

**Written Submissions on behalf Brendan Power relative to Confidential Notice of  
Alleged Misconduct**

The Commission might find that in your capacity as a Consultant to the City of Toronto and the Year 2000 Project Office, you:

1. Did not have sufficient training and experience to draft a Request for Quotations for leasing services, to evaluate the responses that would be received to the Request for Quotations, and to evaluate lease rate factors.

Mr. Power worked for the Ontario provincial government for twenty-seven years, commencing in the mid-1970's.

Line 19, Page 138-Line 2, Page 139; Power Examination, March 5, 2003

In 1974, Mr. Power was hired by the Ministry of Government Services. Commencing in 1978, Mr. Power assumed a position at the Ministry's Downsview Computer Centre. Here, he began acquiring knowledge and skills having to do with computer information and management.

Lines 1-17, Page 142; Power Examination, March 5, 2003

Between 1981 and 1983, Mr. Power's responsibilities at the Computer Centre included Manager of client services and of the whole data centre.

Line 19, Page 142-Line 8; Power Examination, March 5, 2003

Between 1983 and 1985, Mr. Power served as Manager to the Computer Centre. As such, he was responsible for service delivery, services planning and controlling financial and human resources. The Centre had 5,000 to 6,000 on-line users and a staff of about one hundred (100) employees.

Line 9, Page 142-Line 1, Page 143; Power Examination, March 5, 2003

After 1985, Mr. Power held computer related positions in the Ministry of Education, the central government purchasing agency, and the Ministry of

Government Services again. During those years, he continued to acquire knowledge of computer technology, hardware and software.

Line 8, Page 144-Line21, Page 145; Power Examination, March 5, 2003

Computer acquisition at the Computer Centre was done by both outright purchasing and leasing.

Lines 2-5, Page 146; Power Examination March 5, 2003

He was personally involved in and knowledgeable of computer procurement process.

Lines 6-9, Page 146; Power Examination, March 5, 2003

Mr. Power was involved in establishing corporate contracts, centrally managed by Management Board Secretariat, by which computers could be acquired throughout the whole of government.

Pages 147-148; Power Examination, March 5, 2003

The value of the corporate contracts was in excess of \$100 million.

Line 22, Page 147-Line 3, Page 148; Power Examination, March 5, 2003

The acquisition of computer software and hardware was done centrally on behalf of other Ministries. The suppliers were selected through an RFP process. In some instances, only one supplier was selected and in other cases more than one supplier was selected.

Page 149; Power Examination, March 5, 2003

Mr. Power occupied his position at Management Board Secretariat for six (6) years. During that time, there were four or five RFP's per year. In total, Mr. Power was involved in the preparation and evaluation of approximately

twenty (20) RFP's. All government personnel involved in the preparation and evaluation of the RFP's reported to Mr. Power.

Lines 5, Page 151- Line 8, Page 152; Power Examination, March 5, 2003

Mr. Power personally drafted RFP's and oversaw the work of others.

Lines 9-11, Page 152; Power Examination, March 5, 2003

In addition to RFP's by which suppliers of IT equipment and software were selected there was an arrangement by which government Ministries could finance those acquisitions by leasing.

Line 24, Page 152-Line 9, Page 153; Power Examination, March 5, 2003

On occasion, Mr. Power's office was consulted by Ministries about whether they should lease IT equipment and software.

Lines 13-18, Page 153; Power Examination; March 5, 2003

His staff had established guidelines for Ministries to use relative to leasing.

Line 19, Page 153-Line 7, Page 154; Power Examination, March 5, 2003

The first RFP for IT leasing in which Mr. Power was involved was issued in 1992. Mr. Power was involved in the selection process, including the drafting of the tender documents.

Line 4, Page 154-Line 21, Page 154; Power Examination, March 5, 2003

Mr. Power's personal involvement in the leasing RFP was mostly on the business side. Leasing experts developed related components of the RFP. Mr. Power coordinated the overall package.

Line 24, Page 154-Line 6, Page 155; Power Examination, March 5, 2003

Commentary

It is submitted that Mr. Power had more than sufficient experience in drafting RFQ's/RFP's related to leasing services and in evaluating the responses or at least coordinating the evaluation of responses to such RFQ's/RFP's..

2. Accepted a role in which you would be viewed and accepted as an expert in computer technology leasing when you were unqualified to assume such a role.

Mr. Power did not consider himself a computer leasing expert.

Line 22, Page 154-Line 12 , Page 156; Power Examination in Chief, March 5, 2003

Commentary

Evaluation of subject RFQ was financial matter, and mostly the assessment of lease rate factors. Mr. Power did not hold himself out as an expert in calculating or assessing lease rates. In his capacity as coordinating assessment of the six responses to the 1999 RFQ, his involvement relative to calculating and assessing lease rates was double checking that Rabadi had used the correct input information.

3. Failed to consider, or failed to supervise, direct or advise staff to consider whether City of Toronto employees had sufficient training or experience to draft and review a Request for Quotations for leasing and specifically to consider whether assistance or advice should have been sought from external counsel or consultants if you could not fulfill this role.

Mr. Power believes he spoke to Ms. Viinamae regarding the types or experts or outside consultants that would or might be needed. Mr. Power did not believe it was within his responsibility to seek authority to access experts. He considered this the responsibility of Ms. Viinamae.

Line 12, Page 86-Line 12, Page 88; Power Examination, March 26, 2003

Further, Mr. Power was not aware of the training and experience of City of Toronto employees involved in the drafting and reviewing the leasing RFQ. To the extent he gained an impression of the training and experience of employees in Finance, he found them to be quite familiar with issues surrounding leasing. Further, Mr. Power was aware that the City had previously entered into other leasing arrangements.

Lines 8-20, Page 90; Power Examination, March 26, 2003

Lines 21-25, Page 90; Power Examination, March 6, 2003

4. Failed to consider, or failed to supervise, direct or advise staff to consider, or failed to supervise, direct or advise staff to consider, whether computer hardware could or should be sold to MFP Financial Services Ltd. (“MFP”), and to ensure adherence to the City’s policies and procedures when selling assets.

Mr. Power notes that, typically, by-laws relating to the disposal of assets apply to assets that are obsolete or no longer of any value. That was not the case here. In fact, the City was seeking to have MFP acquire the desktops at the City’s purchase price

Line 14, Page 70-Line 25, Page 71; Power Examination, March 6, 2003

No one from the City and, specifically, no one from Legal or the Clerk’s office took exception to the sale of assets to MFP.

Line 21, Page 40-Line 5, Page 41; Power Examination, March 26, 2003

5. Failed to retain legal counsel in a timely manner to assist with the leasing transaction, including the drafting and reviewing of the tender documents and the negotiation of subsequent contracts.

Mr. Power had discussions about retaining outside experts, including legal counsel, with Ms. Viinamae within a week or two of Council approval.

Pages 86-87; Power Examination, March 6, 2003

Mr. Fecenko indicated he 'prefers' to be involved in complicated situations at an early stage and as early as drafting the RFQ. He indicated there were benefits to his doing so as a lawyer and that he could provide value at that stage. He did not indicate he considered legal involvement at that stage was essential or even strongly advised.

Line 16, Page 44-Line 2, Page 49; Fecenko Examination, April 3, 2003

Mr. Power did not give much thought to having the tender documents reviewed by legal counsel as he did not believe there would be much benefit to doing so. Most of the documents forming the RFQ consisted of City template documents. Mr. Power expected that the template documents had been prepared or reviewed the City's legal department.

Line 19, Page 137-Line 15, Page 138; Power Examination, March 25, 2003

Mr. Power did not anticipate involving legal counsel until the successful respondent had been selected.

Lines 14-25, Page 138; Power Examination, March 25, 2003

Mr. Power did not believe it was necessary to retain outside experts or consultants prior to that time.

Line 8, Page 85-Line 5, Page 86; Power Examination, March 6, 2003

Mr. Fecenko's evidence was that, with the benefit of information from Mr. Power regarding the RFQ and MFP's response, he did not need to review those two documents for the purposes of his legal review of the Master Lease Agreement and the Program Agreement.

Line 5, Page 82-Line 21, Page 85; Fecenko Examination, April 3, 2003

6. Recognizing that a Request for Proposals would be better suited and would better protect the City's interests than a Request for Quotations, failed to discuss such considerations with City of Toronto staff or impress upon them the benefits of using a Request for Proposals over a Request for Quotations in these circumstances.

Mr. Power was surprised to learn from the Purchasing the City used a RFQ process rather than a RFP relative to equipment leasing. In any event, the subject tender document, the 1999 RFQ, included aspects of an RFP, except that it included standard RFQ documents used by Purchasing. In fact, Mr. Power believes he used precedent RFP's he had drafted or in which he was involved in drafting while he was with the Provincial Government. In other words, even the tender document was titled an RFQ, it took the form of an RFP. Indeed one of the initial drafts of the tender document prepared by Mr. Power referred to the document as an RFP.

Line 3, Page 100-Line 17, Page 101; Power Examination, March 6, 2003

Line 12, Page 117-Line 5, Page 119; Power Examination, March 6, 2003

Document 12834

Line 12, Page 119-Line 12, Page 121; Power Examination, March 6, 2003

7. In May 1999, drafted a Request for Quotations for leasing of information and technology products and failed to ensure that the Request served the best interests of the City of Toronto and fairly and accurately described the leasing transaction that was contemplated by the City of Toronto, including:

- (a) ensuring that the period for which bidders were required to submit lease rates (90 days from the closing date) was sufficient time to protect the City's interests;

In Mr. Power's experience, a 90 day guaranty period was sufficient. Only in circumstances where the review and approval of quotations or approvals was complicated had Mr. Power seen a guaranty period of 120 days. Mr. Power was aware that Council was meeting in July and, therefore, had no reason to believe that a 90 day guaranty period was insufficient when he was drafting the RFQ.

Even as late as July 18, 1999, Mr. Power believed that all previously acquired assets and all assets acquired that summer could be put on lease within the 90 day guaranty period.

Lines 2-17, Page 129; Power Examination June 24, 2003

As of June 1999, the City had received \$15.1 million in assets for which it had not paid suppliers and that there were concerns that the selected bidder might not be willing to pay full price for purchasing those assets from the City.

Line 8, Page 83-Line 3, Page 85; Power Examination, March 24, 2003

Document 14320

### Commentary

It is submitted that a longer guaranty period may have caused respondents to decline to pay the City's full purchase price for the equipment the City had already acquired.

(b) specifying clearly that the City of Toronto intended to sell hardware that it had already purchased to the successful bidder and lease back this equipment;

Mr. Power readily acknowledges that this aspect of the arrangement is not explicitly stated in the RFQ and that it would be if he were to do this all over again. Nonetheless, Mr. Power notes that the RFQ includes a schedule headed "City hardware and software configurations (typical new configurations) already purchased or to be purchased in 1999". Further, there was not any confusion amongst bidders about the sale-leaseback aspect of the anticipated arrangement as all bidders, except those captive to equipment makers, quoted on that equipment.

Lines 7-, Page 21; Power Examination, March 24, 2003

Documents 6104 and 6116

Line 16, Page 39-Line 9, Page 40; Power Examination, March 24, 2003

(c) particularizing the equipment that was to be sold to the successful bidder and leased back;

The RFQ does contain a chart of the equipment to be sold and leased back.

Document 6116



- (d) accurately stating the leasing volume estimates including the value of the hardware and software to be leased and the time period during which the acquisitions would be made;

As noted elsewhere herein, at the time the RFQ was issued in May 1999, the City had not yet established a refresh or upgrade strategy. Without such a strategy in place, it was not possible to accurately state anticipated leasing volumes. The same is also true relative to anticipated software acquisitions. In all the circumstances total leasing volumes over the three year term of the leasing arrangement were not known in 1999. Accordingly, it was not possible to state anticipated leasing volumes in the 1999 RFQ. It is submitted that the situation is analogous to the 1998 RFQ for computer suppliers such that it was a fairer representation of the facts for the 1999 RFQ not to state anticipated leasing volumes.

At the time the RFQ was issued major software acquisitions were anticipated but the actual volumes were not yet known. Clause 1.1.21 states that the City expects respondents to incorporate these costs into a lease agreement.

Line 24, Page 174-Line 4, Page 176; Power Examination, March 6, 2003

The City had entered into at least one contract, let alone issued an RFQ with no upset limit. It had done so relative to the 1998 RFQ for the computers to be acquired under the Year 2000 project plan. No upset limit for that contract had been established because the quantity of goods to be acquired was not known.

Line 21, Page 38-Line 5, Page 42; Pagano Examination, March 5, 2003

The 9,000 desktops already received by the City as of May 1999 and the 4,000 to be acquired later related only to the Year 2000 project plan.

Line 20, Page 173-Line 23, Page 174; Power Examination, March 6, 2003

- (e) providing for disqualifying any bids that did not meet any mandatory requirements, and specifying the mandatory requirements;

The RFQ contains a Disqualification of Quotes clause, namely clause 2.6. The clause provides that quotes received after the deadline will not be considered.

Document 6114

The RFQ also contains a Right to Reject clause, namely clause 2.7. That clause provides that the City, at its discretion may select any one quote or part or a combination of more than quote. It further provides that the City is not obliged to select the quote with the lowest price. It also gives the City the right to negotiate with any or all respondents.

Document 6114

The RFQ also contains numerous clauses in which it is stipulated respondents “must” or “shall” comply. For instance, clause 1.1.6 states that respondents must explain the mechanism that will allow the purchase of leased products at any time during the term of the lease. Clause 1.1.21 requires that respondents must be willing finance, by way of lease, major software acquisitions.

Documents 6105 and 6107

It was Mr. Power’s evidence that it would have been preferable to have proceeded by way of RFP than RFQ as RFP’s tend to be more formal documents and often have draft contracts appended to them. This was something Mr. Power assumed Purchasing was aware.

Line 9, Page 171-Line 10, Page 174; Power Examination, March 27, 2003

### Commentary

While it would have been preferable for an RFP to have been used relative to the subject process, the 1999 RFQ contains provisions that would have allowed the City to reject the submission of any respondent had it deemed doing so warranted or appropriate.

- (f) providing for “vendor of record” or exclusive vendor of record status, if this was the City’s intention;

Mr. Power does not accept that MFP was named an exclusive vendor of record. Rather, Mr. Power testified that the agreement did not preclude the City from identifying other leasing vendors of record such that the City could have arranged a competition for lease rate factors during the term of the agreement.

Lines 7-20, Page 126; Power Examination, March 26, 2003

It was Mr. Power’s understanding, based on his preliminary meeting with Ms. Viinamae in April 1999, it was the City’s intention to select one vendor of record.

Line 25, Page 118-Line 9, Page 119; Power Examination, March 27, 2003

It was also Ms. Viinamae’s understanding that this was one of the objectives of the 1999 RFQ.

Line 23, Page 162-Line 16, Page 163 ; Viinamae Examination, October 15, 2003

Mr. Power observes that from his discussions with Mr. Andrew, he understood Mr. Andrew wanted only one leasing company as they never talked about having more than one vendor of record. By that, Mr. Power did not understand that Mr. Andrew expected the successful bidder to have an exclusive arrangement with the City.

Lines 22-12, Pages 127-128; Power Examination, March 27, 2003

Lines 6-20, Page 138; Power Examination, March 27, 2003

To the extent that it was open to departments to use another leasing company for acquisitions but that this was not made clear, Mr. Power says this was a

facet of the arrangement that was to have been communicated later to Commissioners by the CMO.

Line 1, Page 139-Line 3, Page 142; Power Examination, March 27, 2003

Mr. Altman of Finance told KPMG he considered MFP to be the vendor of record.

Line 23, Page 70-Line 5, Page 71; Altman Examination, July 8, 2003

It was also Mr. Altman's understanding, as of July 9, 2003 that MFP was being recommended as vendor of record.

Lines 12-16, Page 187; Altman Examination, July 8, 2003

In participating in drafting the Report to the Policy and Finance Committee, it was Mr. Power's intention that the Report recommend that MFP be the vendor of record for leasing.

Lines 7-18, Page 78; Power Examination, March 24, 2003

The phrase "vendor of record" was a term with which Mr. Power was familiar but did not use in the Report because it was not a phrase commonly used at the City.

Line 25, Page 111-Line 5, Page 112; Power Examination, March 24, 2003

Mr. Power acknowledges the intention that MFP be selected as the "vendor of record" could have been more clearly identified in the Report to the Policy and Finance Committee.

Lines 6-11; Page 112; Power Examination, March 24, 2003

(g) specifying clearly the real estimated value of the RFQ.

See sub-paragraph (d) above.

8. In June and July 1999, failed to ensure, or failed to direct supervise or advise staff to ensure, that the responses received by the City of Toronto to RFQ #3406-99-01735 for Leasing Services of Information Technology Products (“RFQ”) were thoroughly and accurately assessed, including:

Mr. Power’s consulting services to the City were provided pursuant to a contract between the City and EDS of Canada. Mr. Power was not a City employee.

Line 1, Page 163-Line 24, Page 164; Power Examination, March 5, 2003

In 1998, Mr. Power was assigned to the Year 2000 project management office as External Agreements and Partners Coordinator. In that capacity Mr. Power served a coordination function reporting to Ms. Viinamae. No personnel in the project management office or otherwise reported to Mr. Power.

Line 6, Page 176-Line 18, Page 179; Power Examination, March 5, 2003

In or about April 1999, Mr. Power was assigned to work on the 1999 RFQ. Mr. Power was instructed by Ms. Viinamae to work with Purchasing and Finance.

Line 9, Page 58-Line 18, Page 59; Power Examination, March 6, 2003

Mr. Power did not know whether Messrs. Rabadi, Altman and Brittain were accountants or economists. Mr. Power was not informed by Ms. Viinamae or otherwise about the backgrounds or experience of these three individuals. Based on conversations Mr. Power had with them, he believed they were quite familiar with issues around leasing and understood the financing mechanisms of the City.

Lines 8-20, Page 90; Power Examination, March 6, 2003

As regards evaluation of the responses to the RFQ, Mr. Power's role was limited to being primarily responsible for doing so on IT's behalf and to be the primary point of contact between IT and Finance in that process.

Line 19, Page 198-Line 17, Page 199; Power Examination, March 27, 2003

Line 18, Page 206-Line 9, Page 207; Power Examination, March 27, 2003

### Commentary

In his capacity, Mr. Power did not have authority to direct or supervise staff to do anything in respect of the RFQ or the Report to the Policy and Finance Committee.

- (a) Ensuring that the responses to paragraph 1.1.17 of the RFQ provided a complete mechanism for any changes to the lease rate during the term of the lease;

Mr. Power does not accept that there was an advantage to requiring respondents to tying future lease rate changes to an external to a particular benchmark as different leasing companies base their rates on different factors and he intentionally did not require respondents to base their lease rate changes on a benchmark.

Line 18, Page 23-Line 1, Page 27; Power Examination, March 24, 2003

In Mr. Power's experience, respondents are not required to tie their lease rate changes to a benchmark. Typically, it is left to respondents to describe how frequently and the circumstances in which their lease rates will change.

Lines 1-9, Page 25; Power Examination, March 24, 2003

In light of the foregoing, Mr. Power considered MFP's response relative to clause 1.1.17 and future changes to its leasing rates to be proper.

Line 9, Page 27-Line 2, Page 29; Power Examination, March 24, 2003

### Commentary

As regards assessing the responses to the RFQ and, in particular to determining which bidder had the lowest quote, it is Mr. Power's position that there would have been no benefit to requiring respondents to tie future lease rate changes to an external benchmark as it inevitable that lease rates would change regardless of the benchmark used. In that context, requiring a benchmark to be stated in response to clause 1.1.17 of the RFQ would not serve a useful purpose. Rather, by not requiring a benchmark respondents were given flexibility in crafting their responses.

- (b) Ensuring that there was an evaluation of all costs and options associated with leasing, such as re-writes, early return of equipment, or end of lease options;

As noted above, Finance was responsible for the financial analysis of the responses to the RFQ and of the merits of leasing. According to Mr. Power's observations of Finance officials, they appeared to understand the concept of total cost of leasing.

Line 5, Page 95-Line 24, Page 96; Power Examination, March 6, 2003

Appendices to the Report to the Policy and Finance Committee did endeavour to calculate the actual leasing costs on an annual basis.

Lines 10-22, Page 102; Power Examination, March 24, 2003

Amongst the factors that might affect leasing costs are upgrades while assets are under lease. Prior to issuance of the 1999 RFQ, the City had not established a refresh or upgrade policy whereby the City might know what was reasonable over the 36 month term of the agreement.

Pages 15-16; Power Examination, March 24, 2003

### Commentary

It would have been impossible to evaluate all costs associated with leasing. In addition to anticipated major software acquisitions and the acquisition of other desktops over the three year term of the anticipated arrangement, there was no way of knowing changes in leasing rates over the three years, regardless of whether such changes were tied to an external benchmark. It was not the purpose of the 1999 RFQ or evaluation of the same to determine all costs of leasing, even if that objective was achievable.

- (c) Analysing the cost of leasing software, including whether software should be leased at all.

The Introduction section of the RFQ clearly refers to the leasing of software. Clause 1.1.21 of the RFQ specifically advises that the City anticipated separate corporate licence agreements for major software acquisitions and the expectation that respondents will incorporate these costs into a lease agreement.

Documents 6105 and 6107

As regards the Oracle software licences, it appears the issue of analyzing the costs of leasing did not arise until Oracle substantially reduced its prices. As Mr. Power understands it, at that time the issue was whether the City had available funds or would it be necessary to finance that transaction. Mr. Power believes the decision to lease was made by Finance and Ms. Viinamae.

Line 11, Page 283-Line 7, Page 284; Power Examination, March 27, 2003

### Commentary

It is submitted that the decision to finance software licences and acquisitions was primarily, if not solely, a financial decision and a question of whether the City had other financial resources with which to pay for those expenditures. Consequently, the analysis of the cost of leasing software is simply an analysis of the cost of money.



9. In June 1999, failed to disqualify, or to direct, supervise or advise staff to disqualify, the bid submitted by MFP or any other bids that did not comply with the requirements of the RFQ, and specifically to disqualify any responses to paragraph 1.1.17 of the RFQ that did not provide a complete mechanism for any changes to the lease rate during the term of the lease.

The restrictions on Mr. Power's authority at the City have already been noted herein. Mr. Power did not have authority to direct or supervise staff on any issue, including disqualification of a bid received in response to the RFQ. The City's right to ignore any bid as per the terms of the RFQ has also been addressed herein. The fact that Mr. Power intentionally drafted clause 1.1.17 of the RFQ such that lease rate increases need not be tied to external benchmarks has also been dealt with.

In Mr. Power's view MFP's response and in particular MFP's response to clause 1.1.17 of the RFQ was acceptable.

Line 9, Page 27-Line 25, Page 28; Power Examination, March 24, 2003

Documents 23413 and 23425

10. Failed to adequately direct, supervise or advise Nadir Rabadi, including closely reviewing his analysis and responding to his questions and conclusions in a timely manner.

Mr. Rabadi did not report to Mr. Power. Mr. Rabadi was in Finance and reported to Mr. Altman, who in turn, reported to Mr. Brittain. Accordingly, it was not Mr. Power's role to direct or supervise Mr. Rabadi.

Line 17, Page 89-Line 7, Page 90; Power Examination, March 26, 2003

It was Mr. Rabadi's evidence he was responsible for the financial analysis of the responses to the RFQ, under the direction of Mr. Altman and Mr. Brittain. Mr. Rabadi does not make reference to being subject to the direction of Mr. Power.

Paragraph , Rabadi Affidavit; Rabadi Examination, June 24, 2003

11. Made revisions or did not object to revisions in the draft Report to the Policy and Finance Committee from the Executive Director Information and Technology and the Treasurer and Chief Financial Officer, including deletions to the Report which stated that:

Mr. Power would not have made substantive changes to the draft Report without having consulted with Ms. Viinamae.

Lines 15-18, Page 163; Power Examination, March 25, 2003

- (a) the City of Toronto intended to sell hardware that it had already purchased to MFP and lease back this equipment;

There are no known drafts of the Report in which there was a clearer indication of the sale-leaseback aspect of the transaction that was amended or revised to delete such indication. It was put to Mr. Power by Commission Counsel that the only reference in all drafts of the Report and the as-issued Report to the sale-leaseback aspect was found in the caption above the chart listing goods acquired or to be acquired in 1999. Mr. Power agreed with Commission Counsel's assertion in that regard. There is no known evidence contrary to Mr. Power's testimony in this regard. Consequently, it does not appear that Mr. Power made revisions or failed to object to revisions to the draft Report in this regard.

Lines 1-10, Page 23; Power Examination, March 24, 2003

- (b) leasing of computer equipment and software that was to be associated with the Year 2000 Project;

In the first draft of the Report to the Finance and Priority Committee, dated June 27, 1999, Mr. Power proposed wording stating: "The primary focus of the RFQ was to lease Information technology products and services" ... That draft accorded with Mr. Power's understanding that acquisitions were not to be limited to only the Year 2000 project.

Document 31848

Line 20, Page 179-Line 20, Page 80; Power Examination, March 27, 2003

(c) the quantity of computer hardware and software that the City of Toronto intended to lease was limited to \$43 million;

It was not Mr. Power's understanding that the cost of equipment that could be leased through MFP was limited to \$43 million.

Lines 9-25, Page 164; Power Examination, March 27, 2003

It is the evidence of Ms. Marks that Mr. Power was instructed by Ms. Viinamae to remove the reference, in a draft of the Report to Priorities and Finance Committee, to a \$43.5 million limit on the leasing arrangement.

Line 8, Page 266-Line 17, Page 269; Marks Examination, August 13, 2003

Mr. Power further notes that the acquisitions to be made for the Year 2000 project alone exceeded \$43 million.

Line 23, Page 168-Line 5, Page 169; Power Examination, March 27, 2003

(d) the lease rates quoted by MFP were only valid for 90 days from the closing of the RFQ and could change thereafter, and that MFP was the lowest bidder only if the interest rates remained constant.

In his testimony, Mr. Power acknowledged there is no reference in the Report to the rates quoted by MFP remaining valid for 90 days.

Line 23, Page 128-Line 1, Page 129; Power Examination, March 24, 2003

### Commentary

There is no known evidence of a draft or drafts of the Report containing such a reference from which draft or drafts the reference was deleted.

12. Failed to ensure that the Chief Financial Officer and Treasurer, the Executive Director of Information and Technology, and the Director, Year 2000 Project were aware of the '90 day guarantee period' (as specified in the RFQ), and its

significance to the leasing transaction and the Report to the Policy and Finance Committee.

Mr. Power briefed the Director, Year 2000 Project, Ms. Viinamae about all parts of the proposals received, including the 90 day guarantee period.

Pages 157-158; Power Examination, March 26, 2003

Ms. Viinamae denies anyone informed her the lease rates from MFP were guaranteed for only 90 days. Ms. Viinamae acknowledges being provided with a copy of the RFQ. The RFQ stipulates that leasing rates must be valid for 90 days.

Paragraph 54, Viinamae Affidavit; Pages 27-28; Viinamae Examination, October 15, 2003

Documents 5219 and 12733

Ms. Viinamae acknowledges that for four or more weeks prior to October 1, 1999 considerable efforts were being made to establish an inventory of acquired goods. This implicitly acknowledges that it was not possible to put the sale-leaseback goods or the newly acquired goods on lease prior to expiry of the guarantee period on September 11, 1999.

Paragraphs 53-54, Viinamae Affidavit; Pages 27-28, Viinamae Examination, October 15, 2003

While Treasurer and Chief Financial Officer, Ms. Liczyk, was not aware of the 90 day guarantee period, she was aware there was a guarantee period and of the period's significance.

Pages 290-291; Liczyk Examination; November 3, 2003

The Executive Director of Information and Technology, Mr. Andrew, was aware of the 90 day guarantee period and appreciated its significance.

Pages 24-25; Andrew Examination; September 29, 2003

13. Failed to ensure that revisions and/or comments from the Chief Financial Officer and Treasurer were included in the final version of the Report to the Policy and Finance Committee, and failed to ensure that they were not removed without her knowledge and consent.

Mr. Power was not provided with a copy of the version of the draft the Report bearing Ms. Liczyck's handwritten comments.

Document 12884

Line 19, Page 159-Line 14, Page 160; Power Examination, March 25, 2003

Mr. Power was not the only person responsible for drafting the Report. In fact the first draft Report was prepared by Mr. Rabadi, dated June 24, 1999.

Paragraph 31, Rabadi Affidavit; Page 130 Rabadi Examination, June 24, 2003

Document 12765

Mr. Rabadi sent his first draft of his Report to Mr. Andrew, Ms. Viinamae and Mr. Power, seeking comments from all of them regarding the same.

Paragraph 31, Rabadi Affidavit; Pages 130-131, Rabadi Evidence, June 24, 2003

Document 14133

Mr. Power was not the person solely responsible for drafting the recommendations contained in the Report. For instance, recommendation numbered 1 in the draft Report dated June 30 and bearing Mr. Liczyck's handwriting was not drafted by Mr. Power. He believes it was drafted by someone in Finance, probably Mr. Rabadi.

Document 12884

Line 10, Page 161-Line 18, Page 162; Power Examination, March 25, 2003

14. In June and July 1999, failed to ensure, or failed to direct, supervise or advise staff to ensure, that there was a protocol or evaluation team to review the responses received by the City of Toronto to the RFQ and failed to ensure that the responsibility for drafting the Report and incorporating changes was clearly demarcated.

Mr. Power's role was to be the primary person to evaluate the responses to the RFQ from IT's perspective. Finance was to evaluate the responses from a financial perspective.

Line 19, Page 198; Power Examination, March 27, 2003

Mr. Rabadi acknowledges this was agreed at a meeting between Finance and IT in May 1999.

Paragraph 19, Rabadi Affidavit, Page 127, Rabadi Examination, June 24, 2003

In addition, Mr. Power was the primary contact between IT and Finance relative to the evaluation of the responses.

Lines 18-23, Page 206; Power Examination, March 27, 2003

15. Failed to ensure that the 90 days (from the close of the tender, as specified in the RFQ) was sufficient time to obtain City Council's approval and to complete the leasing transaction, including the sale and leaseback. You also failed to consider the financial impact if approval was not obtained and the leasing transaction was not completed within the 90 day period.

There was never any intention that the leasing transaction, in its entirety, would be completed within the 90 day guarantee period. This is why the proposed term of the leasing arrangement was three years. For instance, it was known that an additional 4,000 desktop computers would be acquired and put on lease later in the term of the leasing arrangement.

Line 18, Page 19-Line 13, Page 20; Power Examination, March 24, 2003

At the time he was involved in drafting the RFQ, Mr. Power was aware of the process leading to review and approval of a recommendation that a particular

bid be accepted. Specifically, he was aware that Council usually met every month and that the Policy and Finance Committee met in advance of Council meetings. He was aware that Council was meeting in July 1999. Based on his experience while with the Province, Mr. Power was aware that a longer guarantee period, such as 120 days, could have been stipulated. Mr. Power considered the approval process at the Province to be more complicated than the City's approval process. In other words, Mr. Power considered and had good reason to believe that the sale-leaseback aspect of could be completed within the 90 day guarantee period.

Line 2, Page 147-Line 22, Page 50; Power Examination, March 6, 2003

It is clear that Mr. Rabadi was alive to the possibility of leasing rates changing if all equipment was not on lease within the 90 day guarantee period. In his email dated July 2, 1999, Mr. Rabadi wants to know whether all equipment is going to be received by July 31 so that he can accurately calculate monthly leasing costs. In his evidence at the Inquiry, Mr. Rabadi's confirmed his awareness of the 90 day guarantee period and the fact leasing rates could change after September 11.

Document 12257

Pages 63-64; Rabadi Examination, June 25, 2003

### Commentary

To the extent that equipment was not going to be put on lease prior expiry of the 90 day guarantee period, it is submitted it was not possible to calculate the financial impact if approval was not obtained within the guarantee period as the leasing rates after September 11 were not yet known.

16. When it was clear that the City would have difficulty or be unable to complete the leasing transaction, including the sale and leaseback, within 90 days, you did not negotiate, or failed to direct, supervise or advise staff to negotiate, an extension of time.

Mr. Power recalls that there were discussions in August 1999 about how much the sale-leaseback goods and newly acquired goods could be put on lease prior to expiry of the 90 day guaranty period on September 11, but he was not really involved in those discussions. Mr. Power was aware that the major problem

at that time was establishing an inventory of what equipment had been received and that it had been necessary for someone from MFP to be brought in to assist with that.

Line 11, Page 149-Line 7, Page 150; Power Examination, March 24, 2003

Mr. Power was not very involved in doing inventories and related matters.

Lines 8-13, Page 140; Power Examination, March 24, 2003

Mr. Power does think he was involved in discussions about getting such assets on lease by September 11, 1999.

Lines 15-19, Page 19, Page 150; Power Examination, March 24, 2003

Mr. Power believes there may have been discussions about approaching MFP to extend the guarantee period but he does not recall being involved in such discussions. He believes the difficulty the City had was compiling an inventory of equipment already received and believes someone from MFP was brought in to assist in the process.

Lines 20-25, Page 150; Power Examination, March 24, 2003

He does not recall thinking he should speak to MFP about extending the guarantee period.

Lines 1-4, Page 151; Power Examination, March 24, 2003

Ms. Viinamae was well aware of the 90 day guarantee period.

Pages 157-158; Power Examination, March 26, 2003

Commentary



It is submitted that Mr. Power was not, at the relevant time of September 11, 1999, involved in matters that would have made it clear to him that the guaranty period had expired without any equipment having been put on lease. Further, Mr. Power was not in a position, in any event, to instruct staff to negotiate an extension of time.

17. Failed to ensure that the Report to the Policy and Finance Committee from the Executive Director, Information and Technology and the Treasurer and Chief Financial Officer, dated July 12, 1999 (and any subsequent versions) fairly and accurately described the leasing transaction, including ensuring that the Report:

- (a) stated that the City of Toronto intended to sell to MFP hardware it had already purchased and would be leasing back this equipment.

Mr. Power acknowledges there could have been greater clarity or specificity in the Report relative to the sale-leaseback aspect of the arrangement.

Lines 10-14, Page 23; Power Examination, March 24, 2003

- (b) accurately set out the quantity of computer hardware and software that the City of Toronto intended to lease pursuant to the RFQ, and that the amount would exceed \$43 million;

It was not the purpose of the RFQ to arrange lease financing limited to \$43.5 million in assets. The sum of \$43.5 million was simply used as a constant dollar amount for the purpose of evaluation responses to the 1999 RFQ. It was always anticipated that more than \$45.3 million in assets could be acquired under the leasing arrangement.

Line 20, Page 78-Line 25, Page 79; Power Examination, March 24, 2003

- (c) limited the value of the leased equipment to \$43 million and specified this limitation in the list of Recommendations;

See sub-paragraph (a) above.

It was Mr. Power's understanding, based on his discussions with Ms. Viinamae, that more than \$43.5 million in assets might be put on lease. It was

anticipated that other City Departments would make use of the leasing arrangement after it was in place.

Line 24, Page 75-Line 5, Page 77; Power Examination, March 6, 2003

The fact it was anticipated more than \$43.5 million in assets might be put on lease is reflected in the Briefing Note prepared on or about July 18, 1991 for the Policy and Finance Committee meeting. Part of the text of the Briefing Note is as follows:

"The cost of the further equipment in excess of \$43.15 million, which IT intends to lease with full details."

"Unknown at this time, but any funds in operating for IT equipment and software is a possibility."

Line 12, Page 215-Line 11, Page 215; Power Examination, March 27, 2003

Documents14221 and 14222

### Commentary

In the circumstances, it would have been misleading for the Report to state that the proposed arrangement limited the value of leased equipment to \$43.5 million.

(d) clearly stated that the lease rates quoted by MFP were valid for only 90 days from the closing of the RFQ and could change thereafter;

In his testimony, Mr. Power acknowledged there is no reference in the Report to the rates quoted by MFP remaining valid for 90 days.

Line 23, Page 128-Line 1, Page 129; Power Examination, March 24, 2003

Clause 1.1.17 of the RFQ clearly required that respondents guaranty their quoted rates valid for ninety days from the closing date of the RFQ.

Implicitly, this meant that the rates of all respondents could, legitimately, change after 90 days.

Documents 6105-6107

### Commentary

It is submitted it was not imperative that the Report make specific noted of the 'guaranty' period as it would be unreasonable for anyone to assume that quoted rates would be available for the full three year term of the agreement. Further, the primary purposes of the report were to assess the costs of leasing versus the costs of debenture financing and to identify a leasing vendor of record from the six respondents.

- (e) described all aspects of the leasing transaction, including refreshing or changing hardware, returning hardware, and other options during the term or at the end of the lease;

Mr. Power suggests this was the responsibility of Finance as the matters listed are of a financial nature. Mr. Power also notes Finance was an 'equal partner' in the leasing transaction.

Lines 2-10, Page 225; Power Examination, March 27, 2003

- (f) stated that MFP would be treated by the City of Toronto as "vendor of record" or an exclusive vendor of record.

Mr. Power was told by Ms. Viinamae that from her perspective the City wanted to appoint a vendor of record for leasing.

Line 25, Page 118-Line 9, Page 119; Power Examination, March 27, 2003

Mr. Power understood the Mr. Andrew envisioned a situation in which the City would lease all of its IT assets through one company for a three year period.

Lines 6-24, Page 196; Power Examination, March 27, 2003

Mr. Power did not make the decision about whether there should be a vendor of record or not. He was not in a position to make such a decision.

Lines 12-19, Page 123; Power Examination, March 27, 2003

Mr. Power acknowledges that the intention there be only one leasing vendor of record is not disclosed in the Report to the Policy and Finance Committee.

Line 25, Page 196-Line 5, Page 197; Power Examination, March 27, 2003

#### Commentary

It was open to Mr. Andrew and Ms. Viinamae to address this deficiency in the Report, having been provided with numerous drafts of the Report.

18. Directed or agreed to a change in the term of the lease term, from 36 months to 60 months, without considering whether such a change contravened the authority granted by counsel.

Mr. Power's understand of the resolution proposed by Mr. Jakobek, adding the 'flexibility' clause to the Report to the Policy and Finance Committee, was that it permitted some assets to be put on lease for more than three years. The assets that could be put on lease for more than three years were those with a life expectancy of more than three years, such as high end servers.

Line 17, Page 238-Line 18, Page 247; Power Examination, March 24, 2003

Mr. Power learned from Ms. Viinamae that Finance had made the decision to move from 36 month to 60 month lease terms. Mr. Power was not party to the conversations and was not asked to comment or deliberate on the change.

Line 1, Page 32-Line 12, Page 33; Power Examination, March 26, 2003

Ms. Viinamae was the person who asked Mr. Power to obtain lease rates for sixty (60) months.

Line 25, Page 247-Line 4, Page 248; Power Examination, March 27, 2003

When Mr. Power was asked by Ms. Viinamae to obtain sixty (60) month lease rates, he thought she was looking to put equipment on lease that could legitimately be put on lease for that long.

Lines 8-14, Page 250; Power Examination, March 27, 2003

Mr. Power was not provided with a copy of the analysis prepared by MFP and delivered to Finance, comparing thirty-six (36) month terms to sixty (60) month terms.

Line 3, Page 253-Line 16, Page 254; Power Examination, March 27, 2003

The first Mr. Power learned that equipment had been put on lease for sixty (60) months was when he received an email from Ms. Viinamae on October 1, 1999, that is after the Certificate of Acceptance had been approved.

Line 5, Page 260-Line 6, Page 261; Power Examination, March 27, 2003

Document 14232

In Mr. Power's view the contract should have been re-tendered due to the change in the term of leases. Mr. Power informally expressed his concerns in this regard to others at the City, but the rebuttal was always that the flexibility clause authorized the change. Mr. Power did not express his views formally as he did not sense that his views were being sought on this issue. Discussions at the City at this time, regarding the change, revolved around finance.

Lines 11-18-Line 13, Page 39; Power Examination, March 25, 2003

19. Failed to consider, or failed to direct, supervise or advise staff to consider, the financial impact or require financial analysis in respect of changes to the lease between the City of Toronto and MFP, and particularly:

- (a) the financial impact for the City of Toronto of the change of the lease term from 36 months to 60 months;

See comments above in reference to Mr. Power's lack of involvement in decision to change lease term from 36 to 60 months and his views that the change warranted a re-tendering of the contract.

Mr. Power was not asked by Finance for his input on the effect of changing to sixty months or the effect on maintenance or on return policy or on any other item.

Line 17, Page 33-Line 5, Page 34; Power Examination, March 26, 2003

By the time Mr. Power was asked, on October 6, 1999, to obtain leasing rates for a 60 month term, Ms. Viinamae had already announced, on October 1, 1999, the decision to move to 60 month lease terms.

Line 8, Page 35-Line 10, Page 36; Power Examination, March 26, 2003

Document 36609

At the time Mr. Power was asked to obtain the 60 month lease rates from MFP, he did not know whether Finance knew lease rate factors by way of other means.

Lines , Page 36; Power Examination, March 26, 2003

- (b) the financial impact of the re-write of the leases between the City of Toronto and MFP in July 2000.

Mr. Power is not familiar with what the lease re-writes involved.

Line 18, Page 40-Line 2, Page 41; Power Examination, March 25, 2003

Mr. Power was not consulted about the lease re-writes.

Lines 11-16, Page 43; Power Examination, March 25, 2003

Mr. Power did not have discussions with Ms. Viinamae, Mr. Andrew or anyone else about the wisdom or re-writing the leases.

Lines 11-14, Page 44; Power Examination, March 25, 2003

In July of 2000, Mr. Power was working on a number of RFP's, completing work on the year 2000 project and working on a number of contracts with Oracle. He cannot recall what he was doing all summer but there were a number of other major contracts underway.

Line 17, Page 43-Line 2, Page 44; Power Examination, March 25, 2003

It was the evidence of Mr. Colley that Ms. Liczyk was responsible for the lease re-writes. He was so informed by Ms. Bulko.

Lines 11-23; Page 135; Colley Examination, September 2, 2003

20. Directed or failed to observe the fact that the term of the leases between MFP and the City of Toronto exceeded 36 months, contrary to Council authority and the RFQ, and did not require that a fresh Request for Quotation be issued.

As noted above, Mr. Power was of the view that the change in lease terms warranted a re-tendering of contract but that his views on the matter were not solicited.

21. Failed to consider whether the hardware and software would be obsolete or ill suited for the use of staff or whether the warranty would be affected as a result

of the change of the lease term from 36 months to 60 months and of the re-write of the leases between the City of Toronto and MFP in July 2000.

Mr. Power had numerous conversations with Ms. Viinamae in which he expressed his view that the useful life of desktops was three years and not five years and that he recommended a three year term of desktops.

Lines 10-17, Page 33; Power Examination, March 25, 2003

Mr. Power did not reiterate his previously expressed views the desktops not be put on a five year lease after the decision to do so had been made.

Line 18, Page 33-Line 2, Page 34; Power Examination, March 25, 2003

As regards non-desktop hardware, Mr. Power was of the view that some equipment had a life span longer than 3 years. At the time, Mr. Power was asked by Viinamae to obtain 5 year lease rates, he thought this was in reference to equipment with a life span longer than 3 years. In reference to that equipment, a five year lease would not be longer than the life span of the equipment.

Line 14, Page 249-Line 18, Page 250; Power Examination, March 27, 2003

Mr. Power was not consulted about the economic impact of going to 5 year leases and was not involved in the analysis of these effects being conducted by the City and MFP.

Lines 3-21, Page 253; Power Examination, March 27, 2003

Also, see above regarding Mr. Power's lack of knowledge of the lease re-writes and his lack of involvement in the same as he had been assigned to other work.

22. Failed to ensure that the sale of hardware to MFP and the subsequent leaseback was administered in an organized and effective manner, and



specifically that the equipment that was to be sold to MFP was properly inventoried and organized and that staff had sufficient training and experience to administer the sale and leaseback within 90 days of the closing of the RFQ.

Mr. Power's position and the limitations on his authority have already been noted. By late September 1999, Mr. Power had already returned to performing his responsibilities relative to the remediation of City contracts to address Y2K issues.

Line 18, Page 28-Line 7, Page 29; Power Examination, March 25, 2003

The CMO and, in particular, Ms. Bulko and two other individuals working with her were responsible for organizing and administering the equipment lease schedules and putting the equipment on lease.

Line 19, Page 163-Line 9, Page 164; Power Examination, March 25, 2003

Mr. Power was asked to establish a process to assist in getting the equipment in, facilitate payment for the equipment and subsequently pay MFP.

Line 11, Page 8-Line 11, Page 10; Power Examination, March 25, 2003

In 1999, Line Marks held the position of Year 2000 Project Coordinator, reporting to Ms. Viinamae.

Paragraph 4, Marks Affidavit; Page 213, Marks Examination, August 13, 2003

### Commentary

Mr. Power was a consultant and did not have line authority in either IT or the Year 2000 project office, such that he was responsible for the CMO or its personnel, including their training.

23. In or around July 2000, directed or agreed that the leases between MFP and the City of Toronto be re-written for a term that exceeded 36 months, contrary

to Council authority and contrary to the RFQ, and did not require that a fresh Request for Quotation be issued.

See above regarding Mr. Power's lack of involvement in and knowledge of this issue.

24. Failed to ensure that the sale of hardware to MFP and the subsequent leaseback did not negatively impact on the City's tax position, and specifically address concerns to ensure that the City could successfully claim a return of Goods and Services Tax and the Provincial Sales Tax it had paid in respect of the equipment it had purchased.

The difficulties the City experienced in seeking a refund of PST was the requirement the City show it intended to lease the equipment at the time it originally acquired the equipment. Much, if not all, the equipment at issue was the equipment acquired prior to the leasing arrangement with MFP. The Provincial tax authorities determined that the City did not have such an intention and rejected the City's application for a refund.

Paragraphs 43-35, Colley Affidavit, Pages 248-249; Colley Examination, September 2, 2003

Mr. Power was not aware there was a provincial sales tax issue as of August 1999.

Line 25, Page 11-Line, Page 12; Power Examination, March 25, 2003

In late August 1999, Ms. Marks sent a request to suppliers that they issue a credit note to the City for acquisitions made that year. She did so because she had come to understand that MFP was sales tax exempt and would not be providing a reimbursement to the City for PST already paid.

Line 2, Page 163-Line 10, Page 164; Marks Examination, August 14, 2003

Ms. Currie cannot recall any discussions with Mr. Power about the sales tax issue. She recalls that she checked with Ms. Bulko and Mr. Power regarding certain aspects of the issue.

Line 23, Page 126-Line 17, Page 127; Currie Examination, September 2, 2003

When asked whether there were any discussions at the City when it was learned that suppliers would not be issuing credit notes to the City, Ms. Marks indicated there were but did not mention Mr. Power as being a party to those discussions.

Lines 1-14, Page 166; Marks Examination, August 14, 2003

Ms. Marks recalls a meeting involving City officials on September 22, 1999 at which the sales tax refund was discussed. Ms. Marks cannot recall whether Mr. Power attended that meeting.

Line 16, Page 166-Line 19, Page 168, Marks Examination, August 14, 2003

Line 24, Page 128-Line 2, Page 130; Marks Examination, August 14, 2003

### Commentary

It should be evident from the foregoing that Mr. Power had no direct involvement and little or no direct involvement in the City's efforts to obtain a PST refund. Further, it is apparent that the City was not entitled to the refund as it did not have the requisite intention to lease the equipment at the time of acquisition.

25. Failed to ensure that the City of Toronto's submissions with respect to its claim for a refund of Provincial Sales Tax were complete and accurate.

See submissions above relative to the PST rebate issue. At best, Mr. Power had nominal involvement in this matter. The rebate issue was pursued by Finance and by personnel in the CMO.

26. Failed to ensure that there was financial monitoring and tracking in place in respect of:

- (a) the value of the equipment that was leased from MFP, to ensure that it did not exceed the amount that was authorized by Council, and failed to alert Council or anyone when the amount of equipment leased exceeded the amount approved by Council;

Mr. Power was not very involved in doing inventories and related matters.

Lines 8-13, Page 140; Power Examination, March 24, 2003

- (b) the lease rate factors provided quarterly by MFP to the City of Toronto, to ensure the rates were competitive;

Mr. Power was not involved with the lease rate factors supplied after the initial (October 1999) lease rate factors. Mr. Power was not asked to conduct an analysis of those subsequent lease rate factors. He had moved on to doing other things for the City.

Lines 2-20, Page 57; Power Examination, March 24, 2003

In October 1999, Mr. Power was asked by Ms. Viinamae to obtain lease rate factors from MFP.

Line 20, Page 34-Line 3, Page 35; Power Examination, March 25, 2003

As regards the lease rate factors provided by MFP in October 1999, it is Ms. Viinamae's evidence she did not ask Mr. Power whether they were reasonable.

Line 24, Page 16-Line 9, Page 17; Viinamae Examination, October 17, 2003

Other than the initial lease rate factors supplied on October 6, 1999, lease rate factors were forwarded to the CMO and not Mr. Power.

Paragraph 87, Wilkinson Affidavit; Page 76, Wilkinson Affidavit, September 16, 2003

It was Ms. Viinamae's evidence she did not expect Mr. Power to analyze lease rate factors.

Line 17, Page 4-Line 1, Page 6; Viinamae Examination, October 17, 2003

It was Mr. Power's understanding, based on advice from Ms. Viinamae, that someone from Finance, Mr. Colley, was to be responsible for reviewing the quarterly lease rates provided by MFP. Finance was to be responsible for the financial aspect of the arrangement.

Line 8, Page 218-Line 17, Page 229 ; Power Examination, March 27, 2003

### Commentary

The sum of Ms. Viinamae's evidence would appear to be that she asked Mr. Power to obtain lease rate factors in October. To the extent Ms. Viinamae thought an analysis of MFP lease rate factors provided in October 1999 and beyond was to be conducted, the analysis was to be performed by Finance, and not Mr. Power.

27. Advised Lana Viinamae that the lease rate factors received from MFP were reasonable and competitive without appropriate financial analysis or any other grounds to do so.

See reference above to Ms. Viinamae's evidence she did not ask Mr. Power whether the lease rate factors provided by MFP in October were reasonable.

28. In August 1999, negotiated a lease with MFP on behalf of the City of Toronto without having sufficient experience or training to protect the best interests of the City and, in any event, negotiated a lease with MFP on behalf of the City of Toronto that did not protect the interests of the City.

Mr. Power was experienced in negotiating leases and, specifically, negotiating a lease with Mr. Wolfrain of MFP.

Lines 13-17, Page 140; Power Examination, March 25, 2003

Mr. Power considered himself to have strong negotiating skills.

Lines 7-13, Page 187; Power Examination, March 5, 2003

Mr. Wilkinson of MFP did not know Mr. Power's background very well but says Mr. Power appeared to have leasing experience and expertise and experience negotiating computer leasing contracts.

Paragraph 56, Wilkinson Affidavit; Page 61, Wilkinson Examination, September 16, 2003

Line 24, Page 214-Line 5, Page 215; Wilkinson Examination, September 16, 2003

It was Mr. Wolfram's evidence it is MFP's usual practice to resist treating the RFQ or the response thereto as forming the basis or comprising a contractual document as often times many sections of an RFQ and the responses thereto are written in narrative non-legal language, as was the case in the 1999 RFQ.

Paragraph 58, Wilkinson Affidavit, Page 62, Wilkinson Examination, September 16, 2003

It was also Wilkinson's evidence that MFP was willing to refer to the RFQ in the contractual documents, but not to have it be the primary basis for determining the legal rights and obligations of the parties.

Paragraph 58, Wilkinson Affidavit, Page 62, Wilkinson Examination, September 16, 2003

29. In August 1999, sought legal advice from Mark Fecenko, a lawyer with the firm of Fasken Campbell Godfrey, to negotiate a lease with MFP and did not advise Mr. Fecenko that the scope of legal advice and services involved a transactional matter that had a bearing on the City's corporate priorities and policies which required him to discuss the matter with the City Solicitor or his

designate, contrary to the terms of the retainer agreement between Fasken Campbell Godfrey and the City.

The transactional matter having a bearing of the City's corporate priorities and policies has not been identified. At paragraph 18 of his affidavit, Mr. Fecenko states his belief that no such transactional matter arose.

Page 17; Fecenko Examination, April 3, 2003

The examination of Mr. Fecenko by Commission Counsel suggests that exception is being taken with Mr. Power providing Mr. Fecenko with legal instructions about Y2K matters. It is Mr. Fecenko's evidence that he had discussions with Ms. Viinamae and Mr. Loreto about taking instructions from Mr. Power on Y2K issues and both indicated this was acceptable as Mr. Power was acting as Ms. Viinamae's designate.

Pages 65-70; Fecenko Examination, April 3, 2003

Pages 70-77; Fecenko Examination, April 3, 2003

On Mr. Power's examination, he was asked by Commission Counsel whether it was acceptable for him to be making use of Mr. Fecenko's legal services relative to the Master Agreement, particularly given that the agreement related to more than just Y2K issues. Mr. Power's response was that he considered the agreement a Y2K issue as the transaction was being managed by the Y2K office at this stage, before being transferred to the IT Contract Management Office.

Pages 164-166; Power Examination, March 24, 2003

To the extent that it might be argued that the Master Agreement involved a transactional matter requiring Council approval, the fact is that Council had already approved the transaction on July 27, 1999 and no further Council approval was anticipated in August, when Mr. Fecenko was providing legal advice on Mr. Power's instructions. Accordingly, it is submitted that the limits on Fasken's retainer were not triggered such that legal advice should have been obtained from the City's Legal Department instead of Fasken.

30. In August 1999, sought legal advice from Mr. Fecenko to negotiate a lease with MFP without providing Mr. Fecenko with any documentation supporting the lease, including: the RFQ, the response to the RFQ by MFP, the report to the Policy and Finance Committee supporting the selection of MFP, and the report authorizing the lease.

Mr. Power would have provided Mr. Fecenko with any additional documents Mr. Fecenko asked for. As there is no indication of Mr. Fecenko receiving additional documents, Mr. Power concludes that Mr. Fecenko did not ask for any.

Line 23, Page 160-Line 16, Page 161; Power Examination, March 24, 2003

31. In August 1999, sought legal advice from Mr. Fecenko to negotiate a lease with MFP without providing Mr. Fecenko with sufficient time to provide accurate and meaningful legal advice.

Mr. Fecenko did not say he was not given enough time to conduct the review sought by Mr. Power. The City had previously requested legal work on tight time lines.

Line 20, Page 162-Line 2, Page 163; Power Examination, March 24, 2003

Council granted approval to the MFP transaction on July 27, 1999. Mr. Power and others from the City started dealing with officials within a week or so. By August 10, a draft agreement with MFP had been prepared. As of August 10, there remained some business issues to be negotiated with MFP. In an email of that date from Mr. Power to Ms. Viinamae he advised that these business issues need to be negotiated before the 'legal scrubbing'. The draft agreement for legal review was received late in the day on August 17.

Line 14, Page 138-Line 21, Page 139; Power Examination, March 24, 2003

Document 15674

### Commentary

As noted above, Mr. Power received revised draft agreements late on August 17 and forwarded them to Mr. Fecenko early on August 18. Certain City



executives were leaving on vacation on August 20, as appears from Mr. Power's email of August 19 to Mr. Fecenko. The short time limit for Mr. Fecenko's legal review was not a consequence of Mr. Power's conduct but, rather, external circumstances. It is submitted that if Mr. Fecenko felt he could not competently provide the legal services requested by Mr. Power within the limited time frame available, that Mr. Fecenko should have declined the retainer or sought to find a way to contact City executives on their vacation or ascertained whether the legal work could have been done after those executives returned from vacation.

32. In August 1999, directed Mr. Fecenko to provide the City of Toronto with a letter stating that the terms and conditions of the Master Lease Agreement with MFP and the Equipment Schedule and Program Agreement No. PA-1 fell within the realm of "commercial reasonableness", but did not ask him to explain or define the meaning of "commercial reasonableness." The letter was relied upon by the City Solicitor to approve the lease with MFP as to form and content.

Mr. Power did not know what "commercially reasonable" meant except that he understood letters stating that an agreement was commercially reasonable had previously been provided where an agreement had not been reviewed by the City's Legal Department but, rather, by outside counsel. In his evidence, Mr. Power notes that Mr. Fecenko was sufficiently satisfied to provide such a letter and that the letter was accepted by the City Solicitor's office and the City Clerk's office.

Line 16, Page 170-Line 3, Page 177; Power Examination, March 24, 2003

Documents 11120 and 15641

### Commentary

It is submitted that if the City Solicitor's office had any questions about the meaning of the words "commercially reasonable", it was incumbent on that office to raise that issue with either Mr. Fecenko directly or through Mr. Power. It is doubtful the City Solicitor's office had any questions or doubts about the meaning of those words given that they had previously been used in similar letters in similar matters.

33. In August 1999, mislead Mr. Fecenko when you advised him that MFP had agreed to all but one of the proposals put forward by Mr. Fecenko when, in fact, this was untrue.

Mr. Power reviewed the final draft of the agreement with MFP but the fact that not all the amendments he had sought, based on Mr. Fecenko's advice, had not been adopted was an oversight on his part.

Line 7, Page 290-Line 16, Page 292; Power Examination, March 27, 2003

Mr. Loreto expected that Mr. Fecenko would have reviewed the entirety of the final draft of the agreement that was to be signed by the City. Mr. Loreto believed that the advice the City received was based on Mr. Fecenko having done so. Mr. Loreto did not discover this was not the case until after the fact.

Line 14, Page 135-Line 11, Page 137; Loreto Examination, April 2, 2003

#### Commentary

It was open to Mr. Fecenko to have requested a copy of the final draft of the agreement and to have established that all the proposals advanced by him had not been incorporated into the agreement.

34. Failed to ensure that the lease between the City of Toronto and MFP protected the best interests of the City of Toronto, including:
- (a) that it contained all the terms and conditions with which MFP had agreed to in the RFQ;

Mr. Power acknowledges that to the extent there were provisions contained in the RFQ or MFP's response that were not included or clearly stated in the MFP contract, this was a consequence of oversight.

Lines 13-19, Page 280; Power Examination, March 27, 2003

Mr. Fecenko acknowledges he did not have copies of the RFQ and MFP's response to the RFQ in providing legal advice to Mr. Power relative to the draft Master Lease Agreement.

Lines 24, Page 89-Line 2, Page 90; Fecenko Examination, April 3, 2003

Mr. Fecenko acknowledges he had asked for copies of those documents.

Lines 3-13, Page 90; Fecenko Examination, April 3, 2003

Mr. Fecenko acknowledges asking whether the RFQ and MFP's response contained legal terms or inconsistent terms.

Lines 3-13, Page 90; Fecenko Examination, April 3, 2003

Mr. Power told Mr. Fecenko there were no legal terms in those documents.

Lines 3-13, Page 90; Fecenko Examination, April 3, 2003

Mr. Fecenko says he did not insist on reviewing those documents because his sense was that the City was happy with the business deal and that Mr. Power was coming to him to look at the legal terms and conditions.

Lines 5-24, Page 92; Fecenko Examination; April 3, 2003

Mr. Fecenko's advice to Mr. Power is contained in a memorandum, dated August, 19, 1999.

Line 21, Page 93-Line 15, Page 94; Fecenko Examination, April 3, 2003

Mr. Fecenko acknowledges he did not accept Mr. Power's opinion that there were no inconsistent terms between the RFQ, MFP's response to the RFQ and the other three contract documents as a legal opinion.

Line 23, Page 158-Line 13, Page 159; Fecenko Examination, April 3, 2003

Mr. Fecenko was aware that Mr. Power was not a lawyer.

Lines 18-20; Page 169; Fecenko Examination, April 3, 2003

Mr. Fecenko acknowledges he knew there were things in the RFQ and the response that Mr. Power wanted.

Line 16, Page 176-Line 8, Page 177

It is Mr. Fecenko's evidence that he did not ask Mr. Power what it was Mr. Power wanted to achieve by ranking MFP's response higher than the RFQ. His evidence is that they did not get into specifics.

Line 24, Page 180-Line 2, Page 181; Fecenko Examination, April 2, 2003

Referring to the book he has written regarding leasing, Mr. Fecenko states at paragraph 10 of his affidavit: ... "it is often best to involve legal counsel early into the procurement process to fully involve legal counsel so that he or she fully understands the business deal and ensures the business deal is reflected in the final legal document." In that paragraph of his affidavit, Mr. Fecenko proceeds to quote a passage from his book, the essence of which is to profile the tendency of clients not to involve legal counsel early enough in the process or to downplay the significance of legal documentation, even the primary contractual document.

Paragraph 10, Fecenko Affidavit; Pages 10-11, Fecenko Examination, April 3, 2003

Mr. Fecenko acknowledges that had he reviewed the RFQ and MFP's response to the RFQ he may have averted to any discrepancies between MFP's response to the RFQ and the contract documents.

Lines 7-14, Page 32; Fecenko Examination, April 7, 2003

Commentary

Mr. Power is not a lawyer. It was clear to Mr. Fecenko that Mr. Power was seeking his legal advice relative to the Master Agreement with MFP. Mr. Fecenko notes a distinction between providing legal advice and providing legal advice and further notes he was not retained to provide business advice. Be that as it may, Mr. Fecenko acknowledges in his affidavit the importance of legal counsel understanding the business terms of the transaction. As Mr. Fecenko did not obtain and review the RFQ and MFP's response, which together contained the business terms, it is submitted Mr. Fecenko failed to abide by his own advice as contained in his text.

The "paramountcy" clause in the draft Master Agreement referred to the RFQ and MFP's response. Mr. Fecenko accepted Mr. Power's word that those documents only contained business terms and not legal terms. Mr Fecenko did so without obtaining copies of those documents.

It was Mr. Fecenko's evidence he frequently provided advice relative to drafting RFQ's and RFP's and it is his view that legal counsel should be involved in the ??? process at that point because the RFQ/RFP may and should contain legal terms.

Without reviewing a copy of the RFQ or MFP's response, Mr. Fecenko recommended that the order of precedence between the relevant documents be such that the RFQ and MFP's response rank below equipment schedules, the Program Agreement and, most notably, the Master Lease Agreement.

While Mr. Fecenko may have intended a different result, the fact is that even if Mr. Power had strictly followed Mr. Fecenko's advice relative to the drafting of the paramountcy clause, there would be little or no difference between Mr. Fecenko's advice and the wording of the Master Lease Agreement.

(b) providing for "flexibility", including return of equipment and replacement (refreshing) of equipment on lease;

Mr. Power's understanding of the agreement was that it did provide for "flexibility". In this regard he understood the City could return to MFP some but not all the equipment on a particular lease schedule.

Line 17, Page 145-Line 8, Page 147; Power Examination, March 24, 2003

The RFP noted that respondents were to identify buy-out options on each piece of equipment. Further, Mr. Power anticipated that at the end of the three year term of the agreement the City would make it a requirement of any successful bidder on the then new arrangement would or could be required to buy-out the existing MFP leases.

Line 11, Page 243-Line 25, Page 258; Power Examination, March 26, 2003

(c) providing for end of lease options for software and adequately addressing software ownership;

While Mr. Power was aware that software could be put on lease, he was not aware that any particular software, such as the Oracle licences, were going to necessarily be leased. Mr. Power was not involved in the discussions to move the Oracle acquisition onto lease but, rather, was simply told that the Oracle licences were going to put on lease.

Line 18, Page 90-Line 18, Page 91; Power Examination, March 25, 2003

Line 11, Page 283-Line 7, Page 284; Power Examination, March 27, 2003

### Commentary

The agreement with MFP clearly states that the City would not have any form of an ownership interest in leased products. Those who made the decision to put software on lease, therefore, knew or ought to have known that ownership of any software put on lease would not be owned by the City. To the extent this was not a desirable result, alternative arrangements should have been negotiated with MFP by the decision makers.

(d) providing for termination of the leases after three years, including a buy-out of the leases if desired;

It is Mr. Fecenko's recollection he spoke to Mr. Power regarding termination of the Master Lease Agreement. The notes he made on a draft agreement do not contain any details regarding any conversations he had with Mr. Power on this issue and Mr. Fecenko does not recall any particulars of such discussions. Mr. Fecenko's memorandum to Mr. Power does not contain any comments regarding termination of the agreement.

To the extent that the Master Lease Agreement could or should have contained terms providing for termination of the leases after three years, including a buy-out of the leases if desired, it appears Mr. Fecenko did not raise this issue with Mr. Power or certainly did not recommend that the draft agreement be amended to include such provisions.

35. Failed to ensure there were adequate processes in place for administering the leasing, including ordering of equipment, tracking equipment, and asset management.

The time frame to which this suggestion applies has not been made clear, that is, whether it relates to the time before MFP was awarded the leasing contract or after. As regards the time before the award, in late July 1999, Mr. Power was not involved in the ordering of equipment, tracking equipment and asset management.

When Mr. Power was preparing the draft report relative to the 1999 RFQ (in May, June and July, 1999) there was no contract management office in the Information and Technology Division. At that time there was an intention to establish an office to perform the functions of managing contract administration and leasing in general but a business plan for the office had not yet been developed.

Line 12, Page 112-Line 9, Page 114; Power Examination, March 24, 2003

As of November 1999, the Contract Management Office (“CMO”) had a staff of only three.

Lines 18-25, Page 49; Power Examination, March 25, 2003

As regards Mr. Power’s roles and responsibilities relative to the CMO, he acted as a resource person to whom it could refer to draft documents or review documents. Mr. Power was not charged with responsibility for establishing the CMO.

Line 21, Page 54-Line 9, Page 55; Power Examination, March 25, 2003

Also, see comments above relative to the CMO and Ms. Bulko's responsibility in these areas. Mr. Power's limited authority as a consultant have already been noted.

36. Failed to ensure that there was a business case for the acquisition by the City of Toronto of 10,000 Oracle Enterprise licences and approval by City Council, and the subsequent lease of the licences from MFP.

There may not, logically, be a business case for leasing, software or otherwise, as leasing represents a form of financing and not an acquisition.

Lines 8-19, Page 17; Power Examination, March 26, 2003

Based on his involvement in the drafting of the two reports leading to Council's approval, in November 1998, of the Y2K budget, Mr. Power was aware of a business case supporting the suggestion that several tens of millions of dollars of hardware and software would need to be acquired.

Lines 3-13, Page 43; Power Examination, March 6, 2003

Mr. Wong acknowledged there is no by-law requiring preparation of a business case supporting City purchases.

Lines 4-13, Page 99; Wong Examination, August 5, 2003

In her evidence, Ms. Viinamae acknowledged there was not a written business case for the acquisition of the Oracle Enterprise licences.

Line 23, Page 30-Line 3, Page 31; Viinamae Examination, October 20, 2003

At paragraph 90 of her affidavit, Ms. Viinamae states that the business case for the licences was derived from dealings between the City and Oracle over several years.

Paragraph 90, Viinamae Affidavit; Page 44 , Viinamae Examination, October 15, 2003



It is Ms. Viinamae's evidence that the issue of Oracle licences and leasing of the software was discussed at Y2K Steering Committee meetings in the fall and early winter of 1999 and that all members were aware of the costs and IT considerations for the City at that point.

Paragraph 100, Viinamae Affidavit; Page 47; Viinamae Examination, October 15, 2003

At the meeting of the Y2K Steering Committee on December 9, 1999, Ms. Viinamae presented a proposal from Oracle for the acquisition of the 10,000 Enterprise licences compared the costs of the same to another approach.

Paragraph 104-105; Viinamae Affidavit; Pages 48-49, Viinamae Examination, October 15, 2003

Ms. Viinamae states that at the December 30, 1999 meeting of the Y2K Steering Committee she obtained approval for the acquisition of the licences.

Paragraph 111, Viinamae Affidavit; Page 51, Viinamae Examination, October 15, 2003

The acquisition of the Oracle Enterprise licences was approved by the Y2K Steering Committee and a year 2000 Delegated Approval Form executed by all the required signatories.

Paragraph 112, Viinamae Affidavit; Page 51, Viinamae Examination, October 15, 2003

### Commentary

It is submitted that as there was not an applicable by-law requiring written business case, there was no obligation on Mr. Power or, for that matter, anyone to ensure there was such. Further, it is submitted there was an unwritten, though meritorious, business plan regarding the acquisition of the Oracle Enterprise Licences. Finally, it is submitted there was no obligation on Mr. Power, in any event, to ensure there was a business plan, written or otherwise. The expenditure on the licences was approved by Mr. Power's

immediate superior and others in more senior positions at the City and it was not Mr. Power's place or responsibility to second guess their judgment on this issue.

As regards leasing the said licences, it is Mr. Power's position that financing the acquisition of the licences was clearly anticipated by the RFQ and, if deemed appropriate by those with responsibility, a legitimate means to finance the acquisition.

37. Failed to ensure that proper Council approval was sought for the acquisition by the City of Toronto of 10,000 Oracle Enterprise licences, and the subsequent lease of licences from MFP.

By way of email dated December 23, 1999, Mr. Loreto of the City Solicitor's office specifically raised with Mr. Power and Mr. Fecenko the issue of whether the acquisition of the Oracle licences was part of the Council-approved Y2K budget or required separate Council approval.

Paragraph 18, Loreto Affidavit, Page 214, Loreto Examination, April 1, 2003

Document 5412

In Mr. Power's view the acquisition was an item covered by the Y2K authority granted in November 1998 and he communicated this to Mr. Loreto, though he does not recall whether this was done verbally or otherwise.

Lines 10-24, Page 85; Power Examination, March 25, 2003

On his examination, Mr. Loreto's evidence was he could not 'recall' receiving a response to his query about Council authority.

Line 18, Page 254-Line 24, Page 255; Loreto Examination, April 1, 2003

Mr. Loreto acknowledges he did not follow up on his query.

Line 24, Page 257-Line 18, Page 258; Loreto Examination, April 1, 2003

Mr. Loreto can recall making of Mr. Power and Mr. Fecenko only one inquiry relative to Council approval for the Oracle transaction and that was his aforementioned email of December 23, 1999. In that correspondence, Mr. Loreto does not ask whether there is a business case for the transaction.

Document 5412

Line 18, Page 254-Line 24, Page 255; Loreto Examination, April 1, 2003

Mr. Power was involved in the process leading to Council's approval, in 1998, of the Y2K budget, having worked with Ms. Viinamae in the development of the two reports upon which that approval was based. Mr. Power was aware the intention of IT included, in addition to the acquisition of hardware and software for the purpose of Y2K, acquisitions of the same for meeting general needs of the Corporation following amalgamation,

Line 12, Page 40-Line 8, Page 44; Power Examination, March 6, 2003

There is documentary evidence to suggest that the acquisition of the Oracle licences formed part of the Y2K budget, namely a requisition executed by the Chief Administrative Officer approving the transaction.

Line 9, Page 147-Line 9, Page 149; Loreto Examination, April 2, 2003

Document 30456

Ms. Viinamae states that at the December 30, 1999 meeting of the Y2K Steering Committee the acquisition of the licences was approved. As a consequence of that approval a Delegated Approval Form was executed by all the necessary signatories.

Paragraph 111, Viinamae Affidavit; Page 51, Viinamae Examination, October 15, 2003

Commentary

The fact of the matter is that further Council approval was not required for the acquisition of the Oracle Enterprise Licences, unless it can be said that the acquisition did not properly form part of the Y2K budget. In that case, the issue is what, if anything, should Mr. Power have done, particularly in the face of instructions from the person to whom he directly reported and the ostensible approval of the expenditure by a legitimate body, the Y2K Steering Committee.

The fact that Mr. Loreto specifically asked, of his own initiative, whether acquisition of the Oracle licences formed part of the Y2K budget suggests this was not an unreasonable for Mr. Power to hold the view that it did form part of the Council approved Y2K budget. This was Mr. Power's view of the matter. Given Mr. Power's familiarity with the authority granted by Council in 1998, it is submitted this was not an unreasonable determination. In any event, the above noted requisition indicates the acquisition was, in fact, included in the Y2K budget.

Given his intimate involvement with Council's approval of the Y2K budget, Mr. Power was in a position to know the purpose and intent of the approval. It is submitted that Mr. Power's conclusion that acquisition of the Oracle licences did not require separate Council approval was reasonable.

38. In December 1999 sought legal advice from Mr. Fecenko to negotiate an agreement with Oracle Corporation and did not advise Mr. Fecenko that the scope of the legal advice and services involved a transactional matter that had a bearing on the City's corporate priorities and policies and required him to discuss the matter with the City Solicitor or his designate, contrary to the terms of the retainer agreement between Fasken Campbell Godfrey and the City.

Ms. Viinamae authorized Mr. Power to instruct Mr. Fecenko and other solicitors at Fasken's. Mr. Loreto was aware this was the case.

Line 21, Page 8-Line 18, Page 9; Power Examination, March 27, 2003

It is Mr. Fecenko's evidence is he understood from Ms. Viinamae that he would receive his instructions regarding the agreement from Mr. Power directly. Mr. Fecenko further states he raised the issue of Mr. Power providing instructions directly and that Mr. Loreto indicated this was acceptable.

Paragraph 16, Fecenko Affidavit, Pages 15-16; Fecenko Examination, April 3, 2003

Mr. Loreto does not dispute Mr. Fecenko's evidence on this point. Mr. Loreto says he was aware Mr. Power was providing Mr. Fecenko with instructions relative to the agreement with Oracle Corporation and he did not have any problem with that.

Line 18, Page 185-Line 1, Page 186; Loreto Examination, April 2, 2003

The retainer agreement between the City and Fasken Campbell Godfrey (Fasken's) makes a distinction between transactional matters and matters of City corporate governance, priority and policies. As regards the former, Fasken's was to take instructions from Ms. Viinamae or her designate. As regards the latter, Fasken's was to take instructions from the City Solicitor or his designate, Mr. Loreto. It is not a term of the retainer agreement that instructions regarding transactional matters having a bearing on the City's corporate priorities and policies are to be received from the City Solicitor.

Document 6447

#### Commentary

It is submitted that the Oracle agreement was a transactional matter and, accordingly, instructions to Fasken's were to be provided by Ms. Viinamae or her designate. It is further submitted the evidence clearly shows that Mr. Power was Ms. Viinamae's designate and was, therefore, legitimately able to give instructions on this matter.

To the extent it could be said the Oracle agreement raised matters of corporate governance, priorities and policies, which is an interpretation not accepted by Mr. Power, it is submitted that Mr. Power acted as designate of the City Solicitor.

39. In the period from January to March 2000, Mr. Power misled Brian Loreto, legal counsel for the City of Toronto, with respect to the amount of equipment that had been leased by the City of Toronto from MFP and the authority to enter into equipment schedules that exceeded three years.

Mr. Power believes he and Mr. Loreto discussed the amount of equipment on lease as of January 2000. In a memorandum to file, dated February 15, 2000, which memorandum Mr. Loreto sent to himself, he records having been told by Mr. Power that \$33 million in equipment was on lease. There is no evidence that an amount other than \$33 million in assets had been put on lease as of early 2000.

Document 11041

Lines 9-18, Page 183; Power Examination, March 24, 2003

To the extent it is suggested that Mr. Power misled Mr. Loreto in not disclosing that more than \$43 million in assets would be leased, it is Mr. Power's evidence is he does not recall this issue arising in discussions with Mr. Loreto. Mr. Power specifically says he did not deliberately mislead Mr. Loreto on this issue.

Line 5, Page 187-Line 10, Page 188; Power Examination, March 24, 2003

Mr. Power says he probably told Mr. Loreto about the change in the lease term to sixty (60) months and his involvement in that process. Mr. Power further observes that documentation he arranged to have sent to Mr. Power would have disclosed this information. In an email dated January 13, 2000, Mr. Power offered to provide Mr. Loreto with the complete file on these issues, including the council approval, approval form, contract, and equipment leases. In an email Mr. Loreto sent to himself, dated January 26, 2000, Mr. Loreto records having received a telephone message from Mr. Power that day, wherein Mr. Power advises he has prepared a package of materials that contained the original documents. Mr. Loreto further records in that email that he called Mr. Power asking that the package of documents be sent to him. Further, Mr. Power did, in fact, provide Mr. Loreto with those documents.

Document 6264

Document 12587

Line 20, Page 181-Line 2, Page 182; Power Examination, March 24, 2003

40. Failed to ensure that City staff were aware that photocopiers were not included in the contract between the City and MFP.

Mr. Power was not involved in the photocopier transaction or in the decision to put photocopiers on lease pursuant to that MFP agreement.

Pages 217-240; Power Examination, March 26, 2003

As noted above, it was Mr. Power's understanding that MFP was vendor of record for IT hardware and software as it was his understanding that one of the objectives of the 1999 RFQ was to identify such a vendor of record.

Pages 60-65; Power Examination, March 6, 2003

Mr. Power was not involved in proposed leasing arrangements relative to photocopiers. However, he would have considered it a stretch to consider photocopiers as IT equipment and, therefore, subject matter of the agreement between the City and MFP. In other words, Mr. Power did not consider MFP to be the City's vendor of record relative to the leasing of photocopiers.

Lines 12-22, Page 218; Power Examination, March 26, 2003

Line 9, Page 221-Line 1, Page 222; Power Examination, March 26, 2003

### Commentary

As Mr. Power was not involved in the proposed photocopier leasing arrangements, he was not in a position to know, that others were under the mistaken belief that photocopiers were IT equipment and subject to the leasing agreement between the City and MFP, if it, in fact, be true that others were under that mistaken belief.