1. Overview

1. As set out in Chapters 6, 7, and 8, following Council approval of the P&F Report, all the key players in I&T (Andrew, Viinamae, Power, and Bulko) thought there was an open ended “vendor of record” relationship with MFP. In contrast, staff in Finance (Liczyk, Brittain, Altman, and Rabadi) correctly concluded that what Council had approved was a one time deal with MFP for $43 million; Council had not approved future leasing transactions for unspecified amounts at an unspecified interest rate with no competitive process.

2. Regrettably, no one in Finance was aware that I&T staff fundamentally misconceived their authority and thus took no steps to correct I&T’s fatal misconception of the leasing program. The disconnect between I&T and Finance that first arose during the drafting of the RFQ and the Report to P&F only grew. It led to continued miscommunication between members of I&T, principally Viinamae, and the various members of Finance with whom she interacted.

3. I&T was responsible for administering the leasing program. Members of Finance playing only an intermittent supportive role. This led to the implementation of the I&T open-ended vendor of record concept after July 1999, 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 subsequently never obtained - Council approval for additional leasing expenditures. No one outside of I&T monitored the situation 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 Services, Legal Services or any other division would effectively “police” I&T’s compliance with City policy unless they were directly involved in negotiating with MFP or implementing the leasing contracts. In any event, it never occurred to anyone outside I&T that experienced, senior I&T staff, such as Andrew and Viinamae, would act outside the authority of the Council approval and the Financial Control Bylaw.

4. Viinamae suggested in her testimony that she discussed the specifics of the open-ended nature of the leasing program, that had no $43 million cap with members of Finance, including Colley and Brittain. Her evidence on this point should be rejected. She further suggested that various documents supported her contention that “Finance” knew all along that the leasing program was not limited to $43 million. While a close reading of these documents might have raised questions if anyone had thought that the nature of Council authority was in issue, there was no credible evidence to suggest that anyone in I&T ever specifically told anyone in Finance that I&T intended to implement an open-ended leasing program without reporting back to Council.

5. There were enough hints, however, to have raised a red flag if someone in Finance been specifically charged with monitoring the administration of the leasing transaction and the work of the CMO. In hindsight, given the inexperience of the I&T staff charged with negotiating the MFP leases and administering them thereafter, direct oversight by Finance and/or assistance from Legal Services may have prevented the transactions from going offside Council authority. At a minimum, the ill-conceived nature of the I&T vision would likely have been identified much earlier. Instead, various staff from different divisions in Finance played piecemeal and supporting roles at various times in the life of the MFP leases; no one had the full picture.

6. Of the Finance witnesses, only Colley knew that more than $43 million of computer equipment had been acquired from MFP, but he was not aware until July 2001 that the July 1999 Council approval capped the total expenditure at $43 million. Thus, the fact that additional amounts had been committed to lease held no significance for him. No one in Treasury had any ongoing involvement after September 1999, except for some minor assistance provided by Brittain at Liczyk’s specific request during the budget process in late 1999 and early January 2000.

7. In dealing with the more detailed day-to-day accounting issues, however, I&T was looking to “Finance” (broadly defined) to provide more assistance than I&T ever appears to have received. This appears to have arisen because of a disconnect within Finance itself – Brittain was looking to dissociate Treasury generally and himself in

particular from the ongoing leasing program as it did not pertain to his Division's core mandate. Colley was focused almost exclusively on fulfilling the cost allocation exercise he had been asked to carry out by Liczyk. Budget Services was also involved, but apparently only on specifically budget issues. As a result, there was no coordinated response by Finance to I&T's requests for assistance.

8. Finally, although the fact that I&T had exceeded the $43 million amount approved by Council came directly to Liczyk's attention in mid-December 2000, it was reported by Liczyk to Council in March 2001 only as a budget variance, and not specifically as an amount put on lease with MFP without Council approval. Similarly, although Liczyk claims she clearly told Viinamae, Bulko, MFP, and Colley in a meeting on January 17, 2001, that the excess amounts on lease with MFP were not properly authorized by Council and must end, no one else at that meeting recalled Liczyk taking this position. Liczyk's evidence on this point must be rejected as revisionist history. Her version of events was never put to Viinamae, Bulko, or Colley when they testified and was only revealed when she gave evidence. Even more importantly, the subsequent actions of everyone who attended the January 17, 2001 meeting were not consistent with having been sharply warned by Liczyk that the ongoing leasing program was not authorized above a capital amount of $43 million. Viinamae's confident presentation to Council in May 2001 following Councillor Bas Balkissoon's ("Councillor Balkissoon") questions about the March 14, 2001 Administration Committee Report regarding photocopiers is but one striking example.

2. Evidence of direct knowledge by Finance of overspend above $43 million

9. It was not until June 2001 that Brittain appreciated that the $43 million amount approved by Council in July 1999 had been exceeded by a significant amount. Although he was aware of a March 2001 budget document showing that the leasing program had been over budget in 2000, Brittain did not equate this with spending above the amount approved by Council and did not trace back to determine whether I&T had gone back to Council during 2000.[1]

10. Liczyk testified that she only became aware of the "overspend" above $43 million in late 2000 through information obtained in the 2001 budget process. She chose to advise Council of this issue through the 2001 budget approval process at Budget Advisory Committee, although only from the budget perspective.

11. Although the evidence supports the conclusion that at some point Colley knew that more than $43 million had been spent, his knowledge is irrelevant because he was never aware that only $43 million was approved by Council. Rather, he had been informed by "staff in the Leasing Unit" that the leasing program involved more than the $43 million for Y2K item in the 1999 capital budget, and that ongoing computer acquisitions would also be handled through leases with MFP.[2] He had no reason to disbelieve I&T staff and no reason to independently verify this assertion. In any event, Colley testified that he only learned of the existence of the $43 million cap in July 2001.[3]

[1] Brittain 07/29/2003 at 60-61.
[2] Colley 09/04/2003 at 124.
[3] Colley Affidavit, paras. 29, 41, 09/02/2003 at 243-244, 247-248.

3. 2000 budget process

12. In late 1999 Liczyk asked Brittain (Treasury), Shultz (Accounting Services), Vollebregt (Budget Services) and Andrew (I&T) to “finalize how we are financing the Y2K project” in order to finalize budgets for reporting to the Budget Advisory Committee. Specifically, Liczyk asked Brittain to “identify the capital portion of equipment put under the lease program”.[4] Brittan responded by clarifying the treatment of debt charges budgeted in 1999 and re-allocated towards lease payments as approved by Council in Recommendation 2 of the P&F Report.[5] He also conducted a high level review of the lease cost against budget figures provided by I&T, which confirmed that approximately $48 million of equipment had been acquired.[6] As this was within the 10% variance of the $43 million approved by Council in July 1999, Brittain concluded this was “generally reasonable”.[7] Brittain did not at any time in 1999 or 2000 look closely at the leasing transaction to determine the asset value of the equipment on lease.[8]

13. In addressing the treatment of debt charges, Brittain reviewed a January 2000 spreadsheet related to the 2000 budget process prepared by Viinamae entitled “Capital Briefing Note 2 – Operating Pressures from Year 2000”.[9] This spreadsheet showed annual lease costs of $11.5 million associated with the “initial lease request of $43.15 million”, and an additional $4.7 million of lease costs for “items not included in original lease estimate”. The document did not identify the underlying asset value for these additional items.

14. Brittain’s involvement in reviewing this document was to clarify the debt charges used by I&T in their budget planning, and to tie them back to the treatment required by the P&F Report.[10] As a result, he revised the 1999 debt charges to be deducted in the

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[4] COT013081, 52:1:13.
[5] Brittain Affidavit, paras. 27, 43, 07/09/2003 at 150, 155-156.
[6] COT013082, 63:3:1a; COT013083, 63:3:1a.
[7] Brittain Affidavit, para. 43, 07/09/2003 at 155-156.
[8] Brittain 07/09/2003 at 240.
[9] Brittain 07/29/2003 at 69; COT005240, 63:13:25; COT064008, 63:13:12a.
[10] Brittain 07/25/2003 at 69, 74.

2000 budget consultations.[11] Any other issues addressed in this document he saw as being budget issues, which were not of concern to him.

15. Although it would have been possible for someone reading Viinamae's spreadsheet to ascertain that I&T intended to incur lease costs on items leased over and above those included in the "initial $43.15 million", Brittain explained that this was not apparent to him at the time he reviewed the document. He approached the document as a forward-looking budget document, that contained information about plans and estimates for the coming year.[12] As a result, he assumed that any approval process would take place at the appropriate time during the 2000 fiscal year, if and when I&T determined it intended to lease additional computer equipment and software. It never occurred to him that the projected lease costs represented computer acquisitions already committed to in the existing MFP lease program for which Council approval was obtained in July 1999:

> I saw this as a budget exercise and I didn't focus on what stage they were at in terms of the commitments. The assumption being, at the time, that the IT Division would obtain the necessary approvals.[13]
>
> IT division is closest to the situation in terms of the need for new software, the justification for new software. How they're going to request it in the budget process, what authority they're going to seek to acquire that software and to the extent they needed any further assistance, it's their call, as to whether they want to, in my mind, bring my group into the equation to help them once again.[14]

16. Liczyk agreed that it was not obvious from Viinamae's budget spreadsheet that the additional amounts listed over and above $43 million represented amounts already committed to MFP, as opposed to amounts included for budget approval purposes in contemplation of a future commitment approval process.[15] She confirmed that "the budget approval process is such that you are not supposed to spend until you have budget approval", and that it was not obvious that "the additional operating costs that

[11] Brittain 07/29/2003 at 72.
[12] Brittain 07/29/2003 at 77.
[13] Brittain 07/30/2003 at 235.
[14] Brittain 07/30/2003 at 243.

[Viinamae was] requesting actually equated with an additional $23 million in additional capital costs that [had] already [been] incurred".[16]

17. This was particularly so given Viinamae's January 7, 2000 email to Brittain that the total of "committed funds to date" was $48 million.[17] Brittain asked Viinamae to clarify the difference between the $48 million committed and $43 million.[18] Viinamae responded with a breakdown of the $48 million.[19] Brittain testified that this did not raise a red flag that I&T had put more on lease than had been approved by Council because the difference of $5 million (between $43.15 million and $48 million) was within an acceptable range of variation from the original estimate.[20]

18. Although MFP provided Viinamae with a schedule showing that as of January 18, 2000, $61 million had been put on lease, Viinamae did not explain this to Brittain.[21] There is no evidence that Viinamae ever provided a copy of this schedule to Brittain.

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[15] Liczyk 11/18/2003 at 125.
[16] Liczyk 11/18/2003 at 127-128.
[17] COT013082, 63:3:1a.
[18] COT015690, 63:8:84.
[19] COT005230, 63:13:12a.
[20] Brittain 07/30/2003 at 236; Brittain 07/31/2003 at 136; Liczyk 11/18/2003 at 129-130.
[21] Brittain 07/31/2003 at 138.

4. Accounting for the sale leaseback transaction

19. Accounting Services was involved in determining the appropriate accounting for the sale leaseback transaction, and the ongoing leasing transactions. It relied on I&T to provide the detailed information necessary to make the appropriate accounting entries.[22]

20. In the fall of 1999, Colley was advised by Shultz, and subsequently by Viinamae and Andrew, that the City expected to receive a cheque from MFP for the cost of equipment already purchased by the City which was subject to the sale and leaseback. Although the cheque was not ultimately received until May 2000, Colley was involved in ensuring that the City's financial records for the 1999 accounting year adequately recorded the necessary accounting information to reflect the sale leaseback transaction.[23]

21. In particular, Viinamae provided the necessary accounting information to Colley in 2000 with respect to the sale leaseback transaction to permit this information to be reflected in the City's 1999 accounts.[24] Colley did not perform any audit or other check on this information, but relied on Viinamae for its accuracy.[25] This limited involvement by Colley did not alert him to the fact that the amount on lease may have exceeded that authorized by Council.

22. Colley understood that the CMO was keeping track of the equipment that was placed on lease, the value of that equipment, and the periodic leasing costs. To the best of his knowledge, no one in Finance was tracking or maintaining this information.[26]

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[22] Colley 09/03/2003 at 13-14.
[23] Colley Affidavit, paras. 10-11, 09/02/2003 at 237.
[24] Colley 09/03/2003 at 13.
[25] Colley 09/03/2003 at 14.
[26] Colley Affidavit, para. 31, 09/02/2003 at 244.

a) 1999 financial statement preparation

23. In June 2000, Colley was attempting to finalize the City's 1999 financial statements. He emailed Bulko indicating that he urgently needed the "outstanding commitments as at December 31, 1999", as this was the only item delaying the issuance of the financial statements.[27] The information provided by the CMO indicated lease commitments of $66.7 million as of June 14, 2000.[28] There is no evidence to suggest this was brought to the attention of Brittain or Liczyk. Colley was not aware of the potential significance of this information in relation to the $43 million cap in the P&F Report.

[27] COT071811, 63:18:5.
[28] COT031677, 63:9:69a; COT031678, 63:9:69a; Colley 09/03/2003 at 54-55.

5. Non-Program Account

a) Corporate cost centres

24. The City maintained a group of corporate cost centres (collectively, "Non-Program Account") which recorded budgets and expenditures for a variety of corporate-wide charges and revenues which were not allocated or charged specifically to departments within the City. Examples of accounts within the "non-program family" were corporate capital and finance charges, tax revenues and write-offs, water accounts, and a corporate grant program.[29] These accounts were controlled by Finance.[30]

25. Computer lease costs were included in the corporate Non-Program Account for the year 2000. It was Liczyk's intention to remove those costs from the corporate Non-Program Account in subsequent years, and to allocate them to user departments, to promote greater accountability by those departments for their leasing costs.[31] This was part of a larger initiative promoted by Garrett and Liczyk to attempt to increase departmental accountability for the costs they incurred by matching all of the costs of capital acquisitions to those who actually used the related assets.[32] Financing costs, including leasing costs, buried in a corporate Non-Program Account, did not permit departments to see and understand the true impact of their capital budget requests. This was a City-wide model, not limited only to computer leasing, and continued to be promoted by Liczyk throughout 2000 and 2001.[33]

b) Colley undertook a cost centre allocation exercise for leasing

26. In early 2000, Colley was charged with the task of determining the appropriate accounting for the leasing transaction with MFP. This involved separate accounting for the computer assets that were the subject of the sale leaseback transaction, and

[29] Colley 09/03/2003 at 16.
[30] Bulko 08/13/2003 at 195.
[31] Colley Affidavit, paras. 22-24, 09/02/2003 at 241-242; COT032212, 63:18:9.
[32] Colley 09/03/2003 at 14-15; Liczyk 11/04/2003 at 114-115.
[33] Colley 09/03/2003 at 171.

leasing costs on a prospective basis. In order to do this, Colley required specific detailed information from the CMO, including the equipment on lease for each invoice, and the departmental cost centre to which the leasing costs should be charged. Until Colley received that information to permit him to allocate costs to departments, he was required to maintain a series of cost centres in the Non-Program Account. [34]

27. Colley described the cost allocation plan in this way:

> The intent, that I understand, was trying to ensure that costs that were being incurred were being matched to the benefiting areas, in this case, departments at a very high level, so that you wouldn't have a quantum of unallocated costs in the City's accounts that nobody was responding to or taking responsibility for. This would more accurately measure the consumption of resources by the individual departments…
>
> When I became involved in the leasing program that was the direction, that the leasing charges would be recorded in these non-program cost centres, and it was intended at that point that it be for a one (1) year period. …the rationale for that, it was the uncertainty at that point in time as to how those leasing charges would be allocated to departmental accounts. So it was a trade off how it would be carried in the non-program for the first year.
>
> And once we had the history in terms of what those leasing charges, which departments those – those leasing charges really belonged to, then for the next budget cycle, there would be a transfer of – of dollars, budget dollars and - and actuals into those Departmental accounts.[35]

28. In order to cover leasing costs recorded in the Non-Program Account in the year 2000, the plan was to transfer funds from the Y2K budget for Y2K related expenses, and from the user departments' operating budgets for non-Y2K related costs.[36]

29. The information about cost centres and to which department leasing costs should be allocated was to come from the CMO. By email dated February 27, 2000, Colley requested the necessary information from Viinamae.[37]

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[34] Colley Affidavit, paras. 22 and 28, 09/02/2003 at 241, 243.
[35] Colley 09/03/2003 at 14-15.
[36] Colley Affidavit, para. 23, 09/02/2003 at 241.
[37] Colley Affidavit, para. 25, 09/02/2003 at 242; COT015585, 63:9:31.

30. Although Colley had been told by Viinamae to expect the required information from the CMO by May 2000[38], he had not received it by October 2000.[39] Although he requested it again from Viinamae in January 2001,[40] Colley never received the information he needed, and leasing costs therefore were never allocated to departments as intended, but instead remained in the Non-Program Account.[41]

31. Colley's view of why the CMO was unable to provide the requested cost allocation information was as follows:

> I think the problem probably goes back to how they approached the identification of amounts under lease and what Lana had arranged to do, at a very early stage, prior to getting the – the numbers from - from MFP, she had agreed that [the dozen] vendors [the CMO] had been dealing with … would send invoicing files from 1999, related to invoices issued to the City of Toronto …to MFP, and that that would be the starting point in terms of identifying how much was on lease.
>
> The problem that the CMO had was that the invoice in itself would not indicate what the ultimate disposition of whatever the equipment was, that –that was covered under that invoice. So that would require them to go digging into their own records in terms of this particular invoice, and where did the equipment go? Which department received the equipment? And that's what was taking the time consuming part a) identifying the quantum put on lease, b) identifying the invoices related to that and c) identifying where the equipment went.[42]

32. The cost allocation initiative pursued by Finance was not the same as the total cost of ownership proposal investigated by I&T. The total cost of ownership model was an attempt to allocate the total gross cost of the assets under lease for the entire term of the lease, while the cost allocation exercise was an attempt to allocate only the annual leasing costs incurred.[43] It appears I&T may have confused these two issues, as Viinamae indicated some resistance to providing the information requested by Colley to permit him to allocate the costs of leasing.[44] Nonetheless, Viinamae indicated in a January 8, 2001 email to Colley that the CMO was working on producing "a high-level

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[38] Colley Affidavit, para. 26, 09/02/2003 at 242.
[39] COT071815, 63:13:18.
[40] COT061799, 58:1:27.
[41] Colley Affidavit, para. 28, 09/02/2003 at 243.
[42] Colley 09/03/2003 at 175-176.
[43] Colley 09/03/2003 at 129.

cost allocation", despite the fact that Andrew and Anderton were "still not in support of this".[45] Colley understood that Liczyk "was not on side with [I&T's total cost of ownership] direction and Wanda was giving the original direction, in terms of, we need to get these costs broken down by program."[46]

[44] COT016336, 63:10:87; COT016103, 63:13:10a; Colley 09/03/2003 at 133.
[45] COT066461, 58:1:28.
[46] Colley 09/03/2003 at 134.

6. 2000 budget variance

a) Liczyk's reaction

33. In late 2000, in preparation of the 2001 budget, it came to Liczyk's attention that the leasing program was significantly over budget.[47] Staff in Budget Services worked through November and December 2000 to determine the basis for the "increased pressure to the operating budget request". Liczyk described her dual concern at that time: first, staff needed to determine if there was budget approval for the additional expenditure; and second, staff needed to determine if there was specific transaction approval.[48]

34. In mid-December 2000, "it was determined that what had been added was $24 million worth of software". Liczyk explained her reaction:

> And so staff went through an exercise in December and January where they were trying to determine the amount spent on Y2K against the budget of Y2K and then to determine whether these costs were part of that budget. And so by the time that I wrote the report to Council or to Budget Committee first and then through to Policy and Finance Committee and Council, I was satisfied that the spend was authorized within the Y2K envelope and that it was appropriately Y2K type of software and in the report that I presented to Committee on March 15th, … I described the result of that investigation in that report.
>
> And as far as I was concerned, the disclosure that I put in that report was – I had outlined that $43 million was the original amount and what was the cost expected with the original $43 million worth of assets and then I described that another $24 million had been added which created the additional $5 million worth of costs. So in my opinion, I was disclosing to Council something that had occurred with respect to this transaction.[49]

35. Liczyk further stressed this distinction between budget and transaction authorization and attempted to minimize the failure to obtain transaction approval.

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[47] COT030583, 63:12:9a; COT030579, 63:12:9a; Liczyk 11/04/2003 at 129.
[48] Liczyk 11/18/2003 at 133.
[49] Liczyk 11/04/2003 at 129-130.

> I was satisfied that the additional $24 million that had been added was part of the Y2K budget. So I felt it was an authorized spend. What was not authorized specifically by Council was the financing and particularly, the difference between what was the default financing, which was debenturing of ten years, versus this new term – or this new type of financing being lease financing. So that's the piece that Council had not given approval to in terms of changing the standing approval of Council with respect to the financing . . .
>
> But I think it's important because, to me, and I think everybody's understanding at the time was, is that the extra twenty-four (24) that had been added on was properly, on the spend side, contained within that envelope and that really what was lacking was, in some ways, a technical adjustment to reduce the debenture spending and increase the – sorry, reduce the debenture financing and increase the lease financing."[50]

36. What Liczyk did not address, however, was the issue of having placed the $24 million of additional software on lease with MFP without a proper tender process, which properly conducted, would have culminated in Council approval of not only the spending of the $24 million on leasing the type of financing, but also the award to a specific vendor of that financing. This was hardly a "technical adjustment."

37. Liczyk did not think it necessary to advise Anderton that "IT seemed woefully unaware of how their leasing program ought to have interacted with the City's Purchasing Bylaw". Liczyk excused this lapse by explaining that in "all the activity around the budget process, this is in the –the heat of the whole debate that I missed speaking to her about that".[51] Anderton cannot be held responsible for failing to appreciate that I&T's budget submissions revealed that they had been spending in excess of Council authority. Anderton knew that Liczyk and Finance were assisting Viinamae and Colley with the budget process. Liczyk erred by keeping Anderton in the dark.

b) Viinamae's explanation

[50] Liczyk 11/06/2003 at 105.
[51] Liczyk 11/18/2003 at 146.

38. When asked for an explanation of the budget variance Viinamae indicated that there were a number of reasons for the budget overage, including that "[a]ll [computer] equipment subsequently leased by the Corporation will increase the gross budget", and that previously held MFP leases (i.e. the Councillor lease deal) had been consolidated in the computer lease budget with no corresponding transfer of funds. She further indicated that "[t]hese items have been discussed on numerous occasions with Ken Colley, the Finance lead for leasing".[52]

39. In direct contradiction of Viinamae's claim, Colley emphatically denied knowing of the unfavourable budget variance, and having discussed it or the reasons for it, with Viinamae. Rather, he testified that keeping track of divisional budgets was the responsibility of each Division, and not something for which Finance staff could be held responsible. He further described the budget variance reports which were available to the CMO and staff in I&T (electronically in the case of the Non-Program Accounts, which held the computer leasing information) whenever they wished to access them, and which they were expected to review and monitor.[53] Colley also explained that if anyone in Finance had discussed these issues with Viinamae it would not have been him, but rather someone in Budget Services, as these were specifically budget issues.[54]

c) Colley's involvement

40. Once aware of the unfavourable budget variance, Liczyk asked Colley to keep a close watch on the computer leasing budget, and in particular to closely review the 2001 budget documents received from Viinamae.[55] Viinamae sent Colley an analysis of the 2000 and 2001 budget amounts on December 18, 2000, followed by a revised projected budget from Bulko in February 2001.[56] The information sent on December 18, 2000 was copied to a number of people, including Liczyk. It contained a list of "Total Equipment on Lease", including the Councillors' lease deal and earlier Scarborough leases, but no

[52] COT015561, 63:10:55.
[53] Colley Affidavit, paras. 34-38, 09/02/2003 at 245-247.
[54] Colley 09/03/2003 at 41-42.
[55] Colley Affidavit, para. 39, 09/02/2003 at 247; Liczyk 11/18/2003 at 131.
[56] COT071818, 63:11:27a; COT071819, 63:11:27a; COT015556, 29:1:24.

total. A quick addition calculation would have revealed that, not counting the Councillors' lease deal and Scarborough leases, the total on lease as of December 14, 2000 was approximately $66.5 million.[57] Colley was not aware of anyone raising any concern about the lease commitments having exceeded $43 million.[58]

41. A briefing note prepared by Colley in early 2001, based on information provided by the CMO, indicated that the total amount on lease with MFP on December 31, 2000 was $73 million.[59] It is not clear from the evidence who received a copy of this briefing note, although Colley indicated it was available to staff in Budget Services.[60] At the time he compiled this information, Colley was not alive to the issue of the $43 million limit of Council approval. Moreover, Colley understood that Liczyk's primary concerns at that time were to ensure that computer leasing remained within budget, and that there were transfers from departmental accounts into the Non-Program Account to support lease payments.[61] Liczyk had not instructed him to consider how or why the amounts on lease exceeded $43 million, nor had she even alerted him to the issue.

42. Colley undertook to fulfil the mandate given to him by Liczyk to keep a close watch on the leasing budget for 2001 by "trying to respond to what Budget Services was needing to present in its operating … budget submissions . . . And ensure that what was being said, how it was being said, how it was being presented was conveying all the necessary information related to the leasing program".[62] The specific processes to be transitioned to his watch were: "the receipt of an invoice directly from MFP. And on the basis of documentation from the Contract Management Office, arranging for payment of those invoices directly to MFP, without getting individual sign offs on each invoice before payment would occur".[63]

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[57] COT015556 and COT015557, 58:1:25.
[58] Colley 09/04/2003 at 171.
[59] COT030209; Colley 09/03/2003 at 149.
[60] Colley 09/04/2003 at 171-172.
[61] Colley Affidavit, paras. 41-42, 02/09/2003 at 247-248.
[62] Colley 09/03/2003 at 68-69.
[63] Colley 09/04/2003 at 173.

7. January 17, 2001 meeting between Liczyk and the CMO

a) Liczyk's recollection that she told I&T to stop putting amounts on lease beyond the $43 million

43. Liczyk called a meeting for January 17, 2001, attended by Colley, Viinamae, Bulko, Wilkinson, and Domi to discuss concerns about operating budget pressures, and the fact that the actual lease payments for 2000 were more than the 2000 budget had been allowed. Liczyk testified that she made it clear at the outset of this meeting that she was unhappy that extra amounts had been added on the lease beyond the $43 million, and "we proceeded to have a discussion about how this was going to stop and how that if these Finance functions that were being done in the CMO needed to be transferred over to Finance. So that accountability would be very clearly within Ken Colley's area with respect to the Finance issues that we discussed at that meeting."[64]

44. Liczyk described her communication about the overspend this way:

> I felt that what we had experienced was a communication breakdown between all the parties, with respect to this program, and I thought that the only way to fix this going forward, was to make sure that everybody was in the room at the same time and heard the same message with respect to my expectation on going forward. …
>
> [W]hat I most vividly recall is talking about prospectively saying, this has to stop. That we cannot just be adding things onto this program. That -- I was expressing that I have to take something to Council to disclose what had already occurred, but that on a go forward basis, that this should not re-occur. That was what I most vividly recall.[65]

45. Liczyk confirmed that for anyone present January 17, 2001, meeting, there should not have been any doubt that Council had only authorized leasing in the amount of $43 million and therefore had only authorized leasing with MFP for that amount.[66]

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[64] Liczyk 11/06/2003 at 93-94; Liczyk 11/18/2003 at 135-136.
[65] Liczyk 11/18/2003 at 135-136.
[66] Liczyk 11/18/2003 at 138.

46. Although Liczyk testified that she was certain that she raised the issue of I&T's spending exceeding Council authority at the January 17, 2001 meeting, and that it had to end, no one else in attendance remembered that Liczyk had raised any issue apart from budget issues. Liczyk testified that the recollection of other individuals at the meeting was wrong.[67]

b) Colley's recollection was different from Liczyk's

47. Colley took brief notes of the January 17, 2001 meeting.[68] He was not absolutely certain that his handwritten notes were taken on January 17, 2001. During his evidence, after careful review of his notes, he concluded that "it looks more and more like it came out of that January 17th meeting in terms of the issues that were discussed". He said further:

> I think it [the notes] reflects the discussion that occurred on January the 17th, where Ms. Liczyk was looking for business case and justification on all departmental requests for computer – computer hardware and software. And then looking for certain things to be in place.[69]

48. Colley's notes are very brief. They list the following items:

> Business case / justification (capital)
> IT sign off, IT on equipment
> Financial sign offs
> Departmental sign offs
> MFP invoices to Finance for payment
> Incorporate goods receipts into leasing contract.
> $\quad$ $ Since 7/99
> $ IT Desktop
> $ Y2K
> $ IT operations
> $\quad$ $4.9 to be charged to depts.
> Accounting from Y2K[70]

[67] Liczyk 11/18/2003 at 177, 141.
[68] COT076251.
[69] Colley 09/03/2003 at 59-60.
[70] COT076251, 58:1:75.

49. Although somewhat cryptic, there is nothing in Colley's notes to suggest that Liczyk began the meeting with a strongly worded admonishment to I&T to stop placing items on lease with MFP without Council approval. The notes do suggest that the discussions centred around the process and budget issues described by the others in attendance as the focus of the meeting.

50. Liczyk's claim that she clearly raised the issue of the overspend of $24 million at this meeting was never put to Colley during his testimony. However, such a claim directly contradicts Colley's evidence that he first learned of the existence of the $43 million cap in July 2001.[71]

c) Wilkinson's recollection was different from Liczyk's

51. Wilkinson stated that he and Domi were invited to the January 17, 2001 meeting to "be prepared to provide any clarification that might be required" regarding information MFP had provided. He recalled the meeting as being relatively short, with "some issue as to the allocation of some of the software that had been placed on lease in the budget process", and that "City personnel made reference to various internal City processes and accounting treatments and may have included references to the non program as opposed to departmental budgets". He said further:

> [B]y the end of the meeting my impression was that the City personnel had understood what happened and had determined what they need to do to fix whatever issue or problem may have existed.
>
> I do not recall that anyone at this meeting raised any issue as to the propriety of the leasing program or as to the appropriateness of the assets on lease having exceeded $43 MM, nor do I remember anyone expressing any surprise about the quantum of assets on lease. In fact, to the best of my recollection there was no reference to the $43 MM as a cap, or otherwise. . .[72]

[71] Colley Affidavit, paras. 29 and 41, 09/02/2003 at 243-244, 248.
[72] Wilkinson Affidavit, paras. 138-139, 09/16/2003 at 96-98.

52. Wilkinson's impression was that he and Domi were present for the entire meeting. He testified that "my impression was that the meeting was over when we left and that there were no serious ongoing problems affecting the leasing program."[73]

d) Bulko's recollection was different from Liczyk's

53. Bulko gave a detailed description of the January 17, 2001 meeting in her testimony. The meeting took place in Liczyk's boardroom at City Hall. She, Viinamae, Colley, Wilkinson, Domi, and Liczyk were in attendance. The meeting lasted less than an hour. She understood that the purpose of the meeting was "to find out why we were over budget on the leasing from Y2K". She described the discussions that took place as follows:

> I remember discussing the - the delta amounts for CA, Oracle, Mobius, Sun, Kanatech, Veritas – all those non-funded software programs that were Y2K funded the first year. I remember Lana and Wanda discussing payment for the second or third years, subsequent years and the bottomline, the most important thing that I remember is that Wanda had then charged Ken and Louisa [Ting, a supervisor in Accounting Services who reported to Colley] with managing the finance related tasks of the leasing program.[74]

54. Coming out of that meeting, Bulko understood that, going forward, Colley and Ting would deal with "[t]aking the money out of the departmental accounts into the – into a holding account … and paying MFP and charging back the departments the appropriate amount as per the information that we would send down to them." The CMO would continue to be responsible for keeping track of what was ordered, the amounts placed on lease, the price paid to the vendor, the breakdown by department, the annual lease payments, and where the equipment went. At the end of a period (a month or a quarter) the CMO would send the information to Accounting Services to create a journal

[73] Wilkinson Affidavit, para. 139, 09/16/2003 at 97-98.
[74] Bulko 08/11/2003 at 169-170.

entry that would transfer the funds from a departmental account into the MFP holding account for the purpose of paying to MFP.[75]

55. Bulko's fairly detailed description of the January 17, 2001 meeting is consistent with that of both Colley and Wilkinson. She did not describe any discussion about I&T having exceeded Council authority by leasing more than $43 million from MFP.

e) Viinamae's recollection was different than Liczyk's

56. Viinamae merely described the January 17, 2001 meeting as "a meeting that was being held to address the issues that I had raised with regards to the operating pressures, the Y2K operating pressures.[76]"

f) Domi's recollection was vague

57. Domi was somewhat vague about what went on at the January 17, 2001 meeting. All that he could really recall was that Liczyk and Viinamae were not seeing eye to eye "getting organized and costs and stuff like that.[77]"

g) Liczyk's evidence was not plausible

58. The evidence of Colley, Wilkinson, Bulko, Viinamae, and Domi about the January 17, 2001 meeting was not challenged in cross-examination by counsel for Liczyk. It was not suggested to any of them that Liczyk had made plain on January 17, 2001 that she was concerned that the City had more than $43 million on lease with MFP and that this exceeded Council authority. Colley, Bulko, and Viinamae were consistent on the point that the purpose of the meeting was to deal with the budget issues related to the leases,

[75] Bulko 08/11/2003 at 170.
[76] Viinamae 10/23/2003 at 67.
[77] Domi 02/12/2003 at 7.

not with unauthorized commitments to MFP that had already been made. Much of the meeting dealt with the transition of accounting related functions for the leases, from the CMO to Colley and Ting in Accounting Services. Similarly, the two MFP representatives at the meeting recalled that the meeting focused on internal City processes having little to do with MFP.

59. Liczyk's version of the meeting stands alone. It is not supported by the preponderance of evidence or the conduct of City staff both before and after the meeting. Liczyk's evidence on this point should be rejected.

8. Liczyk's report to Budget Advisory Committee about the negative variance in the leasing budget

60. Liczyk made a report to the Budget Advisory Committee ("March 2001 report") in March 2001 to "provide further analysis of the 2001 operating budgets for the various Non Program Expenditures and Revenues and to recommend amendments to certain budget lines as a result of 2000 year end actuals". Item 4 in the March 2001 report specifically addressed the recommended budget for computer leases of $18.551 million, which was a significant increase from the 2000 budget. It attributed the increase to "software licences for the existing and new applications that were not included in the 2000 budget, but which became necessary as Y2K compliant hardware was implemented throughout the City". The March 2001 report explained:

> Under the City's Y2K project, $43.0 million of hardware and system software was acquired with leasing costs totalling $13.5 million being budgeted in 2000.
> In order to support the expanded infrastructure, software licences for products such as office automation tools … were required as part of the Y2K platform. The costs for these software products totalled $24.35 million with total leasing costs of $5.0 million required, bringing the 2001 request to $18.5 million.[78]

61. There was no specific mention in the March 2001 report of the fact that the additional $24.35 million of software leases were transacted with MFP, or that there had not been a report to Council either to seek approval for these leases, or to report on the lease transactions after the fact. Liczyk tried to excuse this omission by suggesting that Council must have understood this from the language used, since there were no questions from Councilors seeking clarification of the issue. She testified:

> Q: [D]id these numbers here, summary by expenditure category, tell the reader that staff has exceeded Council's authorization by $24 million?
>
> A: When my staff put this report together, page 2 and page 3, I felt that it was adequate disclosure to Council with respect to this item, yes. In hindsight could it have been better? Yes. …

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[78] COT013046, 33:2:70; Colley 09/03/2003 at 186-187.

> A: … I did disclose the amount that there was a capital amount that exceeded the original approval of $43 million, I outlined that that amount was $24 million.
>
> Q: Can you tell me where it says that staff exceeded Council's authority … from July 27th, 1999 by $24 million?
>
> A: That language that you're describing is not here, but to a member of Council who was sitting at the Budget Advisory Committee or at Policy and Finance Committee or at Council, I felt that at the time they understood through the words that I had here, there were no further questions that were asked of me with respect to clarifying anything with respect to this.[79]

62. Liczyk acknowledged that she did not report to Council that "a particular vendor award [had been] exceeded". While she felt she had disclosed that the total project cost had been exceeded, she did not indicate that "the individual contract amount underneath that project was exceeded". She could not recall many instances where a contract with a particular vendor was overspent and reported to Council, as:

> [W]e didn't have good enough controls to be reporting that out on a – on a - very mature basis. So, what we mostly and substantially reported out on was what we call a change in scope, or if a total project had – had exceeded what had originally been approved by Council, we did a lot of reporting out on that through the budget process, through variance reports, through the budget documents, capital budget and in the operating budget, but at the time we did not track well enough, and I think we didn't have good enough internal controls, that where a contract award was exceeded, that in every instance we were ever reporting those to Council.[80]

[79] Liczyk 11/04/2003 at 135-136.
[80] Liczyk 11/19/2003 at 210-211.

9. The leasing program carried on as before following the January 17, 2001 meeting

63. The CMO carried on with "business as usual" following the January 17, 2001 meeting with Liczyk, and did not act as if it had been chastised by the CFO and Treasuer for operating the leasing program in contravention of City bylaws.[81]

64. On January 18, 2001, the day after the January 17, 2001 meeting, Viinamae emailed Andrew and Cindy Draycott (a budget person in I&T) to report on the meeting. She said:

> The meeting occurred as planned. At the meeting we reviewed the budget analysis document previously provided to you.
> Wanda noted that:
> a) the variance for 2000 would be treated as an operating cost arising from Y2K.
> b) dollars would NOT be allocated to Departments in 2001, and
> c) Departments did NOT have this money.
>
> No discussion on the potential transfers from I&T Operating (SAP,Cincom, etc.) to non-program occurred. The focus was on dollars currently committed.[82]

65. On the same day Bulko emailed her staff in the CMO to thank them for their "extreme efforts in pulling together all the information required for our meeting with Wanda and Lana". She concluded with "Back to business as usual!". Viinamae responded: "The provision of this information allowed u[s] to find a satisfactory solution for all parties". Bulko replied: "gotta love `win/wins'!".[83]

66. On April 1, 2001 Viinamae executed Equipment Schedule PA1-5 under the MLA for $4.1 million of desktops for a five year lease term with MFP.[84] Neither she nor anyone else in I&T, or in Finance for that matter, reported to Council with respect to this

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[81] COT015560, 63:11:16; COT066484, 63:11:15; COT066485.
[82] COT015560, 63:11:16
[83] COT066485.
[84] COT022740, 18:3:50.

transaction. It was therefore entered into without Council approval, either in defiance of Liczyk's alleged admonition to stop such conduct, or, more likely, because the CMO was carrying on as before, with no thought that what they were doing contravened City bylaws.

67. These examples indicate no change in direction by the CMO, and no acknowledgement that the way they had been doing things before the January 17, 2001 meeting was wrong, needed to be corrected. Rather, their actions indicate, as Bulko said, "business as usual".

68. Finally, Liczyk's reaction to the proposal to put the proposed new photocopiers on lease with MFP was also consistent with the theory that she had not, by May 2001, turned her mind to the fact that much of the computer hardware and software on lease with MFP was unauthorized. As will be demonstrated in Chapter 16, Liczyk signed a report dated March 14, 2001, that proposed to place over $3 million in photocopiers on lease without MFP without a tender. Liczyk testified that she "assumed" that there had been a tender to support the decision to lease the photocopiers from MFP, the City's "current technology leasing provider".[85] Liczyk testified that she missed the fact that I&T was proposing to award another contract to MFP without a public tender process. Liczyk's actions regarding the leasing of photocopiers were entirely inconsistent with her version of the January 17, 2001 meeting.

[85] Liczyk 11/18/2003 at 151.