TORONTO COMPUTER LEASING INQUIRY
SUBMISSIONS of HARRY WILLIAM OSMOND DOYLE

Background

1. Osmond Doyle ("Doyle") had a long, distinguished career at the City of Toronto (and its predecessor, the Municipality of Metropolitan Toronto ("Metropolitan Toronto")), where he worked for over 30 years. Indeed, he is one of the most experienced municipal solicitors in Canada.

2. Doyle obtained a B.A. in 1963 and a Master's Degree in 1965 from the University of Toronto. He obtained his law degree from Osgoode Hall in 1968 and was called to the Bar of Ontario in 1970. In 1983, he obtained a Master of Laws degree from Osgoode Hall Law School.

Exhibit A, Doyle's April 2, 2003 Affidavit, para. 2

3. After his call to the Bar of Ontario in 1970, Doyle went to work for Metropolitan Toronto. He worked for Metropolitan Toronto and, upon amalgamation, for the City of Toronto (the "City") until he retired on February 5, 2002. In the last four years of his career, he held the position of City Solicitor, the top legal position in the largest municipality in Canada.

Exhibit B, Doyle's Transcript, April 7, 2003, page 96, Line 19-21; pg. 97, lines 2-4, 22-25; pg. 98, lines 1-25

Exhibit A, Doyle's April 2, 2003 Affidavit, paras. 1 and 3

4. The legal division of the City (the "Legal Division") was divided into nine units, including an administrative unit, which Doyle headed. The Administrative Unit performed administrative

tasks for the other eight units. The directors of the other eight units reported to Doyle on legal work.

Exhibit B, Doyle's Transcript, April 7, 2003, page 99, lines 14-24

5. The mandate of the Legal Division was to provide legal services and advice to City Council ("Council"), its Committees, departments, agencies, boards and commissions. The Legal Division did not initiate the decisions or transactions that gave rise to the demands for its services.

Exhibit A, Doyle's April 2, 2003 Affidavit, para. 6

6. As City Solicitor, Doyle's role was most often administrative and managerial, overseeing the outflow of products from the Legal Division and managing numerous professionals within the Legal Division, which was comprised of over 80 lawyers and approximately 100 support staff. Doyle did not supervise any employees on a detailed basis.

Exhibit B, Doyle's Transcript, April 7, 2003, page 100, lines 20-23

7. In the course of his duties, Doyle did not nor was he expected to independently review contracts, decisions of City Council, or decisions of staff to ensure that such were in order or properly authorized.

Exhibit B, Doyle's Transcript, April 7, 2003, page 108, lines 13-18

8. On May 31, 1999, the City issued a Request for Quotations ("RFQ") to lease computer equipment. Based on its response to the RFQ, MFP Financial Services Ltd. ("MFP") was chosen by the City as the supplier of that computer equipment. The City and MFP ultimately signed a Master Equipment Lease Agreement (the "Master Lease"), a Program Agreement, and various Equipment Schedules (the "MFP Transaction"). The MFP Transaction was part of the "Year

2000 Project" through which the City was attempting to prepare itself for any potential Y2K related problems.

9. In the course of the Toronto Computer Leasing Inquiry (the "Inquiry"), the following potential allegations have been raised against Doyle, as set forth in a Confidential Notice of Alleged Misconduct for H.W.O. Doyle attached to a letter from Ms. Daina Groskaufmanis dated October 17, 2003:

> "The Commission might find that in your capacity as the City Solicitor for the City of Toronto you:
>
> a. Failed to provide clear instructions to external legal counsel, specifically Fasken Campbell Godfrey, about the scope of their retainer on the Year 2000 project, or to supervise or instruct employees of the City of Toronto to provide clear instructions to external legal counsel.
>
> b. Provided an incorrect legal opinion during the meeting of City of Toronto Council on May 2, 2001 regarding the interpretation of the minutes of the meeting of City Council on July 27, 28, 29, and 30, 1999 at which it approved Report 4, Clause 11 of the Policy and Finance Committee entitled 'Leasing of Computer Equipment and Software Information and Technology Products and Services'."
>
> *Exhibit D*

10. These allegations are completely unfounded and without merit. As described more fully below, Doyle had extremely limited involvement in the Year 2000 Project, including the MFP Transaction, and, at all material times, acted reasonably in his limited role.

Response to Allegation 1

Retainer of Fasken Campbell Godfrey

11. Contrary to Allegation 1, Doyle had no responsibility to instruct Fasken Campbell Godfrey ("Faskens") on the scope of the Retainer, as it was clearly laid out in the retainer letter, as discussed below. Further, Faskens was only to report to the Legal Division on matters of

corporate governance priority and policies. The designated representative for the Legal Division for such matters was not Doyle but the late Brian Loreto ("Loreto"). If Faskens had concerns relating to the scope of the Retainer with respect to those issues, it should have addressed those concerns with Loreto. Further, it is suggested in Allegation 1 that Doyle had a responsibility to supervise or instruct "employees of the City of Toronto" to provide clear instructions to Faskens. Doyle was in no way responsible for all City employees as the allegation implies. With respect to the MFP Transaction, Doyle was at most responsible for supervising Loreto, which he did, as necessary, in a reasonable and prudent manner. For the most part, however, Doyle reasonably relied on Loreto, an experienced and competent lawyer, to handle the limited role of the Legal Division with respect to Year 2000 issues.

12. Generally speaking, the Legal Division's involvement with a City transaction was either to provide all legal services needed for the transaction or to work with outside counsel to provide the legal services connected to the transaction.

Exhibit A, Doyle's April 2, 2003 Affidavit, para. 8

13. On this occasion, the Legal Division was not to provide any legal services but was to defer entirely to outside legal counsel who would report to the client department. This was due to the fact that the Legal Division had insufficient staff to provide the Year 2000 legal work, which Doyle understood would entail an enormous amount of time, or to work with outside counsel on such work.

Exhibit A, Doyle's April 2, 2003 Affidavit, para. 9

Exhibit B, Doyle's Transcript, April 7, 2003, pg. 138, lines 1-6, 23-25; pg. 139, lines 1-8

Exhibit C, Doyle's Transcript, April 8, 2003, pg. 162, lines 13-14

Exhibit E, Loreto's March 28, 2003 Affidavit, para. 3

Exhibit G, Loreto's Transcript, April 2, 2003, pg. 252, lines 10-22

14. The idea to retain outside counsel who would not report to the Legal Division came from a retainer the Chief Administrative Officer used in retaining outside counsel for the Toronto Hydro restructuring in or around 1998.

Exhibit B, Doyle's Transcript, April 7, 2003, pg. 138, lines 1-22

15. In late 1998 or early 1999, Loreto, a lawyer in the Legal Division who had responsibility for computer related issues, advised Doyle that the legal work for the Year 2000 Project would be considerable and that he did not have the capacity to do this work.

Exhibit A, Doyle's April 2, 2003 Affidavit, para. 10

Exhibit B, Doyle's Transcript, April 7, 2003, pg. 146, lines 12-25

16. As a result of this advice, Doyle instructed Loreto to notify the Year 2000 Project staff that the Legal Division could not provide legal services to them and that they would have to retain an outside law firm. Subsequently, the Legal Division invited a number of law firms to submit proposals to provide the City with legal services relating to the Year 2000 Project. After an evaluation process, the City selected the firm of Faskens.

Exhibit A, Doyle's April 2, 2003 Affidavit, para. 11

17. Doyle agreed with the decision to retain Faskens but had no further involvement with Faskens thereafter.

Exhibit B, Doyle's Transcript, April 7, 2003, pg. 136, lines 10-25; pg. 137, lines 1-6

18. The retainer letter for Faskens' services, dated March 10, 1999, (the "Retainer Letter") provided that the purpose the retainer was for Faskens "to provide legal services in relation to Year 2000 issues as requested from time to time" (the "Retainer").

Exhibit A1

19. The scope of the Retainer obviously included the MFP Transaction, as that transaction was carried out as part of the Year 2000 Project.

20. Pursuant to the Retainer Letter, Mark Fecenko ("Fecenko") was to be the principal contact from Faskens, along with Ian Kyer.

Exhibit A1

21. Fecenko has been licensed to practice law since 1989. He graduated from Osgoode Hall Law School in 1987 and obtained an LL.M. from that school in Intellectual Property in 1999. He joined Faskens in 1987 and became an equity partner there in 1995. The focus in his practice is information technology ("IT") and a large part of his practice is focused on providing legal advice to governments and the broader public sector on substantial IT acquisitions. Lexpert and Mondaq have ranked him as a leading practitioner in the IT and E Commerce fields. He has been published on several occasions, including a book called *Kyer and Fecenko on Computer Related Agreements, a Practical Guide*.

Exhibit H, Fecenko's March 31, 2003 Affidavit, paras. 1-8

22. The Retainer Letter provided that:

a. Faskens was to obtain instructions from Lana Viinamae ("Viinamae") (or her designate, who was Brendan Power ("Power")) on transactional matters. [Both were members of the Information Technology Department (the "IT Department")]

b. Faskens was to obtain instructions from Loreto (as City Legal's designated representative) only on matters of City corporate governance, priority and policies.

c. Accounts for work done by Counsel were to be submitted to Viinamae for payment and copied to Loreto.

d. All correspondence to Viinamae or her designate(s) was to be copied to Loreto.

Exhibit A1

23. The Master Lease between the City and MFP, which fell within the scope of the Retainer, was a purely transactional matter that did not generally involve "corporate governance, priority, or policies". Faskens took instructions from and reported to the client department, which was the IT Department, regarding the Master Lease, and not the Legal Division. Power, a consultant in the IT Department and Viinamae's designate under the Retainer ("Power"), was Faskens' primary contact at the City instructing Faskens. As Fecenko testified, throughout 1999 when the MFP Transaction documents were negotiated, the vast majority of retainer instructions to Faskens on Year 2000 matters came from Power. Given this clear reporting structure, which Fecenko understood, there was no role for the Legal Division to play in the negotiations of the Master Lease once Faskens was involved. Indeed, this was the very purpose of retaining outside counsel, i.e., to alleviate the understaffed Legal Division's responsibilities with respect to the Year 2000 Project.

Exhibit A, Doyle's April 2, 2003 Affidavit, para. 13

Exhibit B, Doyle's Transcript, April 7, 2003, pg. 142, lines 18-22

Exhibit H, Fecenko's March 31, 2003 Affidavit, paras. 16 and 20

Exhibit E, Loreto's March 28, 2003 Affidavit, para. 5

24. As set forth in the Retainer Letter, the Legal Division was to have only a general oversight function with respect to corporate governance priorities and policies. The Legal Division was to have no oversight with respect to transactional matters. Faskens' role with respect to the Retainer was to step into shoes of the Legal Division and perform the duties it would ordinarily perform. Fecenko understood that the Legal Division would not be reviewing the agreements entered into on behalf of the City with respect to the MFP Transaction and would rely entirely on him to do so.

Exhibit B, Doyle's Transcript, April 7, 2003, pg. 139, lines 5-11; pg. 145, lines 1-17; pg. 147, lines 1-8

Exhibit I, Fecenko's Transcript, April 3, 2003, pg.145, lines 23-25; pg. 146, lines 1-11

Exhibit G, Loreto's Transcript, April 2, 2003, pg. 133, lines 24-25; pg. 134, lines 1-5

25. As set forth in the Retainer Letter, Loreto was the designated representative to handle matters of corporate governance, priority, or policies in relation to Year 2000 issues. Loreto, who helped to draft the Retainer Letter in conjunction with Faskens, understood "corporate governance priority and policies" to include those matters that would expose the City to any unusual risk as a result of a given transaction.

Exhibit E, Loreto's March 28, 2003 Affidavit, para. 3

Exhibit F, Loreto's Transcript, April 1, 2003, pg. 231, lines 10-18

Exhibit H, Fecenko's March 31, 2003 Affidavit, para. 15

26. Loreto was a highly competent lawyer upon whom Doyle reasonably relied as lead internal counsel for matters of corporate governance, priority and policies arising under the Retainer. Loreto was called to the Bar of Ontario in 1982 and worked as a solicitor at the City since it was

created by amalgamation on January 1, 1998 and, prior to that, with the City of North York since February 1993. He also worked at the City of Hamilton and the Regional Municipality of Hamilton-Wentworth. He practiced municipal law from May 1988 on. Given Loreto's years of experience as a solicitor with various municipalities, including the City, there was no reason for Doyle to micromanage Loreto or to second-guess his decisions.

Exhibit E, Loreto's March 28, 2003 Affidavit, paras. 1 and 2

Exhibit G, Loreto's Transcript, April 2, 2003, pg. 126, lines 3-9

27. The oversight provided by the Legal Division over Faskens' work on the MFP Transaction and the Year 2000 issues did turn out to be, as contemplated in the Retainer, extremely limited. It would be both impractical and unreasonable to have the Legal Division become as conversant in the underlying product knowledge that informed the MFP Transaction as the client department, particularly given that the Legal Division had outsourced the Year 2000 work precisely because it did not have the personnel to do the work itself.

Exhibit G, Loreto's Transcript, April 2, 2003, pg. 252, lines 23-25; pg. 253, lines 1-2, 19-25; pg. 254, lines 1-6

28. Fecenko had prior experience working with the City. On that basis, it was reasonable to assume that he was aware that municipalities must act pursuant to bylaw powers and/or resolutions and that, therefore, a solicitor should examine the authority for a municipality's actions. Even if he had not had such experience, this is such a fundamental tenet of municipal law that he should have known it before agreeing to the Retainer. It is also fundamental to a retainer to satisfy oneself that the client has authority to instruct counsel.

Exhibit I, Fecenko's Transcript, April 3, 2003, pg. 54, lines 2-9

Approval as to Form Stamp

29. City of Toronto By-Law 39-1998 provided that all documents necessary to give effect to matters approved by Council, or approved by municipal officials under delegated authority, required the signature of the Chief Financial Officer and Treasurer, and Clerk.

Exhibit A, Doyle's April 2, 2003 Affidavit, para. 14

Exhibit A2

Exhibit B, Doyle's Transcript, April 7, 2003, pg. 117, lines 14-21

30. It was the practice at the City of Toronto that the City Solicitor approve a document "as to form" before the Clerk's office signed it. This was not a mandatory requirement but was done to assist the Clerk, who was required to sign. Ordinarily, in signing a document "approved as to form", the assigned lawyer in the Legal Division would look through the document to make sure that it was, at least at a basic level, in accord with Council authority and referenced the appropriate Council authority**.** Ultimately, however, the clerk made the determination with respect to whether Council authority existed, rather than the Legal Division.

Exhibit A, Doyle's April 2, 2003 Affidavit, para. 15

Exhibit B, Doyle's Transcript, April 7, 2003, pg. 118, lines 1-9; pg. 127, lines 4-7

Exhibit E, Loreto's March 28, 2003 Affidavit, para. 7

31. Ordinarily, where the Legal Division did the work on a transaction, the approved as to form stamp meant that:

a. The parties were correctly named;
b. All the pages were included;

c. There was a place for execution; and

d. The authorization stamp and the approval as to form stamp were affixed.

Exhibit A, Doyle's April 2, 2003 Affidavit, para. 16

32. In addition, where the Legal Division provided all legal services connected with a transaction, "approved as to form" also meant that the document reflected what Council had authorized. It did not, however, mean that the Legal Division approved the contents of the document.

Exhibit A, Doyle's April 2, 2003 Affidavit, para. 17

33. However, in the unique circumstances of the Year 2000 Project, where the Legal Division had referred all related legal matters to outside counsel without retaining any meaningful involvement, the Legal Division relied entirely on Faskens' advice in applying the stamp. Because Faskens was stepping into the Legal Division's shoes, Doyle expected that Faskens would have been involved in drafting or at least reviewing drafts of the Master Lease, and would have ensured that the agreement adequately reflected what Council had authorized. Indeed, as Fecenko stated in his affidavit, Loreto instructed him to review the applicable legal documentation (which Fecenko understood to include the Master Lease, the Program Agreement, the Equipment Schedules, the RFQ and the response to the RFQ) for the purposes of stating that it was "approved as to form" for signature by the Legal Division.

Exhibit A, Doyle's April 2, 2003 Affidavit, para. 18

Exhibit B, Doyle's Transcript, April 7, 2003, pg. 159, lines 6-25; pg. 160, lines 1-22; pg. 161, lines 1-14

Exhibit G, Loreto's Transcript, April 2, 2003, pg. 133, lines 20-25; pg. 134, lines 1-15

Exhibit H, Fecenko's March 31, 2003 Affidavit, para. 19

Exhibit I, Fecenko's Transcript, April 3, 2003, pg. 146, lines 12-25; pg. 147, lines 1-25; pg. 148, lines 1-10

34. On August 20, 1999, Power contacted Loreto to sign the draft Master Lease "as to form". Prior to that date, Loreto had no involvement with the MFP Transaction. Loreto advised Power that Faskens should approve the Master Lease as to form since they had been involved in the underlying transaction. However on Power's suggestion, Loreto agreed to stamp it as to form, provided that Faskens confirmed its view that the lease was within the realm of commercial reasonableness.

Exhibit E, Loreto's March 28, 2003 Affidavit, para. 6

Exhibit G, Loreto's April 2, 2003 Transcript, pg. 199, lines 13-20

35. As a result, Fecenko provided a letter dated August 20, 1999 to Power stating, "the terms and conditions of the above noted agreements [the draft Master Lease and its respective Equipment Schedules and Program Agreement] fall within the realm of commercial reasonableness". Fecenko understood that the Letter would go to Loreto for the purpose of providing the City Solicitor's office comfort in signing the documents as to form, which Fecenko understood to be an essential component of the City's internal approval of contract documentation. He further understood that the person who signed the contract would in turn rely on that stamp. He also understood that neither Loreto nor anyone else at the Legal Division was undertaking any review of the contract documentation.

Exhibit K

Exhibit H, Fecenko's March 31, 2003 Affidavit, paras. 30 and 33

Exhibit I, Fecenko's Transcript, April 3, 2003, pg. 103, lines 23-25; pg. 104, lines 1-11; pg. 160, lines 18-25; pg. 161, line 1; pg. 169 lines 21-25; pg. 170, lines 1-6

Exhibit J, Fecenko's Transcript, April 7, 2003, pg. 26, lines 10-25; pg. 27, lines 1-20

36. Loreto's reliance on Fecenko's Letter in approving the lease as to form is evidenced by an email he sent to Doyle dated March 14, 2000 in which he stated as follows:

> The leasing contract was reviewed by Fasken Campbell Godfrey, in their capacity as our special Year 2000 outside counsel. Fasken pronounced the leasing contract to be within the realm of commercial reasonableness. ***On that basis I approved the Agreement as to form*** and it was executed by the City. [emphasis added]

Exhibit A3

Exhibit E, Loreto's March 28, 2003 Affidavit, para. 11

Exhibit F, Loreto's Transcript, April 1, 2003, pg. 243, lines 4-9

37. When the draft Master Lease was brought to Loreto for approval as to form, City Council authority had already been signed off by the City Clerk's office.

Exhibit E, Loreto's March 28, 2003 Affidavit, para. 10

38. Fecenko testified that he conducted the same kind of review that the City would do in order to approve a document as to form, which was to review the agreements and look to the legal terms and conditions to see if there was anything unusual for a commercial document of that type.

Exhibit I, Fecenko's Transcript, April 3, 2003, pg. 161, lines 21-25; pg. 162, lines 1-10

39. Loreto understood the phrase "within the realm of commercial reasonableness" in the context of approval of the draft Master Lease to mean that Fecenko had no legal concerns with the form of the agreement, and that he did not believe the agreement contained any unusual provisions. He further believed that a relevant part of Faskens' review would have been to review Council authority.

Exhibit E, Loreto's March 28, 2003 Affidavit, para. 8

Exhibit G, Loreto's Transcript, April 2, 2003, pg. 133, lines 20-25; pg. 134, lines 6-15

40. Fecenko testified that he did not read the Request For Quotation ("RFQ") or MFP's response to the RFQ prior to drafting the "commercial reasonableness" letter, nor did he review the final drafts of the MFP documents referred to in the letter. Fecenko did not inform Loreto that he had failed to review these documents prior to providing the letter.

Exhibit J, Fecenko's Transcript, April 7, 2003, pg. 30, lines 8-21

41. Neither Doyle nor Loreto had any reason to assume that Fecenko would fail to review such fundamental documents and no reason to doubt Fecenko's judgment. Doyle is not responsible for any problems resulting from Fecenko's failure to review all the necessary documents.

Certificate of Incumbency

42. At some point after July 30, 1999, Viinamae rushed into Doyle's office and asked him to sign a Certificate of Incumbency (the "Certificate") on an urgent basis (the "Certificate Meeting"). At that brief meeting, Viinamae, who was closely involved with the MFP Transaction, briefly described the background of the transaction to Doyle.

Exhibit B, Doyle's Transcript, April 7, 2003, pg. 196, lines 5-15, 21-25; pg. 197, lines 1-12; pg. 198, lines 16-22

Exhibit M

43. The Certificate was requested by MFP to obtain assurance that those people at the City with whom MFP was dealing had the appropriate authority. Doyle was not involved in the drafting of this document or in providing the necessary information to MFP in order to draft it.

Exhibit B, Doyle's Transcript, April 7, 2003, pg. 197, lines 23-25; pg. 198, lines 1-7; pg. 203, lines 17-25; pg. 204, lines 1-7

44. While Viinamae does not recall that the Certificate Meeting with Doyle took place, Doyle has a clear memory of it because it was such an unusual event. In all of his years as City Solicitor, no staff person had ever rushed into his office requiring something similar be done on an urgent basis. Further, as Doyle had virtually no other involvement in the MFP transaction, the Certificate Meeting stands out all the more in his memory. His recollection of this meeting is clearly reliable.

45. The Certificate had already been signed by all the necessary parties, including the City Clerk (Novina Wong), the Chief Financial Officer and Treasurer (Wanda Liczyk), the Executive Director of IT (Jim Andrew), and the Director of the Year 2000 Project (Viinamae), and by Jeffrey Abrams and A.C. Shultz (who were authorized to sign on behalf of Novina Wong and Wanda Liczyk, respectively) (the "Signatories").

Exhibit B, Doyle's Transcript, April 7, 2003, pg. 196, lines 5-21

46. Doyle knew and trusted the Signatories and understood that they were experienced professionals. He therefore reasonably assumed that the Signatories had satisfied themselves

that the Certificate was proper and accurate prior to signing it. On that basis, and given the urgent nature of the request on Viinamae's part, Doyle signed the Certificate.

47. Doyle did not understand the document to mean that Viinamae had the same kind of signing authority as the Treasurer, Wanda Liczyk or the Clerk, Novina Wong. However, had the City wanted to, it could have provided Viinamae with this authority. It was not until later that Doyle learned that Viinamae had signed Equipment Schedules without the proper authority for doing so.

Exhibit B, Doyle's Transcript, April 7, 2003, pg. 201, lines 5-10; pg. 207, lines 10-25; pg. 208, lines 1-21

Comfort Letter

48. In January 2000, Power contacted Loreto to prepare a "comfort letter" for MFP to address the validity of its leases with the City (the "Comfort Letter").

Exhibit E, Loreto's March 28, 2003 Affidavit, para. 20

49. Loreto investigated the issues that went into the Comfort Letter for nearly two months, including the issue of whether Viinamae had authority to sign the Equipment Schedules to the Master Lease.

Exhibit A3

50. At the time Loreto drafted the Comfort Letter, he understood, through Power (whose office was in charge of managing the MFP Transaction), that Council had authorized a budget of $43 million for the MFP Transaction and that the Equipment Schedules in question totalled only $33 million.

Exhibit E, Loreto's March 28, 2003 Affidavit, para. 37

51. The Comfort Letter stated that the execution, delivery and performance of the Master Lease, Program Agreement and Equipment Schedules had been duly authorized by all necessary corporate action and that the persons executing such documents were duly authorized to do so and that all such documents constituted legal, valid, enforceable, and binding agreements of the City.

Exhibit A5

52. As part of his investigation, Loreto reviewed the appropriate documentation in drafting the Comfort Letter, including the Council Resolution, an executed copy of the Master Lease, the Program Agreement, and the Equipment Schedules that had been entered into.

Exhibit G, Loreto's Transcript, April 2, 2003, pg. 21, lines 15-25; pg. 22, lines 1-3

53. On March 14, 2000, Loreto contacted Doyle by email advising him that MFP required the Comfort Letter and attached a draft of the letter to that email. Doyle was familiar with Comfort Letters, as he had previously signed similar letters for other deals.

Exhibit A, Doyle's April 2, 2003 Affidavit, para. 19

Exhibits A3 and A4

Exhibit C, Doyle's Transcript, April 8, 2003, pg. 121, lines 14-18

Exhibit E, Loreto's March 28, 2003 Affidavit, para. 41

54. In the March 14, 2001 email from Loreto to Doyle, Loreto provided the background to the Comfort Letter. The email stated, in relevant part, as follows:

> "For past [sic] two months, I have been ascertaining whether these conditions have been met – since some of the documents had been signed by persons who did not have any signing authority it was necessary for me to arrange for re-execution of those documents by the proper signing officers – and whether other conditions set by Council have been

> met – notably, the flexibility of the terms of the equipment leases – and attempting to negotiate an acceptable form of opinion.
>
> The attached is the form of opinion that ***I have negotiated with MFP and its outside counsel, McCarthy Tetrault***. Please let me know if it is acceptable or not. Should you have any questions or concerns, please let me know." [emphasis added]

Exhibit A3

Exhibit E, Loreto's March 28, 2003 Affidavit, para. 41

55. After reviewing Loreto's email and the draft Comfort Letter, Doyle was satisfied that Loreto had conducted a thorough investigation of the issues, that he had negotiated the terms with the appropriate parties, including MFP and McCarthy Tetrault, and that the terms of the Comfort Letter appeared to be reasonable. Doyle therefore understood that the Comfort Letter was accurate in that the Master Lease, the Program Agreement, and the Equipment Schedules were in fact binding on the City. Further, Doyle understood Loreto to be a competent, dependable, and thorough lawyer. As designate of the Legal Division for purposes of Year 2000 issues, Doyle reasonably relied on Loreto's judgment with respect to the Comfort Letter. On that basis, he signed the letter.

Exhibit C, Doyle's Transcript, April 8, 2003, pg. 121, lines 22-25; pg. 122, lines 1-10

Exhibit B, Doyle's Transcript, April 7, 2003, pg. 208, lines 22-25; pg. 209, lines 1-25; pg. 210, lines 1-14

56. Doyle never believed, however, nor did the Comfort Letter state, that the City had authorization to spend more than the budget that had been allocated by the Council.

Oracle Contract

57. Doyle had no involvement with the Oracle Contract, an agreement for software licenses and services. The Legal Division, including Doyle and Loreto, had no reason to be involved. It was ultimately the responsibility of the Year 2000 Project Team, which was to ensure that the appropriate steps were taken to make the contract binding on the City, including ensuring that the appropriate parties had signed the contract. The fact that the contract was not approved as to form by the City was not fatal to the contract because this was not a mandatory requirement. Any improper execution of the document arose from the fact that the clerk had failed to sign the contract. Ensuring that the right parties had signed was the responsibility of the Year 2000 Project Team.

> *Exhibit B, Doyle's Transcript, April 7, 2003, pg. 173, lines 19-25; pg. 174, lines 1-24; pg. 179, lines 13-25; pg. 180, lines 1-4*

58. Pursuant to the Retainer Letter, Loreto had no obligation to advise Faskens on the Oracle contract, in the absence of Faskens having raised an issue of corporate governance priority or policies with Loreto. As Doyle stated in his Inquiry testimony, "The whole point to retaining the outside firm was Mr. Loreto was swamped with work and there's going to be a huge volume of work for the Y2K project which to my understanding is exactly what had happened. So I don't expect Mr. Loreto to do anything except respond to situation – requests for advice that would come from outside people."

> *Exhibit C, Doyle's Transcript, April 8, 2003, pg. 66, lines 4-25; pg. 67, lines 1-25; pg. 68, lines 1-22*

59. Loreto understood that Power was providing instructions to Fecenko on the Oracle draft agreement. This was appropriate, given the transactional nature of the contract.

Exhibit G, Loreto's Transcript, April 2, 2003, pg. 185, lines 18-25; pg. 186, lines 1-6

Allegation 2

60. The second allegation of potential misconduct brought against Doyle is equally groundless. The views Doyle expressed at the May 2, 2001 City Council meeting were reasonable, particularly under the circumstances described below. Further, application of a standard of "correctness" is inappropriate in this case.

May 2, 2001 Meeting

61. As City Solicitor, Doyle had a seat at the front of Council chambers between the Treasurer/Chief Financial Officer and the Commissioner of Corporate Services. Doyle tried to attend every Council meeting. His role at the meetings was to answer legal questions and assist in providing advice on procedural matters, which are governed by a lengthy procedural bylaw. He generally had only a few days to learn the issues that would be discussed at those meetings and he often would have no advance warning as to what legal questions would be asked of him.

Exhibit A, Doyle's April 2, 2003 Affidavit, para. 26

Exhibit C, Doyle's Transcript, April 8, 2003, pg. 4, lines 24-25; pg. 5, lines 1-21; pg. 6, lines 7-25

62. On May 2, 2001, Council debated a report from Joan Anderton (Commissioner, Corporate Services) and Wanda Liczyk (Chief Financial Officer and Treasurer) to the Administration

Committee (the "May 2nd Meeting"). The report, "Request for Proposals for Photocopier Equipment and Maintenance for Three (3) Year Period," was dated March 14, 2001 (the "Photocopier Report").

Exhibit A, Doyle's April 2, 2003 Affidavit, para. 21

Exhibit A6

63. The Chair of Council called on Doyle to address questions relating to the Photocopier Report. Councillor Balkissoon asked Doyle to interpret the Leasing of Computer Equipment and Software Information and Technology Products and Services Report (the "Computer Leasing Report") approved by Council at its meeting held on July 27, 1999.

Exhibit A, Doyle's April 2, 2003 Affidavit, para. 22

Exhibit A7

64. During the morning of the May 2nd Meeting, Councillor Balkissoon asked Doyle for his view on:

a. Whether the Master Lease gave MFP exclusive rights to all leasing of computer equipment and software with the City of Toronto; and

b. What was meant by the recommendation in the Master Lease to lease for three years.

Exhibit A, Doyle's April 2, 2003 Affidavit, para. 22

Exhibit C, Doyle's Transcript, April 8, 2003, pg. 9, lines 2-8

65. Doyle had only the lunch hour to locate and review the documents and to meet with staff in order to attempt to answer those questions to the best of his ability.

Exhibit C, Doyle's Transcript, April 8, 2003, pg. 9, lines 2-24

66. Doyle had not reviewed the Computer Leasing Report in preparation for the Council Meeting on May 2, 2001. At the meeting, he was only provided with the first page of the Computer Leasing Report, which had been circulated to Council by Councillor Balkissoon, and marked "46(b)" by the Clerk.

Exhibit A, Doyle's April 2, 2003 Affidavit, para. 24

Exhibit A8

67. He also obtained and reviewed certain lease documents between MFP and the City of Toronto, including the Master Lease and another legal document that he has not seen since the May 2nd meeting.

Exhibit A, Doyle's April 2, 2003 Affidavit, para. 25

Exhibit C, Doyle's Transcript, April 8, 2003, pg. 10, lines 7-25; pg. 11, lines 1-6

Exhibit L

68. Based on his brief review of the documents mentioned above, Doyle provided the following preliminary responses to Balkissoon's questions:

a. The Master Lease was non-exclusive; and

b. The Master Lease was for three years, but within the three-year period (i.e., July 1999 to July 2002), the City was able to lease equipment for shorter or longer periods of time.

Exhibit C, Doyle's Transcript, April 8, 2003, pg. 12, lines 2-5

Exhibit A9

69. The latter opinion was based on Doyle's opinion that the City clearly could not lease the thousands of pieces of computer equipment involved in the MFP Transaction on a single day. Doyle believed that the equipment could have been leased at any time within the 1999-2002 three-year period (so long as the City remained within its $43 million budgetary limit). For example, equipment could be leased in July 1999 for up to three years, and then re-leased in July 2002 for an additional three years for a total of 6 years for the same equipment. While six years would be the maximum term of a lease, any term short of that was permissible as well, including a five-year term, so long as it was done in the 1999-2002 three-year period and it did not extend beyond the budgetary limit.

Exhibit B, Doyle's Transcript, April 7, 2003, pg. 184, lines 18-25; pg. 185, lines 1-9; pg. 186, lines 18-22

Exhibit C, Doyle's Transcript, April 8, 2003, pg. 9, lines 2-24

70. Doyle was not called upon at the meeting to give, nor did he provide, any opinion with respect to the $43 million authorized budgetary cap Council had put on the amount of the Master Lease. While Doyle was aware of the $43 million budget cap at the time, he was not informed and had no reason to believe that all the money had been spent by that point or that the City had incurred expenses beyond the authorized budgetary cap. Doyle did not learn until July of 2001 that the City had leased equipment under the Master Lease that had a capital cost in excess of the budgetary cap of $43 million.

Exhibit B, Doyle's Transcript, April 7, 2003, pg. 186, lines 23-24

Exhibit C, Doyle's Transcript, April 8, 2003, pg. 13, lines 21-25; pg. 14, lines 1-2, 6-9

71. Allegation 2 claims that Doyle "provided an incorrect legal opinion" (which Ms. Daina Groskaufmanis, Commission Counsel for the Toronto Computer Leasing Inquiry, confirmed to

Doyle's legal counsel relates to Doyle's view of the term). However, it is not at all clear that Doyle's opinion was in fact *incorrect*. The term of the Master Lease is clearly open to his interpretation, given the imprecise language concerning the term in the contractual and Council documents. This was a very large project and Doyle reasonably thought it was implausible that the entirety of the project was to be accomplished in one year, i.e., in 1999.

72. Moreover, based on the information he had at the time, Doyle's interpretation of the term of the lease was entirely reasonable.

73. A little more than a year earlier, Doyle had read the March 14, 2000 email from Loreto, who had more extensive knowledge of the MFP transaction than Doyle, which stated:

> "Last July City Council authorized the City to enter into a leasing contract with MFP Financial Services Limited for leasing computer and related software. The terms and conditions of the lease ***were to be flexible enough to ensure that the life span of the computer equipment is extended beyond three years. (They have been.***)" [emphasis added]
>
> *Exhibit B, Doyle's Transcript, April 7, 2003, pg. 183, lines 19-25; pg. 184, lines 1-10*
>
> *Exhibit A3*

74. Further, the first page of the Computer Leasing Report (document "46(b)"), which Doyle reviewed prior to providing his opinion as to the term of the lease, contained the "flexibility clause", which had been adopted by Council prior to the May 2nd meeting. That clause indicated that the term of the Master Lease was to extend beyond three years. It provided as follows:

> "The Policy and Finance Committee recommends…that the Chief Financial Officer and Treasurer be requested to ensure that the terms and conditions of the lease be flexible enough to ensure that the life span of the computer equipment is extended beyond three years."
>
> *Exhibit A8*

Exhibit N

75. In addition, Viinamae, who was intimately involved in the MFP Transaction, informed Doyle at the May 2nd Meeting that she believed the term to be 3-5 years. While Doyle's views expressed that day were his own, his views were based, in part, on his consultations with Ms. Viinamae and Mr. Loreto.

Exhibit A, Doyle's April 2, 2003 Affidavit, para. 27

76. Doyle had no involvement in the RFQ or the response to the RFQ and thus was not aware and was not provided with any information informing him as to the term set forth in those documents. In any event, the flexibility clause (which was adopted after the dates of the RFQ and the response to the RFQ) provided Doyle proper guidance in interpreting the term of the Master Lease.

Exhibit C, Doyle's Transcript, April 8, 2003, pg. 96, lines 2-15

77. Notwithstanding the above submissions, and whether or not Doyle's opinions provided at the May 2nd Meeting were "correct", his actions in answering those questions are not censurable. The nature of the city solicitor's job as a participant at a Council meeting is to provide his views on legal questions to the best of his knowledge, often with a very limited knowledge of the details of a given transaction. The standard of care for a city solicitor in those circumstances is therefore clearly different than that of normal corporate counsel who has time to deliberate at length and draft formal opinions. The standard of care is not perfection. It is not censurable to be "incorrect", only to be negligent or intentionally wrong, and Doyle was clearly neither.

78. Doyle was asked to comment on a complicated leasing transaction, in which he had had no prior involvement. He had a very brief time to review the limited documentation he was

provided and was evolving a view on his feet. Accordingly, he did not have time to conduct a detailed analysis of the questions posed to him or to have in-depth conversations with those more intimately involved with the MFP Transaction. Council understood this.

Exhibit C, Doyle's Transcript, April 8, 2003, pg. 23, lines 8-14

79. Doyle was not providing (nor was he asked to provide) a "formal legal opinion" in the normal sense of that term. Rather, Doyle was providing a response to Balkissoon's questions to the best of his ability under the circumstances. He cannot and should not be criticized for that.

Conclusion

80. Doyle served the City in a skilled and professional manner for over 30 years, earning the respect of his colleagues and a level of expertise in the operation of municipalities matched by few other solicitors in the country.

81. Doyle purposefully played a very limited role in the Year 2000 issues, delegating those issues to trusted colleagues and outside counsel, as the Legal Division did not have the staff to handle the vast amount of anticipated work. Those few actions that Doyle did take with respect to the Year 2000 issues were reasonable and performed with due care.

82. Faskens clearly understood the scope of the Retainer, particularly with respect to the very restricted role that the Legal Division would play, as is evidenced by Fecenko's Inquiry testimony and transcript (cited above). Loreto properly instructed Faskens on the appropriate issues, i.e., those relating to corporate governance policy and priorities, though the vast majority of instruction was to come from (and did in fact come from) the IT Department.

83. Doyle's views expressed at the May 2nd Meeting were perfectly reasonable in light of the documentation provided to him, the short timeframe he had to review the documentation, and his lack of prior involvement with the MFP Transaction. Further, under these circumstances, it is erroneous and unfair to apply a standard of "correctness" to Doyle's views, particularly when there has been no evidence of any "standard" of care for municipal solicitors in such situations except as provided by Doyle.

84. Based on the foregoing, it is respectfully requested that the allegations of misconduct brought against Doyle be dismissed.

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