

I. Overview*	1
II. The Facts	7
a) Amalgamation – January 1, 1998	7
b) The City considered leasing – Fall 1998	8
c) From farmers to hunters	8
d) Domi courted the City’s key decision-makers	9
e) MFP’s competition: Dell Financial Services	10
f) Things began to heat up – late April and May 1999	11
g) Flight to Philadelphia – May 2, 1999	12
h) Jakobek obtained draft RFQ – May 17, 1999	12
i) City released RFQ – May 31, 1999	13
j) Lyons asked DFS for \$150,000 for an improper purpose	14
k) MFP’s winning bid: the bait – June 11, 1999	15
l) City evaluated bids and recommended MFP to Policy and Finance	16
m) The Jakobek Amendment – July 20, 1999	17
n) The Switch: MFP resiled from the MFP bid	18
o) Insufficient legal review – August 1999	19
p) Another Switch: From 3 to 5 year lease terms	19
i) Golf at the Hunt Club – September 2, 1999	20
ii) Domi and Wilkinson met Liczyk and Brittain – September 21, 1999	20
q) Viinamae signed the 5-year leases – October 1, 1999	22
r) Domi’s Commissions	24
s) What did Domi do with the money?	24
t) Domi gave \$25,000 to Jakobek	26
i) Jakobek and Domi had an inappropriate and otherwise inexplicable relationship	26
ii) Jakobek and Domi repeatedly denied or minimized their relationship	27
iii) Jakobek and Domi concocted implausible alibis	28
u) I&T implemented its vision of the leasing program – Fall 1999	30
v) Oracle	31
w) July 2000 rewrites	33
i) Domi used his inappropriate relationship with Liczyk to get her signature on the bottom line	34
ii) MFP churned the City account	36

- x) The 2000 Budget Process.....37
- y) Photocopier leasing – Spring 200138
- z) Summer 2001.....39
- III. Responsibility42
 - a) MFP/CLEARLINK’s Responsibility42
 - b) Responsibility of Jakobek.....46
 - c) Responsibility of City Staff.....47
 - i) Responsibility of I&T47
 - ii) Responsibility of Finance49
 - d) The Importance of the Inquiry52
 - i) Jakobek obstructed the Inquiry53
 - ii) Domi obstructed the Inquiry54
 - iii) Nigro obstructed the Inquiry54
 - iv) Lyons obstructed the Inquiry55
- IV. Conclusion58

I. Overview*

1. This Inquiry concerns computer leases between the City of Toronto (“City”) and MFP Financial Services Ltd. (“MFP”).¹ In July 1999, Toronto City Council (“Council”) approved putting \$43 million of its computer hardware and software on lease for a three-year term with MFP. In its response to the City’s computer leasing Request for Quotations (“RFQ”), MFP submitted the lowest lease rate of all the competitors. Leasing with MFP appeared to be the lowest cost financing option available to the City. As the Commission’s expert concluded: “There is no doubt that the three-year operating lease pricing offered by MFP in the RFQ presented a good deal for the City.”²

2. However, without a further competitive process and without Council’s knowledge or approval, the City ended up leasing over \$80 million in products and services through MFP. Moreover, most of the lease terms were extended from three to five years. The lease rates were higher than those quoted in MFP’s bid. In July 2000, MFP rewrote the lease schedules with the overall lease term reaching up to 66 months. The July 2000 lease rewrites gave the City no additional benefit, but added at least \$2.5 million to MFP’s bottom line.

3. What happened? How did the City go from a binding commitment from MFP on favourable terms for the City to a public inquiry?

4. The trouble started in early 1999 when MFP devised its marketing plan to win the City’s RFQ. Convinced that Rob Ashbourne (“Ashbourne”), an experienced technology leasing sales representative, was not able to open the right doors at the City, MFP unleashed Dash Domi (“Domi”) on an unsuspecting City. Domi possessed neither formal training nor experience in leasing. His chief

* This Executive Summary is meant as an aide only. For ease of reading, the City has not started many sentences with the usual phrase “It is submitted that...”. Nevertheless these are submissions, they are not conclusions. The City’s submissions total over 1100 pages and span 28 chapters. The full submissions contain detailed references to the relevant evidence in support of these submissions.

¹ MFP changed its name to CLEARLINK Capital Corporation effective October 1, 2004.

attributes included a famous brother, access to a private box at the Air Canada Centre, and an unlimited and unsupervised expense account. MFP encouraged Domi to develop a relationship with the City by aggressively entertaining those whom MFP had identified as the “key decision makers” on the proposed computer leasing RFQ: Jim Andrew (Executive Director of Information & Technology) (“Andrew”), Wanda Liczyk (CFO and Treasurer) (“Liczyk”) and Tom Jakobek (Councillor and Budget Chief) (“Jakobek”). MFP encouraged Domi to develop inappropriate relationships with them. He succeeded.

5. By the time the City released its RFQ on May 31, 1999, Domi was in regular telephone contact with Andrew and had entertained him at hockey games, lunch, and dinner. He had entertained Liczyk and suggested an appropriate hairstylist to her. He had flown Jakobek on a private jet to a Maple Leafs playoff game and dinner in Philadelphia.

6. MFP submitted its response to the RFQ on the June 11, 1999, deadline (“MFP Bid”). Consistent with its reputation for “skinny” pricing, MFP’s quoted three year lease rates that were significantly lower than any other bidder. City staff evaluated the bids and correctly concluded that the MFP Bid was the winner. Council approved leasing computers based on the MFP Bid.

7. MFP’s Investment Committee had approved MFP’s low pricing even though it required a significant equity investment by the company and little, if any, prospect of profit. Why? Because, as MFP’s own internal memo explained it, MFP had succeeded in establishing ‘strong relationships with key decision-makers’ that would enable it, to use MFP’s words, “to enhance” its deal.

8. So how did MFP get around its low 3-year quote? Councillor Jakobek laid the groundwork on July 20, 1999, when he moved a seemingly innocuous amendment to the staff report recommending that the City approve the MFP bid. Jakobek opened the door to changes to the deal. MFP seized that opportunity to discard its bid and to write an entirely new deal.

² COT080176 at COT080178, page 3

9. The deal MFP promised in its bid was never signed. The City asked for and approved a deal it never got, and MFP got a deal it never bid on. MFP pulled off a classic bait and switch. All of the City's work in preparing the RFQ, analyzing the responses, comparing the responses to the cost of financing the acquisition through debentures, and drafting the report to Council, was rendered irrelevant by MFP's bait and switch. None of these elements of the procurement process materially contributed to what became an improvident transaction with MFP.

10. What did materially contribute to the City's improvident transaction with MFP? A number of factors tipped the odds in favour of MFP. First, Jakobek's amendment was not innocuous; it was not a coincidence. The Commissioner should find that Jakobek moved his amendment in order to give MFP the "flexibility" to write a different deal on more favourable terms. In return, on November 1, 1999, one month after the City executed its first five-year equipment lease, Domi made an improper payment to Jakobek.

11. Second, the Commissioner should find that MFP cynically took advantage of the lack of integrity of both Andrew and Liczyk. Domi so ingratiated himself with them that these guardians of the public trust lowered their guard. MFP thereby avoided careful and objective review of its proposals and contract terms. The City thought it had a leasing partner. City employees did not realize a corporate predator was in their midst.

12. Third, some of the blame for the failure of this procurement exercise should be placed on the pressures faced by the City of Toronto following amalgamation, which included:

- a. significant reductions in the number of employees and managers with a corresponding loss of institutional memory and expertise;

- b. financial pressures arising from a combination of provincial downloading of responsibilities and a commitment to a zero property tax increase;
 - c. uncoordinated policies and guidelines that resulted in staff working under different rules and regulations;
 - d. legacy financial control and accounting systems that could not communicate with each other; and
 - e. the looming Y2K deadline, which had largely been ignored by the predecessor municipalities.
13. That said, certain staff members in the Information & Technology Division (“I&T”) and the Finance Department may properly be criticized for failing to:
- a. take ownership of their responsibilities;
 - b. exercise due diligence when circumstances, viewed objectively, called upon them to do so;
 - c. employ basic principles of planning or project management;
 - d. maintain appropriate professional boundaries between themselves and MFP representatives;
 - e. make full and candid disclosure of material facts to their colleagues and decision-makers;
 - f. ensure that they obtained necessary and sufficient professional advice to protect the City’s interests;
 - g. ensure that City staff members had the training and experience necessary to carry out their responsibilities; and

- h. ensure that proper Council approval was obtained and that they complied with that Council approval.

14. The City does not expect its employees, or MFP employees, to be perfect. This procurement exercise failed badly. Whenever such a failure is subjected to intense scrutiny, everyone involved in the project can be faulted. Everyone, it turns out, could have done more, could have done it more quickly, and could have done it better. The City submits that there is little purpose in criticizing everyone who simply touched the computer leasing procurement exercise. To blame everyone is to blame no one.

15. Moreover, when evaluating the conduct of City employees, the Commissioner should consider:

- a. City employees assumed that they were dealing in good faith with a company that was ethical and honest. Unfortunately, MFP was neither ethical nor honest. It would be inappropriate to judge the City's conduct against a standard that would require it to be on perpetual guard against rogues;
- b. the fact that the City entered into a lease arrangement with MFP that was manifestly different from what Council had approved was the result of calculated deception by MFP and was facilitated by Jakobek's "flexibility" amendment;
- c. that MFP misrepresented what it was doing and could do for the City. MFP engaged in sophisticated and road-tested predatory practices that exploited City employees' lack of sophistication about leasing transaction loopholes, fine print, and "gotchas"; and
- d. although MFP's deception exposed significant shortcomings within the City's processes and amongst senior employees, these shortcomings did not cause MFP's deception. Individuals within MFP engaged in deliberate and calculated deception, and cynically

churned the leases, to MFP's financial benefit and to the detriment of the City.

16. Finally, the City notes that the conduct of certain witnesses made the work of the Commission significantly more difficult. The City submits that Tom Jakobek, Dash Domi, Vince Nigro, and Jeff Lyons deliberately impeded the work of this Inquiry. The City is not aware of any other public Inquiry so plagued by key witnesses deliberately and repeatedly lying to a Commissioner. Such conduct should be criticized.

II. The Facts³

a) *Amalgamation – January 1, 1998*

17. On January 1, 1998, the new City of Toronto was born. An amalgamation of seven separate municipalities, it required an integration of 30,000 staff, wide ranging services, technology, systems, departments and divisions. No municipality in Canada has lived through such a process of massive organizational change. Amalgamation was not seamless. Virtually every City witness spoke poignantly of the significant stresses caused by the combined effects of amalgamation, downloading, and the pressure of responding to the Year 2000 deadline.⁴

18. Many of the key figures in this Inquiry had been with the City since Amalgamation:

- a. Tom Jakobek was a member of the first City Council and was its first Budget Chief;
- b. Wanda Liczyk was appointed by the Transition Team to be the City's first CFO and Treasurer;
- c. Jim Andrew was a senior employee in I&T and was eventually appointed the first Executive Director of I&T at the City; and
- d. Lana Viinamae worked with Andrew at the former Municipality of Metropolitan Toronto and became Andrew's *de facto* second in command, taking charge of the Year 2000 Project in June 1998.⁵

³ Throughout this Executive Summary the footnoted references to other chapters direct the reader to a more detailed discussion of the issues raised with pinpoint citations to the evidence. Additional details may be found in other chapters and parts.

⁴ Chapter 3, part 1.

⁵ Chapter 2, parts 4 and 5.

b) The City considered leasing – Fall 1998

19. The City of Toronto realized that it would be necessary to replace a significant number of its computers in preparation for the Year 2000. By the fall of 1998, it was widely rumoured that the City was actively considering a significant leasing tender to finance this acquisition. The City of Toronto had little experience with leasing technology. It had no in-house expertise and spent little time developing it.⁶

20. In the fall of 1998, various leasing companies approached the City to discuss the possible computer leasing tender and to promote the benefits of acquiring computer hardware and software through lease financing. Two of the front runners were MFP and Dell Financial Services Ltd. (“DFS”).

21. MFP was considered to have an advantage because it had leased approximately \$1 million worth of computers for the Councillors’ offices in December 1997. MFP salesperson Rob Ashbourne successfully convinced the City to lease and was rewarded with a \$7811 commission, which he had to split with another salesperson. Even before December 1997, MFP had a long-standing relationship with Andrew, dating back to his days at the Province of Ontario where MFP leased many of the government’s computers.⁷

c) From farmers to hunters

22. MFP’s marketing strategy for the City account was developed by Irene Payne (“Payne”), MFP’s point person at the Province of Ontario. MFP proudly billed itself as a ‘relationship company.’ It encouraged close personal contact between its sales representatives and the client’s key decision-makers. Payne desperately wanted to win the City’s leasing tender. She had little confidence that

⁶ Chapter 3, part 3; Chapter 5, part 2.

⁷ Chapter 5, parts 2 and 3.

Ashbourne, whom she disparaged as a ‘farmer’, could open the right doors at the City and establish the right relationships.⁸

23. Payne wanted a hunter. On the recommendation of Toronto Maple Leaf Tie Domi, MFP salesperson Dave Robson (“Robson”) introduced Dash Domi to Payne. Dash Domi was upfront with MFP. He told them he had no formal sales training, no knowledge of the leasing business, no financial background to speak of, no post-secondary education, and no book of business. He was an untested rookie. What he did have was aggressiveness, an entrepreneurial outlook, a famous last name, and personal connections with Paul Godfrey and his son Rob, and with Vince Nigro (“Nigro”), an assistant in Mayor Lastman’s office. Domi, the hunter, started work at MFP in November 1998.⁹

24. At first, Payne had both Ashbourne and Domi working on the City account. Domi was given no sales training, no leasing training, no technology training and no training on MFP’s policies and procedures. He knew nothing about MFP’s business when he started. His testimony confirmed that years later he knew little more.¹⁰

d) Domi courted the City’s key decision-makers

25. Like his friend Robson, MFP’s salesperson for the City of Waterloo, MFP encouraged Domi to establish personal relationships with key City decision-makers by taking a very aggressive approach to entertaining. This tactic was much criticized by Commissioner Sills in the recent public Inquiry into MFP’s dealings with the City of Waterloo.¹¹ MFP:

- a. gave Domi a limitless expense account;

⁸ Chapter 5, part 4.

⁹ Chapter 5, part 4.

¹⁰ Chapter 5, part 4.

¹¹ Report of the Waterloo Inquiry, page 271, para. 6.

- b. approved clearly inappropriate and extravagant expenses;
- c. gave Domi no training on how to use his expense account ethically;
and
- d. provided no meaningful oversight of his use of the expense account.¹²

26. On February 23, 1999, Domi secured a breakfast meeting with Jakobek, which he attended with Payne, not Ashbourne. On March 15, 1999, he hosted Andrew and Liczyk at the star-studded Tie Domi Charity Dinner. Despite Ashbourne's diligent work and sixteen years of leasing experience, he never secured meetings with Liczyk or Jakobek. He could not establish personal relationships with either key decision-maker.¹³

27. Accordingly, in late March or early April, Payne pulled Ashbourne off of the City file and Domi moved in.¹⁴

e) MFP's competition: Dell Financial Services

28. MFP was not the only leasing company spending money to increase its profile at the City. Early in 1999, DFS hired influential lobbyist Jeffrey Lyons ("Lyons") to help it make contact with key decision-makers at the City. Like MFP, Lyons identified three people that DFS had to meet: Jakobek, Liczyk, and Andrew.¹⁵

29. By the Spring of 1999, I&T had started purchasing new computer hardware in its scramble to meet the Year 2000 deadline. At the same time, I&T was moving towards leasing as its preferred option for upgrading the City's computer platform. Andrew favoured leasing as a way to avoid constant scrutiny

¹² Chapter 5, parts 5 and 6.

¹³ Chapter 5, parts 4 and 5.

¹⁴ Chapter 5, part 4.

¹⁵ Chapter 18, parts 3 and 4.

of the I&T budget by Council and was intrigued by the possibility of outsourcing responsibility for asset management and disposition.¹⁶

30. Lyons arranged a meeting between Liczyk and Andrew from the City and DFS' key representatives, including Scott Marentette ("Marentette") and Gordon Barrett ("Barrett") for April 23, 1999. DFS wanted to meet Liczyk to overcome her reported resistance to the idea of computer leasing. However, to their surprise, Liczyk walked into the room and announced that she was sold on leasing. It now seemed certain that the City would at least seriously evaluate the leasing option by putting some form of tender out to market. Things began to heat up.¹⁷

f) Things began to heat up – late April and May 1999

31. On April 24, 1999 Jakobek took Andrew to Game 2 of the playoff series between the Toronto Maple Leafs and the Philadelphia Flyers. At the game, they ran into Domi. At Domi's invitation, Jakobek and Andrew joined him in Tie Domi's private box at the Air Canada Centre, which Domi had rented from his brother for MFP's purposes ("MFP box"). By that point, Domi had already called Jakobek at his home and had a conversation that lasted over three minutes.¹⁸

32. Five days later, Andrew met with Domi and MFP business partner Karim Kassam ("Kassam") to discuss the upcoming computer leasing tender. The next night, on April 30, Domi entertained Liczyk and Andrew in the MFP box for Game 5 of the Leafs-Flyers playoff series. It was not the first time Domi had invited Andrew to a game. Shortly after this game, Domi arranged a hair cut for Liczyk with his best friend and hair stylist, Gian Frank.¹⁹

¹⁶ Chapter 6, part 3.

¹⁷ Chapter 18, part 5.

¹⁸ Chapter 5, part 5.

¹⁹ Chapter 5, part 5.

g) *Flight to Philadelphia – May 2, 1999*

33. On May 2, 1999, Domi flew Jakobek, Nigro and three others (Harold Peerenboom, his son Greg Peerenboom, and Jim Ginou) to Philadelphia for Game 6 of the playoff series between the Leafs and the Flyers. The flight alone cost MFP over \$6000. It was money well spent. This event marked a turning point in Domi's relationship with Jakobek. Domi proved to Jakobek that he was prepared to spend serious money building relationships with key City decision-makers. Even Lyons would later describe this junket as something he would never recommend to a client because it was "just not appropriate."²⁰

34. By this time, Andrew had assigned IT consultant and long-time friend Brendan Power to draft the computer leasing tender documents and direct the evaluation process. Power had some previous computer leasing experience from his days at the provincial government where he dealt with MFP as the leasing provider. However, Power was not qualified to lead the City's first major computer leasing tender.²¹

h) *Jakobek obtained draft RFQ – May 17, 1999*

35. By May 17, 1999, Power had prepared two draft tenders that required review by staff in the Treasury Division of the Finance Department. Draft tender documents are not shared with City Councillors. City Councillors must not interfere in the tender drafting and evaluation process. That process must be fair and must be seen to be fair by all bidders.²²

36. Andrew had always abided by this policy. However, on May 17, 1999, he sent Jakobek a copy of the draft computer leasing tender. He did so at Jakobek's request. He would not have done so unprompted. Only two weeks after the trip to

²⁰ Chapter 5, parts 5 and 6.

²¹ Chapter 6, parts 4 and 5.

²² Chapter 6, part 5.

Philadelphia with Domi, Jakobek obtained a draft of the computer leasing tender.²³

37. Jakobek’s receptiveness to Domi’s overtures stands in marked contrast to his perfunctory and awkward meeting with Lyons and Marentette from DFS. Despite Lyons’ advice that Jakobek was the only Councillor worth meeting, on May 25, 1999, the DFS meeting with him lasted for no more than 20 minutes.²⁴

i) City released RFQ – May 31, 1999

38. On May 31, 1999, the City issued the RFQ. It was not perfectly drafted. The RFQ did not reflect what I&T later claimed it intended to accomplish. I&T’s vision of using the RFQ to establish a sweeping vendor of record relationship that would allow I&T to put a limitless amount of equipment on lease at undetermined rates for an indeterminate period of time appeared nowhere in the document. This vision was a business absurdity and a municipal governance nightmare. Instead, the RFQ reflected what Treasury and Purchasing and Materials Management Division (“PMMD”) believed the City was asking for: quotes for three year lease rates for a fixed amount of equipment estimated at \$43 million.²⁵

39. Responses to the RFQ were due on June 11, 1999, at 12:00 noon. Vendors, including senior representatives of MFP, knew well that contact with City staff must be severely restricted during what was commonly referred to as the “blackout period” between the date the RFQ was released and final Council approval of the successful bid. The purpose underlying the blackout period was to ensure a level playing field among respondents and to ensure that bids were evaluated on their merits.²⁶

40. Domi appeared to be entirely unfamiliar with the concept of the blackout period. Jakobek and Andrew simply ignored it. During the blackout period, Domi

²³ Chapter 6, part 5.

²⁴ Chapter 18, part 5.

²⁵ Chapter 6, part 5; Chapter 21, part 5; Chapter 7, part 5.

²⁶ Chapter 21, part 3; Chapter 19, part 5.

and Jakobek had 14 cellular telephone conversations and Domi and Andrew were in regular telephone contact. On at least one occasion, Andrew called Domi to obtain hockey tickets.²⁷

j) Lyons asked DFS for \$150,000 for an improper purpose

41. Domi, however, was not the only one trying to get into position to win the bid. At DFS, Simone, the senior executive on the file, and Marentette were both anxious and determined to win the bid. In contrast to Domi, his counterpart at MFP, Marentette was very knowledgeable about technology leasing. DFS had identified MFP as the primary competition.²⁸

42. During “crunch time” sometime between the last days of May and June 11, 1999, Lyons attended a strategy meeting at DFS with Simone and Marentette. Simone’s memory of what transpired at the meeting precipitated an OPP investigation into whether or not Lyons had attempted to secure an improper payment from DFS for himself or himself and Jakobek. Simone’s evidence about what Lyons said and the context of Lyons’ comments was unshaken on the following critical points:

- a. Lyons asked Simone what he thought the 1999 RFQ was “worth” to him;
- b. Simone thought Lyons meant the gross value of the transaction and replied “you know....\$150 million”;
- c. in response, Lyons said “no, no well Tom says its worth \$150,000”;
- d. Simone queried whether paying this sum meant that DFS would win the RFQ;

²⁷ Chapter 19, part 5; Chapter 18, part 2; Chapter 21, part 3.

²⁸ Chapter 17, parts 2 and 8.

- e. Lyons replied that DFS would still have to win the tender process with the lowest bid;
- f. Simone expressed bewilderment: even if DFS bid low enough to win the tender, it stood to make less than a half million in profits and was risking five to six million dollars in “residual” investment;
- g. Lyons retorted: “well, you know, MFP would pay one hundred and fifty grand and others would pay one hundred and fifty grand.”²⁹

43. DFS would make no such payment. Lyons immediately regretted even raising the subject.³⁰

44. The significance of Simone’s evidence goes beyond establishing the impropriety of Lyons’ conduct. It portends the manner in which MFP succeeded in winning the bid for City’s computer leasing transaction and then orchestrated a bait and switch. In keeping with Lyons’ statements to Simone, an improper payment would not eliminate the competition or mean that MFP didn’t have to “win” the RFQ: it still had to make the lowest bid. But if it made the lowest bid, it would be in a position to write a contract unconstrained by the bid’s terms.

k) MFP’s winning bid: the bait – June 11, 1999

45. MFP submitted its bid only moments before the noon deadline on June 11, 1999. MFP bid low, much lower than any other bidder. This was part of a carefully thought out plan. Internal MFP documents made the MFP game plan clear: bid low and after the deal is won, work to “enhance” it to MFP’s sole benefit.

MFP over the last 6 months has been the driving force in convincing the City to lease. We have developed very strong relations with Tom Jakobek (Councilor and Budget Chief), Wanda Liczyk (CFO and Treasurer) and

²⁹ Chapter 17, part 6.

³⁰ Chapter 17, part 6.

Jim [Andrew] (Executive Director of IT). These individuals are the key [decision] makers for this project and many other opportunities within the City.

...

In our response to the [RFQ] we will [emphasize] the importance of vendor independence and the value-added services from MFP. Our strategy is to win the RFP on price, relationship and value adds. Once the deal has been awarded we are confident in the opportunities to enhance our deal. The known opportunities are the sale leaseback of 4,000 desktops, budget constraints in fiscal 1999 and 2000, MFP supply and services and the leasing of other [non] IT assets.³¹

l) City evaluated bids and recommended MFP to Policy and Finance

46. Treasury and I&T jointly evaluated the responses to the RFQ and prepared a report to the Policy & Finance Committee (P&F) dated July 9, 1999 (“P&F Report”). The P&F Report recommended a lease program with MFP, on the basis that leasing with MFP was a better option for the City than purchasing computer equipment. This recommendation was premised on a financial analysis conducted by Treasury which assumed that \$43.15 million of equipment would be leased for a three year term at the lease rates quoted by MFP. This recommendation is unassailable. Even with the benefit of hindsight, the Commission’s own expert concluded that MFP’s bid presented a good deal for the City.³²

47. The recommendation to P&F was *not* premised on I&T’s absurd vision for the leasing program. The report was entirely inconsistent with I&T’s sweeping vision of a vendor of record relationship for an unlimited amount of equipment. No such concept was shared with Treasury; it was not analyzed in the report to P&F.³³

³¹ COT023260, 99:1:34; Chapter 6, part 6.

³² Chapter 7, part 5.

³³ Chapter 7, part 5.

m) The Jakobek Amendment – July 20, 1999

48. P&F considered the P&F Report on July 20, 1999. Jakobek was a member of P&F. Jakobek had 14 cellular telephone conversations with Domi in the period between June 11 (the date MFP submitted its response) and July 20, 1999, when Jakobek moved his seemingly innocuous amendment to the P&F Report (“Jakobek Amendment”). Neither the calls nor the Jakobek Amendment were innocuous.³⁴

49. Liczyk was surprised by the Jakobek Amendment, which provided:

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.³⁵

50. Immediately after the meeting, Liczyk approached Jakobek for clarification. Jakobek, she testified, explained that he intended to provide her with extraordinary powers to put some of the equipment on 5-year, not 3-year leases. At the Inquiry, Jakobek did not remember this conversation, but denied that this was the intention of the Jakobek Amendment. He stated that his intention was simply to ensure that the equipment was not all returned at the end of three years if it could still be used.³⁶

51. The P&F Report, on its face, contemplated the purpose Jakobek described under oath. No amendment was necessary to achieve Jakobek’s purpose. His amendment focused specifically on the flexibility of “terms of the lease”, not a mid-lease consideration of asset lifespan. Taken together with his inappropriate telephone calls to Domi in the days and weeks leading up to P&F’s consideration of the confidential P&F Report, and his inappropriate request for the draft RFQ two months earlier, the conclusion is inescapable: Jakobek moved

³⁴ Chapter 8, part 2; Chapter 18, part 2.

³⁵ Chapter 8, part 2.

³⁶ Chapter 8, part 2.

his amendment to allow MFP to walk away from the MFP Bid after Council awarded it the deal.³⁷

52. Before the Jakobek Amendment was made public, and during the period that Jakobek was speaking to Domi, MFP's financing expert Rob Wilkinson was hard at work. His spreadsheets demonstrated that MFP would increase its revenue by \$3 million if it wrote a 5-year deal instead of the 'skinny', 3-year deal MFP submitted in the MFP Bid.³⁸

53. At its July 27, 1999, meeting, Council accepted the extremely attractive MFP Bid by approving the amended P&F report without debate.³⁹

n) The Switch: MFP resiled from the MFP bid

54. What the City did not know was that MFP never intended to be bound to the terms of its response to the RFQ. A July email from MFP's legal department expressed concern that MFP might have to live up to its promises because MFP had neglected to include its usual boilerplate language designed to permit MFP to avoid legal obligations to honour its promises in the RFQ.⁴⁰

55. Following Council's acceptance of the MFP bid, Domi called Andrew to set up an early August breakfast meeting to discuss the meaning of the Jakobek Amendment. Andrew recalled at that meeting that Wilkinson appeared keen to extend the leases to five years.⁴¹

56. The length of the lease term was not the only term of the deal that MFP wished to change. MFP drafted a Master Lease Agreement (MLA) that resiled from many of the promises it made in its bid. What MFP had promised to do for

³⁷ Chapter 8, part 2.

³⁸ Chapter 10, part 2.

³⁹ Liczyk Affidavit, para. 175, 11/03/2003 at 69.

⁴⁰ Chapter 9, part 2.

⁴¹ Chapter 10, part 2.

free would now come at a price; what MFP had guaranteed became subject to future negotiations.⁴²

o) Insufficient legal review – August 1999

57. MFP successfully implemented its strategy to write the MLA on its terms. Power was the City's point person on the MLA with MFP. He failed to protect the City's interests or enforce the City's rights under the RFQ. He did not involve external legal counsel, Mark Fecenko ("Fecenko"), until the last minute. Nor did Power provide Fecenko with a copy of the RFQ or the MFP Bid.⁴³

58. For his part, Fecenko failed to insist on seeing all the relevant documents to permit him to understand the deal. Fecenko also failed to review the final version of the MLA and the other contract documents. Fecenko provided his client, the City, with a misleading, unqualified, three-line opinion that the MFP contracts were "commercially reasonable." No reasonable person at the City would have known that Fecenko's review was as limited and superficial as it was. Relying on Fecenko's opinion, the City signed the MLA.⁴⁴

p) Another Switch: From 3 to 5 year lease terms

59. The MLA did not establish all of the lease terms. The length of the lease was still being discussed with MFP. I&T met with MFP regularly through August and September 1999. Most of those meetings focussed on the mechanics of leasing. No one in I&T ever suggested that any significant portion of the computer hardware would last as long as 5 years. Nevertheless, MFP finance expert, Wilkinson, claimed that he 'realized' during those meetings that the City was under budgetary pressure and would welcome suggestions on how to reduce or smooth out the annual lease costs.⁴⁵

⁴² Chapter 9, part 2; Chapter 19, part 6.

⁴³ Chapter 19, part 6.

⁴⁴ Chapter 26, parts 3 and 6.

⁴⁵ Chapter 10.

i) Golf at the Hunt Club – September 2, 1999

60. On September 2, 1999, Jakobek organized a golf game for Domi, Liczyk, and Andrew at a private golf club in Toronto. After the game, Jakobek invited the golfers back to his house for a drink. All of the guests admitted that the invitation was unusual. None of them provided a plausible explanation for why Jakobek organized this foursome.⁴⁶

61. Less than three weeks later, MFP called for a meeting with Liczyk to present MFP's interpretation of the Jakobek Amendment. MFP told Liczyk that there was no need for I&T to be at the meeting because MFP had already met several times with I&T. By meeting with MFP without I&T, Liczyk permitted MFP to divide and conquer the City staff.⁴⁷

62. The day before the meeting, Wilkinson faxed Liczyk a one-page handwritten letter and two one-page charts. This was the only written proposal MFP ever provided to the City other than its response to the RFQ.⁴⁸

ii) Domi and Wilkinson met Liczyk and Brittain – September 21, 1999

63. On September 21, 1999, Wilkinson and Domi met with Liczyk and Len Brittain ("Brittain"), Director of Treasury, whom Liczyk invited to the meeting. Wilkinson presented two possible interpretations of the Jakobek Amendment:

- a. a five-year lease with a three year refresh cycle; or
- b. a five-year lease with a staggered refresh cycle.⁴⁹

64. Wilkinson did not provide pricing information or any other written material. His models were conceptual only. He did not suggest other ways the City could keep the equipment for more than 3 years, such as by purchasing all the equipment at the end of 3 years, which would have been to the City's economic

⁴⁶ Chapter 21, part 3.

⁴⁷ Chapter 10, part 4.

⁴⁸ Chapter 10, part 3; Chapter 8, part 3.

⁴⁹ Chapter 10, part 4;

advantage, but would have been disastrous for MFP. Instead, he proposed the most expensive options for the City, which had the dual benefit of being profitable for MFP and locking the City into a long-term relationship that would be difficult and expensive to terminate.⁵⁰

65. In other words, the innocuous looking Jakobek Amendment was the thin edge of the wedge that allowed MFP to walk away from its response to the RFQ and write a much more favourable deal.⁵¹

66. Liczyk testified that she stayed at the September meeting for only fifteen minutes because she had delegated responsibility for implementing the Jakobek Amendment to Brittain immediately after the P&F meeting in July. She claimed she left to Brittain both the meeting on September 21, as well as any follow-up or analysis that was required. Brittain disagreed with this evidence. Liczyk's evidence on this point should be rejected as self-serving: an after the fact attempt to shift blame to Brittain. There is no documentary evidence that supports Liczyk's version of events and no one behaved as if Brittain had been asked to carry the ball.⁵²

67. MFP in particular looked to Liczyk as the key decision-maker in Finance on the Jakobek Amendment. After the meeting, Domi placed a series of calls to Liczyk, Andrew and Jakobek.⁵³

68. The very next day, September 22, 1999, internal MFP documents reveal that Wilkinson began to draft five-year Equipment Schedules. Wilkinson agreed that neither Liczyk nor Brittain instructed him to write five-year leases. He testified that no one at MFP knew who at the City told them to write five-year lease schedules.⁵⁴

⁵⁰ Chapter 10, part 4.

⁵¹ Chapter 8, part 2; Chapter 19, part 9.

⁵² Chapter 10, part 4; Chapter 8, part 3.

⁵³ Chapter 10, part 4.

⁵⁴ Chapter 10, part 5.

q) Viinamae signed the 5-year leases – October 1, 1999

69. On October 1, 1999, Viinamae signed a 5-year lease for over \$20 million worth of computer equipment. She did so:

- a. on the basis of a hallway conversation with Liczyk, during which Liczyk confirmed that she wanted to go with five year leases;
- b. without recognizing the equipment schedule as a \$20 million contract with terms that had never been reviewed by legal counsel for the City; and
- c. without knowing that MFP had never quoted lease rates for a 5-year deal and that no one in Finance had evaluated the cost of this or any five year lease deal.⁵⁵

70. Liczyk, for her part, instructed Viinamae to put the majority of equipment on five-year leases without:

- a. knowing the financial implications of a five-year lease term;
- b. discussing the financial implications of a five-year lease term with any of her staff; and
- c. taking any other steps to protect the City's interests.⁵⁶

71. Thus, MFP succeeded in writing a five-year, \$20 million leasing contract with the City on terms that bore no relation to its winning bid. The deal MFP promised in its RFQ response was never signed. The City asked for a deal it never got and MFP got a deal it never bid on, free from any competition. MFP used the Jakobek Amendment to pull off a classic bait and switch. To paraphrase the evidence of DFS sales representative Marentette, when you bid as low as

⁵⁵ Chapter 10, parts 8 and 10; Chapter 22, part 7.

⁵⁶ Chapter 10, parts 1 and 8; Chapter 24, part 3.

MFP did, you have to do lots of ‘funny things’ to get your economics back in line. MFP did just that.⁵⁷

72. Part of MFP’s bait and switch involved dramatically increasing the deal’s effective interest rate and the difference between the effective interest rate and the equivalent term bond rate (“Interest Spread”). The 5-year deal MFP wrote in October 1999 was significantly more profitable than the 3-year deal it quoted.⁵⁸

73. One of the reasons that MFP’s 3-year bid was so attractive was because its effective interest rate was so low. If the City exercised its purchase option at the end of the 3-year lease at the maximum value of 17%, then the effective interest rate of the MFP Bid was 4.64%. At that time, the equivalent term bond rate was 5.46%. The Interest Spread was therefore -0.82%.⁵⁹

74. In other words, MFP promised the City a lower effective interest rate than the available equivalent term bond rate. MFP would have done better putting its money in bonds than doing this deal. MFP made this bid to get a foot in the door. It would not have made money.⁶⁰

75. However, when MFP extended the lease term from 3 to 5 years, it seized that opportunity to enhance its deal. The first equipment Schedule signed on October 1, 1999 had an effective interest rate of 9.08% (assuming end of term purchase at the maximum value of 9%). The five year bond rate was only 5.77%. Therefore, the Interest Spread on 838-1 was 3.31%, which was 4.13% above the MFP Bid’s effective interest rate.⁶¹

76. All of the City’s work in preparing its RFQ, analyzing the various responses, comparing the responses to the cost of financing the acquisition through debentures, and drafting the report to Council, was rendered irrelevant.

⁵⁷ Chapter 10.

⁵⁸ Chapter 10, part 1.

⁵⁹ Chapter 10, part 1.

⁶⁰ Chapter 10, part 1.

⁶¹ Chapter 10, part 1.

r) Domi's Commissions

77. Domi's contract called for MFP to pay him 17% of the gross profit or margin for a new lease. The MFP Bid was unprofitable and would have generated no commission for Domi under this formula.⁶²

78. However, in the fall of 1999, MFP decided to pay Domi a "subjective commission" of \$600,000 based on the volume of equipment and software MFP anticipated the City would have placed on lease by the first quarter of calendar 2000. MFP purportedly agreed to pay Domi \$600,000 on a \$60,000,000 deal that would not generate any significant margin. If Domi could later restructure any of the leases or if the leases unexpectedly generated margin, Domi could earn additional downstream commission on the transaction. In the end, Domi earned approximately \$1.4 million from the City transactions.⁶³

79. On Friday October 29, 1999, MFP made a \$200,000 commission payment to Domi for the City transaction. Domi received his money less than a month after Viinamae signed the five-year leases.⁶⁴

s) What did Domi do with the money?

80. On Monday, November 1, 1999, Domi withdrew \$25,000 in \$1000 bills from his bank account. Domi spoke twice with Jakobek that same day: at 3:46 p.m. (for about 90 seconds) and again at 4:45 p.m. (for about 20 seconds). Two minutes after the second call, Domi entered the City Hall parking garage. Only 13 minutes later, Domi left the parking garage. He submitted the parking receipt to MFP for reimbursement. Domi admitted that it was very likely that he went to see Jakobek on November 1.⁶⁵

⁶² Wolfraim Affidavit, para. 2, 09/27/2004 at 13-14.

⁶³ Wolfraim Affidavit, para. 10, 09/27/2004 at 18-21.

⁶⁴ Chapter 18, part 5.

⁶⁵ Chapter 18, part 5.

81. On Tuesday November 2, 1999, the Jakobek family engaged in an extraordinarily complex series of banking transactions:

- a. Jakobek appears to have deposited \$3400 in cash into his bank account;
- b. his mother, Ursula Jakobek (“Ursula”), deposited \$3000 cash into bank accounts held by her and her mother, Maria Michie (“Michie”);
- c. Ursula also transferred money among four bank accounts held by Michie and her; and
- d. Ursula certified three cheques payable to American Express by Michie (two cheques on two accounts totalling \$11,000) and by Ursula (one cheque for \$4,000).⁶⁶

82. On Wednesday, November 3, 1999, a \$21,000 payment was made on Jakobek’s American Express account, which consisted of the \$15,000 in cheques from his mother and grandmother and an additional \$6,000 in cash. The Commissioner should find that Ursula went to extraordinary lengths to disguise the source of the funds that ended up deposited to Jakobek’s American Express account.⁶⁷

83. Each of these transactions considered separately is suspicious. No single transaction is itself conclusive. Taken together, it is inconceivable that these transactions were just a complicated way for Ursula and Michie to make a \$15,000 gift to Jakobek and his children. The Commission’s experts at Grant Thornton were right: Jakobek controlled or influenced the banking activity in his parents’ and grandmother’s accounts.⁶⁸

⁶⁶ Chapter 18, part 5.

⁶⁷ Chapter 18, part 5.

⁶⁸ Chapter 18, part 5.

t) Domi gave \$25,000 to Jakobek

84. It was not a coincidence that Domi's cash withdrawals and the Jakobek family transactions took place on consecutive days.⁶⁹

85. On the strength of the above evidence alone, the Commissioner could conclude that Domi gave \$25,000 to Jakobek. But it does not end there. The weight of this evidence is overwhelming when it is considered in light of the inappropriate and otherwise inexplicable relationship between the two men, their attempts to deny or minimize their relationship, and the implausibility of their concocted alibis. It is impossible to do justice to the mountain of this evidence in an overview. In brief summary:

i) Jakobek and Domi had an inappropriate and otherwise inexplicable relationship

86. Domi made hundreds of telephone calls from his cellular telephone to Jakobek's home, cellular telephone, office, and even to Jakobek's wife's cellular telephone. Between May 4, 1999, and September 2002, Domi and Jakobek had at least 109 cell phone conversations. Domi called Jakobek at home at least 17 times. Domi and Jakobek had 13 cell phone conversations between the date that MFP submitted its bid on the computer leasing RFQ and the day that City Council awarded MFP the computer leasing contract.⁷⁰

87. Domi flew Jakobek to Philadelphia in a private jet to attend a Leafs-Flyers NHL playoff game played on May 2, 1999. This trip cost well over \$7,000. Although Jakobek testified that he was not aware that Domi had arranged for and paid for the flight, it is inconceivable that Domi would not want Jakobek to have been aware that MFP was providing Jakobek with the courtesy of this flight, limousine ride, and tickets to the hockey game.⁷¹

⁶⁹ Chapter 18.

⁷⁰ Chapter 18, part 2; Chapter 5, part 5.

⁷¹ Chapter 18, part 4; Chapter 5, part 5.

88. Councillors may have an occasional meeting with a supplier in their offices. Councillors do not have *relationships* with salespeople selling goods to the City. Councillors are supposed to have nothing to do with procurement exercises other than voting to approve or reject staff reports. A *relationship* between a Councillor and a salesperson is inherently and undoubtedly suspicious.

89. How does one explain Domi's special access to Jakobek? They had nothing in common. Neither of them admitted to being friends with the other. Jakobek was famously impatient with people he believed were wasting his time. There is no innocent explanation for the number and nature of their contacts.

ii) Jakobek and Domi repeatedly denied or minimized their relationship

90. Domi and Jakobek went to extraordinary lengths to deny or minimize the extent of their relationship:

- a. Jakobek recalled only a handful of conversations with Domi; the evidence proved over 100 cellular telephone conversations;⁷²
- b. until his cell phone records proved that he was in Philadelphia the day of the flight, Jakobek claimed that he was not on the flight to Philadelphia, told his lawyers he was not on the flight to Philadelphia, told many members of the press (immediately before and during his Mayoral election campaign) that he was not on the flight to Philadelphia, and instructed his lawyers to tell the press that he would testify that he was not on the flight to Philadelphia;
- c. before Jakobek's cell phone records were discovered, Domi told Wolfraim that Jakobek was not on the flight to Philadelphia. He repeated that story under oath at the Inquiry;

- d. Jakobek attempted to convince his friend Harold Peerenboom, who was also on the flight, that Jakobek was not there;
- e. Jakobek told Commission Counsel in August and September 2002 that he had “no involvement” with MFP other than having moved the Jakobek Amendment in July 1999;
- f. in September 2002, when Commission Counsel directly asked Jakobek to describe any contact with MFP, Jakobek replied that he “would need to know with whom and when [he] may have had contact before [he] could comment further.” In fact, Jakobek could have told Commission Counsel that he had spoken with Domi five times in the five days before making his statement;
- g. Jakobek feigned having only passing familiarity with MFP when interviewed by the OPP in November 2002;
- h. during Domi’s OPP interview, he claimed that he “just kind of” knew Jakobek, like he knew all the other Councillors; and finally,
- i. during their evidence, both Domi and Jakobek took every opportunity to minimize their relationship and acknowledged only what was absolutely necessary when confronted with irrefutable proof to the contrary.⁷³

iii) Jakobek and Domi concocted implausible alibis

91. Domi and Jakobek both relied on family members to provide alibis for their suspicious banking transactions between November 1 and 3, 1999. Both alibis shared remarkably similar fundamental elements. Both men relied on:

⁷² Chapter 18, part 2.

⁷³ Chapter 18, parts 3 and 4.

- a. the purported repayment of long-standing imprecise family debts, which had never been documented;
- b. family members to fill obvious gaps in their own stories;
- c. family members' willingness to handle thousands of dollars of cash;
- d. family members having thousands of dollars in cash in their homes;
- e. spontaneous, extraordinarily generous gifts of money from less wealthy to more wealthy family members that were apparently treated as if it was pocket change; and
- f. incredibly tight-knit, loyal, and protective family members.⁷⁴

92. Dash Domi said he gave twenty-five \$1,000 bills to his brother Tie in a birthday card to repay Tie part of the significant amount of money Tie had given to him over the years. Dash could remember few other details about Tie's generosity or the alleged gift. Tie contradicted Dash on the few important details that he did provide about the purported birthday gift to Tie. Their evidence did not ring true. It was the product of the Domi family loyalty that Dash so emphatically described.⁷⁵

93. In October 2003, Jakobek swore an affidavit in which he explained that the money for the American Express payment came from his father-in-law, Ken Morrish to pre-pay a family trip to Disneyworld. After being pressed by Commission Counsel for more details, Jakobek reiterated this story in a second affidavit in December 2003. He testified that, until late August 2004, when Commission Counsel presented him with copies of the certified cheques signed by his mother and grandmother, he had no idea that the money had in fact traveled through his mother and his grandmother's accounts.⁷⁶

⁷⁴ Chapter 18, parts 7, 8, and 9.

⁷⁵ Chapter 18, part 7.

⁷⁶ Chapter 18, part 9.

94. The Commissioner should find that Jakobek knew all along that the money traveled through his mother and grandmother's accounts. He did not bring this evidence forward himself because he knew he couldn't explain it. Jakobek recognized that no one would believe that his mother and grandmother, both of modest means, transferred \$15,000 to him one day after Domi's \$25,000 cash withdrawal and visit to City Hall. And he knew that if anyone looked, Ursula and Michie's accounts would reveal massive cash deposits and transfers to him and to third parties for his benefit: \$34,500 in October and November 1999 alone.

95. Once the cheques were produced, and the bank records were analyzed, the conclusion became inescapable: Jakobek controlled or influenced the accounts held in the name of his parents and grandmother and used them to disguise the source of cash at his disposal.

96. He had to bury the certified cheques to American Express because he knew that they would bury him. So he retreated to safer ground: he claimed his wealthy father-in-law, who could not be called as a witness because of a medical incapacity, had made the American Express payment for him. For years Jakobek had used Ken Morrish's generosity to explain his own affluent standard of living.

97. The City submits that Domi gave the \$25,000 to Jakobek for having moved the Jakobek Amendment, which allowed MFP to carry out its bait and switch. Jakobek moved some or all of the money through the accounts of his grandmother and his parents and had some of it returned to his benefit in the form of the certified cheques payable to his American Express account.

u) I&T implemented its vision of the leasing program – Fall 1999

98. In the fall of 1999, all the key players in I&T (Andrew, Viinamae, Power and Kathryn Bulko ("Bulko")) thought they had an open ended "vendor of record" relationship with MFP. In contrast, staff in Finance correctly concluded that what had been approved was a one time deal with MFP for \$43 million. In fact, Council

had not approved future leasing transactions for unspecified amounts at an unspecified interest rate and no competitive process.⁷⁷

99. Because I&T was responsible for administering the leasing program, and Finance played only an intermittent supportive role, the I&T vendor of record vision was implemented at the City without the knowledge of Finance staff. It is true that I&T made no secret of its plans to lease considerably more than \$43 million from MFP. But what was not apparent to those outside I&T was that I&T did not intend to seek – and never obtained – Council approval for additional leasing expenditures.⁷⁸

100. I&T created the Contract Management Office (CMO) to administer the leasing program and to put further hardware and software on lease. The CMO was housed in I&T. Bulko, the head of the CMO, took instructions from and reported to Viinamae. No one outside of I&T monitored the leasing program to ensure that Council authority had been obtained for the additional contracts entered into with MFP, nor was it reasonable to expect that anyone in PMMD, Treasury, Accounting, Legal or any other department would effectively “police” I&T’s compliance with City policy unless they were directly involved in negotiating with MFP or implementing the leasing contracts.⁷⁹

101. In any event, it never occurred to anyone outside I&T that experienced and senior I&T staff, such as Andrew and Viinamae, would act outside the authority of the Council approval and the Financial Control By-law.⁸⁰

v) Oracle

⁷⁷ Chapter 21, part 5; Chapter 22, part 5; Chapter 232, part 7; Chapter 12, part 3.

⁷⁸ Chapter 14, parts 2, 6 and 7.

⁷⁹ Chapter 12; Chapter 14.

⁸⁰ Chapter 14, part 3.

102. One of the largest single software acquisitions that the City put on lease with MFP was the City's Oracle Enterprise Licence Agreement ("ELA"). In the fall of 1999, Viinamae spearheaded the \$11 million Oracle ELA acquisition. She did so without:

- a. assessing the City's needs;
- b. creating a project charter (a detailed planning and operational document);
- c. writing a business case;
- d. conducting a financial analysis of the transaction; or
- e. consulting with other senior staff in I&T.⁸¹

103. Despite her insistence that this was a Year 2000 transaction, Viinamae never made a detailed presentation to the Year 2000 Steering Committee, which consisted of Liczyk, Andrew, and Councillor Dick O'Brien. The Year 2000 Steering Committee was charged with approving Year 2000 expenditures and had special powers that allowed acquisitions without tender where necessary.⁸²

104. Viinamae obtained the Committee's approval for the Oracle acquisition on December 30, 1999, without giving the Committee anything in writing. The next day, she obtained the CAO's approval of the transaction based on the Committee's approval and Viinamae's description of the transaction, which was inaccurate, incomplete and misleading.⁸³

105. Shortly thereafter, Viinamae placed the Oracle ELA on lease with MFP. Putting the Oracle ELA on lease was a mistake. The City effectively pre-paid to MFP five years worth of maintenance and support fees, which were only due to Oracle on an annual basis. MFP knew the City was pre-paying the expense to

⁸¹ Chapter 13, part 3.

⁸² Chapter 13, part 4.

⁸³ Chapter 13, part 4.

the benefit of MFP, but said nothing. Once again MFP exploited Viinamae's lack of leasing knowledge to its profit.⁸⁴

w) July 2000 rewrites

106. The rewrites are a third striking example of how MFP manipulated the shortcomings in the City's processes. Throughout the fall of 1999, Wilkinson and Domi met with the CMO and others in I&T. These discussions covered a wide range of operational issues, including:

- a. how to put equipment on lease;
- b. what a future equipment refresh might look like;
- c. how to develop an asset management strategy; and
- d. how to allocate leasing costs from the City's central budget to individual departments.⁸⁵

107. MFP volunteered to assist the City with these challenges.

108. What the City did not know was that MFP saw these challenges as an opportunity to "enhance" its deal. Internal MFP documents indicated that by January 2000, only four months after writing its first lease with the City, MFP was planning to rewrite the leases entirely. Domi knew that he stood to make a significant commission if he succeeded in obtaining a rewrite of the leases.⁸⁶

109. MFP knew that Liczyk's major concern was to allocate the computer leasing costs out to each department. In May 2000, Wilkinson met with Liczyk. According to her, Wilkinson passed around a binder of reports that MFP had prepared for another client. The binder contained lists of equipment broken down

⁸⁴ Chapter 13, part 6.

⁸⁵ Chapter 15, part 3.

⁸⁶ Chapter 15, parts 4, 5 and 7.

by the department using the equipment. Wilkinson offered to create similar reports for the City. Liczyk testified that there was no discussion of the need to rewrite leases or to change lease rates or terms. She expected that MFP would prepare a prototype report for City staff to approve or reject.⁸⁷

i) Domi used his inappropriate relationship with Liczyk to get her signature on the bottom line

110. By July 2000, Domi and Liczyk had developed an inappropriate relationship. Domi agreed that by that time they were friends and that Liczyk trusted him:

- a. they had attended several hockey games together and had dinner at Harbour Sixty Steakhouse together on several occasions;
- b. they were in regular telephone contact although Domi admitted that he could not discuss lease financing, cost allocation, or technology issues with Liczyk because he was out of his depth;
- c. Domi called her at home and no other sales representative of a supplier ever did;
- d. Liczyk flew with Domi on a private jet to Ottawa, for which she paid \$700, to watch a hockey game with Paul Godfrey and others from a private box; and
- e. Liczyk invited Domi to her home for her 40th birthday party, which was held on July 14, 2000.⁸⁸

111. Liczyk signed the rewritten leases without reading them, before anyone else at the City reviewed them, and without anyone realizing that they would cost the City at least \$2.5 million. The lease rewrites separated desktops, monitors,

⁸⁷ Chapter 15, parts 3 and 4.

notebooks, and printers onto separate lease schedules. The value of each asset category was rolled over to a new lease, along with some new equipment. In addition, some equipment was removed from the original lease schedules. The lease rewrites resulted in a minimum of an additional \$2.5 million in payment obligations. In addition, the lease rewrites all had a common termination date: March 31, 2005. This common termination date effectively increased the already extended 60 month lease terms to 63 and 66 month lease terms.⁸⁹

112. Domi personally delivered the box of rewritten lease documents to Liczyk in her office. Domi agreed that the documents were lengthy and that Liczyk could not possibly read all of the fine print on the documents. Domi further agreed that Liczyk would not think twice about signing MFP documents that purported to be administrative reorganizations or cost allocation reports. Domi presented the leases to Liczyk without informing her that MFP had made significant changes to the terms of the leases. He hoped that she would simply sign the lease rewrites on the bottom line.⁹⁰

113. Liczyk explained her egregious failure of due diligence by attempting to shift responsibility to her assistant for letting Domi bring the documents into her office without checking them first. This explanation was typical of Liczyk. She consistently tried to shift responsibility that was properly hers to her staff. In fact, Liczyk was duped by an unscrupulous vendor. She treated Domi like a trusted friend instead of a charming rogue.⁹¹

114. The lease rewrites were a cynical ploy used by MFP to churn the City account to MFP's sole advantage. The Inquiry's leasing expert concluded that the rewrites were of no value to the City and their purported objectives could have readily been realized through other means at no cost or considerably less cost to the City. No properly informed leasing customer would have knowingly

⁸⁸ Chapter 5, part 5; Chapter 19, part 4.

⁸⁹ Chapter 15, parts 2, 5, and 6.

⁹⁰ Chapter 15, part 6.

rewritten the leases on the terms the City did when Liczyk executed the contracts.⁹²

ii) MFP churned the City account

115. MFP's approach to the lease rewrites mirrored its conduct with respect to the extension of the lease terms from 3 to 5 years. For both transactions:

- a. there was no paper trail;
- b. instead, MFP first met with the City to discuss broad concepts and ideas;
- c. following these meetings, MFP committed nothing to writing, confirmed nothing in writing, and erased or discarded any examples previously provided;
- d. MFP provided no quote and did not disclose the actual cost of the transaction;
- e. MFP drafted a contract and arranged to have Domi personally deliver it to the City to be signed; and
- f. MFP provided no covering letter which identified the fact that the contract was being forwarded to the City for its review and execution, let alone any description of the contract.⁹³

116. When viewed together, the extension of the lease terms and the July rewrites made MFP's *modus operandi* clear.

117. Domi made \$420,000 in commission from the rewrites alone.⁹⁴

⁹¹ Chapter 15, part 6.

⁹² Chapter 15.

⁹³ Chapter 19, part 8.

x) The 2000 Budget Process

118. In late 2000, in preparation of the 2001 budget, it came to Liczyk's attention that significantly more than \$43 million in equipment and software had been placed on lease with MFP. As of the end of December 2000, the total amount on lease with MFP was approximately \$70 million.⁹⁵

119. What did Liczyk do in response? According to her, two things.

120. First, she claimed to have called a meeting of the CMO and MFP for January 17, 2001, to discuss how continued leasing with MFP in excess of the \$43 million cap had to stop. However, no one in attendance recalled the meeting that way and no one altered their behaviour thereafter.⁹⁶

121. Second, in March 2001, she presented an opaque report to the Budget Advisory Committee which referred only to the fact that I&T was over budget for computer lease costs, and made no reference to the fact that an additional \$24 million in assets had been put on lease with MFP without Council approval.⁹⁷

122. Liczyk said that was adequate disclosure to Council because the issue was "water under the bridge." But it was not. After the January meeting:

- a. Viinamae put another \$4.1 million of equipment on lease with MFP;⁹⁸ and
- b. Viinamae and Liczyk approved a March 14, 2001, report to Council for the acquisition of photocopiers that described MFP as the City's "current technology lease provider" and assumed that the photocopiers would be leased from MFP.⁹⁹

⁹⁴ Chapter 15, part 7.

⁹⁵ Chapter 14, part 7.

⁹⁶ Chapter 14, part 7.

⁹⁷ Chapter 14, part 8.

⁹⁸ Chapter 14, part 9.

⁹⁹ Chapter 16, part 2.

123. Liczyk didn't tell Michael Garrett, the CAO, that the MFP contracts were offside Council approval. She didn't tell Joan Anderton, the new Commissioner of Corporate Services. She didn't put her concerns in a memo to Viinamae or Bulko or MFP or anyone else. For Liczyk, it was just business as usual.¹⁰⁰

124. Liczyk knew that the City had placed millions more on lease with MFP than the \$43 million cap allowed. She just didn't care, so long as the money for the lease payments was in the budget. She was prepared to leave Council, Garrett and Anderton in the dark about MFP's untendered contracts and favoured position.¹⁰¹

y) Photocopier leasing – Spring 2001

125. The March 14, 2001, photocopier report was scheduled to be discussed at the Council meeting held between April 23 and May 2, 2001. During the week of April 23, 2001, Councillor Bas Balkissoon reviewed the report in preparation for the Council meeting. He was troubled by the report's reference to the City's 'current technology leasing provider' because he could not recall Council approving a vendor of record relationship with a computer leasing company.¹⁰²

126. In response to a request from Balkissoon, Viinamae had Power prepare a briefing note on the computer leasing program, which referenced the July 1999 Council Report as authority to lease the photocopiers with MFP. Balkissoon disagreed. He raised the issue on the floor of Council on May 2, 2001. Council ultimately approved the March 14 photocopier report but required that the leasing component of the contract be put out to tender.¹⁰³

127. MFP began to pressure Balkissoon. Domi, Nigro and Lyons all called Balkissoon to complain that MFP was entitled to lease the photocopiers without a

¹⁰⁰ Chapter 24, part 5.

¹⁰¹ Chapter 14, parts 7, 8 and 9.

¹⁰² Chapter 16, part 3.

¹⁰³ Chapter 16, part 3.

tender. Domi also called Liczyk. She claimed it was to congratulate her on her new job at Toronto Hydro.¹⁰⁴

128. In May 2001, the Acting Executive Director of I&T, James Ridge, who had assumed the position in February 2001 after Andrew left the City, initiated a review by legal staff of the issues surrounding the MFP leases.¹⁰⁵

129. MFP submitted the low bid in response to the photocopier leasing tender, which was conveyed in a staff report dated May 30, 2001.¹⁰⁶

z) Summer 2001

130. At the July 2001 Council meeting, in the wake of the City of Waterloo's lawsuit against MFP, Acting CAO Shirley Hoy pulled the May 30, 2001, staff report recommending MFP as the successful bidder for photocopier leasing.¹⁰⁷

131. On August 3, 2001, the Acting CAO, Shirley Hoy, sent a memo to the Mayor and Council members advising that she had instructed her staff to conduct a review of the MFP contracts.¹⁰⁸

132. On August 3, 2001 Hoy also wrote a letter to Wolfraim, Domi, and John McGrath, Chair of the Board of Directors of MFP, directing them to remove from the MFP website testimonials provided by Liczyk, Andrew and Viinamae in the MFP 2000 Annual Report.¹⁰⁹

133. Reading MFP's loud boasts from its 2000 Annual Report today, the irony is inescapable:

At MFP, innovation makes huge deals happen. And in the context of the City of Toronto, the \$62 million contract to finance sweeping technological change was significant indeed. MFP Account Executive Dash Domi, and Senior Portfolio Administrator Lee Ann Currie, headed up the MFP Team.

¹⁰⁴ Chapter 16, part 4.

¹⁰⁵ Chapter 16, part 6.

¹⁰⁶ Chapter 16, part 5.

¹⁰⁷ Chapter 16, part 7.

¹⁰⁸ Chapter 16, part 7.

¹⁰⁹ Chapter 24, part 3.

While great effort went into earning the business, one word seemed to make the biggest difference of all. Creativity. Creativity: in service and commitment to the project; innovation and understanding from finance experts like MFP's Rob Wilkinson. MFP contributed to the change process in Toronto by helping the customer rethink the financing aspects of major projects.¹¹⁰

134. Liczyk, Andrew and Viinamae posed for smiling photos and enthusiastically endorsed their supposed leasing partner. Their words demonstrated how little they realized about what MFP had actually accomplished on their watch and how they had lowered their guard:

"MFP's process made it possible to flat-line the acquisition expense over time, manage the assets more effectively and allowed us to build in a technology refresh capacity in a controlled fashion, " [added] Viinamae.

...

"They were financially competitive and a good team for the City," said Liczyk. "MFP expanded things for our staff and exposed them to new ideas. Rob Wilkinson (MFP), for example, took a great deal of time and made the effort to explain new models, and he listened to our concerns. The entire team made sure they were implementing what they were saying."¹¹¹

135. On October 1, 2004, MFP changed its name to CLEARLINK Capital Corp. Under its new name, the same old company continued to present itself to an unsuspecting business community as a trusted advisor, not a leasing company who saw its only obligations to its clients as being contained in the four corners of the self-interested contracts it wrote. The new website states:

Our philosophy towards delivering effective and *beneficial solutions to our clients* is based on four major principles:

Provide the best customer service and administrative support that our clients receive from any lessor or supplier.

Maintain the highest level of financial business acumen to act as *trusted advisors* to our clients.

¹¹⁰ COT028069 at COT028104, 10:2:173.

¹¹¹ COT028069 at COT028109, 10:2:173; Chapter 24, part 3.

Maintain the *technical skills* and market knowledge that allow us to be *effective, independent advisors* to our clients.

Operate from a position of financial strength in order to give our clients the flexibility to select from a complete range of financing options. (emphasis added)

III. Responsibility

a) *MFP/CLEARLINK's Responsibility*

136. MFP/CLEARLINK took the position throughout the Inquiry that it should not be criticized for its dealings with the City because:

- a. MFP had submitted the lowest bid in response to the City's RFQ;
- b. any representations made by MFP or its salespersons were clearly excluded by the terms of the contracts and were mere puffery in any event;
- c. the terms of the deals were clearly spelled out in written contracts;
- d. the contracts had been signed by officials at the City with either actual or apparent authority to sign the contracts;
- e. the City was the sixth largest government in Canada with extensive legal and financial expertise at its disposal;
- f. the City had the opportunity, which it took from time to time, to obtain legal advice on the terms of the contracts;
- g. no one at the City ever advised MFP that any of its business entertainment expenses were inappropriate and other competitors were doing similar entertaining;
- h. MFP simply responded to concerns expressed by the City and offered flexible amendments to the lease arrangements to satisfy its customer; and, above all,
- i. *caveat emptor*: buyer beware.

137. That, however, is only a small part of the story. The evidence established that MFP or its agents:

- a. held out the company as a trusted leasing partner to a city of leasing novices;¹¹²
- b. promised to work with the City to develop financing arrangements that were creative and responsive to its needs;¹¹³
- c. unleashed a charismatic and well connected salesman with an unlimited and unsupervised expense account to target key City decision-makers;¹¹⁴
- d. developed inappropriate personal relationships with key decision-makers and capitalized on ethical lapses by two senior City staff and a former member of Council;¹¹⁵
- e. submitted a response to the City's RFQ that was too good to be true and to which it never intended to be bound;¹¹⁶
- f. after winning the bid, created a culture of confidence between City staff and MFP staff so that City staff would see MFP staff as professionals or consultants working to further the City's best interests, not as a corporate predator, which quietly resiled from its bid and viewed its only obligations to the City to be those found in the four corners of the contracts it wrote;¹¹⁷
- g. made an improper payment to a City Councillor for having created the room to wriggle out of the promises it made in the RFQ and to begin to enhance its deal;¹¹⁸
- h. played divide and conquer with the City's I&T staff and its Finance staff to capitalize on the leasing novices in I&T;¹¹⁹

¹¹² Chapter 19, part 2.

¹¹³ Chapter 4, part 4; Chapter 19, part 4.

¹¹⁴ Chapter 5, parts 3, 4, 5 and 6; Chapter 19, part 3.

¹¹⁵ Chapter 19, parts 3 and 4.

¹¹⁶ Chapter 9, part 2; Chapter 10, part 1; Chapter 19, part 6.

- i. suggested modifications to the leases that represented the most expensive possible ‘solutions’ to the City’s needs;¹²⁰
- j. moved quickly from casual informal discussions of general principles to final form contract documents without providing a single piece of paper (much less a concrete proposal) in between;¹²¹
- k. drafted contract documents before receiving approval, even in principle, from authorized City representatives;¹²²
- l. pulled off a classic ‘bait and switch’;¹²³
- m. failed to advise the City of the cost of the lease re-writes and the cost of the change from to 3-year lease terms to 5-year lease terms;¹²⁴
- n. misled the CFO regarding the effect of the lease rewrites being a mere administrative reorganization;¹²⁵
- o. placed software maintenance agreements on lease and collected lease payments on maintenance fees years before MFP had to pay the fees to Oracle;¹²⁶
- p. failed to train or supervise appropriately its novice salesperson;¹²⁷

¹¹⁷ Chapter 10.

¹¹⁸ Chapter 18, part 5.

¹¹⁹ Chapter 10, parts 3, 4 and 5.

¹²⁰ Chapters 10 and 15.

¹²¹ Chapter 10, part 7.

¹²² Chapter 10, parts 5 and 7.

¹²³ Chapters 10 and 15.

¹²⁴ Chapter 10, part 7.

¹²⁵ Chapter 15, part 6.

¹²⁶ Chapter 13, part 6.

¹²⁷ Chapter 19, part 3.

- q. paid a novice salesperson enormous commissions that were entirely unrelated to any contribution which he admitted to making;¹²⁸
- r. hired Vince Nigro, a former assistant to the Mayor of the City of Toronto, who helped Domi build improper relationships with the City's key decision-makers and allowed Domi to share the commissions Domi 'earned' on the City deal with Nigro. MFP paid Nigro over \$100,000 despite the fact that Nigro never closed a single deal for MFP;¹²⁹
- s. engaged in complicated leasing transactions without creating even a modest paper trail to record discussions within MFP or between the City and MFP, or to record the transmission of documents to the City;
- t. repeatedly violated the Canadian Finance & Leasing Association (CFLA) Code of Ethics, which was designed to maintain integrity, professionalism and trustworthiness within the leasing industry, by withholding information from the City, by making false and misleading statements to the City, and by failing to ensure at all times that all relevant terms of the lease transaction were disclosed;¹³⁰ and
- u. repeatedly violated internal MFP Code of Conduct and policies regarding conflict of interest and expenses.¹³¹

138. MFP's course of conduct with the City was not an isolated event. The findings of Commissioner Sills in the Report of the Waterloo RIM Park Inquiry demonstrate that MFP also behaved unethically in its dealings with the City of

¹²⁸ Chapters 18 and 19.

¹²⁹ Nigro 01/16/2003 at 27-29.

¹³⁰ Chapter 4, part 4.

¹³¹ Chapter 4, part 4; Chapters 18 and 19.

Waterloo. Commissioner Sills found that MFP salesperson David Robson pulled off a “scam, properly characterized as a bait and switch” and that he “deliberately misled” the CFO and other staff of the City of Waterloo.¹³²

139. MFP was a corporate predator. MFP profited from the City’s inexperience with lease transactions, the admitted failures of City process and due diligence, the ethical lapses of Liczyk and Andrew, and Jakobek’s willingness to accept an improper payment from Domi.

b) Responsibility of Jakobek

140. City Councillors must act in the public interest. Councillors must perform their duties in a manner that maintains and enhances public confidence and trust in the integrity, objectivity and impartiality of the City. Trust and mutual respect are the cornerstones of any relationship between the public and its government.

141. There can be little more important than governments that demonstrate integrity. Municipal governments cannot function efficiently if their integrity is doubted. Public confidence is undermined when Councillors prefer their own private interests to the public good.

142. Jakobek failed to meet the standard. His conduct diminished public confidence and trust in the integrity of the City. In particular, Jakobek should be harshly criticized because he:

- a. had an inappropriate relationship with Domi;¹³³
- b. accepted an improper payment from Domi;¹³⁴
- c. moved the Jakobek Amendment in order to assist MFP;¹³⁵

¹³² Report of the Waterloo Inquiry, page 32, paras. 8 and 14.

¹³³ Chapter 5, part 5; Chapter 18.

¹³⁴ Chapter 18.

¹³⁵ Chapter 8, part 2.

- d. obtained draft leasing procurement documents and provided at least one such document to Domi;¹³⁶
- e. had an inappropriate relationship with Andrew;¹³⁷ and
- f. improperly attempted to dissuade Andrew from participating in an internal City investigation into the MFP leases.¹³⁸

c) Responsibility of City Staff

143. The City accepts that its staff made mistakes. The City does not hold its employees to a standard of perfection. This procurement exercise failed badly and everyone involved in the project could be faulted. Everyone, it turns out, could have done more, could have done it more quickly, and could have done it better. The City submits that there is little purpose in criticizing everyone who simply touched this computer leasing procurement file. To blame everyone is to blame no one.

i) Responsibility of I&T

144. Among the City departments and divisions, I&T bears primary responsibility for the improvident leasing transactions. I&T faced enormous burdens in 1998 – 2000. Amidst the chaos of amalgamation, I&T struggled to integrate disparate information technology platforms and get the City ready for the looming Year 2000 deadline. I&T was understaffed and relied heavily on consultants who were not as familiar as they should have been with City policies and processes.¹³⁹

145. I&T was seduced by leasing. I&T had visions of reduced annual operating expenses, flat-lined budgets, regular equipment upgrades, outsourced asset

¹³⁶ Chapter 20, part 3.

¹³⁷ Chapter 20, part 4; Chapter 21, part 3.

¹³⁸ Chapter 20, part 5.

¹³⁹ Chapter 3, parts 1 and 3.

management, and the promised ability to free information technology acquisitions from regular Council scrutiny.¹⁴⁰

146. Andrew was seduced by MFP. He allowed himself to be wined, dined and entertained by Domi. He lowered his guard and trusted MFP. He failed to protect the City's interests because of his misplaced trust.¹⁴¹

147. I&T was the project sponsor for computer leasing. Staff embarked on the project without having engaged in any form of planning to address end of term lease costs, computer refreshes and upgrades, and without the requisite expertise.¹⁴²

148. Andrew, Viinamae and Power developed a broad vision of the type of relationship they wanted with the City's leasing provider: to put an unlimited amount of equipment on lease at undetermined rates for an undefined period of time. They never told any other department about their vision, which was therefore never scrutinized by Finance, PMMD, or internal City Legal. They never got approval for their vision from P&F or Council.¹⁴³

149. They failed to negotiate an MLA with MFP that reflected the promises MFP had made in its response to the RFQ and which were approved by Council. Power failed to adequately involve external legal counsel. The subsequent legal opinion provided Power with the opinion he requested, not the one the City needed. Viinamae signed the five year equipment schedules without even realizing she was signing a \$20 million contract. She failed to have the document reviewed by legal counsel.¹⁴⁴

150. Viinamae was primarily responsible for the City's decision to acquire the Oracle ELA. She did not prepare any written material to support this \$11 million decision. She did not make any sort of detailed presentation to the Year 2000

¹⁴⁰ Chapter 6, part 3.

¹⁴¹ Chapter 21, parts 3, 4 and 5.

¹⁴² Chapter 6, parts 3, 4 and 5; Chapter 21, part 5; Chapter 22, part 5.

¹⁴³ Chapter 6, part 3; Chapter 7, parts 5 and 6; Chapter 8, part 2.

Steering Committee before asking it to approve the acquisition. She mischaracterized the acquisition as a Year 2000 expense.¹⁴⁵

151. Andrew and Viinamae created the CMO to run a leasing program that Council never approved. They and Power, and not Bulko or her inexperienced front-line staff in the CMO, are responsible for the City placing more than \$43 million on lease with MFP.¹⁴⁶

152. Power compounded his earlier mistakes in March 2000 when confronted by Brian Loreto (“Loreto”), a City lawyer who had identified the \$43 million cap in the Council authorization. Power misled Loreto about the amount of equipment that had been put on lease. Had Power told Loreto the truth, Loreto would have immediately raised the red flag on the MFP leasing program.¹⁴⁷

ii) Responsibility of Finance

153. Liczyk bears significant responsibility for the lease transactions with MFP. Her staff, however, played only a minor role. While they made some mistakes and some could have done more, their actions did not materially contribute to the City’s improvident deals.¹⁴⁸

154. Liczyk had an inappropriate relationship with Domi. She allowed him to wine, dine and entertain her far in excess of what was permissible under the City’s codes of conduct and her employment contract.¹⁴⁹

155. They spoke too frequently on the phone. There was no appropriate reason for the City’s CFO to be in such frequent contact with a salesperson for a vendor to the City. These calls are clear evidence of an inappropriate relationship in which professional boundaries were crossed. As will be detailed in the City’s

¹⁴⁴ Chapter 9, parts 2, 4 and 7; Chapter 10, part 10.

¹⁴⁵ Chapter 13, parts 3, 4 and 5; Chapter 22, part 8.

¹⁴⁶ Chapter 12, parts 2 and 3.

¹⁴⁷ Chapter 23, part 15; Chapter 26, part 7.

¹⁴⁸ Chapter 25, part 1.

¹⁴⁹ Chapter 5, part 5; Chapter 19, part 4; Chapter 24, part 3.

submissions in TECI, her failure to maintain professional boundaries with Domi, and the resulting impairment of her judgment, was not an isolated event.¹⁵⁰

156. Liczyk's inappropriate relationship with Domi impaired her judgment. She treated Domi as a trusted friend instead of a charming rogue. Her testimonial in the MFP Annual Report demonstrates that she foolishly believed MFP's misleading self promotion to the City's detriment.¹⁵¹

157. Liczyk should have been a leader by setting the ethical standard for others to follow. She did not provide such leadership. Despite this, and fortunately for the City, Liczyk's staff who testified at the Inquiry understood their obligation to avoid conflict of interest situations. Not one of the Treasury, Accounting, or PMMD witnesses was ever entertained by MFP or engaged in any unethical behaviour.¹⁵²

158. Liczyk's compromised judgment was most apparent in two significant decisions:

- a. to put most of the equipment on 5 year leases without the benefit of any financial analysis or a re-tender;¹⁵³ and
- b. to sign the July 2000 rewrites, having been advised they were merely administrative reorganizations, without ensuring that the contract documents had been reviewed by appropriate City officials.¹⁵⁴

159. Both decisions materially contributed to the City's improvident deals. Both decisions were the product of her compromised judgment and her willingness to trust MFP's financial expertise and representations.

¹⁵⁰ Chapter 5, part 5; Chapter 19, part 4; Chapter 24, part 3.

¹⁵¹ Chapter 24, part 3.

¹⁵² Chapter 24, part 3.

¹⁵³ Chapter 10, part 1.

¹⁵⁴ Chapter 15, part 6.

160. The Jakobek Amendment, which precipitated Liczyk’s decision to extend the lease terms, combined with Power’s failure to hold MFP to its promises in the MLA, rendered irrelevant all of the Finance Department’s work in reviewing the RFQ, evaluating the responses and comparing them to the cost of financing the expenditures through debentures, and drafting the report to P&F and Council.¹⁵⁵

161. Liczyk failed to recognize the complexity of the computer leasing transaction and the many pitfalls it presented. It was not, as she assumed, as simple as leasing a car. After the contract was awarded, she failed to designate a lead individual to take responsibility for coordinating Finance’s support of I&T in its role as project sponsor.¹⁵⁶

162. Specifically, Liczyk did not assign Brittain the responsibility of analyzing the Jakobek Amendment or five-year lease terms. Her evidence to the contrary should be rejected.¹⁵⁷

163. However, in hindsight, senior Directors in Finance could have done more to prevent I&T from mismanaging the computer leasing program. Had they, individually and as a group, been more responsive to vague questions from I&T, had they seen beyond the structural silos they occupied, had they questioned Liczyk and the decisions she made, the problems with the leasing program might have been identified sooner.¹⁵⁸

164. Liczyk, on the other hand, *knew* no later than December 2000, that I&T had mismanaged the computer leasing program, that I&T had placed considerably more than \$43 million of computer hardware and software on lease, and that the continued operation of the MFP leasing program was outside the Council authority. Liczyk neither raised her concerns with Andrew, nor disclosed her concerns to Garrett or Joan Anderton (“Anderton”), who joined the City in February 2000 and became responsible for I&T. Liczyk never reported it to

¹⁵⁵ Chapter 8, part 2.

¹⁵⁶ Chapter 24, part 4.

¹⁵⁷ Chapter 8, part 3.

¹⁵⁸ Chapter 25, part 10.

Council. There is no justification for Liczyk's failure to report fully and explicitly to Council that I&T had put significantly more on lease than the \$43 million approved by Council in July 1999.¹⁵⁹

165. In May 2001, Council considered Liczyk's photocopier lease report, which assumed that the photocopiers would be leased with MFP without a tender. Councillors began to question the City's relationship with MFP. Liczyk stayed silent. She did not, even at this late date, on her way out of the City to a new position, tell anyone that she had known since December 2000 that I&T had completely misapprehended Council's authority and had placed as much as \$65 million dollars worth of technology on lease. She owed it to the City to disclose all she knew and she failed to do so.¹⁶⁰

d) The Importance of the Inquiry

166. The Supreme Court of Canada has recognized the important role of municipal public inquiries to safeguard the public interest from the misconduct of elected officials:

The power of an Ontario municipality to authorize a judicial inquiry into matters touching the good government of the municipality, or "any part of its public business", and any alleged misconduct in connection therewith, reaches back prior to Confederation. ...This reflects a recognition through the decades that good government depends in part on the availability of good information. A municipality, like senior levels of government, needs from time to time to get to the bottom of matters and events within its bailiwick. The power to authorize a judicial inquiry is an important safeguard of the public interest....¹⁶¹

167. The work of this Inquiry was hampered by the decision of several witnesses to deliberately obstruct its work. The City acknowledges that individuals may properly choose not to meet with Commission Counsel in

¹⁵⁹ Chapter 14, part 6; Chapter 24, part 5.

¹⁶⁰ Chapter 14, part 9; Chapter 16, parts 2 and 7.

¹⁶¹ *Consortium Developments (Clearwater) Ltd. v. Sarnia (City)*, [1998] 3 S.C.R. 3 at para. 26

advance of testifying. The conduct of certain witnesses, however, went well beyond relying on their rights. Certain witnesses actively misled Commission Counsel and the Commissioner by writing misleading letters to Commission Counsel, feigning memory loss in the witness stand, failing to bring documents to the Inquiry in response to a summons, or actually fabricating evidence in the witness box.

i) Jakobek obstructed the Inquiry

168. Jakobek deliberately obstructed the work of this Inquiry. He:

- a. deliberately misled Commission Counsel and the Commissioner about the quality and nature of his relationship with Domi;
- b. collaborated with Domi and Nigro in an ultimately futile attempt to mislead and convince the Commission that Jakobek was not on the flight to Philadelphia;
- c. actively encouraged witnesses and potential witnesses to lie to the Commission to back up his story that he was not on the flight to Philadelphia;
- d. while in the witness box, he fabricated an entire story surrounding the circumstances leading to his former lawyer's letter to the *Toronto Star*, which attempted to deflect blame from himself to his lawyer; and
- e. misled Commission Counsel and the Commissioner about the source of the funds deposited into his American Express Account on November 3, 1999, in his Affidavits sworn October 15, 2003, and December 2, 2003, and failed to make meaningful inquiries to determine the source of those funds.¹⁶²

¹⁶² Chapter 18; Chapter 20, part 6.

ii) Domi obstructed the Inquiry

169. Domi deliberately obstructed the work of this Inquiry. He:
- a. deliberately misled Commission Counsel and the Commissioner about the quality and nature of his relationship with Jakobek;
 - b. collaborated with Jakobek and Nigro in an ultimately futile attempt to mislead and convince the Commission that Jakobek was not on the flight to Philadelphia;
 - c. misled Commission Counsel and the Commissioner about what he did with the \$25,000 cash he withdrew on November 1, 1999; and
 - d. feigned memory loss on a large number of issues of concern to the Inquiry.¹⁶³

iii) Nigro obstructed the Inquiry

170. Nigro deliberately obstructed the work of the Inquiry.

171. Nigro testified long before Commission Counsel established that Jakobek was in fact on the flight to Philadelphia. He was the first witness called who was actually on the flight to Philadelphia. He feigned memory loss, stating that he did not “specifically recall” whether Jakobek was on the flight to Philadelphia.¹⁶⁴ However, Nigro, like Domi, did recall that Ginou and Peerenboom were on the flight. Nigro feigned memory loss in concert with Domi and Jakobek’s plan to mislead the Commission.

172. Nigro routinely feigned memory loss as a method of concealing his role and the role of others. On one occasion, Nigro testified about the assistance he provided to Domi and Payne while he was the Special Assistant to Mayor Lastman:

¹⁶³ Chapter 18; Chapter 19, part 4.

¹⁶⁴ Nigro 01/16/2003 at 156.

Q: Do you think that you were close enough to the City business to be of any help to Irene Payne?

A: I don't think so.

Q: Well, do you think any of these discussions that you were having with her, four (4) or five (5) discussions over several hours that they were at all valuable to her?

A: She was also with the Federal Government, you know, and I think she talked a little bit about the Federal Government stuff and she wanted to explore a lot more on the Provincial side. That's the type of conversations we had. *I don't remember anything specific about anything in general.*

Q: Do you think that you had any value to her, in relation to the MFP City business?

A: No, I don't think so.¹⁶⁵ (emphasis added)

173. Nigro should be criticized for misleading the Inquiry and for his decision to feign memory loss on issues of concern.

iv) Lyons obstructed the Inquiry

174. Lyons deliberately obstructed the work of the Inquiry.

175. Lyons was served with TCLI summonses in August and December 2002, and with a second summons in December 2002. He was obliged to obtain all potentially helpful material from his former law firm Morrison Brown Sosnovitch ("MBS") and provide it to Commission Counsel. Lyons did not produce his DFS or Dell Computer Corporation files in response to the summons.¹⁶⁶

176. Commission Counsel issued a summons to MBS on March 7, 2003. MBS subsequently produced a large amount of potentially helpful material pursuant to the summons, much of it located at the firm's off-site storage facility.¹⁶⁷

177. Lyons testified that:

¹⁶⁵ Nigro 01/16/2003 at 112.

¹⁶⁶ Chapter 27, part 4.

¹⁶⁷ Chapter 27, part 4.

- a. he searched for the DFS file;
- b. his DFS file was probably destroyed on his instructions;
- c. he did not use long-term storage facilities for files because they were too expensive; and
- d. his assistant had verified that MBS deleted Lyons electronic data when he left the firm.¹⁶⁸

178. All of this evidence was false:

- a. MBS, to its knowledge, did not receive a request from Lyons for any material relevant to the Inquiry;
- b. MBS produced Lyons' DFS file. MBS policy called for client files to be stored or returned to clients, not for their destruction;
- c. Lyons put 21 bankers' boxes of files, including the DFS file, into the MBS long-term storage facilities and had retrieved files from MBS storage in 2002; and
- d. MBS identified relevant electronic data, which had not been deleted because such deletions would have violated the firms' policy.¹⁶⁹

179. Lyons was neither candid with Commission Counsel, nor with the Commissioner. He failed to discharge his obligations to produce all relevant documents to the Commission. He misrepresented the steps he had taken to search for the documents. He misrepresented his practice with respect to document retention and destruction. This lack of candour is extremely troubling and should be criticized by the Commissioner.¹⁷⁰

¹⁶⁸ Chapter 27, part 4.

¹⁶⁹ Chapter 27, part 4.

¹⁷⁰ Chapter 27, part 4.

180. The City submits that Lyons did not respond to the summons in an attempt to prevent the Inquiry from obtaining evidence that might establish that he had obtained confidential City information or had otherwise behaved improperly.

181. Lyons asked two DFS employees for \$150,000 for himself or for himself and Jakobek. Lyons should be criticized for asking Marentette and Simone for \$150,000 for Lyons to secure the contract with the City on favourable terms for DFS. Lyons was not seeking a simple success fee.¹⁷¹

¹⁷¹ Chapter 17, part 6.

IV. Conclusion

182. The City looks forward to the Commissioner's findings, whatever they may be. The Inquiry has a different purpose from either civil or criminal proceedings. The purpose of the Inquiry is not to make findings of liability or responsibility in a legal sense, but rather to report on all the circumstances surrounding the events leading to this Inquiry and all the causes of those events to help ensure that they do not happen again. Understanding what went wrong should, in itself, prove helpful in the future to those responsible for managing and governing the City of Toronto.

ALL OF WHICH IS RESPECTFULLY SUBMITTED on December 6, 2004

Paliare Roland Rosenberg Rothstein LLP
Barristers and Solicitors

Counsel to the City of Toronto