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1. Overview

1. Like MFP, Dell Financial Services Ltd. (“DFS”) worked hard to try and win the computing leasing RFQ. It hired Lyons as a lobbyist to open doors at City Hall, made its own efforts to meet with various City staff, and provided written analysis and presentations to City staff in order to convince them of the benefits of leasing. Rob Simone (“Simone”), the senior DFS executive on the file, and Scott Marentette (“Marentette”), the DFS sales representative, were both anxious and determined to win the bid. They considered MFP to be their primary competitor.

2. In contrast to Domi, his counterpart at MFP, Marentette was very knowledgeable about technology leasing – its advantages, pricing and range of terms. He was Lyons’ chief contact at DFS and attended with Lyons at a meeting with Jakobek on May 25, 1999.

3. Like Domi and Payne, Lyons had identified Jakobek as the only Councillor who was a key decision-maker on the computer leasing file and thus the only Councillor that DFS needed to meet. The DFS meeting with Jakobek was significant because of its awkwardness. Marentette overheard Jakobek question Lyons about why he was accompanied by a DFS representative, having promoted MFP just the day before.

4. During “crunch time” – shortly before the City issued the RFQ or between its issuance and the due date of June 11, 1999 -- Lyons attended a strategy meeting at DFS. Lyons, Simone and Marentette were all present. Simone’s memory of what transpired at the meeting precipitated an OPP investigation into whether or not Lyons had attempted to secure a bribe from DFS for either himself or himself and Jakobek. Although Simone was aggressively cross-examined on the characterization of Lyons’ comments – whether they were fairly characterized as an attempt to obtain a “bribe”, a “shakedown”, or a “success fee” - his evidence about what Lyons said and the context of Lyons’ comments was unshaken on the following critical points:

- a. Lyons asked Simone what he thought the RFQ was “worth” to him;

- b. Simone thought Lyons meant the gross value of the transaction and replied “you know....\$150 million”;
 - c. In response, Lyons said “no, no well Tom says its worth \$150,000”;
 - d. Simone queried whether paying this sum meant that DFS would win the RFQ;
 - e. Lyons replied that DFS would still have to win the tender process with the lowest bid;
 - f. Simone expressed bewilderment: even if DFS bid low enough to win the tender, it stood to make less than a half million in profits and was risking five to six million dollars in “residual” investment;
 - g. Lyons retorted: “well, you know, MFP would pay one hundred and fifty grand and others would pay one hundred and fifty grand.”
5. Although Marentette did not corroborate all of Simone’s evidence, he did not directly contradict it either. As for Lyons, he denied any impropriety, and denied referring to either Tom or MFP at any point during the meeting. Nevertheless, his evidence was consistent with Simone’s testimony in the following significant ways:
- a. he agreed that he identified Jakobek as a key decision-maker on the computer leasing file and the only Councillor that DFS needed to meet;
 - b. he knew well that MFP was competing with DFS and MFP wanted to win the contract;
 - c. prior to the June 11, 1999, deadline for responses to the RFQ, he agreed that a meeting took place with both Marentette and Simone in attendance at which he asked DFS for money;

- d. he realized the computer leasing contract was a “big contract”;
 - e. he asked Simone, as Simone testified, what he thought the contract was worth;
 - f. he indicated that he sought payment or fee, and may not have used the word “success” fee in the amount of \$150,000 – the exact amount described by Simone; and
 - g. Simone asked him a couple of questions which he “couldn’t remember”.
6. Importantly, Lyons’ evidence also confirmed that almost immediately he recognized his error in soliciting \$150,000 because Simone’s spontaneous reaction revealed either surprise, bewilderment or outright negativity. As Lyons explained it, he immediately asked himself “why did I ever bring this up?”
7. Lyons insisted that his request for \$150,000 was nothing more than a standard and benign, if belated, request for a “success fee”, commission or bonus – an amount based on results achieved for the client. The City submits that his evidence on this point should be rejected because:
- a. he himself conceded that he may have not used the word “success” to explain his request for \$150,000;
 - b. his written retainer with DFS clearly contemplated a fixed monthly retainer and made no mention whatsoever of a potential success fee;
 - c. Lyons provided little evidence that negotiation of a success fee for lobbying services was part of his standard practice. He was able to identify only three vague examples over his lengthy career as a lobbyist, none of which yielded fees that ever approached \$150,000; and

d. nothing Lyons had done for DFS between February and May 1999 would have persuaded any reasonable client to consider a payment of such magnitude at “crunch time” unless there was some additional consideration for the payment.

8. Finally, there is no reason to reject the evidence of Simone that Lyons mentioned “Tom” in relation to the “worth” of the deal. Simone had no reason to fabricate this evidence; indeed his continued reluctance to come forward (to the press and Commission Counsel) belied any “sour grapes” motive against MFP or any interest in inculcating either Lyons or Jakobek. Further, there was no evidence to suggest that this critical aspect of evidence was the product of a frail or distorted memory.

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

10. As Simone described it, MFP’s lease rate factor was too good to be true. MFP, having quoted so low, would have to do “lots of funny things to get [its] economics back in line.”

2. The Players

a) DFS and its employees

11. DFS provided financing for the acquisition of computers and related equipment sold by Dell.¹ Three former DFS employees gave evidence about the Lyons allegations:

- a. Simone was the National Sales Director for DFS. Simone was hired by Newcourt and then assigned to DFS.² He was the senior executive working to secure a computer leasing deal with the City of Toronto.
 - b. Marentette was a salesperson at DFS, and the account executive for the City of Toronto account.
 - c. Gordon Barrett (“Barrett”) was the General Manager of DFS and the Senior Vice-President of Newcourt. He was responsible for overall company operations. Barrett hired Lyons to help them win the City of Toronto leasing tender.
12. By the fall of 2002, none of these individuals were employed by DFS.³

b) Lyons

13. Lyons was a consultant/lobbyist and a lawyer. In early 1999, Lyons was counsel to the law firm Morrison Brown Sosnovitch LLP (“Morrison Brown”), which he joined in 1995.⁴ Prior to Morrison Brown, Lyons worked for 22 years in his own law firm, where he practised insurance law, negligence law, and product liability law.⁵ When his

¹ <http://www.dfssales.com/dfsdirect/about.asp>.

² Simone 04/14/2003 at 210.

³ COT041622 at COT041626-41627, 5:1:84.

⁴ Lyons 05/08/2003 at 13-14.

⁵ Lyons 05/08/2003 at 13-14.

firm disbanded, Lyons associated himself with various other law firms.⁶ Lyons testified that, from the time he joined Morrison Brown, “essentially” he no longer practiced law.⁷ Rather, he acted as a rainmaker, introducing clients to the firm and generating business.⁸ He also did extensive political and charitable fundraising.⁹ Lyons agreed that it was in 1995 that he began to consider himself a lobbyist.¹⁰ He described the job of a lobbyist as follows:

Well, I'm a -- I'm a consultant. I'm a problem solver. I strategize. I arrange -- I have -- I arrange meetings and provide intelligence and I think that's it.¹¹

14. Lyons indicated that, most often, he lobbied governments for his clients but he also worked as a lobbyist between private sector clients.¹²

i) Lyons' view of the role of a lobbyist

15. Lyons described himself as a lobbyist and agreed with the definition of lobbyist from the City of Toronto's conflict of interest guidelines:

Lobbying is usually defined as direct or indirect efforts to solicit support and influence government decisions on behalf of another party or an organization, often away from public scrutiny.¹³

16. Lyons identified four services he provided to lobbying clients:

- a. strategic advice;
- b. intelligence gathering;

⁶ Lyons 05/08/2003 at 13.

⁷ Lyons 05/08/2003 at 14, 18.

⁸ Lyons 05/08/2003 at 18-19.

⁹ Lyons 05/08/2003 at 21.

¹⁰ Lyons 05/08/2003 at 28.

¹¹ Lyons 05/08/2003 at 28.

¹² Lyons 05/08/2003 at 28-29.

¹³ COT040386 at COT040395, 32:2:33.

- c. arranging meetings; and
- d. problem solving.¹⁴

17. Lyons testified that he influenced government decisions by putting forward his client's case before the appropriate individuals.¹⁵ In order to advise a client about the City of Toronto's political landscape, he would start researching at the bureaucratic level, and then continue to gather information at the political level.¹⁶

18. Despite receiving a summons from Commission Counsel, Lyons did not provide any documents with respect to his business relationship with Dell Computer Corporation ("Dell") or DFS.¹⁷ Lyons explained his failure to produce a single piece of paper relating to either Dell or DFS by insisting that his standard procedure was to destroy files immediately upon the cessation of a client relationship.¹⁸ He maintained that the vast majority of the information amassed in a lobbying client's file was of no value to him after the retainer was over.¹⁹

19. Lyons left Morrison Brown in June 2001.²⁰ Upon leaving Morrison Brown, Lyons created the ARI Lyons Group, a government relations firm.²¹

c) Susan Cross

20. Susan Cross ("Cross") was Lyons' executive assistant, from August 1998 to December 2000.²² She worked for Lyons in his capacity as a lobbyist, not as a lawyer.²³ Cross frequently attended meetings with or on behalf of Lyons, took notes at such

¹⁴ Lyons 05/13/2003 at 140-141.

¹⁵ Lyons 05/08/2003 at 47.

¹⁶ Lyons 05/08/2003 at 43, 45.

¹⁷ Lyons 05/08/2003 at 6.

¹⁸ Lyons 05/08/2003 at 7.

¹⁹ Lyons 05/13/2003 at 124.

²⁰ Lyons 05/08/2003 at 9.

²¹ Lyons 05/08/2003 at 30.

²² Cross 05/06/2003 at 7.

²³ Cross 05/06/2003 at 17-18.

meetings, and sometimes attended fundraisers.²⁴ These meetings included client meetings, Councillors' meetings, Committee meetings, and City Council meetings. Cross testified that she would be asked to leave when the discussion between Lyons and a client turned to his retainer.²⁵ Cross used notebooks at Morrison Brown to record phone messages, meeting notes, and personal reminders.²⁶ Cross sometimes opened files in the name of Morrison Brown, and sometimes in the name of a numbered company. She did not know the reason for this distinction.²⁷ Lyons testified that all of his lobbying files were opened in the name of Morrison Brown.²⁸

²⁴ Cross 05/06/2003 at 12-14.

²⁵ Cross 05/06/2003 at 13.

²⁶ Cross 05/06/2003 at 20.

²⁷ Cross 05/06/2003 at 16-17.

²⁸ Lyons 05/13/2003 at 107.

3. Lyons contract with Dell

21. On September 16, 1998, Lyons sent a proposal to David Kelly (“Kelly”) at Dell.²⁹ The proposal was further to a meeting between Kelly and Lyons held on that date. Lyons proposed a six month retainer at \$7,500 per month plus GST. The retainer would cover representation both at the City of Toronto and the Province of Ontario.

22. Lyons specifically proposed a “success bonus” to Kelly in his September 16, 1998, letter:

The writer would propose if there is any success with respect to any RFP that an additional “success bonus” be paid in the amount of one-quarter of one percent of the value of the contract.³⁰

23. Lyons testified that he intended that he would receive $\frac{1}{4}$ of 1% of the gross amount of the contract, not $\frac{1}{4}$ of 1% of the Dell’s profit from the contract.³¹

24. Lyons provided a two page written proposal to Dell setting out the goals, objectives and strategies for his retainer.³² The ultimate objective for the retainer was to win the computing leasing RFQ. Lyons proposed three strategies in the document:

Make the appropriate contact to uncover what RFP’s are being (and will be) put forward for bidding. This involves DCC getting thier [sic] name placed on the vendors list.

Meet with City of Toronto staff and elected officials – either one on one sessions, or by DCC making a presentation to the corporate services committee as a whole.

DCC attending/or supporting municiple [sic] functions – become freinds [sic] with councillors and staff.³³

²⁹ TEC046591, 95:5:67; Lyons 09/22/2004 at 21-23.

³⁰ TEC046591, 95:5:67.

³¹ Lyons 09/22/2004 at 23-24.

³² TEC046593, 98:5:66.

³³ TEC046593 at TEC046595, 98:5:66.

25. Lyons confirmed that Dell did not make contributions to any municipal politician's campaign because it was against company policy to do so and because they did not have the expense accounts to do so.³⁴

26. Lyons agreed that there were a range of ways for potential suppliers to meet City Councillors and to become their friends. He agreed that one way was to fly Councillors or staff on a private jet to attend hockey games in other cities. Lyons indicated that he would not have recommended this approach to Dell. He doubted very much that he would have recommended it to any client because "[i]t's just not appropriate."³⁵

27. On November 10, 1998, David Toms, Director of Sales, Public Segment, Dell ("Toms"), sent a counter-proposal to Lyons in response to the September 16, 1998 letter.³⁶ Toms proposed to enter into a relationship with Lyons on the following terms:

- a. Six month retainer at \$7,500 per month;
- b. Morrison Brown would enter into a non-disclosure agreement with Dell; and
- c. Lyons and his firm would agree to comply with all applicable laws and government policies, including without limitation, the *Criminal Code of Canada*, government policies regarding gifts to government employees and procurement activities, and any applicable lobbyist registry legislation.

28. Lyons agreed to this proposal although at the time he did not have the specific knowledge of the contents of the conflict of interest policy that applied to City Councillors and municipal employees at the City of Toronto. Although he could not

³⁴ Lyons 09/22/2004 at 30-31.

³⁵ Lyons 09/22/2004 at 36-37.

³⁶ COT063175, 98:5:65.

recall the broad contours of such policies, he stated that he thought he knew them at the time.³⁷

³⁷ Lyons 09/22/2004 at 41-43.

4. DFS hired Lyons to win the City of Toronto computer leasing contract

a) DFS understood the City computer leasing tender was important

29. Simone testified that DFS understood the value of the computer leasing RFQ to be approximately \$150 million over a three or four year period.³⁸ Simone learned from his account executives, prior to the issuance of the tender, that the initial opportunity was valued at \$40 million, but that the City was projected to spend \$50 million a year for each of the next two years.³⁹ Marentette testified that he understood the value of the RFQ to be between \$40 million and \$100 million.⁴⁰ Simone did not know of any bigger public sector tender occurring that year.⁴¹

30. On the other hand, Barrett stated that he did not consider the RFQ to be a large deal for two reasons.⁴² First, the transaction was relatively significant in terms of size, but not in terms of profitability, and his mandate was to grow the company's profits. Second, he was personally less invested in the RFQ because he was a Newcourt employee whose remuneration was entirely separate from the performance of DFS. Moreover, Barrett did not believe that DFS would win the deal.⁴³

31. Simone explained that Barrett's perception of a "large" tender was distorted:

His frame of reference might be skewed to the global business, because he sort of sat on -- he was in charge of Canada, but he was also -- he also had a larger role in the joint venture. So, for example, that year I think the United States, Dell Financial Services did \$6 billion in revenue. We had one (1) client in Canada that he negotiated a \$240 million global transaction. But, that was unique for us, that was large. Aside from that one (1) transaction, this would have been the biggest of that year.⁴⁴

³⁸ Simone 04/14/2003 at 33.

³⁹ Simone 04/15/2003 at 128.

⁴⁰ Marentette 04/17/2003 at 10-11.

⁴¹ Simone 04/14/2003 at 33.

⁴² Barrett 04/29/2003 at 71-72.

⁴³ Barrett 04/29/2003 at 72, 74.

⁴⁴ Simone 04/14/2003 at 34.

32. Simone testified that DFS was aware that there was a sale/leaseback aspect to the transaction.⁴⁵ He agreed that his knowledge may have been informed by the fact that Dell sold the City computer equipment earlier that year. Marentette agreed that there were “definitely” indications that part of the tender would be a sale/leaseback transaction.⁴⁶ He was not certain about the origins of these indications:

A: I can't remember the exact origin of all the information, but it would have been a combination of information we received from Jeff Lyons, information we received directly from the City, information that we heard on the street.

Q: Information from Dell Computer?

A: Sure.⁴⁷

b) Lyons did not request a success fee as part of his DFS retainer

33. Dell recommended Lyons to help with the City of Toronto leasing tender.⁴⁸ Lyons testified that Kelly from Dell set up a breakfast meeting with Barrett in February 1999 in order to recommend his services to DFS.⁴⁹ Lyons had worked with Kelly before on “many things”, including Dell’s desktop supply contract with the City of Toronto.⁵⁰ Lyons recalled the meeting as friendly.⁵¹ He testified that Kelly and Barrett told him that they were planning to bid on the City of Toronto 1999 computer leasing project, and then they discussed Lyons’ fees.⁵²

34. On February 16, 1999, further to a telephone conversation between them, Lyons sent a retainer proposal to Barrett.⁵³ Lyons proposed a six month trial retainer for a monthly fee of \$3,000. Lyons identified his role to be “to provide intelligence and

⁴⁵ Simone 04/14/2003 at 201.

⁴⁶ Marentette 04/17/2003 at 11.

⁴⁷ Marentette 04/17/2003 at 11.

⁴⁸ Simone 04/14/2003 at 27.

⁴⁹ Lyons 05/12/2003 at 5-6, 7, 9.

⁵⁰ Lyons 05/12/2003 at 6.

⁵¹ Lyons 05/12/2003 at 8.

⁵² Lyons 05/12/2003 at 8-9.

⁵³ COT075441, 17:1:10; COT075442, 17:1:10; COT075443, 17:1:10.

strategic advice as well as to ‘level the playing field’”. The letter made no reference to a success fee. Lyons testified that what he meant by “level the playing field” was:

. . . to make sure we have the same advantage as everybody else that’s bidding on it. So, that we have the right information and made the – you know, we’ve done our homework as to making sure that nobody else has an advantage over us.⁵⁴

35. On March 10, 1999 Lyons sent another proposal to Barrett.⁵⁵ The letter followed another discussion between the two men. Lyons proposed to act as a consultant to DFS and to “provide strategic advice, initiate contacts and provide any other intelligence required” on behalf of DFS. Lyons reiterated his proposal for a \$3,000 monthly retainer for six months. Again, Lyons did not propose any form of success fee.

36. Lyons had now spoken twice with Barrett and written him two letters. According to Barrett, Lyons never raised the subject of a success fee, a commission, or any fee above the monthly retainer amount related to DFS winning the RFQ.⁵⁶ Despite discussing his retainer with Barrett on four occasions, Lyons never asked for a success fee. Lyons knew how to ask for a success fee, indeed he included such a request in his first retainer proposal to Dell.

37. Barrett accepted Lyons’ proposal and hired him.⁵⁷ Neither Simone nor Marentette spoke to Barrett about his decision to hire Lyons.⁵⁸ DFS had never before hired a consultant or lobbyist.⁵⁹ Simone testified that Barrett was not happy about hiring Lyons, primarily because of the expense.⁶⁰ Barrett explained that he was unhappy about the added expense, which he did not see as adding value to the tender response process, and that he was uncomfortable with the idea of lobbying.⁶¹ He disliked Lyons’

⁵⁴ Lyons 09/22/2004 at 46.

⁵⁵ COT075440, 17:1:9.

⁵⁶ Barrett 04/29/2003 at 94, 105-106.

⁵⁷ Barrett 04/29/2003 at 92.

⁵⁸ Simone 04/14/2003 at 28.

⁵⁹ Simone 04/14/2003 at 29; Marentette 04/17/2003 at 21.

⁶⁰ Simone 04/14/2003 at 29-30.

⁶¹ Barrett 04/29/2003 at 104-105.

presence around confidential DFS information and felt that it was not the way that DFS did business.⁶²

c) Lyons' role with DFS

38. Lyons described his role with DFS as follows:

Well, this was -- I don't know whether they had done business at the City before. So, they basically, I think, wanted assistance in, sort of, the lay the land and I think they wanted some meetings with the important players in this proposal; or was it an RFQ, I can't remember what came out subsequently.⁶³

39. Lyons explained what he brought to the table for DFS:

What they're buying when they come to me is forty (40) years of experience. I've been through this process either as -- as in politics or serving in different capacities, and I have a sixth sense other people don't have, and what -- I assisted them. These people were well intentioned, but they had no previous experience at the City. They were private sector oriented, they never had done this bid. And what I did was walk them through it. No, I didn't do the technical expertise, which I've said. But what I did was have them always putting their best foot forward.⁶⁴

40. Simone testified that:

Mr. Lyons was hired to assist us in -- in gaining access to certain decision makers and helping us put our best foot forward towards winning this tender.⁶⁵

41. Marentette testified that Lyons was responsible for ensuring that the DFS message was heard "throughout the decision makers", and that DFS was represented in front of these decision makers through meetings and correspondence.⁶⁶ Marentette

⁶² Barrett 04/29/2003 at 104-105.

⁶³ Lyons 05/12/2003 at 12.

⁶⁴ Lyons 05/13/2003 at 265.

⁶⁵ Simone 04/14/2003 at 31.

⁶⁶ Marentette 04/17/2003 at 29-30.

could not explain what Lyons did for DFS apart from setting up meetings with people at the City staff.⁶⁷

42. Marentette indicated that there were two kinds of decision makers to pursue: staff decision makers and political decision makers. DFS hired Lyons to help gain access to both.⁶⁸

A: ... So our goals were to ensure that, not only on the bureaucratic side but on the political side, if we were successful we would not get anything -- anything -- we would not have any road blocks in the process.

Q: And that was one of the reasons you hired Mr. Lyons?

A: That's correct.

Q: All right. So that you -- if you were successful, you wouldn't get hung up in Council, as you put it here?

A: That there would be no further road blocks to having a signed deal.

Q: And was that one of the reasons for going to talk with Mr. Jakobek?

A: I would think that that would be an acceptable statement.⁶⁹

43. Lyons identified two key staff decision makers: Andrew and Liczyk.⁷⁰ Lyons testified that the three most influential members of Council were the Mayor, the Deputy Mayor, and the Budget Chief.⁷¹ Lyons told Marentette that Jakobek was an "important person in the City" and that DFS should meet with him.⁷² Indeed, Marentette testified that the only City Councillor that Lyons ever spoke about was Jakobek.⁷³

⁶⁷ Marentette 04/17/2003 at 31.

⁶⁸ Marentette 04/17/2003 at 37.

⁶⁹ Marentette 04/17/2003 at 37-38.

⁷⁰ Marentette 04/17/2003 at 145; Lyons 05/12/2003 at 64.

⁷¹ Lyons 05/08/2003 at 134.

⁷² Marentette 04/17/2003 at 33; Lyons 05/12/2003 at 64.

⁷³ Marentette 04/17/2003 at 145.

44. Lyons did not provide technical advice to DFS or advice on how to structure the DFS response to the RFQ. Lyons testified that he never saw the City's RFQ.⁷⁴ He also testified that he could not recall seeing the DFS response to the RFQ.⁷⁵

d) Lyons' relationships with key decision makers at the City of Toronto

i) Lyons' relationship with Jakobek

45. Lyons and Jakobek had a longstanding relationship. Prior to Jakobek's marriage, Lyons considered him a good friend.⁷⁶ He and Paul Godfrey hosted a stag party for Jakobek, which cost \$100 per plate.⁷⁷ However, Lyons testified that he used to be "much closer" with Jakobek in 1985, before Jakobek married and had children.⁷⁸ In addition, Lyons agreed that he raised funds for Jakobek's election as City Councillor.⁷⁹ Jakobek continually tried to minimize the relationship between the two men. Lyons' evidence on this point was much more credible and was supported by extensive documentation.

46. Lyons agreed that he may have called Jakobek 75 times between May 31, 1999 (the date the City released the RFQ) and February 2, 2002.⁸⁰ There were also some phone calls outside of this time period, which Lyons attributed to Jakobek's involvement with a provincial leadership candidate, and Jakobek's search for a job.⁸¹ Lyons could not remember a phone call to Jakobek on May 31, 1999 - the date the City released the RFQ.⁸² Lyons also made a phone call to Jakobek on July 22, 1999, just days after the P&F meeting. He testified that he did not remember having this conversation, or any other conversation with Jakobek about the P&F meeting.⁸³

⁷⁴ Lyons 05/12/2003 at 65.

⁷⁵ Lyons 05/12/2003 at 69.

⁷⁶ Lyons 09/22/2004 at 173.

⁷⁷ Lyons 05/08/2003 at 136.

⁷⁸ Lyons 05/08/2003 at 136.

⁷⁹ Lyons 05/08/2003 at 135.

⁸⁰ Lyons 05/08/2003 at 141.

⁸¹ Lyons 05/08/2003 at 142.

⁸² Lyons 05/08/2003 at 142.

⁸³ Lyons 05/08/2003 at 146.

ii) Lyons' relationship with Paul Godfrey

47. Lyons considered Paul Godfrey to be a long-time close friend. At the time of the Inquiry, Lyons had known Paul Godfrey for thirty-eight years.⁸⁴ Lyons testified that Paul Godfrey was well-known at the City of Toronto, and that Mayor Lastman had occasionally sought his advice.⁸⁵ Lyons agreed that he too had sought and valued advice from Paul Godfrey.⁸⁶ Lyons agreed that Paul Godfrey helped him obtain his seat on the TTC board by making a few calls:

Q: A few phone calls by Paul Godfrey doesn't hurt?

A: No, it doesn't hurt but -- but I had to do a lot of the work myself.⁸⁷

iii) Lyons' relationship with Andrew

48. Lyons knew Andrew.⁸⁸ Lyons testified that he met with Andrew approximately five times in 1999.⁸⁹ He testified that he may have given Andrew tickets to a basketball or hockey game, possibly for Andrew's son.⁹⁰ Later, he recalled providing Buffalo Bills tickets to Andrew for his son.⁹¹

49. Lyons hosted an annual charity golf tournament called the "Brother Jeff Golf Tournament".⁹² Despite an indication in Liczyk's calendar reading, "Brother Jeff Golf Tournament – Jeff Lyons w J. Andrew", Lyons testified that he did not golf in the foursome with Andrew at one of these tournaments, and that he never golfed at these tournaments because he was busy ensuring that the event was successful.⁹³

50. Lyons testified that he did not know about Andrew's future career aspirations and he did not recall ever discussing Andrew's ambition to become a Commissioner.⁹⁴ However, Lyons did recall that Andrew left his post at the City of Toronto either because

⁸⁴ Lyons 05/08/2003 at 158.

⁸⁵ Lyons 05/08/2003 at 157.

⁸⁶ Lyons 05/08/2003 at 157-158.

⁸⁷ Lyons 05/08/2003 at 160.

⁸⁸ Lyons 05/08/2003 at 167.

⁸⁹ Lyons 05/13/2003 at 38.

⁹⁰ Lyons 05/08/2003 at 167-68.

⁹¹ Lyons 05/13/2003 at 33-34.

⁹² Lyons 05/13/2003 at 26-27.

⁹³ COT013656, 63:4:1a; COT013657, 63:4:1a; Lyons 05/08/2003 at 168.

he wanted to be the Commissioner of Corporate Services, or because he wanted more money.⁹⁵ Lyons agreed that he could have assisted Andrew with his ambition to become a Commissioner by speaking to some Councillors.⁹⁶ Lyons testified that he thought Andrew was very good and “ran a good team”.

51. Lyons’ cellular phone records show calls between him and Andrew every month between January 1999 and June 1999.⁹⁷ Lyons agreed that it was “quite possible” he might have spoken to Andrew about DFS.⁹⁸

iv) Lyons’ relationship with Viinamae

52. Lyons considered Viinamae to be the “nuts and bolts” of the I&T, and when Andrew left, Lyons felt strongly that Viinamae should replace Andrew and spoke to someone in the Mayor’s office.⁹⁹ Lyons testified that Viinamae never asked for his assistance and that any phone calls he made to City staff were made of his own volition.¹⁰⁰ He did not see a problem with someone in his position trying to persuade and influence City of Toronto decisions about promotions.¹⁰¹

e) Role of Marentette and Simone

53. Simone was primarily involved in pricing the Computer Leasing RFQ.¹⁰² Marentette was in charge of drafting the DFS response.¹⁰³ Simone and Marentette testified that DFS and Dell worked cooperatively in the months before the RFQ.¹⁰⁴ Bruce Mortensen (“Mortensen”) was the senior Dell account executive for the City of

⁹⁴ Lyons 05/08/2003 at 170, 171.

⁹⁵ Lyons 05/08/2003 at 171.

⁹⁶ Lyons 05/08/2003 at 172.

⁹⁷ Lyons 05/12/2003 at 85.

⁹⁸ Lyons 05/12/2003 at 85.

⁹⁹ Lyons 05/08/2003 at 173-174.

¹⁰⁰ Lyons 05/13/2003 at 65.

¹⁰¹ Lyons 05/13/2003 at 85-86.

¹⁰² Simone 04/14/2003 at 214.

¹⁰³ Marentette 04/17/2003 at 10.

¹⁰⁴ Simone 04/14/2003 at 34-35; Marentette 04/17/2003 at 17.

Toronto account.¹⁰⁵ Mortensen was already familiar with many individuals at the City of Toronto because Dell supplied the City with Dell computers.¹⁰⁶ Accordingly, Marentette accompanied Mortensen to meetings with the City of Toronto as often as possible.¹⁰⁷

54. DFS and Dell would make presentations to the City together, and attend lunches and dinners with City staff together as well. Marentette testified that these meetings included Andrew, Franey, Liczyk, and Bulko.¹⁰⁸ Marentette would probably have met with Brittain alone because the nature of the meeting would be strictly financial.¹⁰⁹

¹⁰⁵ Simone 04/14/2003 at 25.

¹⁰⁶ Marentette 04/17/2003 at 18.

¹⁰⁷ Marentette 04/17/2003 at 18.

¹⁰⁸ Marentette 04/17/2003 at 19.

¹⁰⁹ Marentette 04/17/2003 at 19-20.

5. Lyons' activity on behalf of DFS

55. Lyons testified that he personally worked between 20 and 25 hours on the DFS file.¹¹⁰ His staff, including Cross, spent an estimated 50 additional hours on the DFS file, for a total of 75 hours.¹¹¹ For Lyons' 25 hours, he received \$18,000 in monthly retainer payments, which works out to \$720 per hour.¹¹²

56. On a day-to-day basis, Marentette and Lyons worked closely together.¹¹³ Marentette testified that most of their working relationship was conducted in person, by phone, or by fax.¹¹⁴ In contrast, Simone recalled meeting with Lyons only twice: once in Simone's office a month or two prior to the RFQ; and again in a DFS breakout room shortly before the response to the RFQ was due.¹¹⁵ Marentette recalled Simone meeting with Lyons only once – in the DFS breakout room shortly before the response to the RFQ was due.¹¹⁶

57. DFS kept track of Lyons' work through a reporting back process, whereby Lyons would send faxes communicating his activities.¹¹⁷ Barrett testified that Lyons did not keep him personally abreast of his activities, nor could he remember receiving a copy of any of his faxes.¹¹⁸ However, Barrett agreed that he often met with Simone and/or Marentette in the hallway, during which they would sometimes discuss Lyons' activities.¹¹⁹

a) Lyons educated himself about leasing

¹¹⁰ Lyons 05/13/2003 at 252.

¹¹¹ Lyons 05/12/2003 at 251-253.

¹¹² Lyons 05/12/2003 at 123.

¹¹³ Simone 04/14/2003 at 48-49; Marentette 04/17/2003 at 6.

¹¹⁴ Marentette 04/17/2003 at 24-25.

¹¹⁵ Simone 04/14/2003 at 52-53.

¹¹⁶ Marentette 04/17/2003 at 27-28.

¹¹⁷ Marentette 04/17/2003 at 30-31.

¹¹⁸ Barrett 04/29/2003 at 103-104.

¹¹⁹ Barrett 04/29/2003 at 104.

58. Lyons stated that the first step he took with respect to his DFS retainer was to educate himself. He recalled attending a 45 minute leasing seminar at the DFS offices with Barrett, Simone, and Marentette.¹²⁰ Lyons could not recall any discussion about DFS competitors at this meeting.¹²¹

59. Lyons' file contained three background documents prepared by the Gartner Group that were supplied to him by DFS or that he obtained otherwise to prepare him for his assignment:

- a. Fourth Quarter 98 Residual Value Report;¹²²
- b. Leasing Tutorial: Yes, the Devil is the Details;¹²³ and
- c. Equipment: Applying the Lessons of TCO to Life Cycle Management.¹²⁴

b) April 1, 1999 memo to file: Mole Memo #1

60. On April 1, 1999, Lyons prepared a memo to file regarding DFS:

I spoke later in the day on March 29, 1999 to a senior official in IT. Apparently they have a report that went to Council in October, 1998 and it might have been the first report on Y2K and they stated if the amount to refurbish is over a certain amount then they would buy and if it was under a certain amount they would refurbish. The level was \$1,000.00. It was approved by the Budget Committee and Council and the matter was then referred for the implementation to the Strategic Policy and Priorities Committee.

I should speak to Tom Jakobek about leasing but he says the main problems are with the treasury people and, in particular, Wanda Liczyk.

We he talked to her about leasing, she says if they provide the money to the leasing company the City can do better because they can borrow it at a cheaper dollars.

¹²⁰ Lyons 05/12/2003 at 55.

¹²¹ Lyons 05/12/2003 at 57.

¹²² COT075443, 17:1:12

¹²³ COT075464, 17:1:13.

¹²⁴ COT075475, 17:1:14.

However, he states she doesn't understand valued added services and after three years to send it back, so you only lease a percentage of the hardware and then you keep the technology current. The software keeps changing and as a result you need to change the memory and disk drives.¹²⁵

61. Lyons did not name the "senior official in IT" to whom he spoke. Lyons agreed that the intelligence he gathered regarding Liczyk's views would assist DFS to prepare for subsequent meetings with Liczyk.¹²⁶

62. Lyons also testified that Jakobek did not like the idea of leasing. He explained that Jakobek disliked computer leasing companies because they appeared to be constantly replacing equipment and, consequently, constantly charging more money.¹²⁷

c) April 7, 1999 voicemail message from Marentette

63. On April 7, 1999, Marentette left a voicemail message for Lyons, which Lyons had transcribed for the file. The voicemail message read:

I just want to give you a brief, quick rebuttal on Wanda's initial kybosh on leasing. The fact that they can borrow for less and what it costs us to borrow it is probably, when you look at just the base interest rates they are being charged – absolutely. The banks are great at masking true interest rates, what they do is buy down the interest rate by charging fees up front. So in order to set up a credit facility they will be charged 1 per cent or 2 per cent. The other thing they will do is every year they will charge them a renewal fee and that is based not on the total draw down but on the total facility. *Other things that you have to look at is they have all the issues at the end of the useful life of those computers, they have huge problems trying to get rid of them and we have had to create a whole scenario to get this equipment out at the end of the day. Those are really the big wins for them.* The other things it really does, is it helps in terms of once they have the program rolling and it is approved by Council they don't have to keep going back to Council, every thing there is a capital acquisition because it moves it onto the operating side.¹²⁸

¹²⁵ COT075439, 17:1:29.

¹²⁶ Lyons 09/22/2004 at 54.

¹²⁷ Lyons 05/12/2003 at 80.

¹²⁸ COT075438, 17:1:8 [emphasis added].

64. Lyons agreed that in this message, Marentette highlighted elements of the DFS approach to lease financing that would benefit to the City of Toronto. Lyons agreed that “the big wins” for the City of Toronto, from Marentette’s perspective, were how leasing dealt with end of lease issues and disposal of equipment.¹²⁹

d) April 23, 1999, DFS and Dell meeting with Andrew and Liczyk

65. On April 23, 1999, representatives of DFS and Dell met with Andrew and Liczyk.¹³⁰ Lyons testified that this meeting lasted approximately one hour. He agreed that he considered a one-hour meeting to be a long meeting.¹³¹

66. Marentette testified that he was certain DFS would have been able to meet with Liczyk and Andrew without Lyons’ assistance.¹³² He had never had trouble arranging a meeting with a public sector bureaucrat.

67. Cross took notes and drafted a memo to file summarizing the meeting, which she sent to the clients.¹³³ She recorded that the following seven people were present at the meeting: Liczyk, Andrew, Barrett, Marentette, Mortensen, Lyons, and Cross.

68. Cross recorded that Marentette passed out a handout consisting of:

- a. an agenda;¹³⁴
- b. the City of Toronto Bulldoze proposal;¹³⁵ and
- c. a DFS package.¹³⁶

¹²⁹ Lyons 09/22/2004 at 56-59.

¹³⁰ Barrett 04/29/2003 at 102.

¹³¹ Lyons 05/12/2003 at 75.

¹³² Marentette 04/17/2003 at 149-150.

¹³³ COT075431 at COT075432, 17:1:7.

¹³⁴ COT075500, 17:1:17.

¹³⁵ COT075497, 17:1:17.

69. Cross's notes also indicate that a document titled Dell Standardization Analyst was discussed at the meeting.¹³⁷

70. Cross recorded a number of Liczyk's views on computer leasing including the following:

- a. at the outset of the meeting Liczyk indicated that she was "sold on the idea of leasing" for three reasons: obsolescence, the constant need to refresh, and that leasing would give her leverage with Council when it came to the I&T budget (with contracts in place the I&T budget could not be cut);
- b. Liczyk asked whether or not the "roll out" could be more along the lines of 1/3 1/3 1/3; and
- c. Liczyk also mentioned that she would like to have information technology taken off the political agenda as was done in the former City of North York. She felt that desktops were like any other office supply and should not have to be monitored by Council.

71. Lyons recollected that the crux of the DFS presentation was the synergetic relationship between Dell and DFS.¹³⁸ This was reflected in the "Bulldoze Proposal" and the "Standardization Analyst", which will be considered in TECI.

72. Marentette also testified that the DFS sales strategy was to sell the proposition of integrated leasing services between a lessor (DFS) and a vendor (Dell) to the City's

¹³⁶ COT075489, 17:1:17. Cross also prepared a memo to file dated April 29, 1999, which summarized this document: COT075427, 17:1:6.

¹³⁷ COT075432 at COT075434, 17:1:1.

¹³⁸ Lyons 05/12/2003 at 82.

decision makers.¹³⁹ The primary benefit of integrated leasing services was the provision of a single point of contact and accountability.¹⁴⁰

e) May 25, 1999, Lyons and Marentette met with Jakobek

73. Lyons explained that the only Councillor he approached on behalf of DFS was Jakobek because:

- a. he was the third most powerful member of Council;
- b. he was the Budget Chief and therefore responsible for decisions about the capital versus operating budget; and
- c. he was the Chair of the Budget Committee.¹⁴¹

74. Marentette stated that he was not certain whether DFS would have been able to obtain a meeting with Jakobek without Lyons' assistance.¹⁴² Marentette testified that neither he nor Mortensen had ever obtained meetings with political figures at the City of Toronto.¹⁴³

75. On May 25, 1999, six days before the City released the computer leasing RFQ, Lyons and Marentette met with Jakobek. Marentette testified that the meeting lasted approximately 15 minutes; Lyons believed it lasted at least 20 minutes.¹⁴⁴

i) Marentette's recollection of Jakobek's confusion about Lyons and MFP

76. During the meeting, Marentette overheard Jakobek ask Lyons why he was representing DFS when he had attended a similar meeting the day before, on behalf of

¹³⁹ Marentette 04/17/2003 at 12-13.

¹⁴⁰ Marentette 04/17/2003 at 13.

¹⁴¹ Lyons 05/12/2003 at 103.

¹⁴² Marentette 04/17/2003 at 150.

¹⁴³ Marentette 04/17/2003 at 20.

¹⁴⁴ Lyons 05/12/2003 at 61.

MFP.¹⁴⁵ In his OPP statement, Marentette described this start to the meeting as “bizarre”.¹⁴⁶ He explained that at the beginning of the meeting there was confusion about why he was meeting with Jakobek.¹⁴⁷ Lyons and Jakobek stepped aside and had a short conversation.¹⁴⁸

77. Marentette subsequently told Simone that he had suspicions that Lyons was also working for MFP.¹⁴⁹ These suspicions were based in part on rumours that Marentette had heard. The bizarre start to the meeting with Jakobek further confirmed his suspicions.¹⁵⁰

78. From the outset of DFS’s retainer of Lyons, DFS had suspicions that he was also working for MFP.¹⁵¹ Marentette had heard something about Lyons working with MFP in another meeting. In the first meeting between DFS and Lyons, sometime in January or February of 1999, DFS asked him if he was working with another company on the RFQ.¹⁵² Lyons denied it.¹⁵³ Simone testified that even if Lyons had replied that he was working with MFP but not on the RFQ, DFS would not have hired him.¹⁵⁴

Q: Why would it still have been a problem?

A: Because he would have access to our -- basically, our entire tender. He would have sat through maybe five (5) or six (6) value propositions of what makes Dell Financial Services a good option for financing. You know, it would have been hard for him to turn that off, I think, at another MFP meeting where -- he -- it just -- there would have been an obviously conflict of interest for me.¹⁵⁵

¹⁴⁵ COT041622 at COT041644, 5:1:84.

¹⁴⁶ COT041622 at COT041675, 5:1:84.

¹⁴⁷ Marentette 04/17/2003 at 18.

¹⁴⁸ Marentette 04/17/2003 at 18.

¹⁴⁹ Marentette 04/17/2003 at 49-50.

¹⁵⁰ Marentette 04/17/2003 at 50-52.

¹⁵¹ Simone 04/14/2003 at 153.

¹⁵² Simone 04/14/2003 at 154.

¹⁵³ Simone 04/14/2003 at 153.

¹⁵⁴ Simone 04/14/2003 at 154-155.

¹⁵⁵ Simone 04/14/2003 at 155.

79. Simone testified that he recalled asking Lyons initially, at the beginning of his retainer, whether he was working with MFP.¹⁵⁶ Simone could not recall where this meeting occurred, although he thought it was either in Lyons' office or in the Dell hallways.¹⁵⁷ Lyons denied it. After the meeting with Jakobek, Simone and Marentette asked Lyons again.¹⁵⁸ Once more, Lyons denied it.¹⁵⁹ Simone agreed that Lyons never disclosed that MFP hired him as a lobbyist, nor that MFP terminated his contract upon learning that he was also employed as a lobbyist for DFS.¹⁶⁰

80. Simone also testified that Lyons was privy to DFS pricing information throughout the RFQ process.¹⁶¹ Barrett agreed that he would have been offended if Lyons was working for MFP and DFS at the same time.¹⁶² He would have expected Lyons to disclose this information to him.¹⁶³

ii) Lyons' recollection of the meeting

81. When Lyons first testified at the Inquiry, he did so without the benefit of any documents from his files. At that time, Lyons' DFS file had not been located. Lyons described the meeting with Jakobek as follows:

And when I arrived with Mr. Marentette, he [Jakobek] didn't seem to know who I was arriving with. He just knew he had a meeting with me, it seemed. And who I was representing, must have been just something he was aware of, when we started to talk to him. So, I introduced him to Mr. Marentette, so I told him I was representing Dell Financial Services.¹⁶⁴

82. Lyons testified that Marentette then presented the case for leasing computers with DFS.¹⁶⁵ He did not recall having a private conversation with Jakobek during this

¹⁵⁶ Simone 04/15/2003 at 79.

¹⁵⁷ Simone 04/15/2003 at 210.

¹⁵⁸ Simone 04/15/2003 at 210-211.

¹⁵⁹ Simone 04/15/2003 at 79.

¹⁶⁰ Simone 04/16/2003 at 159.

¹⁶¹ Simone 04/14/2003 at 155-157.

¹⁶² Barrett 04/29/2003 at 202.

¹⁶³ Barrett 04/29/2003 at 202.

¹⁶⁴ Lyons 05/12/2003 at 105.

¹⁶⁵ Lyons 05/12/2003 at 105-106.

meeting.¹⁶⁶ Lyons gave evidence that he and Marentette did not have a conversation afterwards with respect to any misunderstanding, and that Marentette was not concerned or upset.¹⁶⁷ According to Lyons, Marentette never told him that he was suspicious that Lyons was working for MFP.¹⁶⁸

83. Lyons testified that, at the time of the Jakobek meeting, he “absolutely” did not know that MFP was in ongoing discussions with Jakobek, that they had met with Jakobek on February 23, 1999, or that Domi had telephoned Jakobek numerous times.¹⁶⁹ He had received no indication that Jakobek favoured MFP.¹⁷⁰

iii) Lyons’ prepared memo to file regarding meeting with Jakobek

84. Lyons dictated a memo to file dated May 27, 1999:¹⁷¹

Meeting with Councillor Tom Jakobek on May 25, 1999.

Scott Marentette and I met before the meeting and we rehearsed basically the same presentation that he made to Wanda Liczyk and other members of the City of Toronto staff.

However, we met with Tom Jakobek and he basically thinks the IT companies are dealing in plant obsolescence and essentially trying to sell products that most people don’t even use.

However, we did present some of the material that he would hopefully read and he didn’t even think he was one of the decision makers.

Afterwards he indicated that Dash Domi was going around City Hall and telling the individuals that I was supporting them and he says he was confused. I get the impression that Tom will be onside, it is just that he is “blowing smoke” as Scott Marentette stated he would just cut the City off from the world.

Apparently, MFP have had some problems with MR and Comsoc with respect to the end of the lease where there is no residual value and they attempt to forward it into the next lease. Apparently the auditor has gone through those leases and indicates there is just “smoke” at the end of the lease.

¹⁶⁶ Lyons 05/12/2003 at 106.

¹⁶⁷ Lyons 05/12/2003 at 109.

¹⁶⁸ Lyons 05/12/2003 at 109.

¹⁶⁹ Lyons 05/12/2003 at 110-111.

85. On re-examination, when questioned about the memo, Lyons stated that he still had no recollection of a discussion about MFP or Domi at the Jakobek meeting,¹⁷² although he conceded that he was not quarrelling with the substance of the memo.¹⁷³ Lyons' recollection was unchanged that this "was a straight forward meeting" in which there was "no discussion or a concern about [Lyons] working for DFS or . . . working on MFP."¹⁷⁴ When asked to interpret the meaning of the contents of the memo, Lyons repeatedly denied any recollection of the discussions cited in his memo.¹⁷⁵

86. Lyons also denied any recollection of whether competitors such as MFP or GE Capital were mentioned at the Jakobek meeting even though Lyons' memo to file suggested there had been such a discussion:

Q: . . . "Afterwards Scott Marentette reviewed with me the advantages of their lease as opposed to MFP or GE Captial [sic]." Now let's just stop there for a second. Was MFP or GE Capital mentioned at this meeting with Tom Jakobek?

A: I have no recollection.

Q: Is it possible that it was?

A: I have no recollection.

Q: Is it possible that there was a discussion comparing MFP and GE Capital to DFS?

A: I can't recall.¹⁷⁶

87. Finally, Lyons denied any recollection about the meaning of the notation to himself that "Apparently, MFP have had some problems with MR and Comsoc", although he speculated that the "MR" could be the Ministry of Natural Resources. He

¹⁷⁰ Lyons 05/12/2003 at 111.

¹⁷¹ COT075424, 17:1:4.

¹⁷² Lyons 09/21/2004 at 137-143.

¹⁷³ Lyons 09/21/2003 at 143.

¹⁷⁴ Lyons 09/21/2003 at 143-144.

¹⁷⁵ Lyons 09/21/2004 at 145-147.

¹⁷⁶ Lyons 09/21/2004 at 149.

also allowed that that the “auditor” referred to in his memo could be the Provincial auditor.¹⁷⁷

87. The memo to file clearly supports Marentette’s testimony that there was a conversation between Jakobek and Lyons regarding Jakobek’s confusion that Lyons was supporting MFP. Lyons’s strained explanations of the memo, and his continued assertion that no such conversation took place with Jakobek were not credible.

88. After the meeting with Jakobek, Marentette told Lyons the three things that differentiated the DFS proposal from that of MFP or GE Capital: equity, stream of payments, and the residual position on the equipment.¹⁷⁸

f) June 2, 1999 – Lyons’ letter to Marentette

89. On June 2, 1999 Lyons wrote to Marentette and advised him that the report on the computer leasing RFQ would go to P&F and that Viinamae, Power and Brittain would be preparing the RFP [presumably, the RFQ].¹⁷⁹

g) June 10, 1999 – Mole Memo #2

90. On June 10, 1999, Lyons dictated a memo to file, which he faxed to Marentette.¹⁸⁰ The memo read:

Meeting with Dell and official at the City of Toronto.

On June 7, 1999 I met with Scott Marentette, Rob Simone, Bruce Mortensen and Dave Kelly.

Basically they wanted me to find out who is going to invite [sic – evaluate] bids and I found out that it would be a committee by Wanda Liczyk headed up by Len Brittain.

¹⁷⁷ Lyons 09/21/2004 at 150-151.

¹⁷⁸ Lyons 09/22/2004 at 73-74.

¹⁷⁹ COT075422, 17:1:3.

¹⁸⁰ COT075417, 17:1:29; COT075418, 17:1:29; COT075419, 17:1:29; COT075420, 17:1:19.

He also wanted to know how they weight the criteria and he basically stated it is the cost per thousand and it is essentially pricing! You have to look at the residuals, not only for computers for three years, but also five years for servers.

He asked me who writes the report and who recommends it. My contacted [sic] stated it would be Treasury as IT has all it wants. They got the Tier 1 companies who will lease only from the Tier 1 hardware suppliers and he didn't want clones and they avoided that by getting a Tier 1 supplier.

We then talked about the residuals with respect to the hardware and that there are some advantages in Dell in that they also use the parts for rebuilding computers. However, the issue was raised as to whether other servers and printers and high end risk boxes will also be cannibalized for parts because that becomes part of the package.

One of the issues that MFP raises is that they can get to the line of supplies, such as hardware providers, service providers, but according to the IT Department, they don't want that to happen, they want to have the direct quotes and maybe MFP finances the purchases. In other words, Questech, Systemhouse and GE do the service providing now and they are very happy with Questech.

91. Lyons again declined to name his source for the information contained in the memo. This is because he knew that his source was providing him with confidential City information. Lyons did not want to risk burning his source, and so kept the source's identity confidential.

92. The source provided Lyons with the following confidential, if somewhat inaccurate, information:

- a. the committee evaluating the bids was chosen by Liczyk and would be headed up by Brittain;
- b. the City would be determining the successful respondent essentially on the basis of pricing and residual values; and
- c. Treasury would be writing the report to P&F because I&T had already achieved its goals in the acquisition process.

93. Approximately 18 hours before the DFS response to the RFQ was due, Lyons told his client that the bid would be evaluated essentially on the lease rate factor quoted. Marentette had repeatedly explained to Lyons that the DFS competitive advantage was in value added services, reduced end of term lease costs, and the real and substantial residual value. Marentette continually emphasized issues other than a low lease rate factor.

94. The City submits that this information would have been incredibly valuable to DFS. It would have forced it to drive its lease rate factor as low as possible, even though DFS believed its strength lay elsewhere. Ultimately, DFS was unable to drive its price low enough. Another leasing company, MFP, was prepared to bid even lower to win the contract.

6. Lyons requested a \$150,000 payment from Marentette and Simone

95. The evidence of Simone and Marentette was largely consistent. Both of them testified before Lyons' DFS file was located. The minor inconsistencies in their evidence, particularly with respect to timing, must be viewed in light of the fact that they did not have the benefit of reviewing the documents in the file to identify key dates.

a) Simone's version of events

i) When did the meeting take place?

96. Simone testified that DFS met with Lyons periodically prior to the issuance of the tender.¹⁸¹ One of these reviews took place in a DFS breakout room with Lyons, Simone, and Marentette. The purpose of the meeting was to review the DFS strategy for the City of Toronto tender process.¹⁸²

97. Simone could not recall exactly when he met with Lyons, but he thought it was shortly before the response to the RFQ was due on June 11, 1999:

Q: This meeting with -- with Mr. Lyons, we know that the RFQ was tendered on May 31st, and it was due on June the 11th. Did you meet with Mr. Lyons during that period?

A: No.

Q: Do you recall when you met with Mr. Lyons, if it wasn't during that period?

A: I met with Mr. Lyons once, just before the tender was due, and one (1) time in his office, my guess is at least a month or two (2) before.

Q: All right. And that's twice. The last meeting, now is what I'm talking about. The meeting that you discussed with police and with Mr. Lakey. When was that meeting?

A: That would have been shortly before the tender was due.

Q: Shortly before June the 11th?

¹⁸¹ Simone 04/14/2003 at 48.

¹⁸² COT041622 at COT041642-41643, 5:1:84.

A: Wouldn't that -- wasn't it due May 31st?

Q: The tender was issued on May 31st --

A: Oh, excuse me --

Q: -- the tender was due on June the 11th?

A: My guess is it probably would have been inside that period or just before the tender was due. Before the tender was issued.

MADAM COMMISSIONER: Before the tender was issued or?

THE WITNESS: Could have been. I don't remember if we had the actual tender in our possession, when we were talking to him.

Q: As far as you know, was this to be the last meeting before the tender -- before your bid proposal was going in?

A: I think we were ready to start formulating our response, yes.¹⁸³

98. However, Simone also thought the meeting took place before the meeting between Marentette, Lyons and Jakobek, which, as it turned out, was held on May 25.¹⁸⁴

ii) What did Lyons say?

99. Simone recalled nine important points about the conversation:

- a. Lyons asked him what the deal was worth to him, as opposed to the worth of the gross amount of the contract;
- b. Lyons told him that Tom says it's worth \$150,000;
- c. Simone asked Lyons whether, if he paid the money, he could bid whatever he wanted and win the deal;

¹⁸³ Simone 04/14/2003 at 52-54.

¹⁸⁴ COT041622 at COT04144, 5:1:84.

- d. Lyons replied that, no, DFS would still have to be the low bid to win the deal;
 - e. Lyons said that MFP and others would pay \$150,000;
 - f. Simone again asked whether if he paid the money he could bid whatever he wanted;
 - g. Lyons again replied, no, DFS have to be the low bid;
 - h. Simone asked why he had to pay the money if low bid would win the day; and
 - i. Lyons did not respond to that question.
100. Simone testified as follows:

We were -- I guess we were making idle -- idle chitchat about where we thought things were going and -- and to my recollection, Jeff said something a little odd and basically he said to me, you know, Rob, what is this -- what is this deal worth to you?

I didn't understand that, I thought he meant the, you know, what was the amount of the con -- like, how big was this deal and I told him that it was worth \$150 million and he said, no, that's not what I meant. What's it, sort of, worth to you and I said, what do you mean and then he said, well Tom says it's worth one hundred and fifty (150) grand.

And I kind of didn't understand it and -- and then I said, well, what do you mean? Like a payment of one hundred and fifty thousand dollars (\$150,000) and -- and he basically agreed and I said, that doesn't make sense. It, you know -- does this mean I can sort of bid whatever I have to bid and -- and I pay this we negotiate a deal with the City and he says, no, no, you have to be low.

Okay. It doesn't make sense because if I bid this the way we think we have to bid it, we'll be lucky to make a half million dollars profit, four hundred and fifty thousand dollars (\$450,000) profit over three (3) years and we have to risk \$5 to \$6 million in residual money which is normally money that you -- you accrue a rate of equity on, you know, north of regular rates of return and I said, it just doesn't make sense.

And then he, you know, retorted. He said, well, you know, MFP would pay one hundred and fifty (150) grand. Others would pay one hundred and fifty (150) grand and -- and then I just -- I -- I said, no, it's impossible.

I said, you know -- I asked him again, if -- if I paid this money does this mean that, you know, I can just bid whatever I want? No, no, you have to be low. Like, you have to be the lowest person on the tender. So I said, then why -- why do I have to pay this one hundred and fifty (150) grand, if low wins? And he didn't respond and that was it.¹⁸⁵

101. Simone clarified that DFS did not do business this way. He could not ask DFS for a cheque for \$150,000, let alone explain to DFS that this payment would not guarantee that they would win the bid.¹⁸⁶

102. In his OPP statement, Simone called the computer leasing RFQ "skinny". He explained that this meant that, even if successful, DFS would reap very modest profits.¹⁸⁷ Barrett further described that DFS had established parameters for the debt rate and the residuals for transactions.¹⁸⁸ To win the RFQ, DFS would have had to bid outside the DFS parameters. In order to price a transaction outside of the DFS parameters, Simone had to obtain approval from Jim Williams ("Williams"), who was in charge of residual pricing for DFS worldwide.¹⁸⁹

iii) What did Lyons mean?

103. Simone testified that understood that Lyons was seeking a fee from DFS for himself.¹⁹⁰ In effect, Lyons was attempting to ascertain how much a reasonable success fee for himself would be.¹⁹¹ Simone derived this understanding from the queries he put to Lyons.

MADAM COMMISSIONER: I'm just trying to understand how you got that understanding? What was it from what Mr. Lyons said that made you think that

¹⁸⁵ Simone 04/14/2003 at 56-58.

¹⁸⁶ COT041622 at COT041640, 5:1:48.

¹⁸⁷ Simone 04/14/2003 at 37.

¹⁸⁸ Barrett 04/29/2004 at 57.

¹⁸⁹ Barrett 04/29/2003 at 57.

¹⁹⁰ Simone 04/15/2003 at 24-25.

¹⁹¹ Simone 04/15/2003 at 26-27.

he was trying to get this for himself. Is that something that you guys, sort of, discussed afterwards?

THE WITNESS: When I asked him, I didn't understand what these monies were for per se and I asked if we paid these monies, would the -- would the tender process end and we'd enter into negotiation with the City? And he said, no. So, I -- that's why I took it to be these are monies that he wanted for himself. And I just said, this is unreasonable. I mean we can't -- given we have to be low, I can't build this \$150,000 into the cost of my contract. I can't do that.¹⁹²

104. Simone later developed this further, testifying that he understood Lyons to be seeking the money as a bonus.¹⁹³ Simone did not understand Lyons to be suggesting that this was a bribe.¹⁹⁴

105. However, at no point during the strategy meeting in the DFS breakout room did Lyons ever state that the \$150,000 fee was for himself.¹⁹⁵ Simone also testified that at no point during that meeting, nor during any other interaction Simone had with Lyons, did Lyons use the words "success fee".¹⁹⁶

106. It bears emphasis that Simone clearly made an immediate connection between paying Lyons \$150,000 and winning the contract: that is the only reason he asked Lyons if the \$150,000 payment still required DFS to submit the lowest bid. Lyons never denied that Simone asked him if DFS still had to have the low bid or Simone's evidence that Lyons reiterated that DFS did. This undisputed evidence strongly suggests that Simone believed, at that moment, that Lyons was saying that the \$150,000 was to secure the leasing contract with the City and not to compensate Lyons for his efforts.

¹⁹² Simone 04/15/2003 at 27.

¹⁹³ Simone 04/15/2003 at 88.

¹⁹⁴ Simone 04/15/2003 at 88, 111-112.

¹⁹⁵ Simone 04/15/2003 at 27.

¹⁹⁶ Simone 04/16/2003 at 157.

107. Immediately following the meeting, Lyons left and Simone and Marentette discussed his comments. Simone testified that they concluded that Lyons was trying to raise his rate of return from DFS, and wanted the \$150,000 for himself.¹⁹⁷

No, I think we kind of chalked it up to Jeff trying to basically shake us down for some money before this tender closed. I don't recall really thinking much more about it at the time.¹⁹⁸

108. The City submits that Simone's reaction after the meeting was understandable: Lyons asked for \$150,000, Simone asked Lyons if that meant DFS would win the deal, Lyons said no, DFS still had to be the low bidder. Simone then concluded that the \$150,000 was a shakedown by a lobbyist looking to feather his nest. What Simone did not understand was that what Lyons was proposing was not as simple as either:

- a. pay the money and bid whatever you want because you are guaranteed to win the contract; or
- b. pay the money and go directly to contract negotiating with the City without having to bother with the competitive tender.

109. Lyons was proposing a more sophisticated arrangement. The money was not for the purpose of winning the contract. Neither relationships nor money win contracts. The low bid would win the contract. The money was required to obtain the flexibility to permit the winning bidder to depart entirely from the bid and to negotiate a contract on much more favourable terms, which bore scant resemblance to the bid.

110. As it turned out, Lyons was correct when he told Simone that if Simone was not prepared to pay, MFP was prepared to pay. Domi made the deal with Jakobek that Lyons offered Simone.

¹⁹⁷ Simone 04/14/2003 at 60.

¹⁹⁸ Simone 04/14/2003 at 64.

111. During the meeting, Simone did not ask who “Tom” was. However, he knew that the only “Tom” that Marentette had met with at the City was the Budget Chief, Tom Jakobek.¹⁹⁹ After the meeting, Simone recalled asking Marentette who “Tom” was. Marentette responded that the only “Tom” he knew was Tom Jakobek.²⁰⁰

¹⁹⁹ Simone 04/14/2003 at 59.

²⁰⁰ Simone 04/14/2003 at 62.

b) Marentette's version of events**i) When did the meeting occur?**

112. Marentette recalled one particular meeting with Lyons that lasted no more than 30 minutes.²⁰¹ Marentette testified that the meeting occurred at the eleventh hour, during "crunch time" between May 31, 1999 and June 11, 1999, while DFS was responding to the tender or while DFS was in the final stages of closing its bid for the RFQ.²⁰² Marentette was absolutely certain that the meeting with Lyons occurred after he met with Jakobek and Lyons.²⁰³ Since Marentette was at the meeting with Jakobek, and because both Marentette and Simone agreed that the meeting was at 'crunch time', Marentette's evidence that the Jakobek meeting happened before Lyons requested the \$150,000 should be preferred.

ii) What did Lyons say

113. Marentette's recollection of the conversation was much less detailed than Simone's:

- a. Marentette did not recall the exact words that were exchanged;
- b. Marentette did not recall the amount of money that Lyons requested, except that it was large;²⁰⁴
- c. Marentette testified both that Lyons did not use the words "success fee" during the meeting²⁰⁵ and that he could not recall if Lyons used those words during the meeting;²⁰⁶

²⁰¹ Marentette 04/17/2003 at 66.

²⁰² Marentette 04/17/2003 at 43.

²⁰³ Marentette 04/17/2003 at 45-46.

²⁰⁴ Marentette 04/17/2003 at 68, 157.

²⁰⁵ Marentette 04/17/2003 at 28.

²⁰⁶ Marentette 04/28/2003 at 52.

- d. Marentette recalled that his emotional response to the conversation was that Lyons was pressuring him and Simone at a critical time in the process;
- e. Marentette said Lyons' request felt like a shakedown and made him uncomfortable;²⁰⁷ and
- f. Marentette could not recall Lyons mentioning the name "Tom" during the conversation.²⁰⁸

iii) What Lyons meant

114. Marentette testified that Lyons wanted the money for himself. However, in his OPP statement Marentette alluded to a different purpose for the funds "[I] [c]ouldn't really postulate in terms of what what I thought it was for it looked like the money was gonna be used to do whatever ... make sure that ... we had a successful bid."²⁰⁹

115. When asked to explain what he meant by this statement, Marentette refused to speculate on what Lyons would do with the funds.²¹⁰ However, he later indicated that he made this comment in relation to earlier comments about a success fee:

[T]hat comment is directly a result of a comment in earlier -- in earlier testimony where it could have been characterized as a success fee. So, if Jeff Lyons, or anyone here is -- is characterizing this request for additional funds as a success fee, then obviously he's going to do whatever he needs to do to make it successful.²¹¹

c) Lyons' version of events

²⁰⁷ Marentette 04/28/2003 at 135; Marentette 04/17/2003 at 69.

²⁰⁸ Marentette 04/17/2003 at 156.

²⁰⁹ COT041622 at COT041678, 5:1:84.

²¹⁰ Marentette 04/17/2003 at 78.

²¹¹ Marentette 04/17/2003 at 81.

i) When did the meeting take place?

116. Lyons testified that the meeting occurred toward the end of May, after the Jakobek meeting.²¹² He recalled that the meeting was not in June because DFS was in the process of submitting its bid for the RFQ.²¹³ Lyons also recalled that the meeting occurred before the issuance of the RFQ.²¹⁴

117. Lyons testified that Marentette called the meeting and he believed that the purpose of the meeting was to meet with Simone and review recent meetings and progress.²¹⁵

ii) What did Lyons say?

118. Lyons testified that the meeting began with some small talk, after which he brought up his “success fee”:

And then I just said, because I'd been thinking about it for a few weeks, that this contract now is a big contract and I had never really worked out a success fee. And I'd been thinking somewhere in the neighbour of one hundred (100) to one hundred (100) -- to one hundred (100) to about two hundred thousand (200,000) as a success fee. So I asked Simone, because he's -- it's the first time I'd met with him in a few weeks, what he thought this contract was worth. He -- he gave me this look on his face like, what's this all about and I said to myself, what did I -- why did I even bring this up? But anyway, I said I think if -- if I'm successful, I should be -- receive a fee of one hundred and fifty thousand (150,000). I might not have used the word success. If we get this bid, my fee will be one hundred and fifty thousand (150,000). Something to that -- to that extent and then he just looked at me and I -- and he asked me a couple of questions which I can't remember and then that was the end of the conversation and we went on to discuss other issues.²¹⁶

119. Lyons testified that he regretted bring up the topic with Simone and realized he should have spoken with Barrett.²¹⁷ He stated that if Simone had been interested in

²¹² Lyons 05/12/2003 at 112.

²¹³ Lyons 05/12/2003 at 112.

²¹⁴ Lyons 05/12/2003 at 113.

²¹⁵ Lyons 05/12/2003 at 116-117.

²¹⁶ Lyons 05/12/2003 at 118-119.

²¹⁷ Lyons 05/12/2003 at 119-120.

pursuing this idea, Lyons would have approached Barrett.²¹⁸ Lyons agreed that his general rule was to negotiate a success fee at the beginning of the contract.²¹⁹ In this instance, Lyons did not negotiate at the beginning because at the time of the initial meeting he saw DFS as an “adjunct” to Dell and “was sort of doing it to assist this company”.²²⁰ In other words, Lyons initially perceived the DFS contract to be a favour to Dell.

120. Lyons could not explain in any detail how he arrived at the \$150,000 success fee.²²¹ He testified that it was based on the complexity and size of the transaction.²²² Lyons agreed that he may have talked about Jakobek during the meeting, indeed it was “quite possible”.²²³ He denied saying either “Tom says it’s worth \$150,000” or “some think it’s worth \$150,000”.²²⁴ He would not speculate on the impression his comments may have created:

Q: Do you appreciate the fact that the effect of what you asked for, changing the deal in their eyes, could create the impression that you were asking -- that you were threatening to withdraw unless you got more money?

A: Well, I couldn't tell you the impression it created.²²⁵

121. Lyons testified that he might not have used the word “success” in describing this fee.²²⁶ However, Lyons was certain that he used the word “fee”.²²⁷

iii) What did Lyons mean?

122. Lyons would not agree that there was more than one interpretation of the word “fee”. Despite the fact that he was already being paid \$3000 per month, he would not

²¹⁸ Lyons 05/12/2003 at 133-134.

²¹⁹ Lyons 05/12/2003 at 122.

²²⁰ Lyons 05/12/2003 at 122.

²²¹ Lyons 05/12/2003 at 142-142.

²²² Lyons 05/12/2003 at 142-143.

²²³ Lyons 05/12/2003 at 154, 156.

²²⁴ Lyons 05/12/2003 at 158.

²²⁵ Lyons 05/12/2003 at 161.

²²⁶ Lyons 05/12/2003 at 144-145.

²²⁷ Lyons 05/12/2003 at 147-148.

concede that Simone and Marentette may have interpreted that the fee was for some other purpose.²²⁸ He testified that Simone and Marentette did not understand success fees, and he must have been speaking to the “wrong level”.²²⁹

123. Lyons testified that he personally spent between 20 and 25 hours on the DFS file.²³⁰ His staff, including Cross, spent an estimated 50 more hours on the DFS file, for a total of 75 hours.²³¹ For Lyons’ 25 hours, he received \$18,000.²³² The \$150,000 success fee would be over seven times the amount of Lyons’ agreed retainer with DFS.

124. However, Lyons had difficulty recalling the specifics of other success fees that he had negotiated, particularly temporal specifics.²³³ He gave three vague examples, one of which he placed prior to May 1999.²³⁴ Lyons stated that this success fee was for a retainer with a movie industry client, and was received before May 1999 “or around that time”.²³⁵ The pre-May 1999 success fee was not in respect of an RFQ, but rather a dispensation from City Council.²³⁶ This success fee did not exceed \$30,000.²³⁷ Accordingly, Lyons’ demand for a \$150,000 success fee was \$120,000 more than he had ever received as a success fee for City of Toronto work.²³⁸

d) Conclusion

125. The City submits that Simone’s evidence should be preferred to the evidence of Lyons, where it is in conflict. Lyons’ evidence was frequently self-serving in contrast to that of Simone, which was utterly devoid of a retreat to self-interest. Indeed, Simone was a reluctant witness with no possible gain from his testimony. Simone was careful and always attempted to be fair in his evidence. He acknowledged where he was

²²⁸ Lyons 05/12/2003 at 150-151.

²²⁹ Lyons 05/12/2003 at 151.

²³⁰ Lyons 05/13/2003 at 252.

²³¹ Lyons 05/13/2003 at 251, 252.

²³² Lyons 05/14/2003 at 123.

²³³ Lyons 05/13/2003 at 178-181.

²³⁴ Lyons 05/13/2003 at 178-180.

²³⁵ Lyons 05/13/2003 at 191.

²³⁶ Lyons 05/13/2003 at 209-210.

²³⁷ Lyons 05/13/2003 at 211.

uncertain and consistently presented as an honest witness. Even under intense and overly aggressive cross-examination, the essential elements of his evidence remained unshaken. He was reluctant to characterize Lyons' motivation and intention and was equivocal on how best to understand the true nature and import of Lyons' request for money.

126. Lyons' version of events is difficult to accept on its face. No economically rational economic client would agree to pay Lyons that amount of money that late in the process. No rational valuation of the services provided by Lyons on behalf of DFS comes anywhere close to a value of \$150,000 on top of his monthly retainer. No skilled lobbyist would raise a \$150,000 bonus with two DFS employees who had nothing to do with negotiating his original contract, which did not include a success fee of any kind. No lobbyist would tell his client that his client should pay him a success fee because their competitors, who were not his clients, were prepared to pay such a fee. No one who thought they deserved \$150,000 would drop the issue after raising it with the wrong people. If Lyons is to be believed, surely he would have raised the issue with Barrett, the person with whom he had negotiated his contract.

127. Lyons knew that Simone and Marentette were hungry to get the deal. Lyons thought that they would be prepared to pay the \$150,000 to secure the contract with the City on favourable terms. Lyons thought they were hunters, like Domi. Whatever he thought of them, his own evidence reflects the instant realization that they were the wrong guys to tell what Tom thought the contract was worth.

²³⁸ Lyons 05/13/2003 at 276.

7. Marentette and Simone told Barrett about Lyons' request

128. Both Simone and Marentette testified that they spoke with Barrett about Lyons' conflict of interest and his comment about the \$150,000.²³⁹ Both Simone and Marentette testified that Barrett was very upset.²⁴⁰ He wanted to fire Lyons immediately, but Simone convinced him to wait until after the DFS response to the tender.²⁴¹ Simone explained that Lyons had strong relationships with senior sales representatives at Dell, and strong connections with all kinds of other people.²⁴² Simone thought it was unwise to upset Dell or Lyons immediately prior to the submitting the DFS response to the RFQ.²⁴³

129. Barrett gave evidence that he could not recall this meeting.²⁴⁴ He attributed his lack of recollection to the fact that he was working on other, more profitable transactions, and that he would not have been offended by Lyons' request and therefore it did not stick with him.²⁴⁵ Both Simone and Marentette testified that the meeting occurred.²⁴⁶ Later, Barrett admitted that the meeting probably occurred:

[I]f they say it happened, it probably happened, I just don't recall it. You know, [Simone] doesn't lie particularly for any reason. You know, he's a truthful guy. I just don't recall the meeting.²⁴⁷

²³⁹ Simone 04/14/2003 at 75-77; Marentette 04/17/2003 at 85.

²⁴⁰ Simone 04/14/2003 at 78-79; Marentette 04/17/2003 at 87; Marentette 04/28/2003 at 137.

²⁴¹ COT041622 at COT041644, 5:1:84.

²⁴² Simone 04/14/2003 at 78.

²⁴³ Simone 04/14/2003 at 78.

²⁴⁴ Barrett 04/29/2003 at 108.

²⁴⁵ Barrett 04/29/2003 at 129-130.

²⁴⁶ Simone 04/14/2003 at 79; Marentette 04/17/2003 at 85.

²⁴⁷ Barrett 04/29/2003 at 115.

8. DFS was suspicious when MFP won the bid

130. Marentette considered MFP to be of DFS' primary competitor on the RFQ.²⁴⁸ Marentette based this on two factors: a) MFP already had a computer lease in place with the City; and b) MFP was known to offer 'skinny pricing' and do well in the public sector.²⁴⁹ Lyons testified that he was not aware that MFP had negotiated the 1997 Councillors' Leases with the City of Toronto.²⁵⁰

131. Marentette could not recall when he learned that DFS had lost the bid, but it was shortly after the tender closed.²⁵¹ Although he could not recall when he learned that MFP had won, he thought it likely that Lyons had told him.²⁵² Marentette confirmed in his OPP statement that he was very disappointed that DFS did not win the RFQ: "it would have been a big win".²⁵³

132. Simone testified that DFS learned that MFP won the RFQ tender process several weeks later from Lyons.²⁵⁴ Lyons told Marentette, and Marentette told Simone. Lyons could not recall whether or not he was the one who told DFS that they lost the bid, or when he would have told them.²⁵⁵

133. Simone asked Marentette to obtain particulars from Lyons so that DFS could perform a loss review.²⁵⁶ Marentette testified that he asked Lyons for these particulars.²⁵⁷

134. According to Marentette and Simone, shortly after the successful bidder was announced, Lyons provided DFS with a one or two page written report and a

²⁴⁸ Marentette 04/17/2003 at 138.

²⁴⁹ Marentette 04/17/2003 at 138.

²⁵⁰ Lyons 05/12/2003 at 71.

²⁵¹ Marentette 04/17/2003 at 98.

²⁵² Marentette 04/17/2003 at 107.

²⁵³ Marentette 04/17/2003 at 103.

²⁵⁴ Simone 04/14/2003 at 92.

²⁵⁵ Lyons 05/12/2003 at 181.

²⁵⁶ Simone 04/14/2003 at 93.

²⁵⁷ Marentette 04/17/2003 at 108.

comparative spreadsheet of the bidders' lease rate factors.²⁵⁸ Simone testified that Marentette obtained the document, provided it to him, and told him that it was confidential.²⁵⁹ Simone recalled thinking that it was odd that DFS was provided with the document.²⁶⁰ Upon being shown a copy of Appendix C to the P&F Report at the Inquiry he confirmed that it looked "basically like what I saw", although he could not recall whether his document was marked "confidential".²⁶¹ Marentette corroborated Simone's evidence on this point. He testified that Appendix C resembled the spreadsheet that Lyons provided, particularly with respect to the layout, but he could not recall whether the document was marked confidential.²⁶² Marentette testified that the document he was given listed the names of all of the bidders for the RFQ, and the lease rate factors of all the respondents.²⁶³

135. Lyons could not recall being requested to provide these documents.²⁶⁴ He made five phone calls to Andrew between July 16 and July 19, 1999, but he testified that these phone calls did not pertain to the status of the P&F Report.²⁶⁵ He stated that he never asked Andrew for a copy of any confidential information relating to the RFQ.²⁶⁶ Further, he testified that had never seen Appendix C.²⁶⁷

136. Cross testified that sometimes either she or Lyons would mark a document "confidential" before sending it out.²⁶⁸ She knew that confidential City documents were marked in broad capital letters diagonally across the page.²⁶⁹ In hindsight, Cross could not be certain that the confidential documents she saw at Lyons' office were marked in broad capital letters diagonally across the page.²⁷⁰ However, she testified that, at the time that she saw the confidential documents in Lyons' office, she understood them to

²⁵⁸ Simone 04/14/2003 at 93-94.

²⁵⁹ Simone 04/16/2003 at 35, 151.

²⁶⁰ Simone 04/14/2003 at 94.

²⁶¹ COT029335, 6:3:22; Simone 04/14/2003 at 98.

²⁶² Marentette 04/17/2003 at 109-110.

²⁶³ Marentette 04/17/2003 at 111, 159.

²⁶⁴ Lyons 05/12/2003 at 182.

²⁶⁵ Lyons 05/12/2003 at 182-184; Lyons 05/13/2003 at 31.

²⁶⁶ Lyons 05/13/2003 at 30.

²⁶⁷ Lyons 05/12/2003 at 187.

²⁶⁸ Cross 05/06/2003 at 118.

²⁶⁹ Cross 05/06/2003 at 119-120.

be City documents.²⁷¹ Lyons testified that he had never received documents marked “confidential” from the City of Toronto.²⁷² He was adamant that his office would never receive such confidential documents.²⁷³

137. Lyons did not recall receiving any telephone messages from Marentette inquiring about obtaining the P&F Report.²⁷⁴ Cross’ notes showed that Marentette was attending a P&F meeting with Lyons.²⁷⁵ Lyons testified that his staff would have attended this meeting.²⁷⁶ Cross’ notes also showed a reminder to “call about getting the report by weekend”.²⁷⁷ Lyons had no explanation for this entry.²⁷⁸ The next entry referred to Marentette and his home phone number, and then read “it did go through”.²⁷⁹ Lyons testified that he did not have any knowledge regarding whether or not his firm sent Marentette a report related to P&F.²⁸⁰ He explained that he would always provide his client with a report if it was public. Lyons was not clear on when the P&F Report became public.²⁸¹

138. Simone believed that Power was one of the authors of the written report Lyons gave him.²⁸² Upon reading the report, it occurred to Simone that the MFP’s bid “seemed impossible”:

[I]t discussed the winning proponents, lease rate factors and end of term option, purchase option, and suggested that should City of Toronto lease for thirty six (36) months at that lease rate factor, and purchase it at the end, which is hypothetically worst case scenario, because you could return it, right, and not pay that end of term option; it was less than a straight loan they could get at the time.²⁸³

²⁷⁰ Cross 05/06/2003 at 120.

²⁷¹ Cross 05/06/2003 at 120.

²⁷² Lyons 05/12/2003 at 163.

²⁷³ Lyons 05/12/2003 at 188.

²⁷⁴ Lyons 05/12/2003 at 170.

²⁷⁵ COT061572 at COT061613, 31:1:4.

²⁷⁶ Lyons 05/12/2003 at 173.

²⁷⁷ COT061616, 31:1:5.

²⁷⁸ Lyons 05/12/2003 at 174.

²⁷⁹ COT061616 at COT061617, 31:1:5.

²⁸⁰ Lyons 05/12/2003 at 175.

²⁸¹ Lyons 05/12/2003 at 170.

²⁸² Simone 04/14/2003 at 100-101.

²⁸³ Simone 04/14/2003 at 99.

139. Simone also recalled thinking that MFP's lease rate factors were "astonishingly low".²⁸⁴ He doubted that MFP would be able to write lease contracts with such low lease rate factors. Simone emphasized that DFS and MFP operated in the same business environment, and faced the same debt costs.²⁸⁵ Marentette would not discuss whether or not MFP's bid was unrealistic, but he did testify that:

It's just a very low rate. Anyone can see that if you look at the cluster of the rest of the rates, they're [MFP] considerably below.²⁸⁶

140. Cross' notes also referred to the MFP rate being below the Bank of Canada rate, and that there was "no way that MFP could honour this deal".²⁸⁷ Simone testified that it was standard practice for lease negotiations to take place for approximately 45 days.²⁸⁸ During this period, it remained possible that the parties would not reach an agreement and another bidder would be selected instead. Accordingly, Simone telephoned Williams, who was in charge of residual pricing for DFS worldwide, and who had approved the DFS lease rates for the RFQ. Williams was also an old friend of Andrew. Simone asked Williams to ensure that Andrew was diligent in his negotiations on behalf of the City of Toronto:

I wanted him to impress upon his friend that, look, watch out in your negotiations because they're going to try to either move this rate, or put in terms that will make this rate possible. I mean, you can go in with a low lease rate factor, but then you -- you -- you basically -- you need terms and conditions that make it impossible for them to execute, you have to do lots of funny things to get your economics back on line.²⁸⁹

²⁸⁴ Simone 04/14/2003 at 101.

²⁸⁵ Simone 04/14/2003 at 102.

²⁸⁶ Marentette 04/17/2003 at 112.

²⁸⁷ Lyons 05/12/2003 at 178-79; Cross 05/06/2003 at 86; COT061750, 31:1:15.

²⁸⁸ Simone 04/14/2003 at 104.

²⁸⁹ Simone 04/14/2003 at 105-106.

141. During his conversation with Williams, Simone passed on MFP's lease rate factors per thousand, and the end of term buy-out numbers.²⁹⁰ A day or two later, Williams called Simone and explained that Andrew could not be persuaded that the deal was "too good to be true".²⁹¹

142. Andrew told Williams that MFP was planning to use its investment tax shield, which is a capital cost allowance deduction, to buy down the cost of funds thereby offering the City an interest rate lower than the Bank of Canada at the time.²⁹² Simone testified that this did not make any sense because a company cannot use tax shields on a non-profitable transaction.²⁹³

143. After DFS conducted its own internal assessment of the transaction, called a "loss review", Simone terminated Lyons' retainer.²⁹⁴ Simone testified that the termination occurred after MFP had won the bid, which was a few weeks after the responses to the RFQ were due.²⁹⁵

²⁹⁰ Simone 04/14/2003 at 123-124.

²⁹¹ Simone 04/14/2003 at 124-125.

²⁹² Simone 04/14/2003 at 168.

²⁹³ Simone 04/14/2003 at 168-169.

²⁹⁴ Simone 04/14/2003 at 172.

²⁹⁵ Simone 04/16/2003 at 134, 137-138.

9. Discussions between Simone and Marentette after the fact

144. Simone agreed with Marentette's OPP statement that they discussed the RFQ tender several times:

[S]imone and I have rehashed this thing several times because you know we worked together there we work together at at ah at Compaq and we've rehashed it a thousand times how we lost why we lost what we thought went on all that kinda stuff it's all speculation an and hearsay you know you put all the pieces on the the board and try to connect the dots but it's all you know us speculating on what happened.²⁹⁶

145. In his OPP statement, Simone explained why he did not follow up on Lyons' comments. There were two primary reasons: first, he had 60 people working for him who needed to keep moving forward and winning other bids; and second, there were strong relationships between senior executives at Dell and MFP.²⁹⁷ They shared a reciprocal relationship whereby MFP helped Dell win numerous bids, and Dell, in turn, supported MFP bids with mechanisms like manufacturer's assisted funds.²⁹⁸ In his evidence, Simone added that he still thought that Lyons intended the payment for personal gain and was trying to pad his fee.²⁹⁹

146. Simone eventually told his story to Frank Carnevale ("Carnevale"), a competitor of Lyons. It was as a result of this conversation that Simone's evidence eventually came to the attention of Commission Counsel and members of the media. Carnevale testified for three days at the Inquiry. His evidence of what Simone and Marentette told him was consistent with their evidence at the Inquiry. His evidence is entirely irrelevant. The Commission had the benefit of hearing Simone and Marentette. Given the absence of any clear and significant prior inconsistent statements, what they said to Carnevale before the hearing is irrelevant to the assessment of Simone and Marentette's evidence.

²⁹⁶ COT041622 at COT041697, 5:1:84.

²⁹⁷ COT041622 at COT041653-41654, 5:1:84; Simone 04/14/2003 at 148-149.

²⁹⁸ Simone 04/14/2003 at 149-150.

²⁹⁹ Simone 04/14/2003 at 149.

Similarly, whether or not Carnevale was ill-motivated, and the City submits he was not, is irrelevant to the persuasiveness of Simone and Marentette's evidence.