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1. Overview

1. On December 31, 1999, in the final countdown to Y2K, the City entered into an agreement with Oracle Capital Canada (“Oracle”) to acquire 10,000 software “enterprise” or “network” licences at a cost of over \$11 million. Shortly thereafter, the Oracle acquisition was put on lease with MFP. The acquisition was essentially a paper transaction: very little actual product had to be shipped to the City or installed onto City computers; rather the agreement with Oracle provided the City with additional licence rights for software already in use.

2. The rationale for this significant acquisition was never documented. No written business case or project charter was ever prepared. Nor were the merits of the transaction ever analyzed by senior I&T staff with relevant expertise. Instead Lana Viinamae, the transaction’s champion, relied entirely on the data and needs analysis provided by the supplier itself, Oracle.

3. In her presentations to the Y2K Steering Committee (“Steering Committee”) and the CAO (and in her evidence at the Inquiry) Viinamae characterized the acquisition as a Year 2000 expense which allowed her to use the Y2K budget to fund it and to avoid any competitive process in selecting the supplier or evaluating the supplier’s asking price. The evidence at the Inquiry convincingly established that the acquisition was not required for business as usual on January 1, 2000 and that Viinamae’s characterization was either inept or a stretch.

4. According to Viinamae, the acquisition was approved by the Steering Committee on December 30, 1999. Neither Liczyk nor Andrew, both marked in attendance at the meeting, could remember the meeting let alone approving the acquisition. The minutes of that meeting were silent on the point. The lack of any contemporaneous documentation for a purchase of this magnitude is disturbing.

5. Nevertheless, and notwithstanding the City’s concerns about the credibility of much of Viinamae’s testimony on other issues, her evidence that the \$11 million

transaction was approved by the Steering Committee must be accepted. Apart altogether from the apparent frailties of Andrew's memory on various material issues, and Liczyk's possible motive to deflect responsibility from herself, the minutes of the subsequent Steering Committee meeting held on January 6, 2000 clearly documented the December 30, 1999 approval.

6. These minutes were not prepared by Viinamae but by Diane Field. There was no evidence to suggest the minutes were fabricated; in fact, Andrew's handwritten scrawl on his copy of the January 6, 2000 agenda provided independent evidence to support their authenticity.

7. The cost effectiveness of the Oracle transaction will long be debated. The Inquiry heard evidence that in the countdown to Y2K, enterprise licenses were necessary to serve the City's needs and evidence, mostly from Oracle and Viinamae, and that the amount paid was so discounted as to refute any concerns about whether number of enterprise licenses needed was 2000 or 10,000. What cannot be debated, however, was that the financial consequences to the City of putting the total Oracle contract on lease, and on lease with MFP, were never even considered, not even by Viinamae.

8. The evidence overwhelmingly established the financial hazards of putting the entire Oracle contract on lease, particularly the five year maintenance and support fees which were only due on an annual basis. The City's leasing contract with MFP required it to make lease payments to MFP for Oracle support services yet to be provided and yet owing to Oracle. MFP knew the City was in effect prepaying, all to MFP's benefit, but said nothing. Once again, MFP knowingly profited at the City's expense and knowingly exploited Viinamae's lack of knowledge and sophistication about leasing costs and leasing contracts.

2. The Oracle transaction

9. On December 31, 1999, the City entered into an Enterprise License Agreement (“ELA”) with Oracle Corporation Canada Inc. (“Oracle”) for the acquisition of 10,000 Oracle software licenses and accompanying support.¹ The authority for the agreement was purportedly found in a Year 2000 Delegated Approval Form (“Delegated Approval Form”) requested by Viinamae.² The Delegated Approval Form was prepared on December 29, 1999 and was signed by Pagano, Director of PMMD, Viinamae, Director, Year 2000, Liczyk, Steering Committee member, and Garrett, CAO.³ The Delegated Approval Form authorized the expenditure of \$11,336,651 over five years for an Enterprise Software License and Services Agreement.⁴

10. The ELA between Oracle and the City consisted of the Master Software License and Services Agreement (“MLSLA”),⁵ the Addendum,⁶ Appendix 1,⁷ the Assignment Agreement,⁸ the Network Order Form,⁹ the Addendum to the Network Order Form¹⁰ and Exhibit A.¹¹

11. Part of the ELA, the Network Order Form set out the contents of the contract, which included 10,000 Oracle Database Enterprise Edition network licenses plus support fees. The total cost of the licenses was reduced by a credit for existing licenses which the City held.¹² The effect of the credit was to upgrade all of the licenses that the

¹ COT040503, 26:1:21.

² COT030456, 3:1:6.

³ COT030456 at COT030457, 3:1:6.

⁴ COT030456, 3:1:6.

⁵ COT040503, 26:1:21.

⁶ COT040503 at COT040509, 26:1:21.

⁷ COT040503 at COT040513, 26:1:21.

⁸ COT40503 at COT040514, 26:1:21.

⁹ COT040503 at COT040516, 26:1:21.

¹⁰ COT040503 at COT040517, 26:1:21.

¹¹ COT040503 at COT040519, 26:1:21.

¹² COT040503 at COT040516, 26:1:21.

City held to “network” licenses. Addendum A contained amendments to the MLSLA, including a technical support cap on support in years 2, 3, 4 and 5 of the contract.¹³

12. The Oracle acquisition was put on lease with MFP in 2000 under the MLA¹⁴ and Equipment Schedule 838-2¹⁵.

13. The Oracle transaction was basically a paper transaction. There was very little actual product that had to be shipped to the City or installed onto City computers. The basic database software already existed at the City and was installed on most City computers. The Oracle transaction essentially increased the rights of the City to use that software by providing the City with additional license rights for the software.¹⁶

¹³ COT040503 at COT040517, 26:1:21.

¹⁴ COT020598, 18:1:1.

¹⁵ COT021050, 54:1:30.

¹⁶ Griffith 08/06/2003 at 172-173.

3. Process leading to acquisition of Oracle licenses

14. The purpose of the Oracle acquisition, as described on the Delegated Approval Form that served as the authority for the acquisition, was to consolidate the licenses previously held by third party vendors and the licenses held by individual operating departments.¹⁷ However, prior to entering into the Oracle agreement, the City did not compile its own inventory of existing licenses and applications that would be affected by Oracle. Instead, the City relied on data provided by Oracle.¹⁸

15. In other words, in negotiating the terms and price of the Oracle agreement, Viinamae relied entirely upon Oracle to verify how many Oracle users the City had and what types of licenses those users were using.¹⁹ Viinamae did not make independent inquiries, but instead relied entirely on the presentation by Larry Griffith (“Griffith”), the Oracle account manager, of Oracle’s own data.²⁰ As is discussed below, Oracle’s data was problematic.

16. Viinamae justified her reliance on Oracle’s user data because the City did not have time to complete an inventory of its Oracle usage.²¹ However, the evidence established that Oracle would have provided consulting services free of charge to assist the City to review and track license usage for the City.²² Oracle had a Licence Management Service Division that could assist customers with counting the number of licences in use on a particular system, and had provided those services to the former Metropolitan Toronto in the past. This method would have produced more reliable user data.²³

17. The City did not begin compiling its own Oracle usage statistics until February 2002, over two years after the Oracle ELA was executed.

¹⁷ COT030456, 3:1:6.

¹⁸ Wong affidavit, paras. 10(a)(i), 16, 18, 07/31/2003 at 178, 181, 182.

¹⁹ Viinamae 10/17/2003 at 48-49.

²⁰ Viinamae 10/20/2003 at 48-49.

²¹ Viinamae 10/17/2003 at 102-103.

²² Griffith Affidavit, para. 16, 08/06/2003 at 126.

²³ Griffith 08/06/2003 at 159-160.

a) Viinamae prepared no business case or financial analysis

18. Viinamae never prepared a written business case to describe the need for the Oracle agreement or to describe the problem for which it was the solution.²⁴

19. The Year 2000 Project was run on the basis of business cases and they were treated as mandatory.²⁵ Business cases were drawn up for all of the priority one business functions, and for the priority two and three business functions as well. Those business cases were used, in Viinamae's words, as a:

[R]isk management exercise, basically to articulate the strategy that was being used to solve the problem and estimated cost on the problem and an estimated time line on the problem; also articulated the resources required and this was primarily for communicating with the Councillors so that they would understand the business issues that we were facing, but, more importantly I think it was to also ensure that if we were ever sued by the public or by a staff member, for Y2K, that we could demonstrate the due diligence that we had taken with regards to that specific business function.²⁶

20. A business case should have set out the need, the proposed solution and a financial analysis to support the solution selected.²⁷ If an operating department wanted to change the business case for its department, it had to submit a written change request to the Steering Committee, which would consider the change request and then amend the business case or refuse the amendment.²⁸

21. In contrast to the standards set by the Year 2000 Office for the rest of the City's operating departments, there was neither a single departmental written business case nor any written change requests prepared for the Oracle acquisition.

²⁴ Viinamae 10/20/2003 at 30-31.

²⁵ COT015898 at COT015901, 29:1:12.

²⁶ Viinamae 10/20/2003 at 33-34.

²⁷ Wong Affidavit, para. 13, 07/31/2003 at 180; Viinamae 10/20/2003 at 34-35.

²⁸ Viinamae 10/20/2003 at 37-38.

22. Both Liczyk and Andrew testified that they expected that Viinamae would develop a business case for the Oracle acquisition.²⁹

b) Viinamae undertook no competitive process prior to the acquisition

23. The Oracle agreement was awarded under the CAO's special delegated Year 2000 spending authority. The Comment section of the Delegated Approval Form contained the following statement:

This Agreement is a consolidation of licenses that were previously held by third party vendors, e.g. SAP, ESCOM, and separate license agreements with each operating department.

24. There was a handwritten notation following the above statement that read: "As per Lana Viinamae, Oracle is the only provider of these licenses".³⁰

25. The "Selection Process" section of the Delegated Approval Form contained a tick mark beside the box for "Sole Source".³¹ The mark indicating that this was to be a sole source acquisition, along with the notation that Oracle was the only provider of the licenses, indicated that there was no competitive process followed in selecting Oracle as the vendor for this particular acquisition. There was no formal RFP or RFQ process followed, nor was there a call for tenders. The process of selection consisted entirely of negotiations with Oracle.

c) Viinamae did not create a project charter for the acquisition

26. In addition to the absence of a City inventory of existing Oracle licenses, and the absence of a business case supporting the acquisition of the Oracle licenses, there was no project charter developed for the Oracle acquisition.

²⁹ Liczyk 11/12/2003 at 97-100; Andrew 10/14/2003 at 64.

³⁰ COT030456 at COT030456, 3:1:6.

³¹ COT030456 at COT030456, 3:1:6.

27. The City had guidelines to aid staff in completing project charters.³² In addition, there was a standard form for project charters.³³ The project charter clearly set out the department, division, Executive Director or Director, and Project Manager that was responsible for the project. It included a project definition, scope, objectives, constraints and assumptions. It also set out the project team, the reporting responsibilities for the project and the signoffs necessary for the project.³⁴

28. The project charter would provide a clear description of the project, the accountability for the project, and the necessary reporting for the project. The purpose of the charter was to set the parameters of the project from the outset and to ensure that staff responsible for initiating and managing a project were aware of the issues in the charter.³⁵

29. Although there was no mandatory requirement for project charters at the City of Toronto,³⁶ it was common practice to prepare them for projects of any significant magnitude. A project charter should have been prepared for the Oracle acquisition.³⁷

30. There was no project charter drawn up with respect to the Oracle acquisition.³⁸ Viinamae, as Director of the Year 2000 Office, and as the director who led the process that resulted in the acquisition, should have drafted a project charter for the acquisition.

31. Viinamae testified that project charters were not used extensively until after 2000.³⁹ However, prior to 2000, project charters had been used on occasion in the City.⁴⁰ The lack of a project charter for the Oracle acquisition was a further example of the lack of documentation relating to the acquisition.

³² COT056340, 63:14:9.

³³ COT056335, 63:14:9.

³⁴ COT056335, 63:14:9.

³⁵ Andrew 10/02/2003 at 44-45.

³⁶ Andrew 10/02/2003 at 45-46.

³⁷ Liczyk 11/12/2003 at 97.

³⁸ Andrew 10/14/2003 at 64.

³⁹ Viinamae 10/21/2003 at 198.

⁴⁰ COT056334, 63:14:8; COT056343, 63:14:10; COT068109, 63:14:7.

d) Viinamae did not consult senior I&T staff prior to making the acquisition

32. In making the decision to proceed with the Oracle Enterprise License Agreement, Viinamae did not consult with the City's senior I&T staff to determine the appropriateness of proceeding with the agreement. In particular, she did not consult with Wong or Michael Franey as to the Oracle license needs of the City.

33. Viinamae's evidence was that the I&T Directors were kept abreast of Year 2000 Project developments, including the Oracle acquisition, at regular meetings.⁴¹

34. Wong, as Project Director for the SAP Project and the Director of Applications and Professional Services, was not consulted by Viinamae prior to the execution of the Oracle Enterprise License Agreement. In his dual roles, Wong's responsibilities would have been affected by the acquisition of additional or replacement Oracle licenses.⁴²

35. Despite the fact that software licensing fell under his responsibilities, Franey, the Acting Director of Computer Operations and Telecommunication Services, was not adequately consulted about Oracle. Regrettably, he was never asked to provide or evaluate any information regarding licence tracking, the City's then current Oracle usage, or the City's projected Oracle needs.⁴³ Franey's sole involvement in this acquisition was restricted to attending two meetings in the fall of 1999 at which there were very general discussions about Oracle.⁴⁴

e) Conclusion: no planning, no documents, no consultation

36. Viinamae acknowledged the lack of documentation with respect to the Oracle ELA and stated that more formal documentation would have been valuable.⁴⁵ In her opinion, the appropriate documentation would have been to ensure that a proper briefing of the speaker's notes she used in her December 9, 1999 presentation to the

⁴¹ Viinamae 10/29/2003 at 158

⁴² Wong Affidavit, paras. 28-29, 07/31/2003 at 185-186.

⁴³ Franey Affidavit, paras. 17, 21, 08/07/2003 at 62, 63.

⁴⁴ Franey Affidavit, paras. 16-17, 08/07/2003 at 61-62.

Steering Committee was handed out. She did not think that the absence of a business case was a deficiency in the process leading to the Oracle ELA.⁴⁶

37. According to Viinamae, preparation of a proper business case would have taken more than a year and was not possible in the face of the looming Y2K deadline.⁴⁷ The City submits that Viinamae's reluctance, even at the Inquiry, to frankly acknowledge the serious risks of concluding a multi-million dollar transaction in the absence of a proper business case and objective is indicative of a troubling lack of judgment. As is described below, her reliance on the Y2K imperative was itself a mischaracterization of the actual rationale for the acquisition and was no justification for a disturbing lack of documentation.

⁴⁵ Viinamae 10/27/2003 at 14-15.

⁴⁶ Viinamae 10/27/2003 at 17.

⁴⁷ Viinamae 10/27/2003 at 16-17.

4. Oracle transaction was not approved through appropriate mechanisms

38. The Oracle acquisition was approved through the Y2K Steering Committee and through Garrett's delegated Year 2000 spending authority. The City submits that the Oracle ELA should not have been characterized as a Year 2000 expense.

a) Role of Steering Committee

39. The Y2K Steering Committee was created to deal with the Year 2000 issue. The Steering Committee dealt with the priority through four business functions established in the Year 2000 Action Plan.⁴⁸ The Steering Committee generally operated through the use of business cases and change requests. The Oracle acquisition was approved by the Steering Committee in the absence of any such documentation. Viinamae was the driving force behind the Oracle acquisition at the Steering Committee.

b) Acquisition not fairly characterized as Y2K expense

40. The City submits that the Oracle acquisition was not truly a Year 2000 expense and did not fall within the purview of the Y2K Steering Committee. The Oracle acquisition was not required for 'business as usual' on January 1, 2000.

41. Viinamae defended her characterization of the Oracle acquisition as a Year 2000 expense in a variety of ways. For example, in her affidavit, Viinamae deposed:

At the October 7, 1999 meeting, we discussed the number of additional licenses that would be required as part of the Y2K business cases, the prevalence of unlicensed usage, the use of licenses that had not been paid for, the lack of clarity about usage because of incomplete and disparate record keeping in the previous municipalities and the failure of some municipalities to keep up their maintenance fees before amalgamation. There was discussion of leasing as a method of lowering annual costs and the committee directed me to speak to Oracle to determine what was possible.⁴⁹

⁴⁸ COT039149, 63:13:8a.

⁴⁹ Viinamae Affidavit, para. 101, 10/15/2003 at 47-48.

42. In short, her rationale for the inclusion of the Oracle acquisition as a Year 2000 expense was that if the Oracle enterprise agreements were not in place by December 31, 1999, the City would not have had maintenance agreements or warranties in place on a City-wide basis. She hypothesized that, if an Oracle platform went down on December 31, 1999, then the City's IT structure would have broken down, and there would have been no maintenance contracts in place to have people repair it. The City would have had no recourse against anyone for the failure of the platform because of the lack of warranties.⁵⁰ Viinamae conceded, however, that nothing in the Steering Committee minutes supported this theory.⁵¹

43. In her affidavit, Viinamae also explained that:

By the summer and fall of 1999, a significant number of program areas were asking the PMO for Oracle software as part of their business cases for "business as usual" on January 1, 2000. Several such requests were approved by the Y2K Steering Committee, the result of which was that at least 2000 additional Oracle seats would be required for Y2K. A number of these were "internally developed applications", which could not be accessed through run-time licenses.⁵²

44. Viinamae gave evidence that the City actually required 2,000 Oracle licenses for the Year 2000 Project. She maintained that there were business cases that referred to the need for 2000 additional licenses.⁵³ In addition, the City held 6300 licenses at the time of the Oracle acquisition. The ELA upgraded all of those licenses to network licenses and provided or upgraded the support for those licenses.⁵⁴

45. Viinamae viewed the ELA as a means to acquire the licenses the City needed for the Year 2000 Project, to upgrade the existing licenses, to ensure that the City was not

⁵⁰ Viinamae 10/23/2003 at 60-61.

⁵¹ Viinamae 10/17/2003 at 86.

⁵² Viinamae Affidavit, para. 97, 10/15/2003 at 46.

⁵³ Viinamae 10/17/2003 at 185-186.

⁵⁴ Viinamae 10/17/2003 at 189.

using unlicensed software, and to ensure that the City had support in place for the Oracle licenses it was using.⁵⁵

46. Although these may have been appropriate goals for the City in the long term, the City submits that the ELA was not necessary for business as usual on January 1, 2000, and therefore was not an appropriate Year 2000 expense.

47. Viinamae testified that:

[I]f I were to have acquired two thousand individual licenses, we wouldn't be having this discussion. It's the fact that we changed the format of the licence from a -- the existing structure to the enterprise licence agreement that -- my understanding is where the whole question comes up.⁵⁶

48. The 2000 individual licences may have been a valid Year 2000 acquisition for business as usual on January 1, 2000. The shift to the ELA made the acquisition a non-Year 2000 issue.

49. The view that the Oracle licenses were a Year 2000 issue was not widely shared. Power's evidence was that the Oracle licenses did not need to be in place on December 31, 1999 for business as usual in the City.⁵⁷

50. Liczyk did not consider the Oracle acquisition to be a Year 2000 issue. At the October 7, 1999 Steering Committee meeting at which Oracle was first discussed, Liczyk was of the opinion that the Oracle matter, should it be pursued, would be part of the 2000 capital budget.⁵⁸

51. During the negotiation of the Oracle agreement, Loreto became concerned as to the authority for the Oracle agreement. Loreto sent an email to Fecenko and Power asking them whether the Oracle agreement was an enterprise agreement and was

⁵⁵ Viinamae 10/17/2003 at 193-198.

⁵⁶ Viinamae 10/17/2003 at 170.

⁵⁷ Power 04/25/2003 at 74.

therefore not part of the approved Y2K budget.⁵⁹ Loreto did not receive a response to his request, and did not follow up on the request.⁶⁰

52. Wong did not consider the Oracle acquisition to be a Year 2000 issue at all. Wong's evidence was that the existing Oracle licenses owned by the City were subject to existing maintenance agreements, the technical support provisions of which included upgrades to Year 2000 compliant versions of Oracle. The Year 2000 issue, as it related to Oracle, required only that the City ensure that the existing Oracle licenses held by the City were Year 2000 compliant.⁶¹ Business as usual after December 31, 1999 did not require the acquisition of additional or replacement Oracle licenses.

53. Wong was unable to find any information substantiating the claim that the City had an extensive number of unlicensed Oracle users.⁶² In addition, Oracle had published information regarding the Year 2000 readiness of their products. That information was available to the City. If there were existing licenses that were not Year 2000 compliant, those licenses could have been upgraded so that they were Year 2000 compliant.⁶³

54. Griffith gave evidence that he was not aware of any licence non-compliance at the City. He further did not understand the City's acquisition of the Oracle licences to be a Year 2000 issue.⁶⁴ He believed that all of the licences being used by the City were under current and valid support agreements which would have allowed the City to get upgrades to the latest versions of Oracle software and to ensure that the software was Year 2000 compliant.⁶⁵

⁵⁸ Liczyk 11/06/2003 at 158.

⁵⁹ COT005412, 26:1:17.

⁶⁰ Loreto Affidavit, paras. 18-19, 04/01/2003 at 214.

⁶¹ Wong Affidavit, paras. 37-39, 07/31/2003 at 190.

⁶² Wong 08/05/2003 at 23-24.

⁶³ Wong 08/05/2003 at 23.

⁶⁴ Griffith 08/06/2003 at 162.

⁶⁵ Griffith 08/06/2003 at 163.

55. The Delegated Approval Form for the transaction stated that the ELA was “a consolidation of licenses that were previously held by third party vendors.”⁶⁶ The form itself indicated that the objective of the Oracle ELA was more a harmonization objective than a Year 2000 objective. There was no mention of a Year 2000-related rationale for the acquisition on the form that was used to approve the acquisition.

c) Reports to Steering Committee in fall of 1999

56. In the months leading up to the Year 2000, the Steering Committee was meeting approximately bi-monthly. The Oracle issue, which appears to have been approved under the authority of the Steering Committee, first appeared in the minutes from the October 7, 1999 Steering Committee. It was not referred to again until the December 9, 1999 minutes. The approval for the ELA was inserted into the December 30, 1999 minutes, which were approved at the January 6, 2000 meeting. There were four Steering Committee meetings which were relevant to the Oracle matter: October 7, 1999, December 9, 1999, December 30, 1999, and January 6, 2000.

i) October 7, 1999 Steering Committee meeting

57. Although the Oracle matter did not appear on the agenda for the October 7, 1999 Steering Committee meeting⁶⁷, it appeared in the minutes for that meeting.⁶⁸ The first item appearing under the heading “Matters arising from the minutes” was “Oracle licenses”. The item stated:

A question was asked on what are is being doing Corporate Wide regarding Oracle licenses. This is being looked at and will be part of the capital budget for next year. Now that the City is leasing, the possibility of getting multi-use licenses is being investigated. Generic platform prices are being obtained. Using schedule with the Master Contract agreement is also being looked at.⁶⁹

⁶⁶ COT030456 at COT030456, 3:1:6.

⁶⁷ COT068648, 59:1:15.

⁶⁸ COT015210, 35:1:53.

⁶⁹ COT015210 at COT015210, 35:1:53.

58. Viinamae's recollection of the October 7, 1999 Steering Committee meeting, as it related to Oracle was that:

[W]e discussed the number of additional licenses that would be required as part of the Y2K business cases, the prevalence of unlicensed usage, the use of licenses that had not been paid for, the lack of clarity about usage because of incomplete and disparate record-keeping in the previous municipalities, and the failure of some municipalities to keep up their maintenance fees before amalgamation. There was discussion of leasing as a method of lowering annual costs, and the Committee directed me to speak to Oracle to determine what was possible.⁷⁰

59. In other words, according to Viinamae, the October 7, 1999 minutes reflected a direction to her from the Steering Committee to begin looking at Oracle licenses.⁷¹

60. Liczyk recalled that the subject of acquiring Oracle licenses under a corporate wide agreement was discussed at the October 7, 1999 meeting.⁷² She believed at the time that it was not a Year 2000 issue, despite it having been discussed at the Steering Committee. She understood that Viinamae was going to look at the Oracle issue and determine whether the City should proceed with an acquisition of Oracle licenses; she expected that Viinamae would develop a business case or project charter if she wished to proceed.⁷³ There were no time lines or other directions.⁷⁴ Liczyk did not recall that Viinamae asked for or received approval for the Oracle acquisition.⁷⁵

ii) December 9, 1999 Steering Committee meeting

61. In the minutes of the December 9, 1999 Steering Committee meeting, under the heading "Matters arising from the minutes", the third matter listed was "Financial Projection". Under Financial Projection, there was a list of items under the heading

⁷⁰ Viinamae Affidavit, para. 101, 10/15/2003 at 47-49.

⁷¹ Viinamae 10/17/2003 at 89-90.

⁷² Liczyk Affidavit, para. 189, 11/03/2003 at 74.

⁷³ Liczyk 11/12/2003 at 96-97.

⁷⁴ Liczyk 11/12/2003 at 97.

⁷⁵ Liczyk 11/06/2003 at 166-167.

“The Y2K pressure on operations”. “Oracle enterprise License Agreement” was one of those items.⁷⁶

62. In Marks’ notes from the December 9, 1999 meeting, there was the following notation below the heading “Financial Projection”:

Under the Y2K Project, Oracle will save money, 6 million, legalize and save ourselves from future suit.⁷⁷

63. That reference did not appear in the formal minutes for the meeting. There was nothing in the minutes of the December 9, 1999 meeting that would indicate that approval was given at that meeting for the City to enter into the Oracle ELA.

64. Viinamae recalled the December 9, 1999 meeting as follows:

By the December 9, 1999 meeting of the Steering Committee, I had a proposal from Oracle based on a figure of \$11.3 million (COT011239), and I presented a comparison of the costs that would result from two scenarios, both of which had to be put in place by December 31, 1999: supplementing the existing need for 6300 run-time licenses by adding 2000 enterprise (network) licenses to satisfy the Y2K needs of priority one business cases (cost: \$13.1 million), or acquiring 10,000 enterprise (network) licenses (cost: \$11.3 million).⁷⁸

I made notes and prepared spreadsheets that I used in my presentation to the Y2K Steering Committee on December 9, 1999, but I do not believe that those documents have been produced or entered into the Inquiry database.⁷⁹

65. Viinamae agreed there was nothing in the minutes of the December 9, 1999 meeting that indicated that she had been given authority to negotiate the ELA with Oracle.⁸⁰

⁷⁶ COT039679 at COT039679, 35:1:68.

⁷⁷ COT079585 at COT079585, 63:14:5.

⁷⁸ Viinamae Affidavit, para. 103, 10/15/2003 at 48.

⁷⁹ Viinamae Affidavit, para. 106, 10/15/2003 at 49.

⁸⁰ Viinamae 10/17/2003 at 112-113.

66. Liczyk recalled being present at the December 9, 1999 meeting. She did not recall Viinamae making a formal presentation about the Oracle proposal. She did not recall anything other than a verbal update as to progress with respect to Oracle.⁸¹

67. Andrew did not recall any presentations being made by Viinamae to the Steering Committee.⁸² Councillor Dick O'Brien ("Councillor O'Brien"), the third member of the Steering Committee, also did not recall Viinamae making a detailed report at the December 9, 1999 meeting.⁸³

iii) December 30, 1999 Steering Committee meeting

68. Viinamae testified that the Steering Committee approved the Oracle acquisition at its December 30, 1999 meeting, after a briefing by her.⁸⁴ Confronted with the absence of minutes documenting this approval, she testified that the minute taker, her assistant Marks, simply missed including the approval of the \$11 million transaction in both her handwritten notes of the meeting and her typewritten minutes of the meeting.⁸⁵ Marks confirmed Viinamae's evidence on this critical point.⁸⁶

69. The December 30, 1999 minutes record both Liczyk and Andrew as present at the meeting but not Councillor O'Brien.⁸⁷ Viinamae testified that Andrew and Liczyk were both present for the meeting, but not Councillor O'Brien.

70. Neither Liczyk nor Andrew recorded attending the meeting.⁸⁸ Liczyk was adamant that she did not approve the Oracle ELA at the meeting; that she would have "recalled vividly" approving a transaction of that magnitude.⁸⁹

⁸¹ Liczyk 11/06/2003 at 168-169.

⁸² Andrew 10/14/2003 at 62; Andrew 09/24/2003 at 136.

⁸³ O'Brien 09/08/2003 at 146-147.

⁸⁴ Viinamae Affidavit, para. 111, 10/15/2003 at 51.

⁸⁵ Viinamae 10/23/2003 at 66.

⁸⁶ Marks 08/04/2003 at 96-97

⁸⁷ COT000340, 35:1:74.

⁸⁸ Liczyk Affidavit, para 190, 11/03/2003 at 75; Andrew 09/24/2003 at 140.

⁸⁹ Liczyk 11/06/2003 at 173-174.

iv) Amendment of the December 30, 1999 meeting minutes

71. The minutes of the January 6, 2000 Steering Committee meeting, which appear to have been taken by Diane Field, record as the first item “Review and approval of December 30, 1999 minutes”:

The minutes were approved with the following addition: The Steering Committee approved the leasing of the Oracle Enterprise Licenses for 5 years at a cost of \$11,000,000.⁹⁰

72. Councillor O’Brien did not attend the January 6, 2000 meeting. Although both Liczyk and Andrew acknowledged attending it, neither recalled discussing or amending the December 30, 1999 minutes to reflect approval of the ELA at that meeting.⁹¹

73. Viinamae testified that she could not recall who made the amendment to the minutes, whether it was her, Liczyk, or Andrew.⁹²

74. Andrew testified that his handwriting appeared on a copy of the agenda for the January 6, 2000 meeting. He wrote the word “Orcle” [sic] beside the reference to the review and approval of the December 30, 1999 minutes.⁹³ Andrew could not recall whether there was discussion about Oracle at the meeting, or why he made that note on the agenda.⁹⁴

75. The minutes of the January 6, 2000 meeting, including the amendment related to Oracle, were reviewed and approved at the February 3, 2000 Steering Committee meeting.⁹⁵ The February 3, 2000 minutes, unlike the minutes for the majority of Steering Committee meetings, do not contain a list of the people who were present at the January 6, 2000 meeting. There is no evidence of who attended the February 3,

⁹⁰ COT079048 at COT079048, 63:18:1.

⁹¹ Liczyk 11/13/2003 at 238-239; Andrew 10/14/2003 at 68.

⁹² Viinamae 10/30/2003 at 119.

⁹³ COT000362, 35:1:75.

⁹⁴ Andrew 10/08/2003 at 125-127.

⁹⁵ COT000363, 35:1:78.

2000 meeting to approve the amendment to the December 30, 1999 meeting that Viinamae testified occurred at the January 6, 2000 meeting.

76. Liczyk testified that she did not attend the February 3, 2000 Steering Committee meeting, and therefore did not see the January 6, 2000 minutes.⁹⁶

v) Conclusion: Steering Committee meetings

77. Much of Viinamae's evidence about the approval process for Oracle was self-serving and improbable. For example, there was no viva voce or documentary evidence to support her contention that a deal with Oracle was approved "in principle" at the October 7, 1999 meeting or that she made a formal and detailed presentation to the Committee at its December 9, 1999 meeting. Her insistence that no written business case was necessary in the circumstances should be soundly rejected.

78. Nevertheless, her evidence that the acquisition was approved by the Committee (no doubt hurriedly, without any thoughtful consideration, and almost entirely at her urging) at its December 30, 1999 meeting must be accepted. Andrew's failure to recall even attending the meeting is not a reliable basis to conclude that it did not occur. The very mileage documents he initially relied on in an attempt to establish he was not at Metro Hall on December 30, 1999 in the end proved the opposite. Moreover, he failed to recall other significant meetings where the evidence establishes that he was almost certainly in attendance (e.g. August 23, 1999 meeting with DFS and Lyons; July 20, 1999 P&F meeting). Liczyk's evidence, that she neither recalled attending the meeting nor approving the transaction, was fundamentally inconsistent with her execution of the Delegated Approval Form and her failure to raise any concerns upon learning of this significant acquisition.

79. Most importantly, the minutes of the subsequent Steering Committee meeting held on January 6, 2000 clearly document, albeit after the fact, the December 30, 1999 approval. These minutes were not prepared by Viinamae but by Diane Field. There was

⁹⁶ Liczyk 11/06/2003 at 181.

no evidence to suggest the minutes were fabricated; in fact Andrew's handwritten scrawl on his copy of the January 6, 2000 agenda provided independent evidence to support their authenticity.

d) CAO's delegated approval

i) Process of signing Delegated Approval Form

80. Andrew did not recall seeing the Delegated Approval Form at the time it was signed.⁹⁷ He did not recall going with Viinamae to get Garrett to sign the form or having a conversation with Garrett regarding the Oracle acquisition.⁹⁸

81. Liczyk's recollection of how she came to sign the Delegated Approval Form was as follows:

Q: Would you turn to Volume I, Liczyk, Tab 21, Begdoc 16151 and that is the Year 2000 Delegated Approval Form, to which you refer in your affidavit. Your signature on that approval form appears on the second page in the lower left-hand corner; correct?

A: That's correct.

Q: Can you explain why, if you didn't -- didn't know or approve of an expenditure of over \$11 million on or about December 30th, 1999, that you signed your name to that document?

A: Well, I recall Viinamae coming to my office with this form asking me to sign it and that she stated that the Y2K Steering Committee had approved this at one of the previous meetings. I didn't have a personal sense that I'd gone to every meeting and so I relied and trusted her briefing of me in that regard and I signed it given the impending urgency of December 31st.

Q: I guess my -- my puzzlement at that is that if \$11 million was such an extraordinary expenditure compared to change requests of twenty-five thousand (25,000) and the like and the fact that you would have remembered, and certainly asked for documentation at the Y2K if they -- if an \$11 million expense was going to be approved, at least by you, why is it that you were not surprised when Viinamae brought you this form saying, well, the Y2K Steering Committee has approved this and sign in the lower left-hand corner?

⁹⁷ Andrew 09/29/2003 at 144.

⁹⁸ Andrew 09/29/2003 at 147-148.

A: Well, I guess, two (2) things. I relied on her briefing of me. She demonstrated to me through the course of my sitting on the Y2K Steering Committee a diligence to detail; that things that were brought forward with respect to change requests had business cases behind them. That as we were going through the review of the eighty-four (84) business cases there was an extensive amount of documentation and so I had come to respect the fact that she'd put together a great process and that it had been running very smoothly and that I assumed that there had been a business case done and that it had been vetted by the IBM Group that was in her Project Management Office and that her -- her great work to that point on the project led me to rely on her -- her briefing of me. And, I guess, in hindsight, I should have asked to see the minutes or I should have asked to see the business case or the documentation that surrounded it, but I relied on her -- her briefing of me.

Q: Did you have any concern that you hadn't heard anything about any such approval by the Y2K Steering Committee until –

A: Well, I recall Viinamae being –

Q: -- you signed this?

A: -- in a rush. That she was wanting – she was -- you know, acknowledgedly, she was a bit nervous and stressed, I think, about making sure all the I's were dotted and T's were crossed with respect to Y2K and I -- I recognized that she wanted to get this done and I -- I signed it without doing a lot of due diligence that, in hindsight, I guess, I should have done.⁹⁹

82. Viinamae acknowledged that it was important that Garrett be properly informed about the reasons that he was being asked to exercise his special authority before signing the Delegated Approval Form.¹⁰⁰

83. The Delegated Approval Form was the last document that Garrett would see before approving a transaction under his Year 2000 authority. The form was designed to provide Garrett, and the other staff signing the form, with enough detail to justify the use of the special authority.

84. Viinamae's recollection of the process leading up to Garrett signing the Delegated Approval Form was that Liczyk signed the form at the December 30, 1999 Steering Committee meeting. Viinamae then told Andrew that she was going to get

⁹⁹ Liczyk 11/06/2003 at 176-178.

¹⁰⁰ Viinamae 10/29/2003 at 167-168.

Garrett to sign the form, and Andrew indicated that he would go with her. Andrew and Viinamae met Garrett just outside his office. He asked Andrew whether this was “a good deal for the City” and Andrew affirmed that it was. Garrett signed the form.¹⁰¹

85. Garrett testified that he did not specifically recall signing the Delegated Approval Form¹⁰² and he did not recall Andrew and Viinamae going to his office to get the form signed.¹⁰³

ii) Viinamae misled CAO as to nature of Oracle acquisition

86. The Delegated Approval Form for the Oracle acquisition was prepared by Power, under Viinamae’s supervision.¹⁰⁴ The form, as it was presented to Garrett, was inaccurate, incomplete, and misleading in its description of the Oracle transaction. The Delegated Approval Form was the only document which Garrett saw in connection with the Oracle ELA, and was the only document upon which he based the exercise of his special authority.

87. The Delegated Approval Form described the Oracle ELA as follows:

This agreement is a consolidation of licenses that were previously held by third party vendors, e.g. SAP, ESCOM, and separate license agreements with each operating department. As per Lana Viinamae, Oracle is the only provider of these licenses.¹⁰⁵

88. By Viinamae’s own admission, this description was incomplete because it did not inform Garrett that the deal involved buying a significant number of new licenses from Oracle. She admitted that, based on the information that appeared on the form, Garrett

¹⁰¹ Viinamae 10/29/2003 at 168-170.

¹⁰² Garrett 12/06/2002 at 79-80.

¹⁰³ Garret 12/06/2002 at 166-167.

¹⁰⁴ Viinamae 10/29/2003 at 170-171.

¹⁰⁵ COT030456 at COT030456, 3:1:6.

would have been left with the impression that he was authorizing an agreement that would consolidate licenses that were already held by the City.¹⁰⁶

89. The City submits that the Delegated Approval Form prepared for the Oracle acquisition, which was the ultimate approval for the acquisition, did not accurately reflect the nature of the acquisition.

¹⁰⁶ Viinamae 10/29/2003 at 172-173.

5. Negotiation of the Oracle contract

a) Prior negotiations between the City and Oracle

90. The City had engaged in enterprise agreement-related negotiations with Oracle on two occasions prior to entering into the ELA. Oracle made a proposal to the former City of Toronto in 1997 and another proposal to the amalgamated City in 1998.¹⁰⁷

i) 1997 Oracle proposal

91. The 1997 proposal included a chart projecting the City's Oracle license usage over a five year period from 1998 to 2002.¹⁰⁸ Griffith developed the data in that chart over the course of a series of meetings with City staff leading up to amalgamation. Griffith met with John Birss and Graham Kemp, who formed part of an IT team that was working on the amalgamation process.¹⁰⁹ The projection was based on the projections of City staff of the applications that would be used in the amalgamated City.¹¹⁰ The chart projected that the City would require 17,320 named user licences by 2002.¹¹¹

92. The 1997 proposal also included a chart setting out the current licenses held by the City.¹¹² Griffith obtained that information from Oracle's own records of City licence usage.¹¹³ The chart reflected that the City held 504 Oracle licenses at the time of the proposal.¹¹⁴

93. The 1997 proposal was the subject of a draft report dated February 4, 1998 to the Corporate Services Committee from Commissioner Margaret Rodrigues. The subject of the draft report was "Contract for Database Management Software with ORACLE Corporation Canada Inc." The draft report recommended entering into an

¹⁰⁷ COT005466, 54:1:3; COT040460, 54:1:6; COT040463, 63:13:28.

¹⁰⁸ COT005466 at COT05483, 54:1:3.

¹⁰⁹ Griffith 08/06/2003 at 134.

¹¹⁰ Griffith 09/06/2003 at 135.

¹¹¹ COT005466 at COT05483, 54:1:3.

¹¹² COT005466 at COT05485, 54:1:3.

¹¹³ Griffith 08/06/2003 at 134.

¹¹⁴ COT005466 at COT05485, 54:1:3.

agreement with Oracle per the 1997 proposal.¹¹⁵ The draft report never went to Committee or to Council.¹¹⁶ The City ultimately did not act upon the 1997 proposal.

ii) 1998 Oracle proposal

94. Oracle made a second proposal in 1998, this time to the amalgamated City. The 1998 proposal came about as a result of the City's SAP Project. The City was implementing a new financial information and human resources system that was to run on an Oracle platform and would require Oracle licenses. Griffith submitted a proposal at the request of Duncan Card, who was acting as the City's external legal counsel.¹¹⁷ This Oracle proposal was not only for the licences required for SAP, but for an enterprise agreement that would meet all of the City's Oracle needs.¹¹⁸

95. The 1998 proposal included a chart that set out the City's projected Oracle license usage over five years.¹¹⁹ The chart was an updated version of the chart that had been included in the 1997 proposal, and was updated to reflect the changes in the City's Oracle usage. Griffith created the chart in consultation with City staff, including Wong and Andrew.¹²⁰

96. The City did not act upon Oracle's 1998 proposal because it elected to purchase licenses directly from SAP. The City concluded that there was neither sufficient time nor available financing to act upon the Oracle proposal.¹²¹

b) 1999 Oracle proposal

97. Oracle made a third proposal to the City on November 12, 1999.¹²² The 1999 proposal was for 10,000 Enterprise Edition Network Licenses and five years of silver

¹¹⁵ COT040456, 54:2:1.

¹¹⁶ Andrew 09/24/2003 at 129-130.

¹¹⁷ Griffith 08/06/2003 at 138-139.

¹¹⁸ COT040460, 54:1:6; COT040462, 54:1:6; COT040463, 63:13:28; Griffith 08/06/2003 at 139-140.

¹¹⁹ COT040462 54:1:6.

¹²⁰ Griffith 08/06/2003 at 141-142.

¹²¹ Loreto Affidavit, para. 14, 04/01/2003 at 211-212.

¹²² COT011236, 26:2:10.

support. The proposal contained a credit for the existing licenses held by the City, and also included annual support for existing licenses and tools. The total amount of the proposal was \$11,336,651.¹²³

98. Griffith prepared a chart called “Named User Database License Requirements by Application – November-99”¹²⁴ as part of his proposal in 1999. The chart did not become part of the formal proposal, but Griffith used it in making the proposal to the City.¹²⁵

99. The chart contained in the 1997 proposal for “Named User Database License Requirements by Application – December-97”¹²⁶ is strikingly similar to the chart used in the 1999 proposal.¹²⁷ Both charts project the total number of named user licenses required to be 17320, and both charts show identical numbers for license usage. The numbers Oracle used in its 1997 proposal were not updated for the 1999 proposal. In the time period from the date of the 1997 proposal until the date of the 1999 proposal, the City had undergone amalgamation, had implemented the SAP system and had undertaken the majority of its Year 2000 preparations, among other IT developments, which would have affected the numbers of Oracle licenses the City was using and would require in the future. These developments were not reflected in Oracle’s numbers.¹²⁸

i) Role of Viinamae

100. Viinamae was responsible for negotiating the contents of the Oracle transaction. She contacted Griffith in October and November 1999, and eventually obtained a proposal from him.¹²⁹

¹²³ COT011236 at COT011240, 26:2:10.

¹²⁴ COT011255, 54:1:67.

¹²⁵ Griffith 08/07/2003 at 34-35.

¹²⁶ COT005466 at COT05483, 54:1:3.

¹²⁷ COT011255, 54:1:67.

¹²⁸ Wong 08/05/2003 at 11-12.

¹²⁹ COT011236, 54:1:8; Viinamae Affidavit, para. 102, 10/15/2003 at 48.

101. Viinamae's evidence was that she successfully negotiated several improvements in the Oracle deal, including reducing the purchase price by eliminating educational services and increasing the number of operating systems under the agreement from five to eight.¹³⁰

102. Griffith's evidence was that the City's goal was to have Oracle on every desktop, so that Oracle was "like the air conditioning or the lights".¹³¹

103. Viinamae's evidence was that:

By the summer and fall of 1999, a significant number of program areas were asking the PMO [Year 2000 Office] for Oracle software as part of their business cases for "business as usual" on January 1, 2000. Several such requests were approved by the Y2K Steering Committee, the result of which was that at least 2000 additional Oracle seats would be required for Y2K. A number of these were "internally developed applications," which could not be accessed through run-time licenses.¹³²

104. Viinamae's affidavit evidence was that the figure of 10,000 licenses was arrived at by considering that there were 15,000 desktops used by the City, less 3000 that did not use Oracle applications, and less another 2000 that were supplied by the Province.¹³³

105. In later testimony, Viinamae stated that the number 10,000 could have been arrived at by two ways. Firstly, from a "top down" perspective, the City used 15,000 desktops, and it was a reasonable assumption that two-thirds of those would be using information based software. Secondly, the numbers provided by Oracle indicated that

¹³⁰ Viinamae Affidavit, para. 109, 10/15/2003 at 50.

¹³¹ Griffith 08/06/2003 at 156-157.

¹³² Viinamae Affidavit, para. 97, 10/15/2003 at 46.

¹³³ Viinamae Affidavit, para. 102, 10/15/2003 at 48.

the City was currently using approximately 6300 licenses.¹³⁴ The City needed 2,000 additional licenses, so 10,000 was a reasonable number.¹³⁵

106. Viinamae did not ask for or receive a proposal for the 2000 licenses that she felt the City needed for the Year 2000 Project. She testified that she told Griffith that the City wanted 2000 licenses, and he thought it would be a good time for the City to look at an enterprise license agreement.¹³⁶

107. Viinamae contended that since the cost of acquiring the 2000 licenses she needed would exceed \$13 million over five years, an \$11.3 million ELA for 10,000 was in the City's economic interests. Accordingly, it was the only option she considered. She did not explore any alternatives.¹³⁷

ii) Role of Power

108. According to Viinamae, Power was responsible for negotiating the contract with Oracle. He was involved in calculating the credit that the City would receive for the Oracle licenses it already held, and dealt with the legal counsel the City used for legal advice on the transaction.¹³⁸

109. Power reviewed the actual contents of the Oracle acquisition with Viinamae. Those issues included the number of operating systems included in the deal and the standards that were used in the deal.¹³⁹

110. Power was responsible for the negotiation of the contract itself, and for negotiating the terms and conditions of the contract. The actual contents of the deal were negotiated by Viinamae. Viinamae negotiated the pricing of the deal with Griffith,

¹³⁴ COT040503 at COT040519, 54:1:10.

¹³⁵ Viinamae 10/17/2003 at 91-92.

¹³⁶ Viinamae 10/17/2003 at 93.

¹³⁷ Viinamae 10/17/2003 at 82

¹³⁸ Viinamae 10/21/2003 at 104-105.

¹³⁹ Viinamae 10/21/2003 at 104-105.

independent of Power.¹⁴⁰ Viinamae also made the final decision as to the number of licenses to be included in the deal.¹⁴¹

111. Power's evidence was that his role was to develop an inventory of the City's existing licenses, with the help of Oracle.¹⁴² He was also the contact person for drafting and negotiating the actual contract. He received a draft of the ELA from Griffith, and forwarded it to Fecenko for review on December 14, 1999.¹⁴³

112. It was Power's understanding that by sending the email to Fecenko, asking him to review the ELA, Power had retained Fecenko pursuant to the City's Year 2000 retainer with Faskens.¹⁴⁴ Power was seeking Fecenko's advice solely on the legal terms and conditions of the agreement, and was not seeking business advice on the deal with Oracle.¹⁴⁵

113. On December 16, 1999, Fecenko sent a memorandum to Power with the subject line: "Oracle Corporation Canada Inc. ("Oracle") Master Software License and Services Agreement ("Master Agreement") and Network Order Form (collectively, the "Drafts").¹⁴⁶ In that memorandum, Fecenko outlined his concerns with the draft ELA that Power had sent to him.

114. Power used Fecenko's memorandum as a guide to conduct negotiations with Oracle. He conducted those negotiations independently, without Fecenko's direct involvement.¹⁴⁷

115. On December 22, 1999, Griffith sent a fax to Power attaching Addendum 1 to the Oracle agreement. Griffith described Addendum 1 by saying it "addresses as many as

¹⁴⁰ Power 04/25/2003 at 66.

¹⁴¹ Power 04/25/2003 at 71, 76.

¹⁴² Power 04/25/2003 at 64-65.

¹⁴³ COT038993 at COT038993-38994, 27:1:15; Power 04/25/2003 at 78-79.

¹⁴⁴ Power 04/25/2003 at 80.

¹⁴⁵ Power 04/27/2003 at 28.

¹⁴⁶ COT005457, 54:2:61.

¹⁴⁷ Power 04/27/2003 at 31-32.

your lawyer's issues as possible."¹⁴⁸ Power faxed the Addendum to Fecenko on December 22, 1999.¹⁴⁹ Fecenko replied by sending Power a memorandum dated December 22, 1999, again with the subject line: "Oracle Corporation Canada Inc. ("Oracle") Master Software License and Services Agreement ("Master Agreement") and Network Order Form (collectively, the "Drafts")."¹⁵⁰ In that memorandum, Fecenko again outlined concerns he had with the Oracle agreement.

116. On December 30, 1999, Power sent an email to Fecenko, asking Fecenko to review the price protection clauses in the agreement.¹⁵¹ Fecenko responded by email on January 4, 2000, including the statement "the changes to price protection are unhelpful."¹⁵² By that point, however, the ELA had already been executed by the City. The agreement was executed without having the price protection clause reviewed by Fecenko. In addition, Fecenko indicated that he had not reviewed a pricing schedule for the agreement, or a completed Network Order Form.¹⁵³ Power did not forward the pricing schedule or the completed Network Order Form to Fecenko because the agreement had already been signed.¹⁵⁴

117. Power stated that he did not play a role in the decision to place the Oracle acquisition on lease. He said he did not speak to anyone about the propriety of financing all of the support and maintenance costs up front so that the City was carrying additional money on lease.¹⁵⁵ He was aware that the City did not have to pay all of the maintenance costs up front, and was aware of the effect of placing the maintenance on lease, but claimed he did not raise those issues with anyone.¹⁵⁶

¹⁴⁸ COT038996 at COT038997, 27:2:27.

¹⁴⁹ COT038996 at COT038996, 27:2:27.

¹⁵⁰ COT005452, 54:2:62.

¹⁵¹ COT016239, 27:2:19.

¹⁵² COT016179, 27:1:19.

¹⁵³ COT016179, 27:1:19.

¹⁵⁴ Power 04/27/2003 at 48-49.

¹⁵⁵ Power 04/27/2003 at 285.

¹⁵⁶ Power 04/27/2003 at 284, 286.

iii) Role of Legal: Fecenko and Loreto

118. As part of the retainer agreement between Faskens and the City, Loreto was copied on correspondence from Fecenko to Power relating to the Oracle acquisition.¹⁵⁷ Loreto was not involved in any other aspect of the Oracle transaction, apart from being copied on correspondence.¹⁵⁸

119. On December 23, 1999, Loreto sent an email to Fecenko and Power, in which he asked the following question:

Is this an enterprise agreement? Brendan, if this is an enterprise agreement and it is not part of the Council approved Y2K budget then is there a separate Council approval for it?¹⁵⁹

120. Power's evidence was that he believed he would have responded to Loreto, and that he would have informed Loreto that in his view, and that of Viinamae, the ELA was covered under the Year 2000 authority conferred in November 1998.¹⁶⁰ However, Power could not specifically remember responding to Loreto, and did not remember whether he replied by email or by a phone call.¹⁶¹ There were no documents in the database that indicate that Power replied to Loreto.

121. Loreto's email also requested that Power send him a copy of the ELA.¹⁶² Power did not recall with certainty whether he sent Loreto a copy of the agreement, although there were no documents in the database to indicate that he did so.¹⁶³ Loreto testified that he did not receive a reply from Power with respect to his question, and he assumed from the lack of reply that the Oracle acquisition was covered by the City's Year 2000 authority.¹⁶⁴

¹⁵⁷ Loreto 04/01/2003 at 254.

¹⁵⁸ Loreto 04/01/2003 at 252-254.

¹⁵⁹ COT005412, 26:1:17.

¹⁶⁰ Power 04/25/2003 at 85.

¹⁶¹ Power 04/25/2003 at 85.

¹⁶² COT005412, 26:1:17.

¹⁶³ Power 04/25/2003 at 87.

¹⁶⁴ Loreto Affidavit, para. 19, 04/01/2003 at 214.

122. The Oracle contract was not approved as to form by Legal Services prior to being signed. Loreto never saw a final copy of the Oracle agreement prior to it being signed and did not approve it.¹⁶⁵

123. Fecenko first became aware of the Oracle transaction on December 14, 1999, when he received the email from Power asking him to review the Oracle agreement.¹⁶⁶ Fecenko sent a reply email to Power on December 14, 1999, asking him several questions about the Oracle transaction.¹⁶⁷

124. Fecenko provided the two memoranda discussed above to Power with respect to the Oracle deal.¹⁶⁸ He replied to Power's email regarding the price protection clause.¹⁶⁹ On January 19, 2000¹⁷⁰ and February 1, 2000,¹⁷¹ Fecenko sent emails to Power asking for status updates as to the Oracle transaction, and requesting a copy of the ELA for his files. On February 2, 2000, Power sent Fecenko an executed copy of the ELA.¹⁷²

125. Fecenko received one email directly from Oracle on December 23, 1999.¹⁷³ He forwarded that email to Power¹⁷⁴ as Power was the person who was conducting the negotiations and was the proper recipient of the email.¹⁷⁵

126. Fecenko did not reply to Loreto's email of December 23, 1999¹⁷⁶ because he thought Power would reply to the questions in the email since the questions were directed to him.¹⁷⁷

¹⁶⁵ Loreto 05/01/2003 at 260.

¹⁶⁶ COT016626; Fecenko 05/03/2003 at 111.

¹⁶⁷ COT038993, 27:1:15.

¹⁶⁸ COT005452, 26:1:15; COT005457, 26:1:13.

¹⁶⁹ COT016179, 27:1:19.

¹⁷⁰ COT016187, 27:1:12.

¹⁷¹ COT016189, 27:1:13.

¹⁷² COT039010, 27:2:28.

¹⁷³ COT005415, 54:2:19.

¹⁷⁴ COT016185, 27:2:13.

¹⁷⁵ Fecenko 04/03/2003 at 208.

¹⁷⁶ COT005412, 26:1:17.

¹⁷⁷ Fecenko 05/03/2003 at 115.

127. Fecenko could not recall when he became aware that the ELA had been executed, but stated that he must have been aware on February 2, 2000, when he requested a copy of the executed agreement.¹⁷⁸

iv) Role of Oracle

128. Griffith was the Oracle account manager responsible for the City of Toronto.¹⁷⁹ He was involved in the three proposals Oracle made to the City, and was primarily involved in negotiating the Oracle contract on behalf of Oracle. With respect to the 1999 proposal, Griffith originally sent a proposal to the City on November 12, 1999.¹⁸⁰ His evidence was that he sent that proposal at the request of Power and Viinamae.¹⁸¹ On December 19, 1999, he followed up on the proposal with a revised estimate for the five year acquisition of Oracle database licenses, annual support, education credits, and on-site technical services.¹⁸²

¹⁷⁸ Fecenko 05/03/2003 at 119-120.

¹⁷⁹ Griffith Affidavit, paras. 2-3, 08/06/2003 at 122-123.

¹⁸⁰ COT040546, 26:2:18.

¹⁸¹ Griffith Affidavit, para. 13, 08/06/2003 at 125.

¹⁸² COT040500, 54:1:70; COT040501, 54:1:71; Griffith Affidavit, para. 14, 08/06/2003 at 125.

6. Decision to put the Oracle ELA on lease

129. The only reference to leasing in the Steering Committee minutes was in the minutes for the January 6, 2000 meeting, where the addition was made to the December 30, 1999 minutes that:

The Steering Committee approved the leasing of the Oracle Enterprise Licenses for 5 years at a cost of \$11,000,000.¹⁸³

130. Viinamae's evidence was that placing the Oracle acquisition on lease was discussed at a meeting of Finance and I&T representatives that was held on September 22, 1999, and that the Steering Committee understood all along that the Oracle software would be leased through MFP as part of the IT leasing program.¹⁸⁴

131. Liczyk testified that she did not recall having any discussions of placing the Oracle licenses on lease at any Steering Committee meetings.¹⁸⁵ Andrew testified that he did not know that the Oracle acquisition had been placed on lease.¹⁸⁶ Power's evidence was that he was not involved in the decision to place the Oracle licenses and software on lease.¹⁸⁷

132. The decision to put the entire Oracle acquisition on lease was an unusual decision. Andrew, among others, expressed the view that maintenance contracts should not be placed on lease.¹⁸⁸

133. Lee Ann Currie ("Currie"), who was a Senior Portfolio Administrator at MFP at the relevant time, also stated that it was unusual for a lease to be composed entirely of software. Software does not have any residual value at the end of a lease.¹⁸⁹

¹⁸³ COT015400, 54:1:70.

¹⁸⁴ Viinamae Affidavit, paras. 99, 113, 10/15/2003 at 47, 51-52.

¹⁸⁵ Liczyk 11/06/2003 at 161-162.

¹⁸⁶ Andrew 10/14/2003 at 41.

¹⁸⁷ Power 04/25/2003 at 91.

¹⁸⁸ Andrew 10/14/2003 at 41.

134. Wilkinson gave evidence that MFP had nothing to do with the City's decision to place the Oracle acquisition on lease:

In particular, with respect to the Oracle lease, MFP did not have the ability or expertise to assess the needs of the City for Oracle licenses and to the best of my knowledge had no contact whatsoever with Oracle regarding the negotiation of the contract with the City. MFP simply received a request from the City to place the Oracle software on lease after the City had made its arrangements with Oracle and MFP did so. I believe that the City was fully aware of the structure of the Oracle licensing agreement, the timing of the payments required thereunder, and of the financial details that were inherent in the lease documentation that we prepared and which the City executed in relation to the Oracle transaction.¹⁹⁰

135. Wilkinson was the point person for MFP in putting together the Oracle lease. He dealt with Viinamae in drawing up the lease. Wilkinson's evidence was that he was handed a schedule that set out the amounts of money that the City owed to Oracle over the course of the deal, and he used that schedule to put together the pricing for the Oracle lease. He did not discuss the benefits and disadvantages of leasing software and maintenance with Viinamae.¹⁹¹

136. The decision to place the Oracle acquisition on lease appears to have been made exclusively by Viinamae, in the absence of advice or information from any other person. The other members of the Steering Committee were not aware and did not have input into the decision to lease the software and maintenance. The Executive Director, I&T did not have input into the decision. The CFO and Treasurer was not part of the decision making process. MFP claimed that it was not consulted about the advantages or disadvantages of placing software and maintenance on lease.

a) The lease with MFP: payment up front versus payment over time

137. By placing the entire Oracle acquisition on lease, the City committed itself to make payments for maintenance and support before these payments were actually due,

¹⁸⁹ Currie 09/02/2003 at 62-63.

¹⁹⁰ Wilkinson Affidavit, para. 90, 09/16/2003 at 78.

¹⁹¹ Wilkinson 09/16/2003 at 258-260.

thereby unnecessarily and improvidently increasing the cost of the underlying support and maintenance.

138. Even more troubling, MFP did not pay the full value of the ELA up front, but rather was required to pay Oracle annually for the support fees.¹⁹²

139. Under the ELA, Oracle was to be paid one sum of money up front, then annually for support. MFP calculated the future payments to Oracle at a debt rate of 5.5% and the present value of the City's obligations to Oracle as \$10,401.00. By taking the money advanced to it up front and re-investing it, MFP, admitted that it stood to make almost \$600,000 on the transaction.¹⁹³

140. Wilkinson prepared the financing for MFP on Oracle.¹⁹⁴ Wilkinson used the 5.5% reinvestment rate to reflect the benefit that MFP would expect to earn over time by virtue of the fact that MFP was paying Oracle over time.¹⁹⁵

141. In effect, MFP lent money to the City at a rate which exceeded the rate at which MFP borrowed the money.¹⁹⁶ Flanagan claimed that the City benefited by obtaining a means of financing the acquisition and by being relieved of responsibility for administering the payments to Oracle.¹⁹⁷

142. The City paid quarterly lease payments on the entire amount of the deal, \$11,336,651, while MFP was only obliged to make annual payments. Wolfraim testified that, to the date of his testimony, MFP had paid significantly less than the \$11.3 million.¹⁹⁸

¹⁹² Wong 08/05/2003 at 73; Wolfraim 12/19/2002 at 94.

¹⁹³ Flanagan 02/20/2003 at 41-42.

¹⁹⁴ COT021058, 62:1:126; Wilkinson 09/23/2003 at 71.

¹⁹⁵ Wilkinson 09/23/2003 at 73.

¹⁹⁶ Flanagan 02/20/2003 at 46.

¹⁹⁷ Flanagan 02/20/2003 at 47.

¹⁹⁸ Wolfraim 12/19/2002 at 93-94.

143. Griffith testified that it was not common to put future years of support on lease because the payments would not come due until sometime in the future, and therefore there was no benefit to be obtained by placing future support on lease.¹⁹⁹

b) Viinamae did not understand the consequences of leasing Oracle

144. Viinamae had only a rudimentary understanding of the terms of the Oracle contract. For example, she was not aware until the commencement of the Inquiry that the entire amount of the Oracle contract was not payable up front.²⁰⁰ She maintained that Griffith had described the ELA and previous Oracle proposals as requiring one time, up front payments for the software and support.²⁰¹

145. In fact, the 1997 and 1999 Oracle proposals clearly contemplated that support payments would be made on an annual basis. The 1997 proposal stated that one of the benefits of the Oracle enterprise agreement was “predictable costs through 5 equal annual payments.”²⁰² Appendix D to the 1997 proposal was a 5 Year Cost Summary for the proposed enterprise agreement. The cost summary clearly contemplated the options of either a single payment, or a payment plan with annual payments.²⁰³

146. Similarly, the 1999 proposal contained a 5 Year Cost Summary for the Oracle licenses, services, and support. The cost summary again clearly contemplated the payment of annual amounts for support.²⁰⁴

147. MFP was aware that the entire amount of the Oracle contract did not have to be paid up front. Wolfram testified that it was clear from the purchase documentation that the entire amount was not due at once.²⁰⁵

¹⁹⁹ Griffith 08/06/2003 at 188.

²⁰⁰ Viinamae 10/17/2003 at 167-168.

²⁰¹ Viinamae 10/17/2003 at 168.

²⁰² COT005466 at COT005472, 26:2:3.

²⁰³ COT005466 at COT05489, 26:2:3.

²⁰⁴ COT011236 at COT011241, 26:1:10.

²⁰⁵ Wolfram 12/19/2002 at 94.

148. Griffith testified that Oracle had no contractual entitlement to the entire support payment up front. He explained that in Oracle's financial systems, payments could not be processed until they became due, and the support payments were not due until the year in which the support payment applied. The payments would only be recognized in Oracle's books in the year that they became due.²⁰⁶

149. The City submits that Viinamae did not adequately understand the terms of the ELA and did not understand the consequences of placing the entire ELA on lease. Her decision to place the ELA on lease was imprudent and an obvious reflection of her lack of knowledge and sophistication about leasing and leasing costs.

²⁰⁶ Griffith 08/06/2003 at 187.

7. Implementation of and communication surrounding the ELA

150. After the ELA was negotiated and executed, Viinamae failed to take responsibility for informing staff that the City had entered into an enterprise agreement. Viinamae's evidence was that "[n]otification of the Oracle Agreement was given to all IT staff and was given to Nicki Camarda, manager of communications for IT, on January 25th 2000".²⁰⁷ Viinamae never checked the City's Intranet to see if the notification had been posted on the Intranet.²⁰⁸

151. Viinamae gave evidence that she informed the I&T Directors of the ELA at a bi-weekly meeting. After that point, she maintained, it was Franey's responsibility to communicate the effects of the ELA, since he was the Director responsible for computer operations and telecommunications.²⁰⁹ She admitted that there was no written communication sent out to individual database administrators advising them of the ELA and its ramifications, but she suggested that the Client Services Directors were verbally briefed.²¹⁰

a) Oracle usage

152. In February 2002, I&T began compiling statistics relating to Oracle usage and license counts. Clem Chan, Manager of Systems Products and Services in I&T, was primarily responsible for compiling the statistics.²¹¹ From March 2000 onwards, Oracle usage charts were prepared on a monthly basis.²¹²

153. The Oracle statistics were compiled through two sources based on the administration of the Oracle databases. For databases that were administered by the Corporate Services I&T division, license usage was tracked through direct access to the

²⁰⁷ Viinamae Affidavit, para. 114, 10/15/2003 at 52; COT016241, 54:2:40.

²⁰⁸ Viinamae 10/17/2003 at 200-201.

²⁰⁹ Viinamae 10/17/2003 at 202-205.

²¹⁰ Viinamae 10/20/2003 at 82-83.

²¹¹ Chan Affidavit, para. 4, 08/07/2003 at 71.

²¹² Chan Affidavit, para. 6, 08/07/2003 at 71-72.

databases. For databases that were not administered by Corporate Services, license usage was tracked by the departmental database administrators and reported to Corporate Services I&T.²¹³

154. The most current Oracle statistics in evidence at the Inquiry were from May 2003.²¹⁴ The May 2003 Oracle statistics showed that there were 7,100 named users of Oracle enterprise licenses including duplicate user names. Once the duplicate user names were removed, there were 5,972 named users of Oracle enterprise licenses.²¹⁵ That number was approximately 60% of the total 10,000 licenses acquired from Oracle.

155. One of the advantages of an enterprise license was that it permitted a registered user to access any Oracle database. Chan developed statistics representing the number of user names that logged onto multiple databases with a single user name, thereby maximizing their use of the enterprise licenses. As of January 2002, there were only 626 users who accessed more than one Oracle based application. Of those 626, 485 accessed two applications, 129 accessed three applications, five users accessed four applications and two users accessed five applications.²¹⁶

156. Viinamae made no attempts to acquire or compile those types of statistics prior to entering into the ELA.²¹⁷ The value of an enterprise license is maximized when a user accesses more than one application. According to the statistics prepared by the City, a very small proportion of Oracle users were accessing more than one application. The City did not start to compile Oracle usage statistics until February 2002, more than two years after the ELA was implemented.

b) Lack of reporting to Council regarding the ELA

²¹³ Chan Affidavit, para. 7, 08/07/2003 at 72.

²¹⁴ COT075305, 54:1:48.

²¹⁵ COT075305 at COT075308, 54:1:48.

²¹⁶ COT060513, 54:1:34.

²¹⁷ Viinamae 10/20/2003 at 79-81.

157. The Oracle acquisition was never reported explicitly to Council. The Oracle transaction was entered into at the Year 2000 deadline, using a questionable approval, and was not subsequently reported to Council. The City submits that there should have been an explicit Report to Council regarding an acquisition of this magnitude.

158. There was a reference to enterprise license agreements in a draft report dated February 8, 2001,²¹⁸ but that report never went to Committee or to Council.²¹⁹

²¹⁸ COT071151 at COT071151, 63:11:29a.

²¹⁹ Liczyk 11/13/2003 at 208-210.