005, p. 41, l. 15 to p. 42, l. 25

⁵⁹⁹ Viinamae, December 8, 2004, p. 92, l. 6 to l. 18

⁶⁰⁰ Viinamae, December 8, 2004, p. 92, l. 23 to p. 93, l. 24; Viinamae, January 27, 2005, p. 42, l. 23 to p. 43, l. 13

⁶⁰¹ COT069778, Exhibit 15, Volume 1, Tab 44

⁶⁰² Viinamae, December 8, 2004, p. 98, ll. 5 to 16

⁶⁰³ *Ibid*; Viinamae, December 8, 2004, p. 64, ll. 2 to 12

⁶⁰⁴ Y2K SC Minutes, COT069778 at COT069779, Exhibit 15, Volume 1, Tab 44

⁶⁰⁵ Viinamae, December 6, 2004, p. 98, l. 21 to p. 99, l. 1; Viinamae, December 8, 2004, p. 98, l. 17 to p. 99, l. 1

⁶⁰⁶ See documents cited at paragraph 245

13. **Choice of Dell In a Fair Process**

229. Based on the facts set out above, Dell submits that the decisions to acquire desktops solely from Dell and to standardize on the Dell desktops for the Year 2000 Initiative resulted from a fair and transparent process. The choice of Dell followed a fair and reasonably documented “Special Bid Pricing” request that Dell won, hands-down. There was nothing unusual about the process followed by staff with this December Mini-RFQ. To the extent that Bulko and Purchasing can find the documents, the documents show that it was a fair process that was followed. Whether a similar fair and transparent process was followed to support the selection of the Toshiba laptops, the main frames, mid-range servers and the other computer hardware⁶⁰⁷ supplied by Dell’s competitors to enable the City to become Y2K compliant remains a mystery, because no documentation has ever been produced as part of the TCLI or TECI.

14. **VARs Cry Foul but City Stays with Dell**

230. The Award Letter referred to the Statement of Work “being forwarded to you for your review.”⁶⁰⁸ It is perfectly clear from the “Dell-Statement of Work” actually sent to Dell by Bulko and received by Dell as of January 25, 1999⁶⁰⁹ that Dell had to “work in conjunction with the City’s three Value-Added Resellers as required”.

231. Throughout 1999 it was consistently the City’s position that Dell had to work with the VARs that had been selected as a result of the August RFP.⁶¹⁰ As Mortensen had recorded in his March 1999 e-mail to Toms: “Dell could only sell directly to the City...Dell could only sell hardware to the City”.⁶¹¹

232. According to Mortensen’s relatively contemporaneous record of events, the result of the decision to choose Dell was that:

⁶⁰⁷ Year 2000 Business Continuity Plan, COT030619, Exhibit 15, Volume 1, Tab 11 at COT030629-31

⁶⁰⁸ TEC031488, Exhibit 15, Volume 1, Tab 33

⁶⁰⁹ TEC031487 and TEC056715, Exhibit 15, Volume 3, Tab 46 and Exhibit 15, Volume 4, Tab 22

⁶¹⁰ Bulko, November 23, 2004, p. 102 ll. 7-12

⁶¹¹ TEC046780, Exhibit 15, Volume 1, Tab 62

IBM, Compaq, SHL and GE went ballistic crying foul play, etc., etc. They went to council members, the Mayor and Senior Staff to cry foul.⁶¹²

233. Bulko agreed GE was “crying foul”.⁶¹³ Bulko agreed that GE was complaining to her and to the Desktop Project Manager, Peter Somerville, on February 4 that GE did not think Dell had complied with the bid or could comply with the bid.⁶¹⁴

234. The City has a contemporaneous record of the issues raised by GE and the responses of the City to the GE issues on February 3 and 4, 1999.⁶¹⁵ The City’s responses in this document were added by either Bulko or the Y2K Desktop Manager at that time, Peter Somerville, and they are shown in the same document in bold italics.⁶¹⁶

235. Franey was aware that Questech, SHL and GE were not happy about not being awarded the hardware business to supply desktops.⁶¹⁷ Viinamae was aware from discussions around the Project Management Office that IBM and Compaq were not happy that it did not get the desktop contract, that it did not get all the business from the City i.e. the PMO, desktops, and servers,⁶¹⁸ but no one “cried foul” to her.⁶¹⁹

236. Bulko confirmed that the City’s position at all times throughout 1999 was that Dell was not the full service reseller, that the VARs still had the RFP, that Dell was supplying desktops only, and was therefore not bound by the terms and conditions of the August RFP.⁶²⁰ GE was not happy about that and was “crying foul”.⁶²¹ Bulko agreed that it was fair to conclude

⁶¹² TEC046780, Exhibit 15, Volume 1, Tab 62

⁶¹³ Bulko, January 19, 2005, p. 111, ll. 1 to 18

⁶¹⁴ Bulko, January 19, 2005, p. 109, l. 22 to p. 110, l. 1

⁶¹⁵ TEC054071, Volume 1, Tab 41; Bulko, January 19, 2005, p. 101, l. 19 to p. 102, l. 9; p. 102, l. 20 to p. 103, l. 25; p. 104, l. 24 to p. 105, l. 6

⁶¹⁶ Bulko, January 19, 2005, p. 105, ll. 7 to 25; p. 106, ll. 19 to 25

⁶¹⁷ Franey Affidavit, paragraph 18, November 30, 2004, ll. 20 to 22

⁶¹⁸ Viinamae, December 6, 2004, p. 114, l. 14 to p. 115, l. 5; Viinamae, December 8, 2004, p. 104, ll. 4 to 21

⁶¹⁹ Viinamae, December 8, 2004, p. 105, ll. 8 to 18

⁶²⁰ Bulko, January 19, 2005, p. 110, ll. 2 to 25

⁶²¹ Bulko, January 19, 2005, p. 111, ll. 1 to 18

that despite GE, at least, coming and crying foul, the City decided to stay with Dell for the supply of the hardware.⁶²²

237. On January 18, 1999, Jim Andrew and Larry Blight met at City Hall.⁶²³ Andrew could not recall the purpose of the meeting or what was discussed at the January 18 meeting.⁶²⁴

15. **Discussions with Councillors: After the Award to Dell**

238. Mortensen's relatively contemporaneous e-mail of March 19, 1999 records his understanding at that time that:

IBM also went to the Mayor suggesting that they were a significant property holder in the City and a significant employer in the City and asked the decision to be overturned.⁶²⁵

239. Mortensen's e-mail records that after IBM, Compaq, SHL and GE had gone to Council members, the Mayor and Senior Staff to cry foul:

- Jeffrey had beaten them to the punch again. He had already gone to the Councillors and Mayor to advised [sic] that the savings they would receive by purchasing Dell now allowed the City to cover off the purchase of the Red Light Cameras that supposedly they could not afford.

- The City re-awarded the Hardware to Dell for the first 4,000 units of they Y2K rollout.

...

- The City stuck by their guns and stayed with Dell Computer Corporation.⁶²⁶

240. The objective facts reveal that the red light camera issue was on Andrew's agenda for discussion on January 5, 1999 and February 12, 1999, as shown by Andrew's calendar.⁶²⁷

⁶²² Bulko, January 19, 2005, p. 111, l. 23 to p. 112, l. 9

⁶²³ COT053051 at 053055; TCLI Andrew Exhibits, Volume 14 to 25; Andrew, January 26, 2005, p. 99, l. 17 to p. 100, l. 7

⁶²⁴ Andrew, January 26, 2005, p. 100, l. 25 to p. 101, l. 4

⁶²⁵ TEC046780, Exhibit 15, Volume 1, Tab 62

⁶²⁶ TEC046780, Exhibit 15, Volume 1, Tab 62

⁶²⁷ COT053051, Exhibit 15, Volume 5, Tab 2, (January 5, 1:00 p.m.); COT053059 at 062, Exhibit 15, Volume 5, Tab 3 (February 12, 1999, 11:00 a.m.)

Lyons had been retained by EDS with respect to the red light project.⁶²⁸ Lyons “could have” told Mortensen about the work he had done for EDS on this project.⁶²⁹

241. However, Commission Counsel and the City’s counsel had access to former Mayor Lastman and the various City Councillors who were serving in 1998-1999. They did not adduce any evidence from such witnesses to support Mortensen’s understanding that Lyons had gone to the Mayor or Councillors on any Dell issue after the initial contract award.

16. **The City Auditor Signs Off on Change in Strategy: February 25, 1999**

242. By February 25, 1999, Ben Smid in the City Auditor’s Department reported to Jeff Griffiths (City Auditor) that the Y2K Desktop Team was able to leverage the volume of computers to negotiate a unit rate lower than originally anticipated in the Report to Council, and that would allow for replacement of 9,382 personal computers. The details of an invoice from Dell had been examined and it supported the unit cost in the revised strategy.⁶³⁰

243. On February 25, 1999, Smid reported to Bulko with his observations on her spreadsheet and his calculations. Smid concluded that, subject to Bulko’s investigation revealing a different amount, he “will consider this matter closed”.⁶³¹

17. **The Desktop Rollout Continues**

244. On December 23, 1998, the first purchase requisition was signed.

245. By January 22, 1999, Dell had received the second purchase order from the Y2K Desktop Team, for an additional 200 Dell desktops.⁶³² On January 29, 1999, Bulko placed a “SAP Order” for 50 corporate standard CPUs.⁶³³ The next order from the City came by e-mail dated February 11, 1999, for 100 desktops.⁶³⁴ The first big blanket order for 1,000 desktops was

⁶²⁸ Lyons, January 17, 2005, p. 257 ll. 20 to 24

⁶²⁹ Lyons, January 17, 2005, p. 258, l. 25 to p. 260, l. 3

⁶³⁰ COT041007, Exhibit 15, Volume 1, Tab 52

⁶³¹ COT041010, Exhibit 15, Volume 1, Tab 51; see also Viinamae Affidavit, paragraph 32

⁶³² TEC057140, Mortensen Affidavit, Exhibit 5; Mortensen Affidavit, paragraph 66

⁶³³ TEC029394 at 395, Exhibit 15, Volume 1, Tab 38

⁶³⁴ TEC027977; Exhibit 15, Volume 3, Tab 49; Bulko, November 23, 2004, p. 110, ll. 3-16

placed on February 16, 1999,⁶³⁵ at which point the rollout was well under way.⁶³⁶ Thereafter, large quantities of desktops and monitors were ordered by the City from time to time primarily by Bulko and her staff.⁶³⁷ Various Purchase Requisitions for Dell equipment were prepared by the Y2K Project Office, signed by the proper employees, verified to be within budgeted amounts and accepted by the City's Purchasing Department.⁶³⁸

246. The rollout of the Dell computers was managed by a special project team headed by Scott Keyes, who coordinated the effort working closely with Senthil Ramaswamy (Inside Sales but working out of the City's premises) and Bruce Mortensen. At least 75 Dell employees were involved with the rollout.⁶³⁹

247. The desktop rollout had its challenges. Among the challenges Dell faced with the desktop rollout was the ongoing efforts by the VARs to undermine Dell.⁶⁴⁰ However, all the problems with the VARs were ultimately resolved by the Dell team, working with the City staff and the VARs, and the rollout proceeded relatively smoothly.⁶⁴¹

18. **Why Dell Received the Orders for the Next 5,000 Units**

248. Viinamae was unequivocal that she made the decision to stay with Dell in June 1999 and that she had the approval of the Steering Committee to make this decision.⁶⁴² As long as Dell delivered, Dell had the desktop business.⁶⁴³ There is no evidence in the record that Bulko or Andrew had any role in the decision made by Viinamae to continue with Dell prior to or

⁶³⁵ TEC027990 (Bottom of the page), Exhibit 15, Volume 1, Tab 47; Bulko, November 23, 2004, p. 111, l. 7 to p. 112, l. 14

⁶³⁶ *Ibid*, at p. 12, ll. 9-14

⁶³⁷ Mortensen Affidavit, paragraph 68

⁶³⁸ Bulko has in her office binders with all the purchase requisitions and invoices. Two of the most significant purchase requisitions are the ones dated December 23, 1998 and June 3, 1999 that are discussed later in these Submissions.

⁶³⁹ Kelly Affidavit, paragraph 16

⁶⁴⁰ Mortensen Affidavit, paragraphs 81 to 86

⁶⁴¹ Kelly Affidavit, paragraph 50

⁶⁴² Viinamae, December 8, 2004, p. 117, l. 22 to p. 118, l. 6

⁶⁴³ Viinamae, December 8, 2004, p. 121, l. 25 to p. 122, l. 12

following the June 1999 price negotiations. They were all, however, recipients of Mortensen's sale pitches.

249. There are two reasons why the decision to standardize on Dell desktops for the Year 2000 Initiative remained in place throughout 1999:

- (a) First, Dell had provided outstanding support and service to the City and had delivered excellent hardware products at the lowest prices available in the market during the first five months of the rollout; and
- (b) Second, it would have created enormous disruption and delays to change manufacturers and systems at a time when the Y2K rollout was not yet 50 percent complete.

250. Kelly testified that if the specifications had changed during the rollout for the Y2K desktops, there could have been potentially disastrous consequences.⁶⁴⁴ A change would have involved more time, more expense and it would not have been appropriate when the City was trying to do something as complex as the Y2K rollout.⁶⁴⁵ Even having the same basic specifications but using different brands was a problem: in fact, it multiplied the problems.⁶⁴⁶ (Standardization of the platform, image, operating system, application, printer drivers – indeed every single thing that can be standardized – is supported by the Gartner Group and others in the IT industry as the well accepted means of reducing your costs and reducing your risks.⁶⁴⁷)

251. Viinamae⁶⁴⁸ and Franey⁶⁴⁹ agreed with Kelly's evidence that changing suppliers in June, at this stage of the rollout with such a large number of desktops still to be deployed, would have generated a substantial risk to the City and would have had a significant impact on the rollout deadline. As Franey said:

⁶⁴⁴ Kelly, November 24, 2004, p. 283, ll. 17 to 22

⁶⁴⁵ Kelly, November 24, 2004, p. 284, l. 8 to p. 285, l. 25

⁶⁴⁶ Kelly, November 24, 2004, p. 285, ll. 1 to 24

⁶⁴⁷ Kelly, November 24, 2004, p. 295, l. 13 to p. 296, l. 2; p. 296, l. 20 to p. 297, l. 8; Mortensen, November 25, 2004, p. 215, l. 3 to p. 215, l. 18; p. 216, l. 9 to 17

⁶⁴⁸ Viinamae Affidavit, paragraphs 28 and 41

⁶⁴⁹ Franey, November 30, 2004, p. 219, l. 2 to p. 220, l. 19

I agree with the assessment of the risk. I mean, if you look at the June 21st date, I mean roughly we are looking at fourteen (14) weeks before we proceed with what we call, lock down, which was September 30th.

To have the team develop a new base image, have the image tested, certified and then distributed to whoever the new manufacturer was, would have taken a long time. I mean it is something you can't develop overnight.

In fact the skill set that we had to develop the image was actually an outside person. So this is something we didn't have the skill sets internally to do, we had to contract somebody else to help us.

So from a risk perspective fourteen (14) weeks deploying thirty five hundred (3,500), plus the outstanding ones...I think it was a good business sense.⁶⁵⁰

252. Viewed in light of the price the City was getting from Dell at that time, Franey testified:

I think it was the right decision based on it was within the budget envelope, we hadn't exceeded the budget, we met our objective or our targets. We delivered on time, whether Y2K was a fact or fallacy, we worked it. We transitioned through the Millennium watch. I think we met our objective.⁶⁵¹

253. Although Mortensen does not have any specific recollection of any specific discussion, in keeping with his usual sales strategy, he would have told Jim Andrew (as well as Kathryn Bulko, Lana Viinamae, and anyone else on the City's Y2K implementation team that he thought could influence a purchase decision), that the City should go with a total replacement solution, and that the City should remain with Dell for the rest of the City's Y2K desktop rollout instead of issuing another RFQ. This is a standard approach in the computer business: any time you can get a contract extension or renewal rather than become involved in an RFQ process, the greater the chance of retaining the business. Mortensen would have emphasized that the City was getting the best product available for the best price and that Dell had done an excellent job implementing the desktop rollout to date.⁶⁵²

254. Mortensen had every intention of proving to the City that choosing to stay with Dell was the best option. It had really required an extraordinary effort on behalf of Dell, the VARs and the City's Y2K Desktop Team to implement the first stages of the desktop rollout, in

⁶⁵⁰ Franey, November 30, 2004, p. 220, ll. 3 to 19

⁶⁵¹ Franey, November 30, 2004, p. 220, l. 23 to p. 221, l. 3; see also p. 244, ll. 2 to 12

⁶⁵² Mortensen Affidavit, paragraph 89; Mortensen, November 25, 2004, p. 199, l. 12 to p. 200, l. 6; p. 202, l. 24 to p. 203, l. 14; p. 212, l. 1 to p. 213, l. 8; p. 214, ll. 3 to 13; p. 215, ll. 3 to 18; p. 216, ll. 9 to 17

such a short timeframe. Mortensen believed that Dell had exceeded all of the City's expectations and deserved a contract extension.⁶⁵³

255. Viinamae agreed⁶⁵⁴ with Dell's opinion⁶⁵⁵ that Dell's continued success with the City throughout 1999 was based on the excellent work of Dell's staff, their continued delivery of top-level support and service to the City, and the delivery of excellent hardware products at the lowest prices available in the market for comparable products.

256. By mid June 1999, the City had completed the rollout of the first 4,000 units.⁶⁵⁶

257. In June 1999 – probably June 14, 1999⁶⁵⁷ – Dell offered to reduce the price-point by \$200 on the PCs being supplied for the Y2K rollout. It is quite typical for Dell to volunteer price reductions because under the Dell Model, when component prices drop, Dell ultimately drops the selling price. Sharing this benefit with Dell's customers keeps them happy, it keeps Dell competitive and it helps Dell to build market share. Dell agreed to reduce the price as part of a strategy to try to get the order for the additional 5,000 desktops that the City was intending to buy.⁶⁵⁸ Dell won the business.

258. As of June 17, 1999, Dell had been told that certain deliveries were on hold for various reasons, such as “waiting for Corp. Services clearance”, “waiting for new budget approval”, “waiting for auditor approval”.⁶⁵⁹

259. As of Friday, June 18, 1999, Dell had received requests for delivery from Questech and GE for approximately 715 additional desktops, all of which had deployment dates

⁶⁵³ Mortensen Affidavit, paragraph 90

⁶⁵⁴ Kelly Affidavit, paragraph 60, sentence 2; Viinamae, December 8, 2004, p. 170, l. 20 to p. 171, l. 13

⁶⁵⁵ Kelly Affidavit, paragraph 60; Mortensen Affidavit, paragraph 97

⁶⁵⁶ E-mail dated June 9, 1999, Exhibit 15, Volume 2, Tab 24

⁶⁵⁷ Mortensen, November 25, 2004, p. 329, ll. 3 to 21; Viinamae, December 7, 2004, p. 116, l. 18 to p. 117, l. 9

⁶⁵⁸ Kelly Affidavit, paragraph 58(a)

⁶⁵⁹ Kelly Affidavit, paragraph 58(c); Dell Forecast, TEC031476-79; Exhibit 15, Volume 3, Tab 53 and Exhibit 3 to Kelly Affidavit

scheduled for the following week. However, since Dell had not received a new purchase order from Bulko, Dell could not place the order for the desktops with the factory.⁶⁶⁰

260. On Monday, June 21, 1999 at 8:28 a.m., the City sent Dell an order for 3,500 additional desktops.⁶⁶¹ The purchase requisition that had been prepared on June 3, 1999 was approved and signed.⁶⁶² Bulko was clear that she had received the necessary authority to order these 3,500 desktops, although she could not point to a specific meeting or conversation between Friday, June 18 and the morning of June 21, 1999, when such authority was given.⁶⁶³

261. As far as Mortensen was concerned, as of June 21, 1999 the City had negotiated a contract extension for another 5,000 desktops, and he sent an e-mail to his boss David Kelly and others at Dell announcing his success.⁶⁶⁴ However, he also readily acknowledged that there never was a binding contract for 5000 units.⁶⁶⁵ In the December 23 meeting, Viinamae had made it clear that if Dell did not execute flawlessly, Dell would lose the business.⁶⁶⁶ Mortensen knew that Dell did not have “any...rock solid, approved by legal” right to supply the balance of the Y2K desktops that the City was intending to acquire.⁶⁶⁷

262. Even though the purchase order issued on June 21 was only for 3,500 desktops, it was Mortensen’s belief at the time that the City intended to buy another 5,000 units.⁶⁶⁸ He

⁶⁶⁰ TEC047017, Exhibit 15, Volume 2, Tab 36

⁶⁶¹ TEC029846; Exhibit 15, Volume 2, Tab 37

⁶⁶² COT021046; Exhibit 15, Volume 2, Tab 19; Bulko, November 23, 2004, p. 125, l. 14 to p. 126, l. 25; Franey, November 30, 2004, p. 171, l. 20 to p. 172, ll. 16

⁶⁶³ Bulko, November 23, 2004, XE, p. 122, l. 20 to p. 125, l. 3. It should be noted that the purchase requisition itself was first prepared on June 3, 1999 and then subsequently signed by Mike Franey and Lana Viinamae. TEC021046, Exhibit 15, Volume 2, Tab 19. Franey initialled the requisition from an auditing perspective, to ensure continuity between when the Business Case was developed to when the various transactions occurred; Franey, November 30, 2004, p. 172, ll. 1 to 16

⁶⁶⁴ Mortensen Affidavit, paragraph 97; TEC047024, Exhibit 15, Volume 2, Tab 38; Kelly Affidavit, paragraph 58(b)

⁶⁶⁵ Mortensen, November 25, 2004, p. 206, ll. 2 to 18; p. 219, ll. 4 to 11

⁶⁶⁶ Mortensen Affidavit, paragraph 60; See also Mortensen, November 25, 2004, p. 177, l. 20 to p. 178, l. 23; Viinamae, December 8, 2004, p. 122, ll. 2 to 19

⁶⁶⁷ Mortensen, November 25, 2004, p. 205, l. 20 to p. 207, l. 16

⁶⁶⁸ Mortensen, November 25, 2004, p. 217, ll. 3 to 15

cannot recall who told him it would be 5,000 units, but he guesses it was part of his conversation with Viinamae.⁶⁶⁹

263. Lyons was not a factor in Dell's success at the City after Dell won the Y2K contract.⁶⁷⁰ Lyons did not provide any help or assistance to Dell in winning the contract extension from the City in June.⁶⁷¹

264. In summary, Dell secured this extra business in June 1999 as a result of Dell's excellent performance during the desktop rollout prior to that date, Dell's low prices, Dell's technology, Dell's outstanding service, and the disruption a change in desktops would have caused, as set out above.

19. **Why Dell Was Awarded an Additional 1000 Units in September 1999**

265. In September 1999, Viinamae directed Bulko to conduct a Mini-RFQ for the next 1,000 units.⁶⁷² This resulted from information obtained by Viinamae and Bulko at a meeting held with Intelligent Decisions Inc. ("IDI") (which was the "middle-man" intended to be used by IBM as a vendor of record),⁶⁷³ and with IBM.⁶⁷⁴

266. On September 20, 1999, Bulko circulated the Mini-RFQ by e-mail to the three VARs and to IBM, Dell and Compaq, following the same process she had followed in 1998.⁶⁷⁵

267. Dell won again. Dell won the September Mini-RFQ because it responded with the best price per system.⁶⁷⁶ Viinamae concurred with Bulko's recommendation to award the

⁶⁶⁹ Mortensen, p. 218, ll. 15 to p. 219, l. 4; p. 220, l. 19 to p. 221, l. 10; Viinamae, December 8, 2004, p. 83 to p. 84, l. 9

⁶⁷⁰ Kelly Affidavit, paragraphs 52 to 54, paragraph 60, sentence 1

⁶⁷¹ Mortensen Affidavit, paragraph 109; sentence 3; Lyons, January 17, 2005, p. 102, l. 24 to p. 103, l. 9; p. 103, ll. 19 to 25

⁶⁷² Bulko Affidavit, paragraph 56, 57; Viinamae Affidavit sworn November 14, 2004, paragraph 45, last sentence; Viinamae, December 8, 2004, p. 124, ll. 2 to 19

⁶⁷³ E-mail from IBM, COT015554, Exhibit 15, Volume 3, Tab 20; Viinamae, December 8, 2004, p. 123, l. 18 to p. 124, l. 10

⁶⁷⁴ Viinamae, December 8, 2004, p. 149, ll. 1 to 10

⁶⁷⁵ Bulko Affidavit, paragraph 59; e-mail TEC031540, Exhibit 15, Volume 3, Tab 8

⁶⁷⁶ TEC019489 at 492; Bulko Affidavit, paragraphs 60, 61; Bulko, November 23, 2004, p. 25, ll. 4 to 16

business to Dell.⁶⁷⁷ Purchasing also agreed with Bulko's recommendation to award the business to Dell.⁶⁷⁸

268. Lyons did not provide any help or assistance to Dell in winning the September Mini-RFQ.⁶⁷⁹

20. **Why IBM Did Not Win the September Mini-RFQ**

269. In the September Mini-RFQ, IBM had attempted to "bid direct".⁶⁸⁰ However, IBM failed to attach to its e-mail the proper document with its pricing, and instead attached a copy of a previous letter that IBM had sent to Viinamae.⁶⁸¹

270. After the stipulated response time of 4:00 p.m. on September 21, 1999, Bulko sent IBM an e-mail asking IBM to check its submission, stating the only document she saw attached was the original RFP.⁶⁸² This gave IBM the opportunity to submit its price after the close of bids.

271. Ultimately, because IBM had missed the deadline, the bid analysis for the September Mini-RFQ showed "no bid" from IBM.⁶⁸³ IBM did not submit its direct bid on time and, consistent with Viinamae's practice⁶⁸⁴, any late bid would not be looked at.

272. The only discussions Viinamae had at any time about IBM "going direct" were in and around September 1999. Viinamae is not aware of any discussions prior to September 1999 about IBM bidding direct and not through a VAR.⁶⁸⁵ In fact, up until the meeting with IDI and

⁶⁷⁷ COT072012, Exhibit 15, Volume 3, Tab 25; Viinamae Affidavit, paragraph 46; Bulko, November 23, 2004, p. 188, l. 25 to p. 189, l. 12

⁶⁷⁸ COT072006; Exhibit 15, Volume 3, Tab 19; TEC019489, Exhibit 15, Volume 3, Tab 21; Bulko, Affidavit, paragraph 61; Bulko, November 23, 2004, p. 189, ll. 19 to 23

⁶⁷⁹ Mortensen Affidavit, paragraph 109; Lyons Affidavit, paragraph 25

⁶⁸⁰ Exhibit 15, Volume 6, Tab 3 [no beg doc assigned to the three page e-mail]; Viinamae, December 8, 2004, p. 145, l. 23 to p. 146, l. 12

⁶⁸¹ *Ibid*; See also: Viinamae, December 8, 2004, p. 147, l. 22 to p. 148, l. 14; p. 149, ll. 11 to 21; p. 150, ll. 3 to 14;

⁶⁸² TEC052661

⁶⁸³ TEC019489 at TEC019490, Exhibit 15, Volume 3, Tab 21

⁶⁸⁴ Viinamae, December, 8, 2004, p. 150, l. 23 to p. 152, l. 4

⁶⁸⁵ Viinamae, December 8, 2004, p. 152, ll. 5 to 16

IBM in September, IBM had indicated to Viinamae that because of the relationship IBM had with the VARs, IBM could not underbid their VARs, without seriously damaging their relationship, and that the VARs were their primary distribution method.⁶⁸⁶

21. **Dell's Desktop Rollout a Success**

273. During the course of the rollout, Dell delivered over 11,000 computers to over 900 separate locations.⁶⁸⁷

274. The City's Y2K implementation team, Dell and the VARs worked very hard from a standing stop in July 1998, when the interim funding was approved for the Y2K Action Plan, until November 1999 when the Y2K desktop rollout was completed, to ensure that the City of Toronto was Y2K compliant before December 31, 1999.⁶⁸⁸ In the final result, the VARs worked effectively with Dell to help the City implement its Y2K Project, on time and under budget.⁶⁸⁹

22. **Was Dell Specified as the Desktop Supplier in the Leasing RFQ?**

275. Dell was not specified as the desktop supplier in the Leasing RFQ. This point seems to be accepted now by Commission Counsel, since not a single question was directed to the specification issue during the desktop phase of TECI.

276. Addendum #1 to the Leasing RFQ issued June 7, 1999⁶⁹⁰ gave potential proponents responding to the Leasing RFQ the minimum hardware configuration for the computers to be leased. That minimum configuration included a "Minimum Pentium **120** mhz" processor, 64 MB of memory, a minimum **2 GB** Hard Drive, and a **17"** SVGA Monitor. The Dell desktops which the City had agreed to acquire by December 23, 1998 were based on a different specification, being the specifications in the December Mini-RFQ that had been sent to IBM, Compaq and Dell on December 7, 1998 for the acquisition of a personal computer with an

⁶⁸⁶ Viinamae, December 8, 2004, p. 152 l. 18 to p. 153, l. 16

⁶⁸⁷ Viinamae, December 8, 2004, p. 79, ll. 5 to 16; Exhibit 18

⁶⁸⁸ Mortensen Affidavit, paragraphs 100, 101

⁶⁸⁹ Mortensen, Affidavit paragraph 16; Kelly Affidavit, paragraph 50; COT031986 at 87, TCLI Exhibit 3, Volume 3, Tab 30

⁶⁹⁰ COT003902, TCLI Exhibit 2B, Tab 96

Intel Pentium II 400 mhz processor, with a 6.4 G EIDE Hard Drive and 64 MB of memory, among other things, plus a 15” colour monitor.⁶⁹¹

277. Section 3 of the Leasing RFQ had provided proponents with a table showing the number of desktops, servers, notebooks, printers and software licenses with certain manufacturers identified by name, but the preamble to Section 3 expressly provided that the City was giving “hardware and software configurations (typical new configurations) already purchased or to be purchased in 1999”⁶⁹² (emphasis added). When the Leasing RFQ was issued on May 30, 1999, almost 4,000 Dell desktops had been “already purchased” by the City. However, consistent with only a “typical new configuration” of computers “to be purchased in 1999”, at least two of the respondents to the Leasing RFQ (Dell Financial Services Limited and Compaq Capital) responded with quotes that provided different leasing prices, depending on whether Dell or non-Dell Tier 1 desktops were acquired,⁶⁹³ or Compaq, non-Compaq Tier 1 or non-Compaq Tier 2 assets were being acquired.⁶⁹⁴

23. **The Sales by Dell and the Sale-Lease Back Transaction**

278. In calendar year 1999, Dell sold a total of 11,318 desktops to various customers who were linked in Dell’s DOMS system to the City of Toronto,⁶⁹⁵ which was not quite all 11,439 desktops required by the City under its Y2K Desktop rollout.⁶⁹⁶

279. In late August 1999, when the City asked Dell to cancel all its invoices and to re-bill all the prior sales to MFP, Dell declined to do so.⁶⁹⁷

280. By the time that Dell accepted the direction from the City to bill MFP directly for units being placed on lease, Dell had already sold at least 10,884 desktops, laptops and servers to

⁶⁹¹ TEC052888 and COT040951 at COT040952, Exhibit 15, Volume 1, Tabs 20 and 21

⁶⁹² COT006104 at COT006116, Exhibit 15, Volume 2, Tab 15

⁶⁹³ DFS Response, COT056828 at COT056854

⁶⁹⁴ COT056913 at COT056930

⁶⁹⁵ Exhibit 18

⁶⁹⁶ COT068279, COT068740, COT064816, Exhibit 15, Volume 3, Tab 14, 29, 30, 32

⁶⁹⁷ TEC047162, TEC030203, TEC030456, Exhibit 15, Volume 3, Tabs 13, 33, 57

the City at a total cost of approximately \$18 million (inclusive of taxes and freight).⁶⁹⁸ Only 368 units were billed directly to MFP in 1999, at a total cost of \$375,105.62.⁶⁹⁹

24. **Conclusion: Why Dell Supplied the Y2K Desktops**

281. It was clear on all the evidence tendered during the desktop phase of TECI that the City selected Dell in December 1998 because Dell offered the best price. Dell secured the extra business in June 1999 as a result of Dell's low prices, Dell's excellent performance during the desktop rollout prior to that date, Dell's technology, Dell's outstanding service, and the disruption to the Y2K desktop rollout that a change in desktops at that time would have caused. Dell won the September Mini-RFQ. Dell maintained the City's confidence throughout the Y2K desktop rollout by providing excellent service to the City and by supplying excellent products at the lowest prices available for comparable products.

282. Viinamae, who had been very sceptical about Dell's ability to deliver in December 1998, became "very impressed" by the prices and service the City received from Dell in connection with the Y2K project.⁷⁰⁰ As this former sceptic noted several times during her oral testimony, Dell did "an excellent job"⁷⁰¹ and gave "excellent service".⁷⁰² Based on Bulko's extensive experience working with Dell, Bulko agreed with Viinamae's assessment as follows:

Q: And would you agree based on your dealing with Dell, first that Dell did excellent work overall?

A: Yes.

Q: Secondly, that Dell delivered top level support and service to your desktop team?

A: Yes.

Q: Would you agree that Dell delivered to the City the most up to date desktops at the lowest prices?

A: Up to date that met the City's requirements, business requirements at that time, yes.

⁶⁹⁸ Mortensen Affidavit, paragraph 97 and Exhibit 9A thereto; TEC057135, Exhibit 15, Volume 4, Tab 27

⁶⁹⁹ Mortensen Affidavit, paragraph 97 and Exhibit 9A thereto

⁷⁰⁰ Viinamae Affidavit, paragraph 50

⁷⁰¹ Viinamae, December 6, 2004, p. 180, ll. 11 to 15

⁷⁰² Viinamae, December 8, 2004, p. 48, l. 20 to p. 49, l. 1; p. 103, ll. 18 to 21; p. 171, l. 1 to 13

Q: Right. Right. And certainly they were the lowest prices in December 1998?

A: Yes.

Q: And they're at the lowest price in September 1999 when we do the Mini RFQ?

A: Yes.⁷⁰³

283. As Commission Counsel had stated at the outset of the oral hearing in the desktop phase and after two years of this investigation, “what’s at issue [was] how did Dell bid on an RFP and lose and then become the supplier of the desktops?”⁷⁰⁴ Quite simply, the answer to that question is: by offering the City the most up to date equipment at the lowest prices, by delivering excellent product, and by providing excellent service.

D. DELL’S ENTERTAINMENT OF CITY STAFF

1. Introduction and Summary

284. The mandate of the Commissioner, as set out the TECI Terms of Reference,⁷⁰⁵ is to “[t]o investigate and inquire into all aspects of the purchase of the computer hardware and software that *subsequently formed the basis for the computer leasing RFQ*”, ... “their history and *their impact on the ratepayers of the City of Toronto as they relate to the good government of the municipality, or the conduct of its public business*, and to make any recommendations which the Commissioner may deem appropriate and in the public interest as a result of her inquiry.” (emphasis added)

285. Accordingly, insofar as any entertainment of City officials by Dell prior to the issuance of the Computer Leasing RFQ on May 30, 1999 had any “impact on the ratepayers” or related to the “good government of the municipality” or the conduct of the City’s “public

⁷⁰³ Bulko, November 23, 2004, p. 128, ll. 1 to 20

⁷⁰⁴ Opening Statement, November 22, 2004, p. 11, ll. 17 to 18

⁷⁰⁵ *Terms of Reference – Toronto External Contracts Inquiry*, paragraphs 5 and 6, p. 3 (“TECI Terms of Reference”).

business”, the evidence on entertainment given during the desktop phase the TECI hearing and earlier may be relevant and helpful to the Commissioner.⁷⁰⁶

286. The standard of conduct against which to judge Dell’s infrequent and minimal entertainment of City staff is the City of Toronto’s code of conduct as that employee policy was actually being enforced in 1998-99.

287. It is respectfully submitted that not even the broadly drafted TECI Terms of Reference give the Commissioner any jurisdiction to develop and apply a new definition of “conflict of interest”, or to make any findings with respect to Dell’s internal Code of Conduct.

288. The reasonable and infrequent entertainment of City staff by Dell had no impact on the ratepayers, the good government of the municipality or the conduct of its public business.⁷⁰⁷ The entertainment by Dell complied with the City’s Conflict of Interest Policies (assuming the terms of the applicable policy during the relevant period can be fairly ascertained). No one engaged in any misconduct within the meaning of section 100 of the *Municipal Act*.⁷⁰⁸

289. In this Part of Dell’s Submissions, Dell will first set out the evidence about the standard of conduct that applied at the relevant time, and then compare Dell’s entertainment to the entertainment by others to illustrate that the only fair and reasonable findings are that Dell’s minimal entertainment had no impact on any decision made by any relevant City employee and that Dell’s entertainment expenses – and those of each of its employees - fully complied with the relevant standard of conduct.

2. **The City’s Conflict of Interest Policies**

290. The amalgamation and continuation of the old City of Toronto, the Municipality of Metropolitan Toronto and five other pre-amalgamation cities into the City of Toronto (the “City” or sometimes, the “New City”) was effective January 1, 1998. During the period from January 1, 1998 – August 2000, the New City of Toronto did not even have a formal Conflict of

⁷⁰⁶ The test for receiving evidence at this hearing is not only relevance, as stated in the Terms of Reference, but also whether the evidence is “helpful”. See *Toronto External Contracts Inquiry: Rules of Procedure*, p. 6, rule 21.

⁷⁰⁷ See Preamble to TECI Terms of Reference

⁷⁰⁸ R.S.O. 1990, c. M. 45 (the “*Municipal Act*”), s. 274(1) of *Municipal Act* 2001, S.O. 2001, c. 25

Interest Policy in place.⁷⁰⁹ Given the many pressures facing the New City, adopting a consistent and acceptable Conflict of Interest Policy was not actually given priority. This is quite properly a concern of the Commissioner.⁷¹⁰ It should also be of concern to the ratepayers.

291. Given the importance of the issue of the lack of a formal Conflict of Interest Policy at the New City for over 3 years, it is remarkable that the lengthy Closing Submissions from Counsel for the City following the evidence at TCLI did not even address the responsibility of the New City to have such a single, consistent and understandable Conflict of Interest Policy or Code of Conduct in place by early 1998. The City's outside counsel conduct had the express authority to criticize the conduct of current employees of the City "only if justified by the evidence."⁷¹¹ The City's lengthy Closing Submissions focussed on the conduct of only a few former employees and quite properly focussed on the impact or the perceived impact of "lavish" and "excessive" entertainment of key decision-makers.

292. Despite several draft Policies and numerous meetings of senior management to discuss an acceptable Conflict of Interest Policy for the New City, it was not until eleven (11) months after amalgamation was effective that a report was made to a Personnel Sub-Committee and to the Corporate Services Committee of City Council by the City's Executive Director of Human Resources and Chief Administrative Officer, recommending the adoption of a Conflict of Interest Policy that would harmonize the past practices of former municipalities.⁷¹² The Corporate Services Committee of City Council referred that report back to the Executive Director of Human Resources for further consultation with the Union Local 79.⁷¹³

293. Eighteen (18) months later, on August 4, 2000, a new Conflict of Interest Policy was approved by City Council. Then there was an additional eight (8) month delay to March 2,

⁷⁰⁹ Conflict of Interest Policy Chronology, COT040377; TCLI Exhibit 3A, Tab 28

⁷¹⁰ Garrett Closing Submissions in TCLI dated August 4, 2004 indicate the Commissioner is considering possible findings of misconduct against the former Chief Administrative Officer for failing to ensure there was a Conflict of Interest Policy in place in a timely manner and that staff abided by the policy.

⁷¹¹ See, for example, Council Resolution of January 27, 28 and 29, 2004

⁷¹² Conflict of Interest Policy Chronology, COT040377, TCLI Exhibit 3A, Tab 28

⁷¹³ *Ibid*

2001 when the formal rollout of the Conflict of Interest Policy to City employees and its implementation began.⁷¹⁴

294. Michael Garrett (“**Garrett**”), the former Chief Administrative Officer of the City, testified that there was a lengthy debate about the new Policy, in part because there were strongly held and divergent opinions among senior management as to the necessity and appropriateness of the strict rules which were eventually adopted by City Council in August 2000.⁷¹⁵ Even those “strict” rules expressly permitted – and to this day expressly permit – the “occasional lunch”.⁷¹⁶

295. There was some evidence given during TCLI and during earlier phases of TECI about the former Codes of Conduct that had been in place at the City of North York,⁷¹⁷ at Metro⁷¹⁸ and the old City of Toronto,⁷¹⁹ as well as the other former municipalities (collectively, the “**Conflict of Interest Policies**”). Evidence was apparently given at TCLI that the Conflict of Interest Policies of the former municipalities which had such policies were intended to apply to former employees of those municipalities until such time as the New City adopted a Conflict of Interest Policy. There is no consistency in these former written Conflict of Interest Policies:

- **City of Toronto Policy:** The old City of Toronto Conflict of Interest Policy provided, as a general rule, that no employee shall engage in any activity, financial or otherwise, that is “*incompatible with the proper discharge of his or her duties*”.⁷²⁰ The specific rules and examples did not even expressly refer to “entertainment”. When dealing with “fees or gifts”, the Policy did refer generally to a personal benefit. An express exception to the prohibition against accepting gifts, fees or personal benefits was a gift received “*as part of a protocol or social*

⁷¹⁴ COT040380, TCLI Exhibit 3A, Tab 30; See also: Conflict of Interest Policy Chronology, COT040377

⁷¹⁵ Garrett Testimony, December 9, 2002, pp. 194-197; see also December 6, 2002, pp. 96-97, 99

⁷¹⁶ 2000 Policy, COT040386 at 389; TCLI Exhibit 3A, Tab 33. Conflict of Interest Policy printed on February 24, 2005, Appendix “C”. See also James Ridge advice to Viinamae that suppliers could pay for lunches after the 2000 policy implemented: Viinamae, October 15, 2003, p. 202, l. 22 to p. 204, l. 13

⁷¹⁷ North York Policy, TEC007584, Exhibit 13, Volume 6, Tab 16; COT014609 at 14623

⁷¹⁸ Metro Policy, COT037273; TCLI Exhibit 3A, Tab 74

⁷¹⁹ Toronto Policy, *Employees’ Conflict of Interest Bylaw*, not found in database but referred to in an employee brochure, COT037352

⁷²⁰ *Ibid*

obligation that comes with the responsibilities of the job".⁷²¹ The policy or practice actually existing at the City in March 1998 was explained in a contemporaneous document as follows:

*"It is also recognized that in the ordinary course of business, dealing with the suppliers or contractors, it may be appropriate for them to pay for an employee's lunch. Receipt of such gift or benefit in the course of business will not be considered to be a breach of those duties."*⁷²² (emphasis added)

This is the Policy that apparently applied to Bulko and unknown others in the New City's IT department in 1998-1999.

- **Metro Policy:** The Metro Policy expressly permitted entertainment accepted for an appropriate business reason. However, such entertainment would be considered "inappropriate" if it was "*excessive or extravagant*".⁷²³ "Excessive" and "extravagant" were not defined. This is the Policy that apparently applied to Andrew, Viinamae, Franey and unknown others in the New City's IT department in 1998-1999.
- **City of North York Policy:** This Policy prohibited employees from accepting "*any gifts, favours or services that **might tend to influence the discharge of duties***".⁷²⁴ The undisputed evidence given during TECI was that this City's Conflict of Interest policy "*has been administered by degree, so that receipt of **sporadic favours** has been permissible*". That was the legal opinion of the New City's outside counsel, Ross Dunsmore ("**Dunsmore**") of Hicks Morley, ("**Dunsmore's Opinion**") as reported by the Chief Administrative Officer and City Auditor to the Audit Committee on November 29, 2001 (the "**CAO/Auditor Report**").⁷²⁵ This Policy may have applied to some employees in the New City's IT department in 1998-1999.

⁷²¹ *Ibid*

⁷²² March 1998 DRAFT Employee Code of Conduct Policy, COT038270 at 38273; TCLI Exhibit 3A, Tab 17 and Garrett, December 6, 2002, p. 104, ll. 3 to 11

⁷²³ Metro Policy, COT037273 at 275, TCLI Exhibit 3A, Tab 74

⁷²⁴ North York Policy, TEC007584, TMACS Exhibit 13, Volume 6, Tab 16

⁷²⁵ CAO/ Auditor Report, COT006367 at 6374, TCLI Exhibits, Griffiths Volume 2, Tab 6

- **Borough of East York Policy:** The Statement of Record related to this Policy stated that any interest offered to an employee, either pecuniary or self serving or for whatever reason, “*that could lead to bias the employee’s judgment or activity as an employee of the Corporation*” was unacceptable.⁷²⁶ However, the Policy itself⁷²⁷ expressly allowed employees to accept “*meals or refreshments of nominal value if in connection with business discussions*”. “Nominal” was not defined. This Policy may have applied to some employees in the New City’s IT department in 1998-1999.
- **City of York Policy:** This Policy prohibited accepting gifts or benefits of any kind that “*may tend to influence or be perceived to have influenced the employees in the discharge of their duties.*”⁷²⁸ This Policy may have applied to some employees in the New City’s IT department in 1998-1999.
- **City of Etobicoke Policy:** This Policy generally prohibited the acceptance of any benefit of any kind, and including “*sporadic or casual benefits such as gifts of a nominal value or sports or entertainment events without the consent of their department head*”. This Policy then expressly stated that the acceptance of such “sporadic” or “casual” benefits is “*usually approved where such benefits are within the bounds of propriety and are not such as to bring doubt upon the employee’s objectivity or impartiality*”.⁷²⁹ This Policy may have applied to some employees in the New City’s IT department in 1998-1999.
- As for any Policy of the former City of Scarborough, it does not appear to be in the database and may not have been in existence.⁷³⁰

⁷²⁶ East York Statement, COT037268, TCLI Exhibit 3A, Tab 72

⁷²⁷ COT037265 at 66

⁷²⁸ City of York Policy, COT037269, TCLI Exhibit 3A, Tab 73

⁷²⁹ City of Etobicoke Policy, COT037262

⁷³⁰ COT040386 at 40396, TCLI Exhibit 3A, Tab 33, records that “most” of the former municipalities had some form of Conflict of Interest Policy or Code of Conduct, leading to the obvious conclusion that all of them did not have such a policy. Garrett testified there were Codes of Conduct of four municipalities to consult. Garrett, December 6, 2002, p. 106, ll. 13 to 16

- The approach of Commission Counsel when questioning Garrett indicated an assumption that various Draft Policies under discussion at the New City informed the obligations of senior staff.⁷³¹

296. Garrett, the former Chief Administrative Officer, testified that the proposed new policy and the topic of appropriate conduct was discussed actively at senior management meetings on a number of occasions at the New City,⁷³² for months in the City's Legal Department.⁷³³ There was a spectrum of activities, as broad as it was wide, and "conduct is not a black and white issue".⁷³⁴

297. Garrett testified that it was understood by senior management in early 1998 that the City was not talking about a complete ban, that there needed to be some intermingling with different communities, and that the staff had to be seen at dinners and events at the non-profit sector.⁷³⁵ The proposed Draft Policy under discussion in 1998 expressly stated that it would be appropriate for suppliers to pay for a City employee's lunch.⁷³⁶

298. In substance, the evidence of Joan Anderton, Jim Andrew and Lana Viinamae during TCLI was that the City's entertainment policies at the relevant time were even more generous than Dunsmore had opined.

- (a) Joan Anderton, the Commissioner of Corporate Services appointed in 1999, was advised by either Joe Halstead (Commissioner of Economic Development) or Wanda Liczyk (Treasurer and CFO) about attending a hockey game in MFP's private box to the effect that: "that's how business is done in Toronto and it is

⁷³¹ Garrett, December 6, 2002, p. 92, l. 24 to p. 93, l. 8; p. 94, l. 23 to p. 96, l. 13; p. 99, l. 22 to p. 102, l. 5; p. 103, l. 16 to p. 104, l. 21

⁷³² Garrett, December 6, 2002, pp. 90 to 111

⁷³³ Garrett, December 6, 2002, p. 110, ll. 1 to 11

⁷³⁴ Garrett, December 6, 2002, p. 97, l. 8

⁷³⁵ Garrett, December 6, 2002, p. 96, l. 8 to p. 97, l. 14; p. 103, l. 19 to p. 105, l. 3

⁷³⁶ January 98 Draft, COT038262 at 266, TCLI Exhibit 3A, Tab 16; March 98 Draft, COT038270 at 273, TCLI Exhibit 3A, Tab 17; June 98 Draft, COT040370 at 373, TCLI Exhibit 3A, Tab 27); Garrett, December 6, 2002, p. 103, l. 17 to p. 104, l. 21

okay as long as there isn't an active RFP".⁷³⁷ In other words, it was all right as long as there was not an active RFQ or RFP in place.⁷³⁸

- (b) Andrew testified that he followed the rule that if there was no active tender situation, then there was no conflict of interest.⁷³⁹ Andrew further testified that this was the test that, in practice, the former Chief Administrative Officer invoked.⁷⁴⁰ No one ever raised any issue about the inappropriateness of Andrew's entertainment practices with him before he left the City.⁷⁴¹
- (c) Viinamae's evidence was that she accepted a number of invitations to various events from suppliers to the City of Toronto, that invitations were extended to her through her superiors, that she was encouraged by her superior, Andrew, to attend and to be seen "networking" at such events, and that when she attended events with her superiors present, none of them told her that her presence was inappropriate.⁷⁴² Andrew agreed that he sometimes invited Viinamae to join him at such events and that he had encouraged her to attend.⁷⁴³ Even considering the frequency of lunches that actually occurred with hindsight, Viinamae was of the opinion that it was all appropriate.⁷⁴⁴

299. Entertainment was engaged in by other members of the IT Department⁷⁴⁵ and other departments,⁷⁴⁶ as well. Exhibit "C" to MFP's Reply Submissions list 213 scheduled

⁷³⁷ Anderton, November 25, 2003, p. 137, l. 12 to p. 138, l. 21, testifying in respect of COT041205, TCLI Exhibit 2B, Tab 13

⁷³⁸ *Ibid*, p. 138, ll. 12 to 22

⁷³⁹ Andrew, September 24, 2003, at p. 237, ll. 10 to 19; October 1, 2003, p. 200, ll. 19 to 24; p. 204, ll. 7 to 23

⁷⁴⁰ Andrew, September 24, 2003, p. 285, ll. 9 to 15; September 25, 2003, p. 20, ll. 19 to 25

⁷⁴¹ Andrew, October 1, 2003, p. 206, ll. 11 to 14

⁷⁴² TCLI Affidavit of Viinamae sworn September 23, 2003, paragraph 150; Viinamae Testimony, October 15, 2003, p. 201, l. 22 to p. 202, l. 21; p. 203, ll. 3 to 9; p. 227, l. 17 to p. 232, l. 10; p. 228, l. 23 to p. 229, l. 4; p. 150, l. 19 to p. 151, l. 2; p. 204, l. 14 to p. 206, l. 16; October 23, 2003, p. 85, ll. 7 to 19

⁷⁴³ Andrew, January 26, 2005, p. 5, l. 9 to p. 7, l. 25

⁷⁴⁴ Viinamae, October 22, 2003, p. 102, l. 8 to p. 103, l. 5. See also Bulko, August 12, 2003, p. 45, ll. 13 to 21

⁷⁴⁵ See eg. Viinamae, October 23, 2003, p. 90, l. 6 to p. 91, l. 2; Evidence at TCLI, *in passim*

⁷⁴⁶ Evidence at TCLI, *in passim*

entertainment events with Andrew, Viinamae and Liczyk to January 2001, and 110 scheduled events with only these 3 City employees to the end of 1999.

300. The excerpt from Dunsmore's Opinion in the CAO/Auditor Report cited above was put to some of the witnesses during the desktop phase of TECI. The consistent evidence of those witnesses was that, in fact, the receipt of sporadic favours, sporadic lunches, dinners and drinks was permissible at the New City during the period 1998-99.⁷⁴⁷

301. Toms and Franey testified that the actual practice at the New City was no different than the actual practice at the former of Municipality of Metropolitan Toronto.⁷⁴⁸ Viinamae agreed the practice or behaviour was similar, although she testified there was maybe an increase in the frequency of entertainment at the New City.⁷⁴⁹

302. Indeed, the change between the entertainment practices as they existed and were permitted under the old Conflict of Interest Policies at the City and the new 2000 Conflict of Interest Policy that was rolled out commencing in March 2001 was so great that Bulko described it as a "culture shock".⁷⁵⁰ Viinamae agreed that the 2000 Conflict of Interest Policy represented a major culture change within the IT division or group.⁷⁵¹ Andrew described the former practices as more liberal than the new 2000 Policy.⁷⁵²

303. No one from the City ever told the Dell witnesses that any of the lunches or other entertainment events were prohibited, nor did they express any concerns.⁷⁵³ If concerns had been

⁷⁴⁷ Toms, November 29, 2004, p. 304, l. 18 to p. 305, l. 16; Mortensen, November 25, 2004, p. 334, l. 4 to p. 335, l. 23; Franey, November 30, 2004, p. 255, l. 19 to p. 256, l. 10

⁷⁴⁸ Toms, November 29, 2004, p. 305, l. 17 to p. 306, l. 7; Franey, November 30, 2004, p. 254, l. 4 to p. 254, l. 25; p. 256, l. 8 to p. 256, l. 24

⁷⁴⁹ Viinamae, October 22, 2003, p. 101, ll. 12 to 23

⁷⁵⁰ Bulko, August 12, 2003, p. 20, ll. 20 to 22

⁷⁵¹ Viinamae, October 23, 2003, p. 87, ll. 1 to 9

⁷⁵² Andrew, October 1, 2003, p. 208, ll. 12 to 19

⁷⁵³ Mortensen, November 25, 2004, p. 248, ll. 7 to 13; Kelly, *in passim*; Toms, November 29, 2004, p. 305, ll. 14 to 16; Andrew, October 1, 2003, p. 206, ll. 15 to 21; p. 208, ll. 5 to 11

expressed to Mortensen, he was clear he would not have gone to the events with the City employees.⁷⁵⁴ Neither Toms nor Kelly was asked a similar question.

304. While David Toms was the Director of Public for Dell, there was not such frequent business entertainment that would lead anyone, in his opinion, to think that Dell had gone over any kind of a line of acceptability.⁷⁵⁵

305. The foregoing paragraphs 292-304 describe the factual matrix in which employees of the New City and employees of suppliers or potential suppliers to the New City found themselves during 1998-99. This factual matrix gives rise to a number of issues and questions:

- First: What was the actual entertainment policy in effect at the New City at the relevant time? Each of the New City's employees were not subject to the same policy. Not only did the various former municipal policies differ, but it cannot be over-emphasized that the written Conflict of Interest Policies were not being enforced strictly in accordance with their terms.⁷⁵⁶
- Second: How would anyone dealing with an employee of the New City know which of the former municipal Conflict of Interest or entertainment policies applied to that employee, unless each and every New City employee provided a copy of the applicable former policy to each and every supplier or potential supplier? At the very least, employees of the New City would have to tell suppliers and potential suppliers what type and level of entertainment was appropriate or inappropriate, and there was absolutely no evidence at TECI to suggest that had occurred.
- Third: How can the conduct of any particular individual be fairly assessed, when there was no single standard of conduct applicable to all New City employees?

⁷⁵⁴ Mortensen, November 25, 2004, p. 248, ll. 7 to 16

⁷⁵⁵ Toms, November 29, 2004, p. 303, ll. 17 to 22

⁷⁵⁶ Dunsmore Opinion, COT006367 at 6374, and evidence of numerous witnesses during TCLI and TECI

(This question would become particularly germane if it is the conduct of an employee of a supplier or potential supplier that is being examined.)

- Fourth: How can the conduct of any employee be criticized, or found to be “misconduct” under Section 100 of the *Municipal Act*, when this municipal employer’s employment policy has been modified by conduct? Basic principles of contract law and employment law provide that when an employer has a written policy which is not enforced in practice, a breach of that corporate policy cannot be relied upon as just cause for termination.⁷⁵⁷

306. In light of the foregoing issues, the position of Counsel for the City is instructive. The City’s Closing Submissions following the evidence on entertainment tendered at TCLI focussed on only a few former employees of the City.⁷⁵⁸ With the exception of two former employees whose conduct being entertained frequently, and indeed “lavishly”, by MFP was singled out by the City’s Counsel for criticism,⁷⁵⁹ the New City’s position on the responsibility of City staff, generally, was: “The City does not hold its employees to a standard of perfection” and “To blame everyone is to blame no one.”⁷⁶⁰

307. The current Chief Administrative Officer, Shirley Hoy, testified at this Inquiry that in 2004 it is “not appropriate” to have lunch with suppliers that the City has contracts with (unless the City is hosting the lunch) and that it is “not appropriate” for the lunch to be held at the expense of the supplier.⁷⁶¹ That is absolutely not the standard of conduct that was applied during the period 1998-1999. It also is not what the City of Toronto’s current Conflict of Interest Policy, as posted on the City’s website in February 2005, states. That Policy, as adopted by

⁷⁵⁷ See e.g., *Tracey v. Swansea Construction Co.*, [1965] 1 O.R. 203 aff’d [1965] 2 O.R. 182 (C.A.) (condonation); *Carbone v. Syncrude Canada Ltd.*, (1997) 32 C.C.E.L. (2d) 246 (Alta. Q.B.) (Finding that an employee could not be dismissed for violating a policy that was not enforced). See also: *Webb v. Eaton Yale Ltd.*, [2003] O.T.C. 1081 at paragraphs 73-76 (S.C.J.) (Finding change in benefits plan could not constitute constructive dismissal, as the change had been accepted by the employee.)

⁷⁵⁸ Closing Submissions of the City of Toronto dated December 6, 2004, *in passim*

⁷⁵⁹ *Ibid*, at Chapter 21 (Andrew), paragraphs 34, 46, 136, 139; Chapter 24 (Liczyk), paragraphs 9, 14, 16

⁷⁶⁰ *Ibid* Chapter 1, Executive Summary, paragraph 143, p. 47

⁷⁶¹ Hoy, January 19, 2004, p. 42, ll. 1 to 5; p. 42, ll. 16 to 23; p. 43, ll. 4 to 23

Council on August 4, 2000, continues to say that the “exceptions” to the prohibition against receiving fees or gifts include the “occasional lunch”.⁷⁶²

3. **Entertainment of Senior City Employees by Other Suppliers**

308. Franey addressed his occasional entertainment by Dell in his affidavit.⁷⁶³ None of the other employees or former employees of the New City who gave evidence during the desktop phase of TECI were required to address their entertainment by Dell in the Affidavits filed at the desktop phase of TECI.⁷⁶⁴ Andrew gave some evidence about Dell in his TCLI affidavit, and Viinamae⁷⁶⁵ and Andrew⁷⁶⁶ gave evidence on the issue of entertainment by other suppliers in their TCLI Affidavits. There was extensive examination of entertainment of various City staff members at the expense of MFP during TCLI, but only limited examination on the entertainment accepted by City Staff members at the expense of other suppliers.

309. At least a partial scrutiny of the entertainment expenses incurred by Dell’s competitors entertaining the relevant City employees could have been effected by issuing Summonses during TCLI or TECI to the suppliers who admittedly entertained the City Staff, requiring those companies to produce the relevant expense records. Such evidence was apparently not deemed to be necessary by Commission Counsel,⁷⁶⁷ helpful, efficient or economic by the Commissioner.⁷⁶⁸ Accordingly, counsel for the parties are limited to the inferences to be drawn from scheduled contact in the few calendars which were produced and to the admissions made by witnesses who were cross-examined with respect to their actual entertainment by suppliers and potential suppliers and who could remember specific, non-controversial events that occurred 5-6 years earlier.

⁷⁶² City of Toronto Conflict of Interest Policy as printed February 24, 2005, Appendix C to these Submissions

⁷⁶³ Franey Affidavit, paragraph 24

⁷⁶⁴ Bulko, Franey and Viinamae Affidavits, Exhibit 14, Tabs A, D, I, *in passim*; Andrew Affidavit, TMACS Exhibit 63, Tab 1

⁷⁶⁵ Viinamae Affidavit sworn September 23, 2003, paragraphs 150 to 155, read into evidence October 15, 2003, at p. 65-67

⁷⁶⁶ Andrew Affidavit sworn September 19, 2003, paragraphs 19, 20, 37 to 46, 51, 57 to 60, 71 to 74, 82 to 88; read into evidence September 24, 2003, at pp. 16, 23 to 28; 31; 35 to 36, 40 to 41, 43 to 46

⁷⁶⁷ Report to Council, October 18, 2002, Appendix “B” hereto

⁷⁶⁸ Letter from Ron Manes to David Moore dated April 6, 2004, Appendix “B” to MFP Reply Submissions

310. Subject to the foregoing constraints, the entertainment of Viinamae, Andrew and Bulko by other suppliers during 1998-1999 included the following:

(a) **Jim Andrew**

(a) Andrew readily agreed that in 1998 and 1999, he was entertained at the expense of a wide array of hardware suppliers, software suppliers and service suppliers in the IT area.⁷⁶⁹ Golf games were “fairly frequent”.⁷⁷⁰ (On December 3, 2002, MFP’s counsel read into the record at TCLI numerous sponsors of golf days, and numerous details of golf invitations.) Andrew’s calendars are replete with scheduled lunches, dinners, golf games and other entertainment events by named suppliers.⁷⁷¹ This practice was not considered to be inappropriate at the time.⁷⁷² Specifically, the actual entertainment of Andrew by others during the 1998-99 included:

- **MFP** – lunches, golf games, hockey games⁷⁷³
- **IBM** – Trip to New York⁷⁷⁴; breakfast⁷⁷⁵, lunches⁷⁷⁶, dinner⁷⁷⁷
- **Compaq** - Lunch⁷⁷⁸
- **SHL System House** – Lunches and Golf Day at Deer Creek⁷⁷⁹

⁷⁶⁹ Andrew, January 26, 2005, p. 27, l. 23 to p. 28, l. 2

⁷⁷⁰ Andrew, October 1, 2003, p. 201, l. 22 to p. 202, l. 15

⁷⁷¹ Andrew Calendars, November 1998 – December 31, 1999, Exhibit 15, Volume 5, Tabs 37, 2-13

⁷⁷² Andrew, October 1, 2003, p. 207, ll. 7 to 11; ll. 22 to 24

⁷⁷³ TCLI evidence, *in passim*

⁷⁷⁴ Andrew, January 26, 2005, p. 16, ll. 5 to 14

⁷⁷⁵ Andrew, September 24, 2003, p. 290, ll. 17 to 24

⁷⁷⁶ Andrew, January 26, 2005, p. 22, l. 21 to p. 23, l. 3; September 25, 2003, p. 23, ll. 5 to 9

⁷⁷⁷ Andrew, September 24, 2003, p. 269, ll. 22 to 25

⁷⁷⁸ Andrew, January 26, 2005, p. 23, ll. 12 to 15

⁷⁷⁹ Andrew, January 26, 2005, p. 24, ll. 11 to 19; September 24, 2003, p. 266, ll. 20 to 25; p. 271, ll. 17 to 20; September 25, 2003, p. 25, ll. 2 to 18

- **GE - Lunch**⁷⁸⁰
- **Storage Tek** – paid trip, with tickets, to the Masters in Augusta⁷⁸¹
- **Metastorm** – paid trip to Scotland⁷⁸²
- **Sun Microsystems** - Lunches⁷⁸³; Golf Tournament and Hockey Game⁷⁸⁴
- **Computer Associates** – Trip to New York⁷⁸⁵; golf day⁷⁸⁶
- **Bell Canada** – Cocktails, dinner, breakfast and lunches⁷⁸⁷ and golf⁷⁸⁸
- **EDS** - Lunch⁷⁸⁹
- **Saga** – Y2K party⁷⁹⁰
- **Microsoft, Oracle, Lucent, Hypertech, LGS and Novell**⁷⁹¹: unspecified events

(b) **Lana Viinamäe**

- (b) From January 1, 1998 to April 2001, Viinamäe had lunches with suppliers or potential suppliers or consultants weekly, and sometimes twice a week, which

⁷⁸⁰ Andrew, January 26, 2005, p. 25, ll. 3 to 5

⁷⁸¹ Andrew, September 24, 2003, p. 256, ll. 19 to 22; p. 257, ll. 10 to 17

⁷⁸² Andrew, September 24, 2003, p. 261, l. 19 to p. 262, l. 11

⁷⁸³ Andrew, January 26, 2005, p. 23, ll. 8 to 11; September 25, 2003, p. 18, l. 21 to p. 19, l. 2

⁷⁸⁴ Andrew, January 26, 2005, p. 25, ll. 16 to 21; September 24, 2003, p. 285, ll. 2 to 8; September 25, 2003, p. 20, ll. 12 to 18

⁷⁸⁵ Andrew, January 26, 2005, p. 15, l. 15 to p. 16, l. 4

⁷⁸⁶ Andrew, September 24, 2003, p. 283, l. 25 to p. 284, l. 8

⁷⁸⁷ Andrew, January 26, 2005, p. 25, l. 9 to 13; September 24, 2003, p. 272, ll. 3 to 10; p. 280, ll. 3 to 8; p. 283, ll. 18 to 24

⁷⁸⁸ Andrew, September 24, 2003, p. 283, ll. 7 to 14; September 25, 2003; p. 16, ll. 5 to 16

⁷⁸⁹ Andrew, September 24, 2003, p. 267, ll. 1 to 5

⁷⁹⁰ Andrew, September 25, 2003, p. 19, ll. 9 to 20

⁷⁹¹ Andrew, January 26, 2005, p. 25, l. 25 to p. 26, l. 8; p. 27, ll. 10 to 22

they would pay for.⁷⁹² A summary was given in her Affidavit read into the record at TCLI.⁷⁹³ During the period from August 1998 through to September 1999, Viinamae had numerous lunches and other entertainment events scheduled with various suppliers,⁷⁹⁴ showing at least that she was receiving such invitations. The lunches or entertainment by suppliers that she confirmed had occurred included:

- **IBM** – lunches;⁷⁹⁵ Chef for Unicef Dinner with spouse;⁷⁹⁶ IBM Family Day at Skydome⁷⁹⁷; a two day trip to New York at the expense of IBM⁷⁹⁸
- **Compaq** – possibly a Compaq Day in August 1998⁷⁹⁹; Compaq Ski Day⁸⁰⁰
- **SHL** - Lunches⁸⁰¹; SHL Ski Day⁸⁰²
- **Questech** – Women of Power Lunch at Metro Convention Centre⁸⁰³
- **Sun Microsystems** – Lunch⁸⁰⁴

⁷⁹² Viinamae, December 8, 2004, p. 19, l. 5 to 15; Viinamae at TCLI; Viinamae, October 15, 2003, p. 205, l. 10 to p. 206, l. 16; See also: October 15, 2003, p. 206, l. 25 to p. 208, l. 19; p. 209, l. 22 to p. 210, l. 11; October 22, 2003, p. 99, l. 7 to p. 100, l. 11; p. 100, l. 22 to p. 101, l. 24

⁷⁹³ Viinamae Affidavit sworn September 23, 2003, paragraph 150

⁷⁹⁴ Two Summaries of Scheduled Contact, TEC057821, Exhibit 15, Volume 6, Tab 8 and TEC057814, Exhibit 15, Volume 6, Tab 9; Viinamae, December 7, 2004, p. 191, l. 12 to p. 193, l. 12; Viinamae, December 8, 2004, p. 156, l. 9 to p. 157, l. 6

⁷⁹⁵ Viinamae, December 8, 2004, p. 157, l. 11 to 18; p. 162, ll. 6 to 11

⁷⁹⁶ Viinamae, December 8, 2004, p. 157, ll. 15 to 18

⁷⁹⁷ Viinamae, December 8, 2004, p. 162, l. 20 to p. 163, l. 1; p. 164, l. 5 to 20

⁷⁹⁸ Viinamae, December 8, 2004, p. 28, l. 23 to p. 29, l. 13; p. 29, l. 25 to p. 30, l. 25

⁷⁹⁹ Viinamae, December 8, 2004, p. 15, ll. 13 to 16

⁸⁰⁰ Viinamae, December 8, 2004, p. 157, l. 19 to 21; p. 158, l. 17 to 21

⁸⁰¹ Viinamae, December 8, 2004, p. 17, l. 24 to p. 19, l. 2; p. 70, ll. 6 to 21

⁸⁰² Viinamae, December 8, 2004, p. 159, ll. 2 to 13

⁸⁰³ Viinamae, December 8, 2004, p. 157, ll. 7 to 10

⁸⁰⁴ Viinamae, December 8, 2004, p. 15, ll. 17 to 23; p. 16, ll. 7 to 16; p. 17, ll. 7 to 8

- **Cognicase** – possible Christmas lunch⁸⁰⁵

(c) **Kathryn Bulko**

- **MFP** - Hockey at the MFP box at the Air Canada Centre on three occasions⁸⁰⁶
- **IBM, Lexmark and Toshiba** - events at least once a year⁸⁰⁷
- **The VARS** - lunches with the resellers once a month or once every six weeks⁸⁰⁸

(d) **Michael Franey**

- **MFP** - Hockey at the MFP box on two or three occasions⁸⁰⁹

311. In contrast to the frequent and sometimes lavish or excessive entertainment of some City employees by MFP and other suppliers, as shown by the evidence adduced during TCLI, entertainment by Dell was infrequent, sporadic, reasonable and entirely appropriate.

4. **Dell's Entertainment Was Infrequent, Reasonable and Appropriate**

312. Dell's reasonable and infrequent entertainment of City employees stands in stark contrast to Dash Domi's entertainment of City Staff and City politicians, which was described by the City's Counsel in the City's TCLI Closing Submissions as "lavish", "very aggressive", "aggressive and improper". Domi had a limitless expense account, he submitted over 200 expense accounts in excess of \$100,000 purportedly for entertaining City Staff or City politicians, and he had provided two private chartered flights to hockey games within a two week period.⁸¹⁰

313. In contrast to Domi's expenses (and even acknowledging that a number of the expenses in the total of over \$100,000 were disputed), David Kelly spent a grand total of

⁸⁰⁵ Viinamae, December 8, 2004, p. 67, l. 17 to p. 68, l. 23

⁸⁰⁶ Bulko, August 12, 2003, p. 44, ll. 11 to 18; p. 45, ll. 13 to 15. She had three lunches with MFP (Ashbourne (1) and Domi (2)); Bulko, August 12, 2003, p. 45, ll. 4 to 10

⁸⁰⁷ Bulko, August 12, 2003, p. 55, l. 10, to p. 56, l. 17; p. 58, ll. 4 to 17

⁸⁰⁸ Bulko, August 12, 2003, p. 58, ll. 4 to 17

⁸⁰⁹ Franey Affidavit sworn May 23, 2003, paragraph 18

⁸¹⁰ City of Toronto Closing Submissions, Chapter 19, paragraphs 9 to 12

\$187.00 between February 1, 1998 and December 31, 1999 on entertainment related to the City of Toronto at events where at least he was present representing Dell. Based on the assumption of equal attendance by Dell employees and City employees and equal consumption, any benefit conferred on these City employees would be approximately **\$93.50**, over a 23 month period, and only **\$45.00** prior to the December 23, 1998 award of the desktop contract.⁸¹¹

314. In contrast to Domi, David Toms spent only **\$356.38** on entertainment related to the City of Toronto at events where at least he was present representing Dell. Based on the assumption of equal attendance by Dell employees and City employees and equal consumption, any benefit conferred on these City employees would be approximately **\$178.00**, over a 23 month period, and only **\$137.00** prior to the December 23, 1998 award of the desktop contract.⁸¹²

315. In contrast to Domi, Bruce Mortensen spent only **\$201.47** at a total of 3 lunches with City employees prior to the December 23, 1998 award of the desktop contract. Assuming the Dell attendees and City of Toronto attendees at these lunches consumed an equal amount, the total amount spent on entertainment of the City of Toronto employees by Mortensen prior to December 23, 1998 was only approximately **\$100.00**. If the analysis is extended to January 21, 1999 (the date on which the City wrote to Dell confirming that it had standardized on Dell computers for the Year 2000 Initiative), the amount spent by Mortensen increases to **\$254.82**.⁸¹³ Again, if the payment for his own lunch is excluded, the total amount spent entertaining City employees by Mortensen prior to the Award Letter was only approximately **\$128.00**.

316. The comparison of the \$254.00 spent by Mortensen to the amount spent by Dash Domi was so obvious - and so obviously significantly less – that questions on the comparison were not permitted.⁸¹⁴

317. The total amount spent by these Dell Account Team members on lunches with City of Toronto employees prior to the Award Letter was only **\$576.82**.⁸¹⁵ Assuming the Dell

⁸¹¹ Kelly Affidavit, paragraph 74; Kelly, November 24, 2004, p. 150, l. 21 to p. 151, l. 14; p. 152, ll. 4 to 19

⁸¹² Toms Affidavit, paragraphs 48 and 49

⁸¹³ Mortensen Affidavit, paragraphs 111 and 112

⁸¹⁴ Mortensen, November 25, 2004, p. 336, l. 12 to p. 337, l. 13

⁸¹⁵ Mortensen Affidavit, paragraph 112 (\$254.82); Kelly Affidavit, paragraph 74(a) (\$48); Toms Affidavit, paragraph 48 (\$274)

attendees and City of Toronto attendees at these lunches consumed an equal amount, the total amount spent on entertainment of the City of Toronto employees by Mortensen, Kelly and Toms prior to January 21, 1999 would only be approximately **\$288.00**.⁸¹⁶

318. During 1999 when the desktop computer rollout was underway, Mortensen submitted expense receipts for 14 lunches, properly characterized by Commission Counsel as “a handful of lunches” on “nothing to close to every day” that Mortensen was dealing with City employees.⁸¹⁷ Again, at least one Dell employee – Mortensen – was present at each of these lunches. Other Dell employees, such as Senthil Ramaswamy, David Toms, David Kelly and Dell’s support staff would sometimes accompany Mortensen.⁸¹⁸ Assuming there was equal attendance by Dell employees and City employees and equal consumption, then any benefit conferred on numerous City of Toronto employees by Mortensen during these infrequent lunches during 1999 was approximately **\$725.00**.⁸¹⁹

319. One of the working lunches was a more expensive lunch attended by Andrew, Mortensen and Kelly on December 1, 1999 at a total cost of \$226.40.⁸²⁰ This lunch was held at the end of the big rollout, to ensure that the customer was satisfied with Dell’s service, support and product.⁸²¹ Again assuming equal consumption by the 3 people attending this lunch, any benefit conferred on Andrew at this lunch was approximately **\$75.00**.

320. There was not one single “\$1,000.00 lunch”.⁸²²

321. There was no Dell Christmas party in 1998.⁸²³ Suzanne Cross admitted she had been mistaken about that fact.⁸²⁴

⁸¹⁶ The assumption of equal attendance and equal assumption would not be accurate for the December 23, 1998 lunch of Dave Toms with Lana Viinamae, if Mike Franey’s evidence is right that he and Terry Pacheco (a non-City employee) also attended; Franey, November 30, 2004, p. 135, l. 4 to p. 136, l. 4

⁸¹⁷ Mortensen, November 25, 2004, p. 245, l. 9 to p. 246, l. 2

⁸¹⁸ Mortensen Affidavit, paragraph 113(a)

⁸¹⁹ Mortensen Affidavit, paragraph 113(a)

⁸²⁰ Kelly Affidavit, paragraph 75, Mortensen Affidavit, paragraph 113(d)

⁸²¹ Mortensen, November, 25, 2004, p. 247, ll. 14 to 24

⁸²² Toms, November 29, 2004, p. 303, ll. 8 to 11; Franey, November 30, 2004, p. 272, ll. 10 to 23

322. There was a significant relationship event hosted by Dell at the Indian Motorcycle Club: this was a celebration of the successful rollout of over 2,000 computers and a departure event for Rick Zwarun.⁸²⁵ At least 9 City employees attended that relationship event,⁸²⁶ and Mortensen testified that he did not list all the people from the City who attended.⁸²⁷ He did not list any people from Dell who attended, but the evidence was that at least Mortensen and Ramaswamy attended, and that probably 4 or 5 people from Dell were present.⁸²⁸ Jeff Lyons probably attended the event,⁸²⁹ as did Suzanne Cross.⁸³⁰ Based on at least 16 people attending this special event, the average cost per person (before tip), was \$42.83 per person, or approximately **\$385.50** for the 9 City of Toronto employees who were noted on Mortensen's expense receipt as being in attendance.

323. There was a single Dell-sponsored golf day at Emerald Hills in July 1999⁸³¹ that included (or was scheduled to include) Viinamae, Franey, Andrew, Bulko, and Andy Lok.⁸³² (This was about half-way through the Y2K roll-out of desktops, at a time when more than 4,000 having been rolled out and the next 5,000 unit roll-out was well underway.⁸³³) As was clear during TCLI, golf invitations to senior City staff and to other members of the City's IT department were common during 1998-99 and thereafter.⁸³⁴

⁸²³ Franey, November 30, 2004, p. 268, l. 8 to p. 269, l. 17

⁸²⁴ Cross Supplementary Affidavit, Exhibit 14, Tab K, paragraph 3

⁸²⁵ Mortensen Affidavit, Exhibit 14, Tab G, paragraphs 92 and 113(b)

⁸²⁶ Mortensen Affidavit, Exhibit G, TEC056711

⁸²⁷ Mortensen, November 25, 2004, p. 247, ll. 10 to 13

⁸²⁸ Mortensen, November 25, 2004, p. 246, l. 14 to p. 247, l. 13

⁸²⁹ Viinamae, December 8, 2004, p. 49, ll. 2 to 19

⁸³⁰ Franey, November 30, 2004, p. 270, ll. 16 to 23

⁸³¹ Mortensen Affidavit, paragraph 115(a)

⁸³² TEC047067, Exhibit 15, Volume 2, Tab 45; Mortensen Affidavit, paragraph 115(a)

⁸³³ COT064872, Exhibit 15, Volume 2, Tab 24. Note that 5831 units had been rolled out as of July 14, 1999: COT070382, Exhibit 15, Volume 2, Tab 50

⁸³⁴ See eg. Andrew, October 1, 2003, p. 201, l. 22 to p. 202, l. 15; TCLI, Exhibit 2A, Summation Sort of Golf Emails

324. There was no entertainment whatsoever of City Councillors by Dell.⁸³⁵

325. The evidence of the City of Toronto employees about Dell's entertainment included the following:

(a) **Jim Andrew**

- (a) Whereas the entertainment of Andrew by MFP was described by him as being at the high end of the range of the suppliers who entertained him, the entertainment of Andrew by Dell was at "the low end of the range".⁸³⁶
- (b) Dell did not send Andrew to a Master's Tournament as another supplier, Storage Tek, did. Dell never sent Andrew to Scotland or England, as Metastorm did. Dell never sent Andrew to New York, like Computer Associates and IBM did. Dell never sent Andrew to any place outside Toronto, including to its facility in Texas.⁸³⁷
- (c) Dell never gave Andrew any invitations to a box at the Air Canada Centre for any Maple Leaf Games, Raptors Games or any sports tickets,⁸³⁸ like MFP did.⁸³⁹ Dell never gave him tickets to any concerts, harbour cruises, gala dinners,⁸⁴⁰ like MFP and other suppliers did.⁸⁴¹
- (d) Dell never invited Andrew to a Christmas party or a holiday trivia night, like Toshiba, Bell Canada, SHL, EDS and/or NCR did.⁸⁴²

⁸³⁵ Kelly Affidavit, paragraph 77, Toms Affidavit, paragraph 51, Mortensen Affidavit, paragraph 117

⁸³⁶ Andrew, January 26, 2005, p. 28, ll. 3 to 12

⁸³⁷ Andrew, January 26, 2005, p. 15, l. 6 to p. 16, l. 14; p. 17, ll. 13 to 17; Andrew at TCLI, September 24, 2003, p. 256, l. 3 to p. 257, l. 14; p. 260, l. 16 to p. 261, l. 21; p. 264, ll. 1 to 19

⁸³⁸ Andrew, January 26, 2005, p. 17, l. 18 to p. 18, l. 1

⁸³⁹ Andrew, September 24, 2003, and September 25, 2003, *in passim*

⁸⁴⁰ Andrew, January 26, 2005, p. 18, ll. 2 to 9

⁸⁴¹ Andrew, October 1, 2003, p. 198, ll. 7 to 13; p. 200, l. 25 to p. 201, l. 22

⁸⁴² Andrew, January 26, 2005, p. 34, l. 3 to p. 36, l. 21

(e) Andrew had two lunches with Dell: one on November 25, 1998 and one a year later.⁸⁴³ He dropped into the Rick Zwarun event on April 23, 1999.⁸⁴⁴ He was invited to the July 1999 golf game by Dell, but he does not believe that he attended, and if he did attend, he came late.⁸⁴⁵ Andrew did not think his infrequent lunches (2) with Dell would even create a perception in Dell's competitors of improper influence, or any belief by Dell's competitors that there was an unlevel playing field in favour of Dell.⁸⁴⁶

(b) **Lana Viinamäe**

(f) Viinamäe had lunch with David Toms and Julianne Clyde on September 11, 1998 although she does not recall attending it.⁸⁴⁷ Nor does she recall attending a lunch with David Toms, Mike Franey and Terry Pacheco on December 23, 1998.⁸⁴⁸ She went to the April 23, 1999 Rick Zwarun retirement event very late in the afternoon.⁸⁴⁹ She attended the July 1999 golf game.⁸⁵⁰ David Kelly testified she attended a lunch with Kelly and Senthil Ramaswamy in August 1999.⁸⁵¹

(c) **Michael Franey**

(g) During the period 1998 – 1999 when Franey was dealing with Dell at the New City, Franey was clear that “wining and dining” was not Dell's style⁸⁵²:

⁸⁴³ Mortensen Affidavit, paragraphs 111(c) and 113(d); Kelly Affidavit, paragraph 75; Andrew, January 26, 2005, p. 18, ll. 10 to 11

⁸⁴⁴ Andrew, September 24, 2003, p. 277, l. 23 to p. 278, l. 6

⁸⁴⁵ Andrew, September 24, 2003, p. 282, l. 12 to p. 283, l. 6

⁸⁴⁶ Andrew, January 26, 2005, p. 32, ll. 12 to 24

⁸⁴⁷ Toms Affidavit, paragraph 48(b); Viinamäe, December 6, 2004, p. 63, l. 19 to p. 64, p. 1

⁸⁴⁸ Viinamäe, December 6, 2004, p. 117, ll. 18, to p. 118, l. 5; p. 118, ll. 20 to p. 119, l. 12

⁸⁴⁹ Viinamäe, December 8, 2004, p. 49, ll. 2 to 10

⁸⁵⁰ Viinamäe, December 8, 2004, p. 166, l. 18 to p. 167, l. 6; COT039981 at COT039984, Exhibit 15, Volume 5, Tab 25

⁸⁵¹ Kelly Affidavit, paragraph 74(b)

⁸⁵² Franey, November 30, 2004, p. 272, ll. 10 to 23; p. 273, l. 6 to p. 274, l. 10

Q: Could you say, sir, based on your experience in dealing with people like Dave Toms and Bruce Mortensen and the others at Dell, that wining and dining a customer being the City of Toronto was simply not Dell's style?

A: I would agree with you. (p. 274, l. 4 to 10)

- (h) There were no Christmas parties sponsored by Dell, but Franey was invited to and did attend Christmas parties in December 1998 put on by other suppliers to the City (being SHL, Toshiba and Bell Canada).⁸⁵³
- (i) Franey had the occasional lunch with employees of Dell, just as he had the occasional lunch with representatives of other suppliers such as IBM, Compaq, GE and people like that. Franey testified that was all perfectly acceptable during the period 1998 – 1999.⁸⁵⁴

(d) **Kathryn Bulko**

- (j) Bulko also agreed that there was “no wining or dining going on”.⁸⁵⁵ Having worked with Dell over the year of the desktop rollout, she was able to say it just “wasn't Dell's style” to give City employees flights to exotic places or hockey tickets.⁸⁵⁶
- (k) While she received hockey tickets from MFP and Domi, she never got any hockey tickets from Dell.⁸⁵⁷ She received no flights to exotic places from Dell.⁸⁵⁸
- (l) Bulko had several lunch meetings with Dell. They were working meetings. There were quite often logistics people from Dell present, some of the technicians who were trying to work through some of the issues before the City got rolling.⁸⁵⁹ Later there were meetings with Mortensen to talk about implementation issues

⁸⁵³ Franey, November 30, 2004, p. 265, l. 13 to p. 269, l. 17

⁸⁵⁴ Franey, November 30, 2004, p. 256, ll. 11 to 20

⁸⁵⁵ Bulko, November 23, 2004, p. 35, ll. 1 to 3

⁸⁵⁶ Bulko, November 23, 2004, p. 35, ll. 4 to 20

⁸⁵⁷ Bulko, November 23, 2004, p. 35, l. 4 to p. 36, l. 9

⁸⁵⁸ Bulko, November 23, 2004, p. 35, ll. 10 to 11

⁸⁵⁹ Bulko, November 23, 2004, p. 34, l. 23 to p. 35, l. 3; p. 28, ll. 5 to 24

and things like that during the rollout.⁸⁶⁰ She recalls attending the April 23, 1999 going away lunch for Rick Zwarun,⁸⁶¹ but she does not think she was aware that Dell was hosting that event.⁸⁶² She attended the July 1999 golf game.⁸⁶³

- (m) Bulko testified that her lunches with Dell in January/February 1999 were acceptable at the time, in the absence of a formal Conflict of Interest Policy.⁸⁶⁴ As for the golf game, it was “quite a common practice”.⁸⁶⁵

326. As Commission Counsel conceded when questioning Franey:

Q: “would you agree with me that we're not talking about hard and fast lines --... that have to be drawn, but rather that there's inevitably an exercise of judgment, that the City person must bring to bear in making the decision to have a meeting that has an entertainment component?”⁸⁶⁶

327. There is no reasonable or fair basis for criticizing the judgment of the City employees who attended the infrequent and reasonable entertainment events hosted by Dell during 1998-1999, or for criticizing Dell or the Dell employees for hosting such events.

5. **Dell's Entertainment Had No Impact on Decision Making Process**

328. It is submitted that the reasonable and infrequent entertainment of City staff by Dell had no actual impact on the conduct of the City's public business, on its good government or on the ratepayers because the entertainment had no impact at all on any decision made by City staff in respect of Dell.

329. As Commission Counsel candidly and impliedly acknowledged, after asking Bruce Mortensen about the two hundred and fifty-four dollars (\$254.00) he had spent to the end of January 1999:

⁸⁶⁰ Bulko, November 23, 2004, p. 35, l. 21 to p. 36, l. 14

⁸⁶¹ Bulko, November 23, 2004, p. 31, ll. 4 to 18 and *in passim*

⁸⁶² Bulko, November 23, 2004, p. 33, ll. 15 to 17

⁸⁶³ Bulko, November 23, 2004, p. 32, ll. 13 to 16

⁸⁶⁴ Bulko, November 23, 2004, p. 33, ll. 4 to 7

⁸⁶⁵ Bulko, November 23, 2004, p. 33, ll. 18 to 25

⁸⁶⁶ Franey, December 1, 2004, p. 93, ll. 18 to 25; See also: Garrett, December 6, 2002, p. 104, ll. 12 to 14; p. 106, ll. 17 to 24

Q. By anybody's measure, that's not what won you this contract is it?

A. No. That's now how we do business.⁸⁶⁷

330. No similar question was asked of David Toms by Commission Counsel, so Dell's counsel asked the question; however, no answer was permitted.⁸⁶⁸

(a) **Entertainment by Dell Did Not Affect Viinamae**

331. It is beyond doubt that Viinamae communicated to Dell that it was the low price bidder in the December 1998 Mini-RFQ.⁸⁶⁹ It was Viinamae who actually wrote up the first purchase requisition for the first 200 Dell desktops that were needed by early January for the Project Management Office, a decision which was made by her at the end of the December 23, 1998 meeting with Mortensen and Kelly.⁸⁷⁰

332. Neither Mortensen nor Kelly had entertained Viinamae at any time prior to the December 23, 1998 meeting.⁸⁷¹ The Account Executive, Mortensen, had not even met Viinamae before learning that Dell had won the Y2K desktop contract.⁸⁷²

333. Viinamae was absolutely unequivocal about the lack of any impact of any entertainment of herself or other City Staff by Dell on this decision:

Q: When you -- when you made the decision that you were going to go with Dell and only Dell for this rollout and when you signed this purchase requisition, did the fact that you might have had lunch with Mr. Toms and Julianne Clyde back in September of 1998, at a cost of a hundred and sixteen dollars and thirty-three cents (\$116.33), did that have any impact on your decision at all?

A: None whatsoever.

⁸⁶⁷ Mortensen, November 25, 2004, p. 244, l. 22 to 24. Dell agrees with the assumption of Commission Counsel and with Mortensen's evidence that it was more difficult to obtain the order for the first 4,000 computers than the succeeding orders for the balance of the City's Y2K desktop requirements. Mortensen, November 25, 2004, p. 242, l. 13 to p. 243, l. 5

⁸⁶⁸ Toms, November 29, 2004, p. 301, l. 22 to p. 303, l. 3

⁸⁶⁹ Viinamae Affidavit, paragraph 18; Viinamae, December 8, 2004, p. 75, ll. 19 to 23; Mortensen Affidavit, paragraph 60; Kelly Affidavit paragraph 52

⁸⁷⁰ Viinamae, December 8, 2004, p. 77, ll. 18 to 22; p. 81, l. 16 to p. 82, l. 23; p. 85, l. 22 to p. 86, l. 11

⁸⁷¹ Mortensen Affidavit, paragraph 111; Kelly Affidavit, paragraph 74

⁸⁷² Mortensen Affidavit, paragraph 60, sentence 1

Q: Okay. And with respect to the entertainment or any lunches or drinks that Mr. Toms or Mr. Mortensen had with -- with other people on the City staff, did that -- did that entertainment enter into your thought process at all when choosing to go with Dell?

A: None whatsoever.⁸⁷³

334. Moving forward to the decision in June 1999 to stay with Dell, Viinamae was unequivocal that she made that decision and that she had the approval of the Steering Committee to make it.⁸⁷⁴ Viinamae was equally unequivocal that entertainment of her by Dell had played no part whatsoever in her decision to stay with Dell in June 1999 at the \$200 price reduction she had negotiated.⁸⁷⁵ She did not know the specifics of any entertainment that Dell might have provided to her staff as of that date, but when she made the decision to stay with Dell in June of 1999, any such entertainment played no part whatsoever in her decision making process.⁸⁷⁶

335. The final decision whereby Dell won the contract to supply desktops to the City occurred following the Mini-RFQ in September 1999. No entertainment by Dell played any part in Viinamae's decision to stay with Dell following the results of September Mini-RFQ, where Dell had once again bid the low price.⁸⁷⁷

336. Viinamae agreed that Dell kept the City's business in 1999 because of "the excellent work of [Dell's] staff, their continued delivery of top level support and service to the City and the delivery of excellent hardware products, at the lowest prices available in the market, for comparable products."⁸⁷⁸

(b) **Kathryn Bulko**

337. Bulko played a role in the decision-making process in December 1998 by performing the financial analysis, discussing the December Mini-RFQ results with Viinamae and

⁸⁷³ Viinamae, December 8, 2004, p. 86, l. 20 to p. 87, l. 8

⁸⁷⁴ Viinamae, December 8, 2004, p. 117, l. 22 to p. 118, l. 6

⁸⁷⁵ Viinamae, December 8, 2004, p. 167, ll. 7 to 13

⁸⁷⁶ Viinamae, December 8, 2004, p. 167, l. 14 to p. 168, l. 8

⁸⁷⁷ Viinamae, December 8, 2004, p. 168, ll. 9 to 13

⁸⁷⁸ Kelly Affidavit, paragraph 60; agreed to by Viinamae, December 8, 2004, p. 170, l. 21 to p. 171, l. 14

concluding that the choice to sole source from Dell was “obvious” and “easy”,⁸⁷⁹ as discussed in above. Bulko passed the recommendation to purchase solely from Dell and save the City’s taxpayers \$710,000 to the Purchasing Department in December 1998, and they did not disagree with the decision.⁸⁸⁰ Bulko also conducted the September Mini-RFQ and made the recommendation to choose Dell at that time.⁸⁸¹

338. Bulko was not asked a single question by Commission Counsel or by the City’s Counsel on whether the entertainment by Dell had any impact, or any perception of an impact, on her decision making role, or on her role generally.⁸⁸² Perhaps this was because the issue of any impact of entertainment by Dell on City staff had not even surfaced as a possible issue when Bulko led off the evidence for the desktop phase of TECI.

339. There is no evidence of any entertainment of Bulko by Dell prior to the December 23, 1998 communication of the contract award to Dell. So whatever role Bulko played in that decision, entertainment of her by Dell had no impact.

340. When asked by Dell’s counsel if she would agree with the essence of David Kelly’s evidence, that a combination of the excellent work, top level support and service, up to date technology and lowest prices, had led to the Y2K Desktop Team’s decision in 1999 to give Dell more business and to issue more purchase orders to Dell, her response was: “That’s a question you’re going to have to ask Lana.”⁸⁸³ She testified she had no opinion on that one way or the other.⁸⁸⁴

341. Nonetheless, it is submitted that it is clear from the totality of her evidence that entertainment of her by any of the bidders participating in the December 1998 Mini-RFQ or the September 1999 Mini-RFQ had no impact whatsoever on the decision to go with Dell.

⁸⁷⁹ Bulko, November 23, 2004, p. 61, l. 22 to p. 62, l. 16; p. 62, l. 22 to p.63, l. 9

⁸⁸⁰ Bulko, November 23, 2004, p. 63, ll. 10 to 19

⁸⁸¹ Bulko Affidavit sworn September 15, 2004, Exhibit 14, Tab A, paragraph 61 and COT072012, Exhibit 15, Volume 3, Tab 25

⁸⁸² Bulko, November 22, 2004, November 23, 2004 and January 19, 2005, *in passim*

⁸⁸³ Bulko, November 23, 2004, p. 128, l. 21 to p. 129, l. 2; Kelly Affidavit, paragraph 60

⁸⁸⁴ Bulko, November 23, 2004, p. 129, ll. 3 to 5

(c) **Mike Franey**

342. Franey testified that he did not believe that any lunches or meetings that may have been held with him in the period September, October, November, 1998, up to the decision made in December 1998, as part of the team, to go with Dell as a result of the December Mini-RFQ had any impact whatever on his decision.⁸⁸⁵ He does not recall having any discussion about whether to continue to buy from Dell in 1999 or to go out for tender in or about May or June of 1999.⁸⁸⁶

(d) **Jim Andrew**

343. There is no evidence that Andrew had any role in the decisions made to choose Dell following the December 1998 Mini-RFQ, following the June 1999 price negotiations or following the September 1999 Mini-RFQ. If Andrew had any role in the decision to proceed with a price refresh or the December Mini-RFQ (which he denies), he only had one lunch with Mortensen at about the time that decision was made⁸⁸⁷ and any benefit conferred on him was only 50% of the cost, or approximately \$26.00.

344. Andrew testified that neither the lunch with Mortensen on November 25, 1998 (that he does not recall attending but that may have occurred) or, indeed, any entertainment of him by Dell was ever a factor in any decision that he would make in respect of Dell.⁸⁸⁸

6. **Conclusion: City Policies Were Complied With**

345. When the frequency and reasonableness of the Dell entertainment expenses are measured against the written terms of the Conflict of Interest Policies of the former municipalities (which were not even enforced in accordance with their terms), there is no basis for criticism of anyone by reason of Dell's entertainment of City employees. When the entertainment is measured against the unwritten policies and the practices of the New City during 1998-1999, there is still no basis for criticism.

⁸⁸⁵ Franey, November 30, 2004, p. 262, l. 19 to p. 263, l. 4

⁸⁸⁶ Franey, November 30, 2004, p. 264, ll. 2 to 25

⁸⁸⁷ Mortensen Affidavit, paragraph 111(c)

⁸⁸⁸ Andrew, January 26, 2005, p. 30, l. 17 to p. 31, l. 19; p. 32, ll. 5 to 11; p. 32, l. 25 to p. 33, l. 4

346. Participating in these minimal social events could not reasonably be construed as conduct “incompatible with the proper discharge” of an employee’s duties, being the standard established by the Old City Policy.⁸⁸⁹ Since the consistent evidence of numerous witnesses at TCLI and TECI was that senior staff were expected to attend lunches and other events with suppliers during the 1998-1999 period, such lunches were “part of a protocol or social obligation that comes with the responsibilities of the job”, as expressly permitted by the Old City’s Policy.⁸⁹⁰ Most importantly the New City expressly recognized in early 1998 that “in the ordinary course of business dealing with suppliers or contractors...it may be appropriate for them to pay for an employee’s lunch” and that such a benefit “will not be considered a breach of those duties.”⁸⁹¹ (emphasis added) It is therefore respectfully submitted that it would be inappropriate and unjustified for the Commissioner to make any finding that the entertainment by Dell’s employees did not comply with the City of Toronto’s Conflict of Interest Policy.

347. The old Metro Policy that apparently continued to apply to each of Andrew, Viinamae and Franey expressly allowed entertainment to be accepted for an appropriate business reason, provided it was not “excessive or extravagant”.⁸⁹² The only rational, fair and reasonable conclusion to be made with respect to the minimal entertainment of these former Metro employees by each of Mortensen, Kelly and Toms is that the entertainment was not “excessive” or “extravagant”. To hold otherwise would deprive these words of their ordinary meaning.

348. The other former Policies did not apply to any of the City employees who gave evidence during the desktop phase. Accordingly, the standards of conduct imposed by the other former municipalities Conflict of Interest Policies should not be used to judge the conduct any of the people who gave evidence during the desktop phase of TECI.

E. THE DELL CODE OF CONDUCT

349. At the request of Commission Counsel, Dell provided the Commission with a copy of the internal Dell Code of Conduct. Notwithstanding that the Dell Code of Conduct and

⁸⁸⁹ Old City of Toronto Policy, COT037352

⁸⁹⁰ *Ibid*

⁸⁹¹ COT038270 at 38273

⁸⁹² COT037273 at 37275

some evidence about the Dell Code of Conduct was tendered during TECI, it is submitted that the Commissioner has no jurisdiction to make any findings or any recommendation with respect to the conduct of the Dell employees by reference to Dell's internal Code of Conduct.⁸⁹³

1. **The TECI Terms of Reference**

350. Dell submits that the TECI Terms of Reference do not and could not give the Commissioner any jurisdiction to inquire into and to make findings regarding the business of Dell (other than its business with the City, a contract with the City or any duties owed to the City), or regarding the internal affairs of Dell, including whether Dell's employees complied or did not comply with Dell's Code of Conduct or whether Dell had an appropriate policy in place for its Public Sector customers. That would involve the Commissioner making findings with respect to compliance with the contracts of employment as between Dell and its own employees and that is manifestly not within the scope of section 100 of the *Municipal Act*.

351. This Inquiry was established under the authority of section 100 of the *Municipal Act*. Dell submits that not even a broad and purposive interpretation of the jurisdiction conferred under section 100 of the *Municipal Act*⁸⁹⁴ empower or authorize the Commissioner to make any findings with respect to Dell's business and internal affairs. This jurisdictional issue is not a mere "technical"⁸⁹⁵ objection, but an essential limitation on the permissible scope of a municipal inquiry.

352. Not surprisingly, the preamble to the TECI Terms of Reference repeats, almost verbatim, subsection 100(1) of the *Municipal Act*.⁸⁹⁶

353. The applicable TECI Terms of Reference authorize the Commissioner:

5. To investigate and inquire into all aspects of the purchase of the computer hardware and software that subsequently formed the basis for the computer leasing RFQ that is the subject of the Toronto Computer Leasing Inquiry.

⁸⁹³ Objection, November 29, 2004, p. 221, l. 17 to p. 222, l. 10

⁸⁹⁴ R.S.O. 1990, c. M. 45

⁸⁹⁵ *Consortium Developments v. Sarnia (City)*, [1998] 3 S.C.R. 3 at 20 ("*Consortium Developments*")

⁸⁹⁶ TECI Terms of Reference, Preamble, paragraph 1, p. 1; Council Resolution, paragraph 1, p. 1

6. To investigate and inquire into all aspects of the matters set out above, their history and their impact on the ratepayers of the City of Toronto as they relate to the good government of the municipality, or the conduct of its public business, and to make any recommendations which the Commissioner may deem appropriate and in the public interest as a result of her inquiry.

AND IT IS FURTHER RESOLVED THAT the Commissioner, in conducting the inquiry into the matters set out above in question to which the City of Toronto is a party, is empowered to ask any questions which she may consider as necessarily incidental or ancillary to a complete understanding of these matters;

It was also expressly anticipated that the investigation may include:

“1. an inquiry into all relevant circumstances pertaining to the various matters referred to in this resolution, the basis of and reasons for making the recommendations or entering into the subject transactions and the basis of the decisions taken in respect of these matters.”⁸⁹⁷

354. The complete TECI Terms of Reference are attached as Appendix “A” to this Closing Submission. Term 5 authorizes the inquiry into “the purchase of the computer hardware”, such as the desktops. Term 6 only broadens Term 5 to allow findings to be made about the “history” of the purchase and “the impact on the ratepayers as they relate to the good government of the municipality” or “the conduct of its public business.” The “further” resolution following Term 6 does not extend jurisdiction to incidental and ancillary findings of fact, but only empowers the Commissioner to ask questions about additional matters to assist the Commissioner in obtaining a complete understanding of “these” matters referred to Terms 5 and 6 in respect of the desktop phase in order to discharge her mandate.

355. While Dell concedes that these Terms of Reference make interactions between the City employees and Dell employees relevant areas of inquiry, matters as between Dell and its own employees are beyond even the widest construction of the TECI Terms of Reference.⁸⁹⁸

⁸⁹⁷ TECI Terms of Reference, paragraph 1, p. 3

⁸⁹⁸ See e.g., *Stevens v. Canada (Attorney General)*, [2004] F.C.J. No. 2116 (F.C.-T.D.) at paragraph 28 (“*Stevens*”) (Finding that because the terms of reference of the Parker Inquiry limited the Inquiry’s jurisdiction to considering whether the Honourable Sinclair M. Stevens had contravened the Conflict of Interest Guidelines that were applicable during his tenure as a Minister of the Crown, Commissioner Parker was precluded from determining whether Mr. Stevens was in a conflict of interest pursuant to a definition Commissioner Parker had formulated during the course of the inquiry); *Nelles v. Grange* (1984), 46 O.R. (2d) 210 at 219 (C.A.) (Finding that the terms of reference of the inquiry precluded the Commissioner from expressing conclusions of law regarding civil or criminal responsibility for deaths at Sick Children’s Hospital.)

356. Further, even the broadly drafted TECI Terms of Reference do not give the Commissioner any jurisdiction to develop and then retroactively apply a new definition of “conflict of interest”.⁸⁹⁹

2. **Subsection 100(1) of the *Municipal Act***

357. The words in subsection 100(1) themselves indicate that there is an essential limitation on a judicial inquiry authorized by a municipality, as both branches of subsection 100(1) are directed at “public” subject matter. The first branch of subsection 100(1) extends jurisdiction to “investigate any matter relating to a supposed malfeasance, breach of trust or other misconduct on the part of ... *any person having a contract with* [the municipal corporation]”. However, immediately following these words are words of limitation. The foregoing power is to be used only for the purpose of inquiring into “the duties or obligations of the ... other person *to the [municipal] corporation*”. The second branch of subsection 100(1) provides that a commissioner may inquire into “any matter connected with *the good government of the municipality* or the conduct of any part of *its public business*”. The words “good government” and “public business” both point towards the public nature of the subject matter of a judicial investigation under the *Municipal Act*. Subsection 100(1) directs the Judge of the Superior Court of Justice to “report to council the result of the inquiry and the evidence taken”, for the obvious purpose of permitting legislative action to be taken, if deemed necessary or desirable by the Councillors.

358. The emphasis on public business and good government – the “public” objects of subsection 100(1) – was present when the equivalent section was first enacted in Upper Canada in 1866⁹⁰⁰ and it remains to this day in section 274 of the *Municipal Act, 2001*.⁹⁰¹ It is submitted that the consistency of emphasis on the public objects indicates an enduring intention on the part of the Ontario Legislature for municipal inquiries to only investigate a subject matter that is “public”.

⁸⁹⁹ *Stevens v. Canada* [2004] F.C. 1746 (F.C. – T.D.) at paragraphs 28-29, 33

⁹⁰⁰ *The Municipal Act*, 1866, 29-30 V., c. 51, s. 380

⁹⁰¹ *The Municipal Act*, 2001, S.O. 2001, c. 25

3. The Proper Statutory Construction

359. The Supreme Court has ruled that “[t]he process of delineating municipal jurisdiction is an exercise in statutory construction.”⁹⁰² The result has been that “a broad and purposive approach to the interpretation of municipal powers has been embraced”.⁹⁰³

360. As has been observed in *Sullivan and Dreidger on the Construction of Statutes*, when conducting a purposive legislative analysis:

[J]udges tend to attribute to the legislature only those purposes that they believe to be rational and appropriate in the circumstances. The judgement of what is rational and appropriate is based on assumptions that the interpreter assumes were held, if not by everyone, at least by the legislature that enacted the legislation in question.⁹⁰⁴

Decisions considering subsection 100(1) of the *Municipal Act*, its predecessors and its equivalent in other provinces have followed this approach.

361. Previous decisions⁹⁰⁵ have properly held that municipalities lack the authority to “direct an inquiry with reference to a matter outside of some actual existing power possessed” by the municipality.⁹⁰⁶

362. The Ontario Court Appeal adopted the purposive approach in *Campbell Flour Mills Co.* when considering the validity of a municipal inquiry into a utilities commission.⁹⁰⁷ In

⁹⁰² *Nanaimo (City) v. Rascal Trucking Ltd.*, [2000] 1 S.C.R. 342 at paragraph 18 (“*Rascal Trucking*”)

⁹⁰³ *United Taxi Drivers’ Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485 at paragraph 493 (“*United Taxi Drivers*”); *Rascal Trucking*, *supra*, at paragraph 18; *Consortium Developments*, *supra*. The Supreme Court has indicated, the “broad and purposive approach to interpretation of municipal legislation is ... consistent with this Court’s approach to statutory interpretation generally”, which is that “the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament”. *United Taxi Drivers*, *supra*, quoting E.A. Driedger, *Construction of Statutes* 2d ed. (Toronto: Butterworths, 1983) at 87

⁹⁰⁴ R. Sullivan, *Sullivan and Dreidger on the Construction of Statutes*, 4th ed. (Markham: Butterworths, 2002) at 213

⁹⁰⁵ *Re City of Berlin and the County Judge of the County of Waterloo* (1914), 33 O.L.R. 73 (H.C.D.) (“*City of Berlin*”); *Campbell Flour Mills Co. Ltd. v. City of Peterborough* (1925), 57 O.L.R. 458 (C.A.) (“*Campbell Flour Mills*”); *Hydro Electric Commission of Mississauga v. City of Mississauga* (1975), 13 O.R. (2d) 512 (Div. Ct.) (“*Mississauga Hydro*”); *MacPump Developments v. Sarnia (City)* (1994), 20 O.R. (3d) 755 at 764 (C.A.) (“*MacPump Developments*”). See also *Black Diamond Oil Fields v. Carpenter Dist. Ct. J.* (1915), 24 D.L.R. 515 (Alta. C.A.) (“*Black Diamond Oil Fields*”)

⁹⁰⁶ *City of Berlin*, *supra*, at p. 77 (Finding that police discipline was outside the jurisdiction of the municipality and thus inquiry into policing matters was *ultra vires*.), citing *Colonial Sugar Refining Co. Ltd. v. Attorney-General for the Commonwealth of Australia Colonial Sugar Refining Co.*, [1914] A.C. 237 (P.C.)

Campbell Flour Mills, the Court found that a municipal inquiry's assertion of jurisdiction over "a matter which ... is not under the direct control of the city council, but is was handed over to another body to manage"⁹⁰⁸ was *ultra vires* the power of the municipality because the "Legislature has ... vested ... various parts of what was originally the *business of the municipality*" in "public utilities".⁹⁰⁹ In other words, the inquiry was not directed into the "public business of the municipality" but rather into the business of a completely separate legal entity that the municipality did not have jurisdiction over. The Ontario Court of Appeal observed that a jurisdictional analysis without rational restraints "is manifestly too wide in scope" and would lead to "unexpected results".⁹¹⁰

363. This same approach was followed by the Ontario Divisional Court in *Mississauga Hydro*, a case concerning when a successor municipality could inquire into the affairs of a predecessor municipality. The Divisional Court affirmed that:

[I]t would be ***not only reasonable but necessary*** to confine an inquiry authorized by s. 240 to the municipality that a council represents. The entire thrust of the *Municipal Act* is to make a council responsible for the municipality that it represents and to confine its powers within the limits of that municipality. No other view may rationally be taken of the normal status of a municipal council. ***The prospect of the appointment by municipal councils of commissioners to make extraterritorial inquiries into the affairs of other municipalities is unnerving, but it is as well contrary to both the letter and the spirit of the Municipal Act.***⁹¹¹ (emphasis added)

This conclusion, that one municipality could not inquire into the affairs of another municipality that it has no jurisdiction over, was found to be "unassailable" by the Ontario Court of Appeal in *MacPump Developments*.⁹¹²

364. The leading decision in *Consortium Developments*⁹¹³ does not alter the principles for determining jurisdiction that have been cited above. Rather, *Consortium Developments*

⁹⁰⁷ *Municipal Act*, R.S.O. 1914, c. 192, s. 248

⁹⁰⁸ *Campbell Flour Mills*, *supra* at 460

⁹⁰⁹ *Ibid*, at 465

⁹¹⁰ *Ibid*, at 466

⁹¹¹ *Mississauga Hydro*, *supra* at 517

⁹¹² *MacPump Developments*, *supra* at 764

⁹¹³ *Supra*, note 895

considers the specific issue of when findings of misconduct can be made in the course of a properly constituted inquiry that is *intra vires* the power of the municipality that established it.

365. The purposive approach described by Professor Sullivan was adopted by the Alberta Court of Appeal in *Black Diamond Oil Fields*⁹¹⁴ where it was found that Alberta's Legislative Assembly lacked the jurisdiction under the province's public inquiry power to establish an inquiry that would inquire into the affairs of private companies. Speaking for the Court, the Chief Justice ruled that "general words and phrases, however wide and comprehensive in their literal sense, must ... be construed as limited to the *actual objects* of the Act and not altering the law beyond".⁹¹⁵ Given that "the Order in Council and the commission ... [was] limited almost entirely to the private affairs of the companies and stock exchanges",⁹¹⁶ the Chief Justice asked: "How can it be said that the private affairs of a company is a public matter". He concluded that it could not: "It may well be that some members of the public are affected by them but that does not make them a public matter."⁹¹⁷

366. Dell submits that the analysis in *Black Diamond Oil Fields* is directly applicable to this Inquiry: the private internal affairs of a company are not a public matter. The principle developed by cases such as *Mississauga Hydro* and *MacPump Developments* is applicable by analogy: the appointment by a municipal council of a commission to inquire into the internal affairs of another corporation is contrary to both the letter and the spirit of the *Municipal Act*.

367. By asserting that a commissioner appointed under the authority of Ontario's *Municipal Act* is without jurisdiction to inquire into the internal the affairs of private company,

⁹¹⁴ *Supra*, note 905; See also *Colonial Sugar Refining Co. Ltd. v. Attorney-General for the Commonwealth of Australia* (1912), 15 C.L.R. 182 at 251 (H.C.) *aff'd* [1914] A.C. 237 (P.C.) where the High Court of Australia found that the *Royal Commissions Act* of the Commonwealth did not extend the jurisdiction establish a Royal Commission that could have led to inquiries into the internal affairs of a private company. On appeal, the Privy Council affirmed the decision of the High Court, but declined to rule on this issue, agreeing with dissent at the High Court that the issue could not be pronounced upon in advance if the Royal Commission was *intra vires* the power of Parliament. The Privy Council found that a specific factual context, where the internal affairs of a company were being inquired into, was required for the issue to be properly before the Court. As discussed below, the proper factual context arose in *Black Diamond Oil Fields* where the Alberta Court of Appeal unanimously affirmed the decision of the Australian High Court that a public inquiry power cannot be used to inquire into the internal affairs of a private company.

⁹¹⁵ *Ibid*, at 517 (emphasis added)

⁹¹⁶ *Ibid*

⁹¹⁷ *Ibid*, at 518

Dell is not arguing that the internal affairs of private companies are, or indeed should be, completely beyond the jurisdiction of any public inquiry created pursuant to any statute. Many statutes have been enacted for the purpose of regulating corporations or regulating the business they are in. Where the appropriate and necessary inquiry powers are given by the statute, Dell agrees that a power to inquire into the business or internal affairs of a company or other person may exist. For example:

- (a) Section 161 of the Ontario *Business Corporations Act*,⁹¹⁸ expressly authorizes an investigation into a corporation where the “business or affairs” of the corporation may have been conducted in a manner that is oppressive, unfairly prejudicial to or which unfairly disregard the interests of a security holder of the corporation (among other grounds);
- (b) Section 11 of the Ontario *Securities Act*,⁹¹⁹ provides for an investigation with respect to a matter that the Ontario Securities Commission or the Minister responsible for the administration of the *Securities Act* considers expedient for the due administration of Ontario securities laws or the regulation of the capital markets in Ontario, and expressly including the “affairs of the person or company in respect of which the investigation is being made...”⁹²⁰ This includes a private company.⁹²¹
- (c) The Inquiry into the loss of life at the Westray Mine in Plymouth Nova Scotia was established pursuant to the *Public Inquiries Act*⁹²² and the *Coal Mines Regulation Act*.⁹²³ The latter statute established the regulatory jurisdiction over the mine, including the activities at the mine, the corporation operating the mine and its employees. The Order-in-Council expressly directed that Commissioner to inquire into the operations of the mine and compliance with the applicable

⁹¹⁸ R.S.O. 1990, c. B.16 (“*OBCA*”)

⁹¹⁹ R.S.O. 1990, c. S. 5 (“*Securities Act*”)

⁹²⁰ *Ibid*, ss. 11(3)(a)

⁹²¹ See definition of “company” and “person” in section 1 of the *Securities Act*

⁹²² *Public Inquiries Act*, R.S.N.S. 1989, c. 372

⁹²³ *Coal Mines Regulation Act*, R.S.N.S. 1989, c. 73, s. 19

regulatory regime. That Commissioner was therefore properly empowered to consider the operations of the mine and the conduct of the operator.

368. In contrast to these specific investigatory powers, the power and jurisdiction of a Commissioner appointed under subsection 100(1) of the *Municipal Act* is limited to inquiring into “the duties or obligations of the ... other person [e.g., a supplier] to the corporation” [e.g., City of Toronto], “any matter connected with the good government of the municipality” or “the conduct of any part of its [the City’s] public business.”

4. **Conclusion on Commissioner’s Lack of Jurisdiction**

369. With all due respect to the purposes for which TECI has been established, jurisdiction to make findings about compliance with Dell’s Code of Conduct has not been conferred upon the Commissioner by the *Municipal Act* or the TECI Terms of Reference. Consequently, Dell submits that the Commissioner has no power or jurisdiction to make findings regarding the internal affairs of this private company, such as whether Dell’s employees did or did not comply with Dell’s 1998 Code of Conduct or whether Dell’s actual practice in 1998-1999 differed from the corporation’s written Code of Conduct, or whether Dell’s 1998 Code of Conduct is appropriate, or anything else relating to the Dell Code of Conduct. The Commissioner has no power or jurisdiction to make any recommendations to Toronto City Council about Dell’s Code of Conduct, and City Council has no power to legislate in respect of Dell’s Code of Conduct.

370. Dell submits, in the alternative, that it would be inappropriate for the Commissioner to make any findings about the extent to which its employees adhered to the company’s Code of Conduct because, as the Supreme Court has found: “Findings of misconduct should not be the principal focus of [a] public inquiry. Rather they should only be made in circumstances where they are *required* to carry out the mandate of the inquiry”,⁹²⁴ or when such findings are “*necessary* to fulfill the purpose of the inquiry as it is described in the terms of

⁹²⁴ *Canada (Attorney General) v. Canada (Commissioner of Inquiry on the Blood System)*, [1997] 3 S.C.R. 440 at 470

reference”.⁹²⁵ *The New Shorter Oxford English Dictionary*⁹²⁶ defines the word “necessary” as “That which is indispensable; a necessary thing; an essential or requisite”.

371. Dell submits that it is unnecessary to fulfill the purpose of TECI for the Commissioner to make any findings regarding the extent to which Dell’s employees adhered to Dell’s own Code of Conduct because the adherence by employees of a private company to the company’s internal corporate policies when entertaining public sector employees is causally independent from the impact of entertainment on a public sector employee. The same conduct allowed by a liberal or broadly worded corporate policy of a supplier may fall afoul of a stricter policy of a competitor that limits all expenses to reasonable expenses or which establishes a very low maximum payment threshold. The degree of adherence to any particular policy (other than the City’s Conflict of Interest Policies as they actually existed in 1998-1999) can only be regarded as a good or bad thing if that particular policy establishes *the only* appropriate standard of conduct. No such evidence was tendered during this Inquiry.

F. DELL’S ENTERTAINMENT WAS REASONABLE AND APPROPRIATE

372. Without conceding the Commissioner’s jurisdiction to make any findings about Dell’s Code of Conduct and only for the avoidance of doubt in this public hearing process, the entertainment of City staff by the Dell witnesses complied with the Dell Code of Conduct, as the Dell Code of Conduct was actually implemented in practice.⁹²⁷ Just like the City’s Conflict of Interest Policies, the strict wording of the Dell Code of Conduct was modified in actual practice, so as to permit the giving of reasonable business gratuities to clients and potential clients in the Public Sector, including but not limited to employees of the City of Toronto.⁹²⁸

⁹²⁵ *Ibid*, at 473

⁹²⁶ *The New Shorter Oxford English Dictionary* (Oxford: Clarendon Press, 1993. See also *R. v. Brozinic*, [1985] A.J. No. 103 (C.A.) (citing same definition in *Random House Dictionary of the English Language*);

⁹²⁷ Toms, November 29, 2004, p. 299, l. 15 to p. 300, l. 8; p. 215, ll. 2 to 19; p. 216, ll. 9 to 19; p. 217, ll. 3 to 21; p. 220, ll. 6 to 24; p. 222, l. 20 to p. 223, l. 4; Mortensen, November 25, 2004, p. 241, l. 19 to p. 242, l. 6; p. 247, l. 25 to p. 248, l. 6; Kelly, November 24, 2004, p. 148, ll. 3 to 8; ll. 21 to 25; p. 149, ll. 8 to 10; p. 149, l. 23 to p. 150, l. 7; p. 242, ll. 18 to 25

⁹²⁸ *Ibid*; Kelly, November 24, 2004, p. 242, ll. 18 to 25

373. Kelly,⁹²⁹ Toms⁹³⁰ and Mortensen⁹³¹ each testified that all of the expenses passed the reasonableness test applied at Dell. Those reasonable – indeed minimal – expenses are summarized above and in the Affidavits filed.

374. Minimal evidence was led by Commission Counsel (or by anyone else) about how the Dell Code of Conduct was actually implemented for private sector clients and potential clients and whether there were any differences. Only one question was asked. In response, Toms confirmed that all expenses incurred by Dell had to be reasonable and infrequent in order to be approved, whether the clients were in the private sector or in the public sector.⁹³²

375. There also is a difference with respect to the Executive Briefing Centre. In practice, Dell does not pay the cost of flights or hotel rooms for employees of Public Sector customers to attend the Dell Executive Briefing Centre in Austin, Texas. Dell constructed a similar facility in Canada for Public Sector customers in Canada who were not allowed to go out of the country.⁹³³ In the corporate sector, the customers do not have the same kind of guidelines.⁹³⁴

376. It is not at all surprising that virtually no evidence was led about Dell's dealings with private sector clients: section 100 of the *Municipal Act* does not authorize such an investigation, nor did City Council authorize such an investigation and inquiry at the ratepayers' expense when establishing TECI.

IV. FINAL SUMMARY AND CONCLUSIONS

A. DELL'S ENTERTAINMENT EXPENSES

377. All of Dell's entertainment of City employees was reasonable and in compliance with all relevant conflict of interest policies.

⁹²⁹ Kelly, November 24, 2004; p. 152, l. 14 to p. 153, l. 14

⁹³⁰ Toms, November 29, 2004, p. 299, l. 24 to p. 300, l. 18

⁹³¹ Mortensen, November 25, 2005, p. 241, ll. 1 to 7; p. 242, ll. 4 to 6

⁹³² Toms, November 29, 2004, p. 300, ll. 17 to 21. This was the only question asked about the private sector at any time during the desktop phase of TECI.

⁹³³ Kelly, November 24, 2004, p. 307, ll. 15 to 25; p. 305, ll. 7 to 12

⁹³⁴ Kelly, November 25, 2005, p. 304, l. 17 to p. 305, l. 6

378. None of Dell's entertainment had any actual impact on any decisions made by the City, nor did it give rise to any reasonable perception that any City employee had any conflict of interest when dealing with Dell.

379. The City's employees did absolutely nothing wrong when choosing to acquire the desktops solely from Dell and to save the ratepayers at least \$710,000. The impact of their decisions on the "good government" of the municipality and the "conduct of its public business" should be seen as beneficial.

380. In all the circumstances, it is respectfully submitted that there is no fair, rational or reasonable basis for any findings, and the Commissioner would be unjustified in making any findings, of misconduct against anyone with respect to the minimal, reasonable and occasional or sporadic entertainment of City staff by Dell or by any of Dell's employees during 1998-99.

B. A FAIR AND TRANSPARENT PROCESS

381. The process for choosing Dell and standardizing on the Dell desktops for the Year 2000 Initiative was a fair process. Dell responded to the December Mini-RFQ with the lowest price and won the December Mini-RFQ. The price differential was so great that the decision to choose Dell was described as "easy" and indeed a "no-brainer".⁹³⁵ The City chose Dell and thereby saved the ratepayers over \$710,000. Dell maintained the City's confidence throughout the Y2K desktop rollout by providing excellent service to the City and by supplying excellent products at the lowest prices available for comparable products.

382. The process for choosing Dell and standardizing on the Dell desktops for the Year 2000 Initiative was a transparent process. The decision resulted from a reasonably documented "Special Bid Pricing" request or "December Mini-RFQ" that Dell won, hands-down. The decision to choose Dell was approved by Purchasing, according to Bulko, and it was certainly approved when Purchasing acted on the purchase requisitions. The City standardized on Dell for the Year 2000 Initiative on or about January 21, 1999, with the knowledge and support of the Y2K Steering Committee. This was discussed at the Y2K Steering Committee meetings in January and February 1999, as it was only Dell's low pricing that made the change in strategy from refurbishment to replacement of more computers possible. The process for choosing Dell

⁹³⁵ Bulko, November 23, 2004, p. 62, ll. 11 to 16; p. 63, ll. 6 to 9

was much more “transparent” than the staff decisions to select Toshiba notebooks, Lexmark printers and the other computer hardware products referred to in the August RFP.

383. It was never intended that the City would be obliged to buy the obsolete equipment that had been referred to in the August RFP, or that it would be prevented over the intended 3 year life of the contracts with the VARs from going back to the market to obtain up-to-date equipment at current prices. Nor was it ever intended that the August RFP or the Report on the results of the August RFP would require the City to purchase the products or services described in the Responses to the August RFP.

384. As Commission Counsel had stated at the outset of the oral hearing and after two years of this investigation: “Dell did give the City very competitive prices, they delivered on time, they provided excellent service to the City. Dell supplied exactly what it was asked to do, at the prices it had promised.”⁹³⁶ Thus, the only issue at this phase of TECI was to determine how Dell was not recommended to win the August RFP, but nonetheless went on to supply all of the desktops that were required to make the City of Toronto Y2K compliant.⁹³⁷

385. Quite simply, the answer is: by offering the City the most up to date equipment at the lowest prices, by delivering excellent products, and by providing excellent service.

ALL OF WHICH IS RESPECTFULLY
SUBMITTED

OSLER, HOSKIN & HARCOURT LLP
Solicitors for Dell Canada Inc.

⁹³⁶ Opening Statement of Commission Counsel, November 22, 2004, p. 11, ll. 12 to 16

⁹³⁷ Opening Statement, November 22, 2004, p.11, l. 17 to p. 12, l. 4