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1. Overview

1. The City hired Brendan Power as an external consultant to assist with Y2K related matters. He was later charged with drafting the 1999 RFQ and directing the P&F Report. Power was not qualified for either of these tasks. He did not advise anyone that he was in over his head. This problem was aggravated by his poor communication skills. Ultimately, Power proved incapable of translating I&T's vision of the leasing program into a representative RFQ and P&F Report. Moreover, he never communicated I&T's vision to the individuals in PMMD or Treasury.

2. During the fall of 1999, Power continued to mismanage the leasing program. He was the sole negotiator for the MLA. He failed utterly to insist upon favourable terms for the City even though the terms were contained in MFP's response to the RFQ. This failure was compounded by his disregard for the need for legal review of contract documents, and his reluctance to provide external legal counsel with the requisite documents.

3. Later, Power did not advise anyone at the City of the need to re-tender the leasing program if the City was going to place the equipment on five year leases. He never told anyone in Finance of their supposed ongoing responsibilities for the leasing program. Power wrongly assumed, and never confirmed, that Finance was reviewing the lease rate factors.

4. All of this might have been apparent on its face, had Power not been shielded by his personal relationship with Andrew.

2. The City's reasonable expectations of Power

5. The City's reasonable expectations of Power were similar to those it had of Andrew and Viinamae. The City reasonably expected Power to:

- a. act in the City's best interests;
- b. exercise good judgment, particularly during the City's initial formative period;
- c. assess his own capabilities and request assistance when necessary;
- d. consult his superiors in I&T with respect to decisions that affected the overall I&T environment;
- e. communicate effectively within I&T and with others in the City milieu; and
- f. obtain adequate legal advice with respect to the significant documents related to the leasing transaction.

6. As will be demonstrated below, Power did not meet these expectations.

3. **Power was not implicated in all aspects of the MFP computer leases**
7. Power was not involved in the July 2000 rewrites and should not be held responsible for them.
8. Power did not accept inappropriate entertainment offers from MFP.

4. Power misrepresented himself as an expert in leasing

9. During the Inquiry, Power admitted that he was not a leasing expert.¹ He had not taken any leasing technology courses.² However, he knew that the City relied on his leasing expertise and experience.³ Power should be criticized because he allowed individuals at the City to believe that he had the required leasing experience and expertise to set up the leasing transaction with MFP. In particular, Power:

- a. permitted Viinamae to assign him to all of the key components of the City's largest I&T tender to date without once suggesting that he was not qualified for the job;
- b. failed to suggest that a leasing expert should be retained during any part of the drafting process;⁴
- c. admitted that Wilkinson far surpassed him with respect to leasing expertise, but negotiated the MLA on behalf of the City without addressing that knowledge differential.

¹ Power 03/05/2003 at 155.

² Power 03/05/2003 at 160.

³ Power 03/26/2003 at 270-271.

⁴ Power 03/06/2003 at 85-86.

5. Power was sheltered by his personal relationship with Andrew

10. Power's lack of expertise would have been readily apparent to Andrew and others at the City if he had not been sheltered by Andrew's friendship, which dated back to 1982.⁵ Power estimated that he met Andrew two or three times per month, usually for golf, but sometimes for lunch or after work.⁶

11. Andrew was the one who advised Power of the job opportunity at Metro, shortly after Power left his government of Ontario position.⁷ Later, Andrew was the one who delegated responsibility for drafting the leasing tender documents to Power.⁸

⁵ Power 03/06/2003 at 55.

⁶ Power 03/26/2003 at 207.

⁷ Power 03/06/2003 at 56.

⁸ Andrew Affidavit, para. 98, 09/24/2003 at 51; Andrew 09/24/2003 at 213.

6. Power was an ineffective communicator

12. Power spent seven days in the witness box. During this time, the Commissioner was forced to intervene on numerous occasions to clarify his testimony.⁹ Power's answers were indifferent and vague.¹⁰ Upon reflection, his answers were frequently irrelevant and/or meaningless.

13. Power's manner of giving evidence was consistent with and confirmed that he had poor communications skills and had difficulty making himself understood.

⁹ See, e.g., Power 03/06/2003 at 72.

¹⁰ See, e.g., Power 03/27/2003 at 183-185.

7. Power failed to communicate I&T's flawed vision of the City's leasing program

14. Power shared Andrew and Viinamae's vision of the City's leasing program. I&T's vision was a leasing program of almost unlimited proportions.¹¹ Andrew, Viinamae, and Power wanted a virtually exclusive vendor of record relationship for a three year period during which I&T could place an unlimited amount of equipment on lease at as yet undetermined rates. This expansive vendor of record relationship had no pre-defined limit on the amount of equipment to be leased, no pre-specified lease term, and no competitive process by which to obtain future lease rates. The only real limitation on I&T's vision was the imposition of a three year limit.

15. This vision was fatally flawed, violated City policies, and failed entirely to ensure that the City leased its equipment at competitive rates. Moreover, I&T's vision was inconsistent with the P&F Report and was not authorized by Council. Council approved the lease program with MFP that was described in the P&F Report: \$43 million in equipment and software for a three year lease term, at the lease rates quoted by MFP. Power should have been aware of this.

¹¹ Viinamae 10/28/2003 at 100.

8. Power failed to prepare an appropriate RFQ

16. Power failed to provide critical information to other City divisions and departments, beginning with the RFQ. Power was well aware of the various time pressures facing I&T.¹²

17. It was two weeks from the date Power was assigned the task until he met with any other department or division at the City about the RFQ.¹³ Power erred in thinking that the RFQ and the mechanics of computer leasing were not complicated.¹⁴ He admitted it was the largest tender to date for I&T, yet he did not think it was necessary to obtain assistance from a leasing expert.¹⁵ In early May 1999, Power and Viinamae finally met with Treasury.¹⁶ This meeting demonstrated Power's inability to communicate I&T's vision. He failed to mention:

- a. the value of the assets to be leased, although he testified that he described "a fairly substantial number of assets ... probably in excess of fifty (50) [million dollars] and maybe not quite a hundred (100) [million dollars]";¹⁷
- b. the asset value for the sale computer acquisitions;¹⁸
- c. the total cost of leasing or any additional expenses such as end of term costs;¹⁹
- d. the cost of refresh, even in the context of factoring refresh costs into a financial leasing model;

¹² Power 03/06/2003 at 69-70.

¹³ Power 03/06/2003 at 84.

¹⁴ Power 03/06/2003 at 85.

¹⁵ Power 03/06/2003 at 85-86.

¹⁶ Power 03/06/2003 at 89.

¹⁷ Power 03/06/2003 at 93.

- e. the intended acquisition of additional software - Power did not advise that the RFQ contemplated additional software, over and above the \$16 million amount identified in the November 3, 1998 Report;²⁰
- f. the role that Treasury should play in the leasing process; and
- g. the factors that should inform Treasury's financial analysis.²¹

18. The drafts of the RFQ did not reflect I&T's vision, which was a further example of Power's failure to communicate well with other City staff. Power should have explained the intended vendor of record relationship to PMMD and to Treasury so that the proposed relationship could be evaluated by them.

19. Power did not consult or work with others within I&T or in Finance to draft the document, except when he required specific information from I&T.²² Power should have asked legal counsel to vet the RFQ, particularly because of the sale leaseback component and the future software acquisition component. Drafting the RFQ unaided had consequences. Power failed to act in the City's best interests by either not mentioning or mentioning in oblique language the following items:

- a. the term "sale leaseback transaction" and its corollary, the tax implications;²³
- b. the total asset value of the acquisition; and
- c. the timeline for delivery of the equipment.²⁴

¹⁸ Power 03/06/2003 at 94.

¹⁹ Power 03/06/2003 at 96.

²⁰ Power 03/06/2003 at 154-156.

²¹ Power 03/06/2003 at 99.

²² Power 03/06/2003 at 108-109.

²³ Power 03/06/2003 at 171-172.

20. The terms of the RFQ were not specific enough to protect the City's best interests and assess properly the option of leasing. Power failed to require the bidders to:

- a. guarantee lease rates for a period of longer than 90 days, despite his admitted understanding that half of the guaranteed 90 day period would have expired prior to the Council meeting²⁵; and
- b. peg changes in the future lease rates to an external marker, such as bank rates or bond rates.²⁶

21. The City issued the RFQ on May 31, 1999. Its shortcomings were noticed immediately and the City began receiving calls about missing information.²⁷ On June 7, 1999, Beattie issued an addendum to the RFQ, which contained information provided by Power on detailed hardware and software configurations and estimated leasing volumes.²⁸

22. The City received six responses to its RFQ. Four bidders did not address the sale leaseback transaction in their responses - clearly they could not identify the need for a sale leaseback transaction in the vaguely worded RFQ.²⁹

²⁴ Power 03/06/2003 at 133-134.

²⁵ Power 03/06/2003 at 147, 150-151.

²⁶ Power 03/06/2003 at 128-129; Power 03/24/2003 at 25.

²⁷ Beattie Affidavit, para.55, 03/31/2003 at 75.

²⁸ Beattie Affidavit, para.57, 03/31/2003 at 75.

²⁹ Power 03/31/2003 at 16-17.

9. Power failed to ensure that the P&F Report represented I&T's vision

23. Power was primarily responsible for failing to advise Council, through the P&F Report, of I&T's intention to establish a vendor of record relationship with MFP for an unlimited sum of money.

24. Power was largely responsible for the ambiguity contained in the P&F Report. As discussed in Chapter 7, he failed to discharge his responsibility as the primary point of contact between I&T and Treasury.³⁰ Specifically, Power should be criticized because he:

- a. failed to assume proper responsibility for the P&F Report, even though others were relying on him;
- b. failed to provide Treasury with all the necessary operational assumptions for its financial analysis, including the cost of upgrades, buyouts, end of term options, and refresh costs;³¹
- c. never disabused Rabadi of his assumptions that:
 1. only \$43.15 million of equipment would be leased for a three year term;³² or that
 2. all equipment would be leased at the rates quoted by MFP in its response to the RFQ;
- d. never communicated the key elements of I&T's vision to Rabadi in response his questions;³³ and

³⁰ Power 03/27/2003 at 206.

³¹ Power 03/27/2003 at 201-202.

³² Power 03/25/2003 at 162-163.

- e. took version control of the P&F Report away from Rabadi and removed the reference in the recommendations to a maximum of \$43.15 million in equipment cost, and all references to the Y2K project and related budget.³⁴

25. According to Power, Andrew envisioned a situation wherein the City would lease all of its information technology assets through one company for a three year period.³⁵ Power agreed that this vision was not disclosed in the P&F Report.³⁶

26. The P&F Report was unclear and failed to expressly mention numerous aspects of I&T's intended leasing program with MFP. Specifically, the P&F Report did not inform Council of the following things:

- a. I&T believed that the figure of \$43 million was not a cap or even a target;³⁷
- b. the lease rates quoted by MFP in its response to the RFQ were only valid for 90 days;³⁸
- c. only a portion of the \$43 million worth of equipment would be in place by the end of the 90 day guarantee period;³⁹
- d. I&T believed that MFP would become the City's vendor of record for a three year period;⁴⁰
- e. the City intended to enter a sale leaseback transaction with MFP;

³³ Power 03/27/2003 at 200-202.

³⁴ Rabadi 07/03/2003 at 149-151; COT013811, 48:1:12.

³⁵ Power 03/27/2003 at 196.

³⁶ Power 03/27/2003 at 197.

³⁷ Power 03/06/2003 at 61-62; Power 03/24/2003 at 96-98.

³⁸ Power 03/24/2003 at 128-129.

³⁹ Power 03/24/2003 at 131.

⁴⁰ Power 03/24/2003 at 112.

- f. the sale leaseback transaction carried the risk of significant negative tax implications for the City;
- g. the City intended to dispose of and re-acquire assets;⁴¹
- h. the three year lease term was a rolling term, which created the possibility of “overhanging” leases entered into during the three year period in which MFP was the vendor of record for the City;⁴² and
- i. the end of term lease issues and costs.⁴³

27. Power must also be faulted for failing to accept responsibility for the absence of a firm and ascertainable mechanism to determine future lease rate factors. Power would not acknowledge that either he or Andrew bore any responsibility for failing to consider the financial impact to the City of maintaining competitive lease rates. Rather, he contended that it was the responsibility of Finance “to make sure those kinds of things work[ed]”, although he took no steps to ensure Finance knew to do this, or had the necessary information to do it.⁴⁴

⁴¹ Power 03/06/2003 at 70-71.

⁴² Power 03/26/2003 at 247-248.

⁴³ Kerr 09/15/2003 at 204-205.

⁴⁴ Power 03/27/2003 at 225.

10. Power was an ineffective lead negotiator for the City for the MLA

28. Power was the only City representative directly involved in the negotiations with MFP.⁴⁵ Power did not ensure that MFP's promises, as outlined in its response to the RFQ, were translated into contractual terms. Power failed to exercise due diligence with respect to the business terms of the MLA. Power should be criticized because he:

- a. recognized that Wilkinson was a leasing expert, yet proceeded to negotiate directly with Wilkinson as if Power was qualified to do so;⁴⁶
- b. negotiated the bulk of the MLA without consulting anyone in I&T;⁴⁷ and
- c. did not insist on MFP living up to the promises it made in its response to the RFQ. Instead, he acquiesced to objectionable terms from the City's perspective, including the order of paramouncy provision.⁴⁸

29. Power admitted that the fact that the MLA contained entirely different terms from the bid document, all of which were more favourable to MFP, was a result of his oversight.⁴⁹

⁴⁵ Power 03/27/2003 at 266-267.

⁴⁶ Power 03/25/2003 at 140-141.

⁴⁷ Power 03/27/2003 at 265-268.

⁴⁸ Fecenکو Affidavit, para. 32, 04/03/2003 at 27-29.

⁴⁹ Power 03/27/2003 at 278.

11. Power failed to obtain necessary and proper legal advice for the MLA

30. The evidence was undisputed that Power controlled the timing and extent of external counsel's involvement in the MFP transaction. He failed to keep I&T, Legal Services, and external legal counsel apprised of his negotiations with MFP in a timely fashion. Such communication would have allowed legal counsel to explain the legal consequences of the "business terms" contained in the contractual documents.

31. Unfortunately, Power did not recognize the importance of meaningful legal review. Instead, he treated legal scrutiny as a burdensome final step in the negotiation process, to be undertaken when everything else had been completed.⁵⁰ Power's failure to involve legal counsel at an early stage of the contract process and his failure to provide legal counsel with a reasonable opportunity to complete a proper review of the contract are indications of the low priority he placed on a legal review. Power should have:

- a. involved external legal counsel at a much earlier stage;⁵¹
- b. provided legal counsel with the necessary documents, including the RFQ and MFP's response to the RFQ, in order to perform a meaningful legal review;
- c. advised Fecenko that the RFQ and MFP's response to the RFQ were the basis for the MLA;⁵²
- d. realized that he could not understand the "business terms" of the lease contracts without understanding their legal consequences;

⁵⁰ Power 03/27/2003 at 13.

⁵¹ Fecenko Affidavit, para. 22, 04/03/2003 at 20-21.

⁵² Fecenko Affidavit, para. 27, 04/03/2003 at 23.

- e. realized that review by Treasury was not at all the same as review by legal counsel;⁵³
- f. given legal counsel an adequate amount of time to meaningfully review the MLA;⁵⁴
- g. realized that the business terms of the bid and the legal terms of the MLA should have paralleled each other, and that the bid documents were not outside the “scope” of legal review;⁵⁵
- h. accurately advised legal counsel of the outcome of his negotiations with MFP;⁵⁶
- i. provided external counsel with specific time to draft an opinion letter and the documents required for the opinion to be meaningful;⁵⁷
- j. copied all correspondence with legal counsel to Viinamae, his senior Director;⁵⁸ and
- k. realized there was a need to involve legal counsel with respect to the equipment schedules, given his knowledge that the equipment schedules would be paramount over other lease agreements.⁵⁹

⁵³ Fecenko Affidavit, para. 27, 04/03/2003 at 23.

⁵⁴ COT011117, 23:1:23.

⁵⁵ Fecenko Affidavit, para. 27, 04/03/2003 at 23.

⁵⁶ Fecenko Affidavit, para. 32, 04/03/2003 at 27-29.

⁵⁷ COT011119, 27:1:16.

⁵⁸ Power 03/26/2003 at 164.

⁵⁹ Power 03/25/2003 at 50-51; Power 03/27/2003 at 73-74.

12. **Five year lease terms: Power failed to advise I&T of the known implications**

32. Power failed to spot the problem with the proposed five year lease terms: if the City intended to lease equipment for longer than three year terms, then the financial analysis comparing three year lease terms to debentures was void and should be redone.⁶⁰ Power's larger oversight, however, was his failure to inform I&T of his view that the change to five year lease terms meant that the City should have re-tendered the lease program.⁶¹ Power knew that the City viewed him as a leasing expert, yet he failed to realize that I&T was relying on him, as its leasing expert, to provide such a direction.⁶²

⁶⁰ Power 03/24/2003 at 134.

⁶¹ Power 03/25/2003 at 37-38.

⁶² Power 03/25/2003 at 38-39.

13. Ongoing lease administration: Power failed to confirm the review of lease rate factors

33. Power did not turn his mind to the ongoing review of lease rate factors in any meaningful way. He testified that changes to the lease rates would be reviewed on a quarterly basis by the CMO once it was in operation.⁶³ This approach failed to take into account the following factors:

- a. Power himself was not certain whether or not the lease rate factors were negotiable;⁶⁴
- b. Power failed to warn the City of the need to assess the commercial competitiveness of the future quarterly lease rates in the context of a “vendor of record” scenario;
- c. Power assumed that Finance would analyze the lease rate factors,⁶⁵ but had no direct knowledge of Colley actually receiving these lease rate factors,⁶⁶ and
- d. Colley had no experience in leasing, and no competitive lease rate information from a re-tender.⁶⁷

⁶³ Power 03/27/2003 at 219.

⁶⁴ Power 03/24/2003 at 51.

⁶⁵ Power 03/27/2003 at 220-221.

⁶⁶ Power 03/25/2003 at 164.

⁶⁷ Power 03/27/2003 at 225-228.

14. Power failed to obtain necessary and proper legal advice for Oracle

34. Power was the contact person responsible for the negotiation of the Oracle contract itself, and for negotiating the terms and conditions of the contract. Power was also involved in calculating the credit that the City would receive for the Oracle licenses it already held, and dealt with the legal counsel the City used for legal advice on the transaction.⁶⁸ The Oracle transaction provides another example of Power's failure to obtain the necessary and proper legal advice. Power should be criticized because he:

- a. forwarded the Oracle contract to Fecenko, seeking advice solely on the legal terms and conditions of the agreement, without describing to him the process leading to or the context of the negotiations with Oracle,⁶⁹
- b. received a second list of outstanding concerns from Fecenko, and requested an opinion about Oracle's changes to the price protection clauses, but executed the Oracle agreement prior to receiving Fecenko's reply;⁷⁰
- c. did not provide Fecenko with the necessary documents for review, including a pricing schedule or a Network Order form;⁷¹ and
- d. did not update Fecenko as to the status of the Oracle transaction for over one month.⁷²

35. Power can also be faulted for failing to respond to Loreto's concern about Council authority for the Oracle transaction.⁷³ Moreover, there are no documents

⁶⁸ Viinamae 10/21/2003 at 104-105.

⁶⁹ Power 04/27/2003 at 28.

⁷⁰ COT016239, 27:2:19; COT016179, 27:1:19

⁷¹ COT016179, 27:1:19.

⁷² COT039010, 27:2:28.

that show that Power sent Loreto a copy of the Oracle agreement, despite Loreto's explicit request.⁷⁴ Finally, Power must be held responsible for failing to have the Oracle contract approved as to form by Legal Services prior to being signed. Loreto never saw a final copy of the Oracle agreement prior to it being signed and did not approve it.⁷⁵

⁷³ COT005412, 26:1:17; Power 04/25/2003 at 85; Loreto Affidavit, para. 18, 04/01/2004 at 214.

⁷⁴ COT005412, 26:1:17; Power 04/25/2003 at 87; Loreto Affidavit, para. 18, 04/01/2003 at 214.

⁷⁵ Loreto 04/01/2003 at 260.

15. The comfort letter

36. In January 2000, Power forwarded MFP's request for an opinion letter from the City Solicitor to Loreto.⁷⁶ During one of his conversations with Loreto about this comfort letter, Power informed Loreto that Council had approved a \$43 million transaction, and that \$33 million worth of equipment had already been placed on lease.⁷⁷ In fact, at the time of their conversation, the total amount of equipment on lease was \$59,954,166.41.⁷⁸ Power should be criticized for misleading Loreto as to the amount of equipment placed on lease.

37. Had Power told Loreto the truth – that there was in excess of \$59 million on lease with MFP – it is reasonable to infer that Loreto would not have recommended that Doyle give MFP a comfort letter. Loreto would have detected, back in March 2000, that the leases were offside Council authority. In the end, it took until July 2001 for the City to learn the truth.

⁷⁶ COT006264, 26:1:18.

⁷⁷ COT011041, 26:1:37.

⁷⁸ Loreto 04/02/2003 at 39-40.