1. Overview

1. The City's Legal Services Division ("Legal Services") or external counsel were involved in the MFP transaction on two occasions. In the summer of 1999, the City's external legal counsel for Year 2000 matters, Faskens ("external counsel"), reviewed the draft MLA and the Program Agreement with MFP and prepared an opinion letter for the City purportedly as to the commercial reasonableness of the agreement. Eight months later, in early 2000 at MFP's request, Legal Services prepared a "comfort letter" that the agreements were properly authorized and executed on behalf of the City. The involvement of legal counsel in the Oracle transaction is discussed in Chapter 13.

2. In the summer of 1999, I&T, and Power in particular, was involved in the negotiation of the MLA. As a part of that process, Power involved Faskens in the review of specific documents, so that the MLA could be approved 'as to form'. Fecenko, on behalf of Faskens, wrote a letter stating that the terms of the MLA were commercially reasonable ("commercial reasonableness letter").[1]

3. The City submits that there was never a meaningful legal review of the contractual documents that created the leasing transaction between the City and MFP. The only documents that were subjected to any legal review at all were the MLA, and uncompleted drafts of the Program Agreement. There was no legal review undertaken of the documents that actually created the specific leasing transactions; namely, the Equipment Schedules. Nor was there legal review of the RFQ or MFP's response to the RFQ, both of which were referred to in the MLA.

4. The City submits that the failure to undertake a meaningful legal review was the result of I&T's failure to recognize the importance of legal review, and its failure to provide a proper opportunity for legal review. The City further submits that some criticism can be directed to Fecenko for failing to review all of the relevant contractual documents, for failing to advise the City that the completed Equipment Schedules

[1] COT011120, 26:1:5.

should have been reviewed by legal counsel, and for writing the unqualified commercial reasonableness letter. In the event that Fecenko felt limited by the scope of the retainer established by Power, Fecenko should have alerted Viinamae and Loreto to this concern.

5. Between January and March 2000, Power involved Legal Services, specifically Loreto, in providing a letter of assurance to MFP ("comfort letter").[2] MFP requested the letter, and provided a draft of the letter to Power, who then forwarded it, together with the request, to Loreto. The comfort letter was signed by the then City Solicitor, Doyle, and returned to MFP on March 15, 2000.[3] The City submits that, in drafting and approving the comfort letter, Loreto reasonably relied on Power to provide him with accurate operational information. In fact, Power's information about the total amount that had been spent on MFP leases was completely inaccurate. The Commissioner should find that Loreto would not have given MFP the comfort letter if Power had told him the truth.

[2] COT023476, 26:1:45
[3] COT023476, 26:1:45.

2. I&T failed to recognize the importance of a meaningful legal review

6. Power testified that he did not review every contract he worked on with Legal Services. He only involved Legal Services in situations where there was definitely a point of law or a term to be changed and he believed it was necessary.[4] Power testified that the decision to consult Legal Services would be a decision made by him and Viinamae.[5] However, with respect to the MFP documents, Power's evidence was that he probably went to Fecenko on his own, without direction from Viinamae.[6]

7. Viinamae testified that she was not involved in Power's discussions with either Legal Services or external counsel.[7] Power did not copy Viinamae on his discussions and correspondence with Fecenko.[8] The evidence is undisputed that Power was the sole contact between I&T and the City's internal or external legal counsel for the purposes of the MFP negotiations.

8. Power testified that he tried to ensure that the business issues had been resolved to everyone's reasonable satisfaction before he gave the deal to legal counsel.[9] In an August 10, 1999 email to Andrew and Viinamae, Power wrote that he had "reviewed the MFP agreement and there are a few items that need to be negotiated before we do the legal scrubbing".[10] The "legal scrubbing" was what he expected Fecenko to eventually provide: legal advice on the legal terms and conditions of the documents.[11]

9. The City submits that I&T failed to recognize the importance of a meaningful legal review of the contracts between MFP and the City. In particular, Power viewed the legal review of contracts as a final step in the negotiation process, to be undertaken

[4] Power 03/05/2003 at 200-203.
[5] Power 03/05/2003 at 203.
[6] Power 03/24/2003 at 152.
[7] Viinamae 10/29/2003 at 50.
[8] Power 03/26/2003 at 164.
[9] Power 03/27/2003 at 10-11.
[10] COT015674, 63:8:38.

when everything else had been completed. 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. Further, the situation of having only Power provide instructions to outside counsel on these matters was not appropriate. Power was not a City employee, he was a consultant.[12] Granted, these were difficult times. Nevertheless, this is not a model that the City should ordinarily follow.

[11] Power 03/27/2003 at 13; Power 03/24/2003 at 139.
[12] Power 03/05/2003 at 160-163.

3. I&T failed to provide a reasonable opportunity to internal counsel and/or external counsel to review all of the relevant contractual documents

10. The City submits that I&T, and specifically Power, failed to provide an adequate opportunity for external counsel to conduct a meaningful review of the contractual terms that would govern the City's relationship with MFP. This failure occurred in two ways: (1) Power failed to give Fecenko all of the necessary documents; and (2) he failed to give Fecenko adequate time to complete his review.

a) Fecenko failed to review all the relevant documents

11. The evidence was undisputed that Power controlled the timing and extent of external counsel's involvement in the MFP transaction.

12. Fecenko testified that he first became aware of the MFP lease on August 18, 1999 from a voicemail message he received from Power. The voicemail message was followed by an email later that morning.[13] In the email, Power asked Fecenko to review copies of the draft MLA and Program Agreement.[14]

13. Fecenko testified that almost immediately, he noticed a reference to the RFQ and MFP's response to the RFQ in the MLA. He asked Power for a copy of both in order to "understand the deal".[15] According to Fecenko, Power told him that the RFQ and MFP's response set out only the business terms of the deal and that Power only sought advice from Fecenko on legal issues. Fecenko testified that, in reliance on this conversation, he concluded that he did not need to review either the RFQ or MFP's response to carry out his retainer.[16]

[13] COT011121, 23:1:25.
[14] COT011126, 23:1:27; COT011121, 23:1:25.
[15] Fecenko Affidavit, para. 27, 04/03/2003 at 23.
[16] Fecenko Affidavit, para. 27, 04/03/2003 at 23.

14. In contrast, Power did not recall having a conversation with Fecenko on the morning of August 18, 1999. His evidence was that if Fecenko had asked for further documents, he would have provided them.[17] Power suggested that because there was no evidence that these documents had been sent to Fecenko, Fecenko must not have asked for them.[18]

15. Power testified that he would have told Fecenko that the MLA followed the issuance of an RFQ, the submission of responses, the evaluation of bids and the selection of MFP. He would also have told Fecenko that the RFQ and MFP's proposal contained business terms that had been carefully reviewed by experts within the City.[19]

16. The City submits that Fecenko's evidence that he asked for the RFQ and MFP's response and Power discouraged him from reviewing them should be accepted over Power's evidence that Fecenko never asked to see them. Power's testimony made clear that he underestimated the need for and importance of legal advice on business deals and that he often viewed lawyers as an impediment to getting the job done. It was entirely consistent with this attitude to narrowly circumscribe Fecenko's retainer. That said, and as is discussed in greater detail below, Fecenko had an obligation to warn the City (Power) about the risks of leasing millions of dollars of technology without a meaningful review of the governing contracts. He was also obliged to warn the City that he could not provide legal advice without, as he himself put it, "understanding the deal"; that is, reviewing the business terms as set out in the RFQ and MFP's response.

b) Power asked for the review in an extremely short time period

[17] Power 03/24/2003 at 161.
[18] Power 03/24/2003 at 161.
[19] Power 03/27/2003 at 51-53.

17. Power asked Fecenko to review the MFP contracts in a very short time frame. Fecenko received the documents on August 18, 1999 at 9:28 am.[20] Shortly after noon the next day, Power asked for Fecenko's changes that afternoon.[21]

18. Nevertheless, Fecenko testified that this brief time period was "sufficient for conducting the scope of the legal review [Power] had requested".[22] Fecenko understood that Power had reviewed all of the relevant documents and had already engaged in negotiations with MFP.[23] The City submits that Power set an inappropriate time line but Fecenko erred in accepting it. His job was not to do the legal review Power wanted but to do the legal review the circumstances required.

19. Legal Services did not become involved in the MLA until August 20, 1999 when Power contacted Loreto regarding approval of the MLA "as to form".[24] The approval as to form is discussed below.

[20] COT011121, 23:1:25.
[21] COT011117, 23:1:23.
[22] Fecenko Affidavit, para. 28, 04/03/2003 at 23-24.
[23] Fecenko Affidavit, para. 28, 04/03/2003 at 23-24.
[24] Loreto Affidavit, para. 6, 04/01/2003 at 207-208.

4. Legal Services was not involved in the contractual negotiations with MFP

20. Fecenko testified that he preferred to be brought in early in a transaction and to be involved in the preparation of the tender or the RFP/RFQ, if applicable. He preferred to be "fully versed in the business deal" including the negotiations. He believed that early involvement was the way in which he could most effectively provide legal advice.[25] Fecenko testified that the reason he preferred to be involved in the preparation of the RFP/RFQ was that the RFP/RFQ would ultimately become part of the contract documents. The inclusion of legal terms and conditions in the RFP/RFQ was a means of ensuring that bidders would agree to those terms and conditions in their proposals or, as he explained in his affidavit:

> It is during the competitive process that one has the greater possibility of getting bidders to agree to favourable legal terms rather than after the successful bidder has been selected.[26]

21. Power did not involve legal counsel until the negotiation of the MLA was almost concluded and then only for "legal scrubbing".[27] The evidence is undisputed that Power was the only City representative directly involved in the negotiations with MFP.[28]

22. The City submits that it is not necessary to involve legal in all of the City's RFPs and RFQs. However, it is appropriate when the City is undertaking a large transaction such as this, in which it has little or no experience. The early involvement of legal counsel in such circumstances is important. As is set out in Chapter 9, Power's approach to the MFP negotiations was foolhardy and exposed the City to unnecessary and significant risks. Power was, by his own estimate, far from a leasing expert and had only basic knowledge of the City's procurement practices and organization. His superficial approach to the negotiation process and his unwillingness to obtain proper

[25] Fecenko Affidavit, para. 22, 04/03/2003 at 20-21.
[26] Fecenko Affidavit, para. 12, 04/03/2003 at 13; Fecenko 04/03/2003 at 44-45.
[27] Power 03/27/2003 at 13.
[28] Power 03/27/2003 at 266-267.

assistance from legal and other experts on both the business and legal terms of the transaction were critical errors. The City submits that it is not necessary to obtain advice from Legal Services or external counsel on every tender. Nor is it necessary to obtain advice from Legal Services or external counsel in every contract negotiation. However, the failure to obtain meaningful legal advice on the MFP transaction was inexcusable – it was a large and novel transaction for the business unit (I&T) and was entirely beyond the competence of Power himself.

5. I&T failed to recognize that the MLA was not the only contract between MFP and the City

23. Fecenko testified that he understood that the relevant documents for the MFP deal were the MLA, the Program Agreement, the Equipment Schedules, the RFQ and MFP's response to the RFQ.[29] However, Fecenko only reviewed the MLA and the Program Agreement; he never reviewed the completed Equipment Schedules, the RFQ or MFP's response to the RFQ.

24. In his analysis of the lease transactions between MFP and the City,[30] Kerr reported that:

> [I]tems that were committed to in the RFQ were never incorporated into the Master Lease. It appears that once the RFQ process was complete it was put aside and the Master Lease became the document that defined the relationship between MFP and the City of Toronto.[31]

25. Power testified that he knew that Equipment Schedules would be required to complete the transaction.

> Q: And, in fact, given your expectation that the parties, that is the City and MFP, would have had to enter into an equipment schedule and finalize the program agreement, that equipment schedule was going to be paramount over all the other terms of the agreement, correct?
>
> A: Yes.
>
> Q: And you would have, I assume, involved either the City legal department or outside legal counsel in a review of those subsequent transactions that would have been required in order to actually create a lease transaction, correct?
>
> A: Yes.[32]

[29] Fecenko 04/03/2003 at 147.
[30] COT080176, 61:1:Report.
[31] COT080176 at COT080183, 61:1:Report.
[32] Power 03/27/2003 at 73-74.

26. Nevertheless, Power never asked Fecenko or Legal Services to review the Equipment Schedules nor did he ever suggest it to Viinamae.

27. Viinamae's evidence made clear that she did not realize that the Equipment Schedules set out critical contractual obligations. She viewed the Equipment Schedules and Certificates of Acceptance as documents that "reflected the operational side of the leasing program"[33] and the Program Agreement as a "process document".[34] In her mind, the MLA set out the terms and conditions of the transaction.[35]

28. Fecenko testified that he would have expected Legal Services or outside counsel to review subsequent contract documents and that he knew that the Equipment Schedules were paramount over all other terms of the agreement.[36] Nevertheless, Fecenko never told Power that the Equipment Schedules should be reviewed by a lawyer. Rather, Fecenko expected Power, as a senior procurement person, to know that the Equipment Schedules required a legal review.[37]

29. The City submits that the Commissioner should conclude that no one in I&T comprehended that the Legal Services' relationship with MFP was defined not only by the MLA and the Program Agreement but also by MFP's response to RFQ and the Equipment Schedules. For his part, Fecenko ought to have insisted on reviewing the Equipment Schedules which he described as "paramount" before providing an opinion on the commercial reasonableness of the MLA. Power's alleged procurement expertise did not relieve Fecenko of this obligation.

[33] Viinamae 10/29/2003 at 58.
[34] Viinamae 10/29/2003 at 58-59.
[35] Viinamae 10/29/2003 at 59.
[36] Fecenko Affidavit, para. 37, 04/03/2003 at 31.
[37] Fecenko 04/03/2003 at 190-192, 194-195.

6. Commercial reasonableness letter

30. On August 20, 1999, Power sent the following email to Fecenko:

> Mark, MFP has agreed with your changes to the Agreement with the exception of Default by Lessee (s.17). The [sic] have suggested a change of "five days of the due date thereof" to "ten days of the due date thereof". I discussed with the City Management and they are willing to accept those terms so the Agreement is ready for signing.
>
> Since this Agreement was reviewed by you and not the City Solicitor'' staff it won't have the "approved as to form" seal. Would you please provide me with a memo saying you have reviewed the document as to form and it is commercially reasonable. I have spoken to Brian Loreto and he is OK with this approach and is willing to co-sign your memo if the City Clerk (signing authority) requires.[38]

31. Power testified that the reference to "City Management" was a reference to Viinamae. He had discussed the fact that MFP would not agree to the default by lessee provision with her, and she accepted the change as it stood.[39]

32. Fecenko replied by email to Power on August 20, 1999. He agreed to send a letter stating that the agreement "falls within the 'realm of commercial reasonableness'".[40] He sent the letter the same day with the subject line "Re: MFP Financial Services Ltd. Master Equipment Lease Agreement No. 838 ("Master Lease"), Equipment Schedule and Program Agreement No. PA1 (collectively, the "Drafts")."[41]

33. The letter itself is a single sentence long:

> Further to your request, this letter states my view, based on my experience in dealing with such agreements, that the terms and conditions of the above-noted agreements fall within the realm of commercial reasonableness.[42]

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[38] COT006329, 26:1:4.
[39] Power 03/24/2003 at 166-167.
[40] COT006329, 26:1:4.
[41] COT011120, 26:1:5.
[42] COT011120, 26:1:5.

34. Fecenko drafted the letter on the basis of his review of a draft of the MLA and the Program Agreement, not based on the final forms sent to him by Power. He had not seen the RFQ or MFP's response. On the basis of Power's August 20, 1999 email he assumed that the drafts he reviewed were identical to the final contracts with the exception of s. 17.[43] He accepted Power's assurance that he did not need to see the RFQ or MFP's response or the final version of the MLA.

35. In fact, not all of Fecenko's recommended changes were incorporated into the final contracts.[44]

36. Fecenko acknowledged that the commercial reasonableness letter did not state that he was relying on Power's assertions that the recommended changes had been incorporated into the final draft.[45]

37. Fecenko testified that he and not Power first coined the expression "commercially reasonable", in order to meet Power's goal of getting Legal Services to approve the contract documents as to form. Fecenko maintained that the letter was not intended to imply that the deal itself was commercially reasonable, but simply that the documents referred to in the letter were commonly seen in a leasing transaction.[46]

38. Fecenko testified that it was not part of his retainer to ensure that the agreements the City entered into accurately reflected the business deal. Instead, his role was simply to review the "boilerplate" to determine if it contained anything unusual.[47]

39. Fecenko testified:

[43] Fecenko Affidavit, paras. 32-33, 04/03/2003 at 27-29; COT011120, 26:1:5.
[44] Fecenko Affidavit, para. 32, 04/03/2003 at 27-29; see also Chapter 9.
[45] Fecenko 04/03/2003 at 105-106.
[46] Fecenko 04/03/2003 at 103-104.
[47] Fecenko 04/03/2003 at 161-162.

> I'm comfortable with the opinion I gave. The City was looking to me to review the legal terms and conditions and to let them know if there was anything unusual in the documents, and that's what the opinion speaks to.[48]

40. In contrast, Loreto testified that he expected Fecenko to review all documents necessary to assess the agreement between the City and MFP for commercial reasonableness.[49] He himself did not know which documents Fecenko had in fact reviewed; he simply relied on external counsel to take whatever steps were necessary to provide an opinion.[50]

41. Loreto was also surprised to learn that Fecenko had not requested or obtained the July 1999 Council Report outlining the MFP transaction prior to providing his opinion.[51] In Loreto's view, Fecenko should have reviewed the Council Report and all of the documents that formed the agreement, including the RFQ and MFP's response to the RFQ.[52]

42. Fecenko testified that the only commercial reasonableness letter he ever gave the City was on the MFP transaction.[53]

43. Power's testimony was very different:

> Q: All right, in any event, returning to your request memo -- e-mail that is, at Tab 123, to Mr. Fecenko, you use the term there in the second paragraph: "Commercially reasonable." And you ask him for a memo saying that he has reviewed the document as to form, and it is commercially reasonable.
>
> So, can you tell us, Mr. Power, what does the term or did the term, commercially reasonable, mean to you when you used it in this memo?
>
> A: Well that was a term that they had used before when we'd asked them to provide letters for the City Solicitor's office, or the City Solicitor's office hadn't

[48] Fecenko 04/03/2003 at 161.
[49] Loreto 04/01/2003 at 240.
[50] Loreto 04/02/2003 at 181.
[51] Loreto 04/02/2003 at 134-135.
[52] Loreto 04/02/2003 at 135-138.
[53] Fecenko 04/03/2003 at 168.

> seen the document before, and it required a sign off. We would ask them to prepare a memo of the -- if they had reviewed the document, and it was okay for them, based on their opinion, to go ahead and execute the contract.
>
> And so commercially reasonable was a term that they did use.
>
> Q: But what confuses me, Mr. Power, and perhaps you can help me, is if -- if you hadn't given Mr. Fecenko the RFQ or the business case supporting it, how could he opine on whether the documentation referred to a commercially reasonable transaction?
>
> A: I don't know, but he seemed to do it.[54]

44. The City Clerk's Office also relied on the commercial reasonableness letter in approving the MLA. Power confirmed in an email to Viinamae on August 20, 1999 that:

> I spoke with Jeff Abrahams and he will accept the Fasken memo as a legal review. He wants a covering memo stating the Council approval report number etc. I will prepare the memo, he will sign on Monday.[55]

45. The City submits that Fecenko should have insisted on seeing the final form of the contracts prior to opining on their commercial reasonableness. Moreover, he should have insisted on reviewing the RFQ and MFP's response before attesting to the commercial reasonableness of the agreement. In a situation in which he should have warned his client about the contractual pitfalls of leasing agreements, Fecenko carelessly reassured his foolhardy client, Power, that all was as one would reasonably expect in similar transactions. His letter was misleading: it utterly failed to tell the City what it needed to know – that he had undertaken a limited and superficial review of the MFP agreements.

46. In contrast to Power, Loreto was thorough and cautious. Had Fecenko's letter to the City raised red flags, it is reasonable to infer that Loreto would have ensured that Fecenko received every relevant document and report and was given adequate

[54] Power 03/24/2003 at 170-171.

opportunity to review them. MFP's calculated attempt to resile from its response to the RFQ may have been detected.

47. The City also submits that Fecenko should have advised Power that the Equipment Schedules required a legal review, and that such advice, under the terms of the retainer agreement, should have been copied to Loreto.

a) Fecenko/Power failure to copy Loreto on early correspondence

48. The retainer agreement between the City and Faskens provided that:

> All correspondence to Ms. Viinamae or her designate(s) will be copied to Mr. Loreto and in his absence to Mr. Brown.[56]

Despite this provision, Loreto was not initially copied on all correspondence between Power and Fecenko with respect to the MFP matter. Fecenko testified that his failure to do so was an unintentional oversight.[57]

b) Legal Service's reliance on Faskens to take the place of Legal Services for Y2K matters

49. Under the retainer, Faskens was to act in the place of Legal Services, and was to perform all of the functions of Legal Services for Year 2000 matters. Loreto testified that Faskens was to play the same role for Year 2000 matters that Legal Services would have played.[58] Fecenko agreed with Loreto's testimony that the role of Faskens under the Year 2000 retainer was the same as the role of Legal Services.[59]

50. Fecenko testified that although there was no formal briefing of Faskens regarding City policies and structures, he received a form of briefing from Power related to

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[55] COT015676, 63:8:41.
[56] COT006447 at COT06448, 26:1:2.
[57] Fecenko Affidavit, para. 19, 04/03/2003 at 17-18.
[58] Loreto 04/02/2003 at 133-134.

Power's role. In addition, he had discussions with Loreto in order to better understand Faskens' role.[60]

51. Fecenko never reviewed the Council authority for the MFP or any other transaction that he did for the City throughout the Year 2000 retainer. He did not believe that a review of Council authority was within the scope of Faskens' role.[61]

c) Legal Services' reliance on the commercial reasonableness letter

52. As discussed in Chapter 2, City Legal had a practice of approving contracts "as to form" prior to their execution. The approval as to form meant that the terms and conditions of the contract were standard, normal terms that were not prejudicial to the City.[62]

53. Loreto testified that he advised Power that Fecenko should approve the MLA as to form since Fecenko had been involved in reviewing the documentation. At Power's suggestion, Loreto agreed to approve the MLA as to form provided that Fecenko confirmed that the MLA was "within the realm of commercial reasonableness".[63]

54. Fecenko agreed that he discussed the MFP transaction with Loreto, who told him that it would be an unnecessary duplication of effort for both of them to review the relevant legal documents. According to Fecenko, Loreto instructed him to review all relevant documents in order that Loreto could approve the agreements as to form.[64]

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[59] Fecenko 04/07/2003 at 38-39.
[60] Fecenko 04/03/2003 at 142-144.
[61] Fecenko 04/07/2003 at 39-40.
[62] Loreto 04/01/2003 at 262-263.
[63] Loreto Affidavit, para. 6, 04/01/2033 at 207-208.
[64] Fecenko Affidavit, para. 19, 04/03/2003 at 17-18.

55. Fecenko acknowledged that he was aware that Loreto was relying on his commercial reasonableness letter in approving the MLA as to form and that Loreto was the intended audience of the letter, even though it was addressed to Power.[65]

56. Loreto stamped and initialled the MLA as approved as to form on the basis of Fecenko's commercial reasonableness letter.[66] In other words, he relied on it as confirming that the terms and conditions of the agreements, were considered "normal" or "standard" for an agreement of that type.[67] Thus, Loreto did not read the draft MLA prior to completing the approved as to form stamp.[68]

57. The City submits that Loreto reasonably relied on Fecenko and the commercial reasonableness letter in approving the MLA as to form. Fecenko was clearly instructed by Loreto to perform all necessary due diligence; his unqualified letter wrongly asserted that he had done so.

[65] Fecenko 04/07/2003 at 26.
[66] Loreto Affidavit, para. 11, 04/03/2003 at 210.
[67] Loreto Affidavit, para. 11, 04/03/2003 at 210.
[68] Loreto Affidavit, para. 11, 04/03/2003 at 210.

7. The comfort letter

58. In January 2000, MFP asked the City to provide an opinion letter from the City Solicitor. MFP needed the letter for one of their funding partners, Canada Life Assurance Company ("Canada Life").[69] MFP provided a draft comfort letter to Power, and asked that the City Solicitor approve it.[70] Power forwarded the request to Loreto.[71]

a) Process undertaken by Loreto in preparing the comfort letter

59. Loreto testified that on or about January 13, 2000, he received a voicemail message from Power raising the prospect of the City Solicitor providing an opinion letter to MFP and Canada Life on certain matters relating to the MLA as executed.[72] On January 13, 2000, Power sent an email to Loreto asking whether the opinion letter was within the reasonable expectations of MFP and Canada Life, and, in the event it was, asking Loreto to revise the attached draft letter received from MFP into a form acceptable to the City.[73]

60. On January 14, 2000, Loreto sent an email to his Director, Jim Anderson ("Anderson"), asking whether it was the ordinary practice of Legal Services to give such opinions and whether there was a standing authority that would permit the City Solicitor to give the opinion.[74] Loreto testified that he was subsequently advised that it was not inappropriate to provide such an opinion.[75]

61. On January 19, 2000, Power sent an email to Loreto asking whether the City Solicitor would provide the opinion, and if so, when the opinion would be provided.

[69] Loreto 04/02/2003 at 6.
[70] Harle Affidavit, paras. 26, 28, 11/24/2003 at 14-16.
[71] COT006264, 26:1:18.
[72] Loreto Affidavit, para. 20, 04/01/2003 at 214.
[73] COT006264, 26:1:18; COT006265, 26:1:19; Loreto Affidavit, para. 21, 04/01/2003 at 215.
[74] COT006263, 26:1:20.
[75] Loreto Affidavit, para. 22, 04/01/2003 at 215.

Power stated in the email that MFP was holding back a payment to a vendor pending the opinion.[76]

62. On January 19, 2000, Loreto sent an email to Power indicating that he would require additional documents and information prior to agreeing to provide the opinion.[77] Loreto asked Power to provide him with the following items:

a. a certified copy of the Council resolution authorizing the City to enter the MLA;

b. at least one executed copy of the MLA, the Program Agreement and any Equipment Schedules entered into under the authority of those agreements;

c. an explanation why the MLA was dated July 30, 1999 and referred to a Program Agreement dated July 30, 1999, while the Program Agreement was dated October 1, 1999 and refers to an MLA dated October 1, 1999;

d. an explanation why the MLA and Program Agreement had no expiry date when the staff report recommending the leasing contract referred to three years in the recommendations and a fixed 36 month period in the description of the tender process;

e. verification that Viinamae had the authority to sign the Program Agreement on behalf of the City; and

f. an explanation of the nature of the agreement between Canada Life and MFP.[78]

[76] COT006248, 26:1:24.
[77] COT006256, 26:1:25.
[78] COT006256, 26:1:25.

63. Loreto testified that he asked for these documents prior to providing an opinion because they were relevant to the opinion.[79]

64. On January 26, 2000, Loreto received a voicemail message from Power that he would be providing Loreto with the certified copy of the Council resolution, the Program Agreement, the MLA and an addendum correcting the dates on the MLA. In addition, Power would be providing a letter from MFP to Canada Life regarding the assignment of two of the schedules. Power advised Loreto that the certified copy of the Council Report provided flexibility to extend the lease beyond three years.[80]

65. Loreto swore that he spoke with Power on January 28, 2000, and made notes of that discussion on a copy of his email of January 19, 2000.[81] Power told him that the purpose of the Council resolution was to allow for changes to ensure that all of the equipment financing did not end at the same time. Loreto stated that Power told him that the flexibility clause had been added to the Council Report at P&F, and provided that some leases would be for 36 months, while some would be for 60 months. Loreto accepted Power's explanation as reasonable.[82]

66. Loreto testified that by January 28, 2000, he had reviewed the MLA and determined that section 20.2 of the MLA allowed MFP to obtain an opinion letter from the City Solicitor. By email dated January 28, 2000, Loreto advised Power that there was authorization for the comfort letter. However, he also said that before the letter could be finalized and approved, he required verification of Viinamae's signing authority with respect to the Program Agreement, Amending Agreement No. 1 and the Equipment Schedules.[83]

[79] Loreto 04/02/2003 at 21-22.
[80] COT006239, 26:1:28.
[81] Loreto Affidavit, para. 30, 04/01/2003 at 219; COT006256, 26:1:25.
[82] Loreto Affidavit, para. 30, 04/01/2003 at 219; Loreto 04/02/2003 at 22-23.
[83] Loreto Affidavit, para. 31, 04/01/2003 at 220; COT010985, 26:1:30.

b) Viinamae's signing authority

67. Loreto also sent an email to Spizarsky in PMMD on January 20, 2000, enquiring into Viinamae's signing authority.[84] Spizarsky phoned Loreto on January 20, 2000, and advised him that Viinamae did not have the authority to sign the Program Agreements.[85]

68. Loreto spoke to Power on January 31, 2000, and again advised that he needed confirmation of Viinamae's signing authority before approving the comfort letter. Loreto suggested that the Program Agreement could be re-executed by the proper signing officers.[86]

69. On February 3, 2000, Viinamae sent a memo to Spizarsky, copied to Andrew, Liczyk, Pagano, Power and Loreto to explain why she had signed MFP documents.[87]

70. Between February 3 and February 5, 2000, a series of emails were exchanged between Spizarsky, Pagano, Viinamae and Andrew, with copies to, among others, Power, Liczyk, and Loreto.[88] Loreto testified that as a result of these emails, his review of the Council Report, and a discussion with Anderson, Loreto concluded that there had been no specific delegation of signing authority to Viinamae.

i) Re-execution of the MFP documents and confirmation of Council authority

71. On February 15, 2000, Power left a voice mail message for Loreto, advising him that the agreements with MFP would be re-executed with proper signing authority.[89] Later on the same day, Loreto spoke with Power. Loreto later prepared a memo to file which reads:

[84] COT006249, 26:1:26.
[85] COT006240, 26:1:27.
[86] COT006228, 26:1:31.
[87] COT003828, 26:1:32.
[88] COT011034, 26:1:33; COT006219, 26:1:34; COT011038, 26:1:35.
[89] COT006217, 26:1:36.

> Telephone conversation with Brendan Power at 4:29p.m. I acknowledged his voice mail of 3:45p.m.
>
> I confirmed that Jeff Abrams' wants assurance that the equipment schedules to be signed are the same as those attached to the Master Lease except that they have been completed. Same too with the Program Agreement. Clarified with Brendan that the equipment schedules to be signed relate to the Program Agreement. Confirmed with him that the Program Agreement is to be re-executed. Confirmed with Brendan that the amounts to be spent contemplated by the equipment schedules to be signed do not exceed the amounts approved by Council for such equipment. Brendan said Council $43 million. He said these schedules total $33 million. Brendan said he would be receiving the new documents tomorrow and will be sending the same to me.[90]

72. In addition Loreto testified that he independently recalled Power telling him that the limit on the leases was $43 million and there was $33 million on lease at the time.[91]

73. Loreto had also reviewed the Council authority for the MFP deal. He testified that, based on his review of the Council report authorizing the deal, his opinion was that the deal had a limit of $43 million.[92]

74. Power could not recall the conversation with Loreto in detail. He testified that he thought it was reasonable that he would tell Loreto that the schedules totalled $33 million, but that he did not think that he told Loreto that the limit on the leases was $43 million. Nevertheless, he did not have a specific recollection of the conversation.[93]

75. The City submits that Loreto's evidence is entirely credible and should be preferred over Power's. His memo to file was created within ten minutes of the conversation. In addition, Loreto testified he had an independent recollection of the conversation. The City submits that Power advised Loreto that Council had authorized the spending of $43 million, and that the equipment schedules entered into totalled $33 million.

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[90] COT011041, 26:1:37.
[91] Loreto 04/02/2003 at 38-39.
[92] Loreto 04/02/2003 at 27-28.
[93] Power 03/31/2003 at 8-13.

76. As of February 15, 2000, there were, in fact, four Equipment Schedules and one Program Agreement that had been signed by the City. According to lease summaries provided by MFP, Equipment Schedules 838-1, 838-2, 838-3, 838-4 and Program Agreement PA1-1 had all been signed by February 15, 2000.[94] The total equipment on lease as of February 15, 2000 was actually $59,954,166.41,[95] an amount well in excess of the $33 million that Power told Loreto was on lease.

77. Loreto testified that if he had known that the amount on lease exceeded $43 million, he would have spoken to his Director, Anderson, and he probably would have also spoken to the City Solicitor because he believed that Council had authorized a limit of $43 million.[96] Loreto expected that the City Solicitor would have taken the matter to be dealt with at a senior level, by the Executive Director, I&T, the CFO and Treasurer, and the CAO.[97]

78. Loreto did not do any independent verification of the amount on lease, nor was he asked to so. Instead he reasonably relied on Power's information. It is not the role of the City solicitor to independently verify this kind of operational data.[98]

79. On February 16, 2000, Loreto sent an email to Power, attaching the draft comfort letter with revisions.[99] The email also included instructions for the re-execution of the documents.[100]

80. The City submits that Loreto was misled by Power about the amount of equipment that had been placed on lease. It remains unclear whether Power knowingly misled him or whether he was as casual about the limits of Council authority as he was about negotiating the City's contracts. In either event, the comfort letter was drafted on the basis of completely erroneous information.

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[94] COT020647, 26:2:17; COT021049, 26:2:17; COT021063, 26:2:17; COT021077, 26:2:17; COT021650, 26:2:17.
[95] Loreto 04/02/2003 at 39-40.
[96] Loreto 04/02/2003 at 41.
[97] Loreto 04/02/2003 at 41.

c) Approval of the comfort letter

81. On March 10, 2000, Loreto, Harle (MFP), and Gordon Willcocks of McCarthy Tétrault LLP (MFP's external counsel) discussed the comfort letter by telephone.[101] Loreto testified that his handwritten notes of that discussion appear on the February 16, 2000 draft of the comfort letter.[102]

82. On March 14, 2000, Loreto sent an email to Doyle, attaching the comfort letter.[103] In the email, Loreto set out the background to the comfort letter and asked Doyle to advise whether it was acceptable to him.

83. Loreto testified that Doyle made several typographical changes to the draft comfort letter, but did not raise any substantive concerns about it.[104] Doyle testified that he executed the letter based on the information provided to him by Loreto.[105] The comfort letter was forwarded to Harle on March 15, 2000, with copies to Andrew and Liczyk.[106]

d) Contents of the comfort letter

84. Loreto testified that he understood that MFP was looking for three assurances from the comfort letter. First, that the agreement was in accordance with the Council authorization; second, that the documents had been signed by the City staff with proper signing authority; and third, that the agreement was enforceable.[107]

85. The comfort letter included the following comments:

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[98] Loreto 04/02/2003 at 28-29.
[99] COT010994, 26:1:38; COT010995, 26:1:42.
[100] COT010994, 26:1:38.
[101] Loreto Affidavit, para. 40, 04/01/2003 at 225; Harle Affidavit, para. 27, 11/24/2003 at 15.
[102] Loreto Affidavit, para. 40, 04/01/2003 at 225; COT010995, 26:1:42.
[103] COT011019, 26:1:43; COT011020, 26:1:44.
[104] Loreto Affidavit, para. 42, 04/01/2003 at 226.
[105] Doyle 04/08/2003 at 121-122.
[106] COT023476, 26:1:45.
[107] Loreto 04/02/2003 at 222-223.

> Based upon the foregoing, and subject to the qualifications set forth below, I am of the opinion that:
>
> 1. The execution, delivery and performance of the Agreements has been duly authorized by all necessary corporate action on the part of the City.
>
> 2. The persons executing the Agreements on the behalf of the City are duly authorized to do so.
>
> 3. The Agreements constitute legal, valid and binding agreements of the City and are enforceable against the City in accordance with their terms.[108]

86. Doyle testified that he understood the terms to mean that the contracts, as entered into with MFP to March 2000 were all authorized by Council that there was no issue with respect to signing authority for the documents, and that the documents were binding on the City.[109]

87. Loreto inquired into the limits of the lease and the amount put on lease as part of his inquiry into whether the agreement was in accordance with Council authorization.[110] Loreto believed at the time that if the total amount put on lease exceeded $43 million, that would have been outside what Council authorized.[111] The City submits that Power informed Loreto that there was only $33 million on lease, and based on that information, Loreto drafted, and Doyle approved, the comfort letter. 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 MFP leases were offside Council authority. In the end, it took until July 2001 for the City to learn the truth.

[108] COT023476 at COT023478, 26:1:45.
[109] Doyle 04/07/2003 at 209-210.
[110] Loreto 04/02/2003 at 230-231, 233.
[111] Loreto 04/02/2003 at 27-28.