1. Overview

1. The evaluation of the responses to the RFQ, culminating in the P&F Report dated July 9, 1999 was conducted jointly by Treasury and by I&T, with some very limited input from PMMD. The P&F Report, which was adopted by Council on July 27, 1999, recommended a leasing program with MFP, on the basis that leasing with MFP was a better option for the City than purchasing computer equipment outright. This recommendation was premised on financial analysis conducted by Rabadi which assumed that 43.15 million of equipment would be leased for a three year term, and that all of that equipment would be put on lease at the lease rates quoted by MFP in its response to the RFQ. These assumptions were based on the information that I&T provided to Rabadi at the time the P&F Report was being drafted. Without these assumptions, the recommendations to Council would have been significantly different.

2. Early versions of the P&F Report drafted by Rabadi set out these assumptions in some detail. As the P&F Report went through various drafts, and as version control shifted between Rabadi and Power, some of the clarity with which these assumptions had initially been described was lost. Accordingly, not all of these assumptions were readily apparent on a cursory reading of the P&F Report, or even from a review solely of its recommendations. Ultimately, however, when read in its entirety, the P&F Report does articulate each of these underlying assumptions, and can only be understood as being premised on these assumptions.

3. Council's approval of the leasing program with MFP was based on the parameters of the P&F Report. The approved lease program therefore limited the amount of equipment on lease to $43 million, for a three year lease term, at the lease rates quoted by MFP.

4. Notwithstanding the relatively narrow parameters prescribed in the P&F Report, and although drafted with significant input from individuals in I&T, those involved from I&T insisted that they never intended to so narrowly circumscribe the City's leasing

relationship with MFP. Rather, I&T's vision was to establish a sweeping vendor of record relationship that would allow I&T to put a limitless amount of equipment on lease at undetermined rates for an indeterminate period of time. This vision appears nowhere in the document. The only real limitation to this otherwise unrestricted relationship with MFP was the imposition of a three year limit.

5. The leasing vision articulated by Power, Andrew, and Viinamae was a business absurdity. It provided no certainty or transparency to the City, and would have held the City captive to lease rates unilaterally imposed by MFP. Most significantly, it would have given extraordinary delegated authority to I&T (and in particular to the CMO). In these circumstances, it was particularly important that Council understand, through the P&F Report, what I&T intended, and the broad scope of the approval it was seeking.

6. It was I&T's responsibility to clearly define its intended leasing program, and to ensure that it met City requirements, both operationally and in terms of complying with the City's Purchasing and Financial Control Bylaws. It was up to I&T, when enlisting Treasury's assistance to conduct a financial analysis and submit a joint report to Council, to ensure that its vision and its underlying assumptions were clearly explained to Treasury. I&T did not do any of these things. As a result, the evidence given by witnesses from I&T about the lease program bore little resemblance to that given by the witnesses from Treasury. It became apparent from Inquiry testimony that I&T and Treasury were like "two ships passing in the night" in terms of each of their respective understandings of the parameters of the lease program and its manner of implementation. This resulted in, among other things, a P&F Report that did not clearly articulate, without a careful read, the limits on the intended leasing program.

7. Moreover, a careful read of the P&F Report does not accord in any meaningful way with the vision of the leasing program described by the I&T witnesses, or I&T's implementation of that program, ultimately through the CMO.

2. Roles of I&T, Treasury and PMMD

a) Role of I&T

8. I&T was responsible for the operational components and assumptions underlying the evaluation of the responses to the RFQ.[1] Power was the primary point of contact between I&T and Treasury with respect to the evaluation of the responses to the RFQ, and was the person in I&T primarily responsible for the review of those responses.[2]

b) Role of Treasury

9. Treasury understood that I&T was leading the process, which began in May 1999 with the RFQ, and culminated in the contracts with MFP.[3] Program departments such as I&T who would be implementing the program once approved were in a better position than Finance, which served a corporate services role, to assess which vendors would satisfy that program department's requirements.[4]

10. Treasury's role in evaluating the RFQ responses was limited to conducting the lease versus purchase analysis by comparing the bid pricing to debenturing.[5] Treasury was asked to do a financial evaluation of the proposals.[6] This evaluation involved a financial calculation of the costs to the City of leasing equipment for a three year period with and without the exercise of a purchase option. Power gave Rabadi the RFQ responses and the additional operational information he needed to perform this financial analysis.[7]

[1] Power 03/27/2003 at 199-200.
[2] Power 03/27/2003 at 206, 199.
[3] Brittain 07/29/2003 at 113.
[4] Brittain 07/29/2003 at 143.
[5] Brittain 07/29/2003 at 110, 113.
[6] Power 03/07/2003 at 99; Power 03/24/2003 at 59.
[7] Power 03/27/2003 at 200, 202; Rabadi 06/25/2003 at 56.

i) Treasury relied on I&T

11. Treasury was responsible for the financial analysis of the bid responses, and was jointly responsible with I&T for the P&F Report. In fulfilling these responsibilities, Treasury relied on information provided by I&T.[8] To the extent that the P&F Report contained non-financial information concerning the proposed leasing transaction, Rabadi relied on I&T to provide that information.[9]

12. Treasury had no previous experience or involvement with analyzing responses to RFQs or RFPs.[10] Brittain had virtually no prior leasing experience before Treasury became involved in the analysis of the responses to the RFQ.[11] He believed that Power did have computer leasing expertise.[12] Similarly, Liczyk understood that Brittain and his group were relying on Power to have the necessary leasing expertise.[13]

13. Brittain believed that it was up to each of I&T, PMMD, and Treasury to ensure it had the necessary expertise and resources to fully participate in the assessment and review of the RFQ and the responses to it. Brittain was satisfied that Treasury had the necessary expertise to fulfill its role within this exercise.[14] He had no reason to believe the other parties did not have the necessary expertise to carry out their part.[15]

c) Role of PMMD

14. PMMD had a very limited role in the evaluation of the responses to the RFQ and the P&F Report summarizing that evaluation.[16] It was not PMMD's role to assess the technical needs of the requesting department.

[8] Brittain Affidavit, para. 28, 07/09/2003 at 150-151.
[9] Rabadi Affidavit, para. 58, 06/24/2003 at 138-139.
[10] Altman 07/03/2003 at 251-252.
[11] Brittain 07/29/2003 at 145.
[12] Brittain 07/29/2003 at 107-110.
[13] Liczyk 11/03/2003 at 267-268.
[14] Brittain 07/30/2003 at 59.
[15] Brittain 07/30/2003 at 60-61.
[16] Beattie 04/01/2003 at 9-10.

> What I meant to say is that we did not have the expertise in leasing activities and for any purchase, the -- expertise in the evaluation of the results of the quotation lies within the department.[17]

15. PMMD's function, rather, was to make sure that the proper procurement practices and policies were followed**.** Specifically, after I&T forwarded its recommendation of and justification for the winning bid to PMMD, PMMD staff would review this information for completeness, and to ensure that fair consideration has been given to each of the responses and that either the lowest bid had been chosen or a valid explanation was given for something other than the lowest bid.[18] PMMD was copied on various drafts of the P&F Report, but was involved only to the extent of suggesting certain changes to the report which dealt with the description of the tender and related process issues.[19]

16. Where a report to Council was required, PMMD would assist in drafting that report, to ensure that it adequately addressed purchasing concerns. PMMD staff involvement was usually limited to ensuring that the report accurately and adequately described the procurement process used. While they might ask questions where obvious issues arose, normally the necessary expertise needed to fully scrutinize the substantive contents of a report resided in the initiating department, and not with PMMD staff.[20]

17. Pagano agreed that the involvement of PMMD in the development and description of I&T's needs assessment through the RFQ, and the evaluation of bid responses, was modest.[21]

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[17] Pagano 02/26/2003 at 5.
[18] Pagano 02/24/3002 at 197,199, 206.
[19] Beattie 04/01/2003 at 10-12.
[20] Pagano 02/24/2003 at 197-198.
[21] Pagano 02/24/2003 at 205.

3. Rabadi was responsible for financial analysis

18. Rabadi was responsible for conducting the financial analysis of the six RFQ responses under the direction of Altman and Brittain. He had two objectives: first, to compare the quoted lease rates and to rank the bidders to allow for selection of the lowest bidder; and second, to compare the cost of leasing to the City's cost of borrowing to determine whether leasing was the preferable means of financing.[22] Rabadi described his role as follows:

> Well, as far as I saw it, I would have to evaluate each of the RFP responses -- RFQ responses to see which one (1) was the lowest cost to the City. And I had to compare it with alternate sources of financing the transaction. Either it comes from reserve funding -- if we had reserve funds available, or we debenture it outside.[23]

19. Rabadi considered a number of factors to be relevant to his analysis, including the lease rates quoted per $1000, the end of lease term purchase option (per $1000), the present value of lease payments assuming the purchase option was not exercised, the present value of lease payments if the purchase option was exercised, and the implicit interest rate in each response.[24]

20. By June 16, 1999, Rabadi had completed a preliminary analysis of the RFQ responses, which he circulated to Power with a copy to Altman and Brittain, and in which he asked Power to check the inputs and review the calculations.[25] Rabadi then met with Power on June 17, 1999 to review the analysis, and followed up that meeting with an email explaining the methodology he used in conducting the analysis. Rabadi advised Power that on the basis of his calculations of present value and internal rates of

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[22] Rabadi 06/24/2003 at 128; Power 03/27/2003 at 204.
[23] Rabadi 06/25/2003 at 35-36.
[24] Rabadi 06/24/2003 at 129; COT014099, 46:1:29.
[25] Rabadi Affidavit, para. 27, 06/24/2003 at 129; COT014077, 46:1:27; COT014078, 46:1:28; COT014084, 46:2:4.

return, both with and without the exercise of the end of term purchase option, in his opinion MFP gave the lowest rate and thus was the lowest cost financing option.[26]

21. No one ever questioned Rabadi's analysis or calculations in this regard.[27] In fact, the Inquiry's expert, Chris Kerr ("Kerr") confirmed that Rabadi's numbers were accurate.[28] Rabadi's financial analysis cannot be faulted, nor can he be held responsible for the final P&F Report, as he reviewed the final version with Liczyk in detail by telephone before she gave her authorization to Andrew to sign it on her behalf.[29]

22. Rabadi made a number of assumptions for the purpose of his financial analysis. These included: if an end of term purchase option was exercised it would be for approximately $170 per $1000 of equipment;[30] only $43.15 million (plus or minus 10 percent[31]) of equipment would be leased under this RFQ;[32] the equipment would all be leased within the 90 days in which the quoted lease rates remained open; and that the lease documentation could all be put in place within that same 90 days.[33] These assumptions were based on information that I&T provided to Rabadi.

23. Rabadi did not think it necessary to consider the various bidders' responses to the RFQ with respect to future lease rate changes (clause 1.1.17) because of his belief that all of the $43 million of equipment would be placed on lease during the 90 day period within which MFP's quoted lease rates were fixed.[34] Furthermore, he understood that if it transpired that not all of the equipment was put on lease before the end of the 90 day period, then a new tender and report to Council would be required. For this

[26] Rabadi Affidavit, para. 28, 06/24/2003 at 129-130; COT014099, 46:2:53; COT014100, 46:1:30; COT014112, 46:3:11; COT014113, 46:3:12.
[27] Rabadi Affidavit, para. 29, 06/24/2003 at 130; Power 03/24/2003 at 73-74.
[28] Kerr 09/15/2003 at 206.
[29] Rabadi 06/26/2003 at 7.
[30] Power 03/27/2003 at 200-201.
[31] Rabadi 06/25/2003 at 71.
[32] Rabadi 06/25/2003 at 78-79.
[33] Rabadi 06/25/2003 at 66, 80-81, 72.
[34] Rabadi 06/25/2003 at 67.

reason, Rabadi included recommendation 4 in the P&F Report which required reporting back to Council for future purchases.[35]

24. Although the RFQ itself may have contemplated that the value of equipment and software placed on lease might exceed $43 million, Rabadi made the decision to limit the scope of the P&F Report, and thus the amount to be approved by Council, to $43 million.[36]

[35] Rabadi 06/25/2003 at 67.
[36] Rabadi 06/25/2003 at 69-70.

4. Drafting of the report

a) The requirement for a report

25. The City's purchasing by-law required Council approval for all spending commitments of more than $500,000.[37] In proposing to lease $43 million of computer equipment and software, staff was therefore required to prepare a report to P&F,[38] for approval by Council, which analyzed and compared the benefits of lease financing with other financing options, recommended whether or not to lease, and if so, with whom.

26. The process of drafting the report essentially consisted of three stages:

a. During the initial phase, from June 24 to July 2, 1999, Rabadi had version control. Rabadi obtained input for the various versions of the report during this time from Power, Andrew, Viinamae, Spizarsky and Liczyk, and copied Altman and Beattie from time to time.[39] The report recommended that the City enter into a leasing contract with MFP for a total cost not exceeding $43.15 million for three years, and considered various options for financing the use of the equipment for 3 or 4 years.[40]

b. The second phase began on July 6, 1999 when Power significantly restructured the report to remove the reference in the recommendations to a maximum of $43.15 million in equipment cost, and removed all references to the Y2K project and related budget.[41]

c. After consulting with Liczyk about concerns raised by the *Municipal Act*, Rabadi again restructured the report to address those concerns by changing his analysis to reflect short-term debentures to match the

[37] Pagano 03/05/2003 at 29-30; COT032007 at COT032010, 3:1:37
[38] Garrett 12/10/2002 at 28-29.
[39] Rabadi 07/03/2003 at 203-204.
[40] COT012702 at COT012704, 48:1:7.
[41] Rabadi 07/03/2003 at 204; COT013811, 48:1:12.

expected useful life of the computer assets.[42] The most significant change made at this time was the addition of a fourth recommendation to require the CFO and Treasurer and the Executive Director, I&T to report back to Council for any expenditures of computer equipment in excess of $43 million.[43] Liczyk was consulted by Rabadi with respect to these revisions, and Liczyk and Andrew signed the final report to P&F based on these revisions.

27. The fact that version control shifted back and forth between Rabadi and Power affected the clarity which existed in the draft report when it was almost entirely controlled by Treasury. As I&T made later revisions, this clarity was edited out. Brittain acknowledged that, in hindsight, it was a mistake to permit the P&F Report to be drafted without anyone taking responsibility for version control of the various drafts.[44]

28. The following more detailed analysis of the various drafts of the report, and the email and other communications which discuss these drafts, are summarized in a document prepared by counsel for the City of Toronto, which was introduced in evidence through Rabadi.[45]

b) Rabadi controlled drafts one through four

29. Rabadi drafted the initial version of the P&F Report on or about June 24, 1999 ("Rabadi June 24 Draft"). Rabadi identified as the purpose of this report "to compare leasing to financing the computers through long term debt and make recommendations on the appropriate financing strategy". In this draft, Rabadi referenced, *inter alia*, "a total cost not exceeding $43.15 million for three years", the fact that "equipment worth $_ has

[42] Rabadi 07/03/2003 at 204; COT012722, 49:2:18.
[43] Rabadi 07/03/2003 at 186-187.
[44] Brittain 07/31/2003 at 61-62.
[45] COT072853, 46:2:64.

already been received by the City", and the postponement of a cost-benefit analysis of exercising the purchase option until the end of the lease term.[46]

30. Rabadi had discussions with Andrew, Viinamae, and Power on June 24, 1999 concerning the Rabadi June 24 Draft. He followed up by email and voicemail on June 25, 1999, requesting the text which I&T wished to incorporate into the P&F Report, and the value of the equipment I&T had already received.[47]

31. On June 27, 1999, Power provided his first draft of a document entitled "CFO Report-Leasing dot June 27,99 (Brendan to Jim, Lana, Nadir).doc, DRAFT, June xx, 1999" ("Power June 27 Draft") to Andrew, Viinamae, and Rabadi. This document identified as its purpose "to seek approval to enter into a contract with MFP Financial Services Ltd . . . pending contract negotiations acceptable to the City". Power focused on some of the operational advantages of leasing, such as flexibility to adapt quickly to changing technology and business needs, and value-added services such as asset management and reporting.[48]

32. Rabadi revised his Rabadi June 24 Draft to incorporate the background information from Power's June 27 Draft into the next version of the report ("Rabadi June 29 Draft").[49] Rabadi sent a copy of this draft to Spizarsky and Beattie in PMMD on June 29, 1999, and asked for their "recommended changes", together with confirmation of their agreement with the decision to "go with MFP".[50] Spizarsky's proposed changes were incorporated into Rabadi's next draft on June 30, 1999 ("Rabadi June 30 Draft").[51] These changes were minor in nature. They reflected PMMD's concerns with respect to the purchasing process only, and did not address substantive issues dealt with in the report.[52]

[46] COT012765, 48:1:1; Rabadi 07/03/2003 at 76-78.
[47] COT031948, 46:2:14.
[48] COT031847, 46:2:15; COT031848, 48:1:1A; Rabadi 07/03/2003 at 93.
[49] COT013052, 46:1:91; Rabadi 07/03/2003 at 93-94, 96, 99.
[50] COT018126, 46:2:16; COT012716, 49:2:11.
[51] Beattie 03/31/2003 at 78-79; COT005770, 46:1:7.
[52] Beattie 04/01/2003 at 10-11.

33. On Wednesday, June 30, 1999, Rabadi provided a copy of the Rabadi June 30 Draft to Liczyk for her review. Liczyk made numerous handwritten comments in red ink on the Rabadi June 30 Draft and returned it to him.[53] These changes included: deleting reference to an assumption that leasing rates would remain at existing levels for future cycles in concluding that leasing would result in overall lower charges to the operating budget as compared to ten year debenture financing; a statement that the estimated life of the new equipment was three years for computers and five years for servers; adding a chart that compared annual lease and debenture costs; adding a chart under Recommendation 1 that showed annual lease rental amounts; and including a plan to recover lease costs from operating user programs.[54]

34. On July 1, 1999, Andrew sent a short email to Rabadi, Brittain, and Bob Batten (”Batten”) with a copy to Liczyk. He inquired: “[w]hat is the status of the Council report?”.[55]

35. On Friday, July 2, 1999, Rabadi made the changes requested by Liczyk (“Rabadi July 2 Draft”). For some reason that Rabadi was unable to recall, he left in the reference to the assumption that leasing rates would remain at existing levels in the future.[56] Rabadi placed a note on the document which read:

> Don, Leaving, This is urgent. pl. pass it on to Wanda – may see her comments, etc. Nadir.

36. Rabadi advised Liczyk through another handwritten note attached to the Rabadi July 2 Draft that he would not be back in the office until Tuesday, July 6, 1999, and that, if she wished, she could “give [the document] to Don & he will call me at my residence”.[57]

[53] COT012884, 46:1:22.
[54] COT003887, 48:1:5.
[55] Rabadi 07/03/2003 at 129-130; COT031854, 46:1:56.
[56] Rabadi 07/03/2003 at 102-104; Liczyk 11/12/2003 at 156.
[57] COT012883, 46:3:20.

37. On Friday, July 2, 1999, Rabadi emailed a copy of the Rabadi July 2 Draft to Andrew, Viinamae, and Power, with a copy to Liczyk, Altman, Spizarsky and Beattie, advising that “Wanda has done a preliminary review and I will address some of her concerns”.[58] Rabadi also faxed a copy of the Rabadi July 2 Draft to Pagano and Beattie.[59] Rabadi followed up his email with a further email to Andrew and Viinamae, advising that “I have just emailed you a draft which has gone through one reading by Wanda”.[60]

38. Andrew responded to Rabadi on Saturday, July 3, 1999, emailing him suggested minor revisions, such as changing “I&T” to “Information and Technology”, and changing “Y2K” to “Year 2000”, and adding the words “and private” to a reference to the public sector. Andrew also stated: “I thought we discussed leasing servers over a longer time frame such as 5 years I did not see any reference to this”. This email was copied to Viinamae, Power, Liczyk, Altman, Beattie and Pagano.[61]

39. Liczyk sent an email to Andrew, with a copy to Rabadi, Brittain, and Batten, on Sunday, July 4, 1999. She advised “I read it on Thursday and have left detailed comments to be included at the office on Friday. I think you should see a draft late MOnday [sic] I hope”.[62] This appears to be a response to Andrew’s July 1, 1999 email enquiring about the status of the Council report[63], and suggests that Liczyk had not yet seen the Rabadi July 2 Draft which incorporated her detailed comments[64], even though Rabadi had sent it to her by email on Friday, July 2, 1999.[65]

40. Very early on Monday, July 5, 1999, Viinamae advised Rabadi by email, in response to a request by Rabadi for information on the timing of receipt of the leased equipment, that not all of the equipment would be received by July 31, 1999, but that

[58] COT031854, 46:1:56; COT031855, 46:1:57.
[59] COT003887, 48:1:5; COT014350, 48:1:8; COT015490, 48:1:9; COT015623, 48:1:10; Rabadi 07/03/2003 at 120.
[60] COT067473, 46:2:57.
[61] COT014321, 46:1:41.
[62] COT014322, 46:1:42.
[63] COT031854, 46:1:56.
[64] Rabadi 07/03/2003 at 138.
[65] COT031854, 46:1:56; COT031855, 46:1:57.

the target was September 1999. Viinamae also discussed budget issues concerning the $43 million, and advised Rabadi that she thought the details of the responses to the RFQ were proprietary, and thus confidential.[66] This led to the decision not to include the RFQ responses as attachments to the P&F Report.[67]

c) Power redrafted/ restructured the report

41. On July 5, 1999, Power sent a restructured draft report to Viinamae ("Power July 5 Draft"). He said:

> "I have restructured the document somewhat. It still needs a lot of work by Finance. Please give it a rigorous review and send your comments to me at home … Jim has indicated to Wanda that she may get a draft of this document tonight. I have no problem sending it to her but I would like your views first."[68]

42. Rabadi was away from the office on July 5, 1999, and was not involved in or aware of the fact that Power was restructuring the document.[69]

43. The Power July 5 Draft made many changes to the Rabadi July 2 Draft. Some of the more significant changes were:

a. references to $43.15 million were deleted from the text of the report;

b. no recommendation to charge user operating programs for lease costs;

c. no charts setting out annual lease information;

d. no reference to three year replacement cycle;

e. no reference to future changes to lease rates;

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[66] COT012257, 56:2:7; Rabadi 07/03/2003 at 139-140.
[67] Rabadi Affidavit, para. 57, 06/24/2003 at 138; COT004230, COT012270.
[68] COT031858, 46:2:18; COT031859, 63:8:13a; COT013811, 46:2:23.
[69] Rabadi 07/03/2003 at 142-143.

f. no reference to asset management advantages of leasing;

g. and no recommendation that purchase options would be reviewed at the end of lease term.[70]

44. Power testified that he may have removed the reference to the $43.15 million cap because "in our view the leasing agreement was for more than the $43 million".[71] The Power July 5 draft stated, in the analysis section, that: "For this analysis a capital budget of $43 million, and MFP's quotation has been used. The $43 million represents the Information and Technology 1999 hardware and software costs."[72] Andrew forwarded a copy of the Power July 5 Draft, together with Viinamae's comments on this draft, to Liczyk by email on July 6, 1999.[73]

45. On July 6, 1999 Power sent Rabadi a further revised draft ("Power July 6 Draft"), incorporating several changes requested by Viinamae. These changes included a recommendation that appropriate City officials be given authority to enter into the necessary agreements, that the leases be administered centrally by I&T, and that the confidentiality of the information contained in the appendices be maintained.[74]

46. A number of other draft reports exist from around this time, which appeared to make minor changes to the Power July 6 Draft. Those involved in these revisions appear to have been Altman (who made handwritten changes)[75]; Andrew, Power, and Viinamae who discussed certain revisions with Rabadi on July 6, 1999[76]; and Rabadi – who incorporated these and other changes in a number of versions of the report all dated July 6, 1999.[77] Power also made minor revisions on July 6, 1999, which he sent

[70] COT013811, 46:2:23; Rabadi 07/03/2003 at 149-151, 158-163.
[71] Power 03/25/2003 at 161-162.
[72] COT013811, 46:2:23.
[73] COT013805, 46:2:21.
[74] COT014362, 46:1:43; COT014363, 46:1:44; Rabadi 07/03/2003 at 164-166.
[75] COT012850, 46:2:25; COT012858, 46:2:28; Rabadi 07/03/2003 at 166-169.
[76] COT014140, 46:1:33; COT014141, 46:1:34; Rabadi 07/03/2003 at 169-170.
[77] COT012858, 48:1:15; COT014141, 46:1:34; COT014180, 46:2:24.

to Andrew and Viinamae ("Power July 6 Draft #2").[78] Viinamae confirmed to Power that this report "[l]ooks good".[79]

47. Andrew sent Liczyk a copy of the Power July 6 Draft #2 by email in the afternoon of July 6, 1999.[80] This date, July 6, 1999, was the first day of the July 1999 Council meeting.[81]

48. On July 7, 1999, Power responded to Viinamae's inquiry as to whether Liczyk had seen and approved the latest version of the report.[82] He indicated that: "She has a copy but I know she intends to rewrite the 1st main paragraph thats [sic] all I know".[83] Power testified that, in his view, this reference to the first main paragraph related to the funding sources paragraph of the P&F Report.[84]

d) Rabadi redrafted the report to address Municipal Act issues

49. An underlying assumption in each of the Rabadi Drafts from June 24 to July 2, 1999, was that the appropriate financing option to compare to lease financing ten year debentures. Likely on July 6, 1999[85], but possibly on July 7 or 8, 1999, Rabadi met with Liczyk in the Council Chambers to discuss a concern with the validity of this assumption, as it had come to Rabadi's attention that the *Municipal Act* might not permit the use of ten year debentures for assets with a useful life of less than ten years.[86] Following this conversation with Liczyk, Rabadi made significant revisions to the Power July 6 Draft #2 to reflect a change in his analytical approach in order to match the term of the debenture to the life of the asset.[87]

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78 COT014211, 46:2:32; COT014212, 46:1:17.
79 COT014211, 46:2:32.
80 COT013818, 46:2:29; COT013819, 46:2:30; Rabadi 07/03/2003 at 174-175.
81 Rabadi 07/03/2003 at 177-178.
82 COT014211, 46:2:32.
83 COT014218, 46:2:34.
84 Power 03/24/2003 at 123.
85 Liczyk 11/12/2003 at 75-76; Rabadi 07/03/2003 at 177-178.
86 Rabadi 07/03/2003 at 177-178; COT012731, 46:1:17; COT012732, 46:1:18.
87 Rabadi Affidavit, para. 63, 06/24/2003 at 140-141; Rabadi 07/03/2003 at 204.

50. There do not appear to be any versions of a report in the database following the Power July 6 Draft #2, until July 9, 1999. Nonetheless, Rabadi testified that before he sent an email to Liczyk on July 8, 1999 asking if she would have a chance to finalize the report that evening,[88] he would have sent her a revised report.[89]

51. On Friday, July 9, 1999, at 8:30 a.m., Rabadi faxed Liczyk a further revised version of the report ("Rabadi July 9 Draft"), and asked for her review and comments.[90]

52. This draft completely rewrote the first main section of the report entitled "Funding Sources, Financial Implications and Impact Statement" to address the perceived requirement in the *Municipal Act* to match the term of debentures to the useful life of the assets.[91] This was consistent with the comment by Andrew to Viinamae on July 7, 1999, that he understood Liczyk intended to rewrite the first main paragraph.[92] Several references to an estimated equipment cost of $43 million were also added to this section of the report, as well as a reintroduction of the words "for three years" in recommendation 1 concerning the term of the contract with MFP (which had been deleted in the Power July 6 Draft #2).[93]

53. Other changes made by Rabadi in the Rabadi July 9 Draft included the addition, at the request of Liczyk,[94] of recommendation 4 requiring the CFO and Treasurer and the Executive Director, I&T to report back to P&F "[p]eriodically on new leasing proposals, and financial impact for the balance of the equipment and software". He also added a discussion of the issues raised by the *Municipal Act* requirement.[95]

54. The leasing versus debentures analysis section of the Rabadi July 9 Draft was significantly revised to address and compare two options: leasing the computer equipment for three years versus purchasing the equipment for use for three years,

[88] COT059132, 46:2:54.
[89] Rabadi 07/03/2003 at 181-182.
[90] COT012721, 46:1:17; COT012730, 46:2:36; Rabadi 07/03/2003 at 190-191.
[91] COT012722, 49:2:18.
[92] COT014218, 46:2:34.
[93] Rabadi 07/03/2003 at 185-186.
[94] Rabadi 07/03/2003 at 187.

financed by issuing three year debentures; and leasing for three years with an exercise of the purchase option at the end of three years, and using the equipment for two more years versus issuing five year debentures and purchasing the equipment to use for five years.[96] Although this revised analysis made the use of debentures more attractive financially than had been the case with the earlier analysis using ten year debentures, Rabadi concluded that, under either option, lease financing was still the most cost effective option.[97]

e) Final report to P&F

55. After faxing the Rabadi July 9 Draft to Liczyk at her home in the morning of July 9, 1999, Rabadi met with Andrew to finalize the report. Together Andrew and Rabadi called Liczyk at home to go over the final revisions. Rabadi made the final revisions requested by Liczyk during that meeting, and gave the report to Andrew for his signature.[98] Andrew signed for both himself and on behalf of Liczyk.

56. Rabadi sent the final P&F Report to the City Clerk's office at 11:50 a.m., on Friday, July 9, 1999.[99] He subsequently sent a copy of the P&F Report to Pagano, Spizarsky and Beattie in PMMD. [100] Although Rabadi later discovered a typographical error in the report, and took steps to have that error corrected, Rabadi did not consider this to be a significant issue.[101] Ultimately, the report was considered by the P&F Committee on July 20, 1999, and subsequently approved by Council on July 27, 1999.[102]

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[95] Rabadi 07/03/2003 at 186-187.
[96] Rabadi 07/03/2003 at 189-190.
[97] Rabadi Affidavit, para. 63, 06/24/2003 at 140-141.
[98] Rabadi 07/03/2003 at 190-191.
[99] COT031868, 46:1:58
[100] COT003924, 48:1:19.
[101] Rabadi 07/03/2003 at 198-200.
[102] COT032202, 48:1:20; COT029855, 48:1:20a.

5. Information provided to Council in P&F Report

a) Purpose

57. The P&F Report made clear to Council that its purpose was twofold: to propose leasing as a financing mechanism for the acquisition of information and technology products and services, and to recommend a successful leasing vendor.

b) Recommendations

58. The P&F Report[103] recommended:

a. that the City enter into a leasing contract with MFP for computer equipment and software for three years;

b. that the 1999 – 2003 capital budget be reduced by the (unspecified) cost of the leased equipment;

c. that the lease payments be reallocated from debt charges to I&T's gross operating budget in the 1999 operating budget;

d. that the CFO and Executive Director, I&T report back to P&F periodically on new leasing proposals and the financial impact "for the balance of the equipment and software"; and,

e. that the appropriate City officials be authorized to carry out the recommendations.

c) Report as a coherent whole

[103] COT032202, 58:1:56.

59. The conclusion reached in the P&F Report - that leasing with MFP was a better financial option than borrowing - was based expressly on the analysis set out in the P&F Report, as summarized on page 4, and in more detail in the appendices.[104] The first sentence of the P&F Report's conclusion section stated this very clearly.

60. The P&F Report also made it very clear that the analysis was based on equipment with a purchase value of $43 million, for a three year lease term, at the lease rates quoted in the RFQ responses, with a projected useful asset life of five years.[105]

61. In particular, the P&F Report made reference to the estimated $43 million value of the computer equipment in a number of places within the body of the report, including on the first page in the discussion about funding sources and financial implications, in the description of the tender process, and in the first sentence of the narrative describing the financial analysis. In addition, the purchase value of $43 million was specifically cited in the heading of each of the appendices to the P&F Report. These appendices were deemed confidential, in accordance with the provisions of the *Municipal Act*, and were available to members of Council only upon request.[106]

62. Although these critical assumptions may not have been apparent to someone who chose to read the P&F Report selectively or hastily, they would have been clear to anyone actually involved in its preparation and/or review, unless he or she failed to review it carefully. These critical assumptions should have been clear to Power, Viinamae and Andrew, each of whom was involved in preparation and/or review of the P&F Report and each of whom was subsequently involved in the implementation of a leasing program which ignored most of these assumptions.

d) Additional information

63. The P&F Report provided the following additional information to Council:

[104] Rabadi 07/03/2003 at 222.
[105] COT032202, 58:1:56.
[106] COT006001 at COT006007, 48:1:25.

a. a description of the impact of leasing on the 1999 and 2000 operating budgets, being a $6 million charge to be absorbed within budgeted debt charges in 1999 and an incremental charge of $8 million in 2000, and a decrease of $43 million to the 1999-2003 capital budget;

b. a discussion of the relative flexibility of leasing in adapting to changing business needs, various value-added services provided by leasing, and reduced administration and overhead costs;

c. three options were identified:

    1. issue debentures and purchase the computer equipment;

    2. lease for three years, then extend the use of the computers for two more years through the exercise of the purchase option at the end of the three years if at that time it was cost beneficial to do so; or

    3. use cash to purchase the computers.

d. MFP provided the lowest overall cost to the City, in comparison both to other bidders, and to the use of debentures, therefore leasing was the better financial option;

e. the details of the financial analysis, and the underlying assumptions used, which led to the recommendation to lease through MFP;

f. an evaluation would be required in 2002 to assess whether purchase options should be exercised, taking into account such factors at that time as market conditions, the need for and cost of upgrades, funding sources and relative interest rates;

g. I&T would centrally manage the contract administration.

e) Amount of equipment on lease ($43.15 million)

i) Treasury limited analysis and report using figure of $43 million

64. The recommendations contained in the P&F Report did not specifically indicate that the lease contract with MFP was limited to an amount of $43.15 million of equipment. However that amount was contained in the body of the P&F report in a number of places: page 1 under "Funding Sources, Financial Implications and Impact Statement", which precedes the recommendations, contained two references - "leasing of computer equipment estimated at $43 million", and "an amount of approximately $43 million being cost of the equipment relating to the proposed lease"; page 3 under the "Tender Process" contained a reference to the RFQ's invitation to submit bids for equipment "valued at about $43 million for 36 months"; page 4, the first line of the Analysis section, referenced "computer equipment estimated to cost $43 million"; and "Purchase Value $43 m" appeared in the title of each of the Appendices. It must have been clear to anyone reading the P&F Report that the analysis, and thus the recommendations which flowed from that analysis, was premised on an equipment cost of $43 million.

65. The best information that was available to Rabadi at the time he did his analysis was that the amount of equipment to be put on lease was $43.15 million. This amount formed the basis for Rabadi's analysis, and for the recommendation put forward in the P&F Report, and subsequently in the Council Report.[107]

66. Initially, Rabadi did not know when I&T expected to receive all of the equipment under the RFQ. He therefore started his analysis by assuming that the lease rates quoted in the RFQ would apply for all of the equipment.[108] In order to confirm this assumption, he asked Andrew, Viinamae, and Power when they expected to have

[107] Power 03/27/2003 at 216-217; COT012257, 56:2:7
[108] Rabadi 07/03/2003 at 81-82.

received all of the equipment.[109] Power advised Rabadi that $23 million worth of equipment had been received by July 1, 1999[110], and Viinamae indicated that the remainder was targeted for receipt by September 1999.[111]

67. Accordingly, Rabadi chose to limit the amount reported to Council to $43 million based on the information contained in the RFQ and the subsequent information he received from I&T (Power and Viinamae), which identified the amount of equipment that would be received before September 1999 as $43 million.[112] He and Brittain expected that any additional acquisitions above this amount would be brought back to Council for approval as required by recommendation 4 in the P&F Report.[113]

68. Rabadi clearly communicated the fact that he had used $43 million for the purpose of his analysis and in drafting the P&F Report to all of the people involved in the drafting process, including Andrew, Viinamae, Power, Liczyk, Brittain, Altman, Pagano, and Beattie. No one ever advised Rabadi that he was wrong in taking this approach.[114] Indeed, Liczyk confirmed that his was the right approach:

> I think he did the right thing and looked at the – what was in front of him, a definitive $43 million. He looked at the best price that existed for the ninety (90) day period that was relating to those $43 million and he made the judgment that that was the basis for, you know, making a recommendation going forward.[115]

69. Power indicated that I&T was not able to quantify the amount over and above $43 million that they expected might go on lease in the future, except to say it may have “been in the 80s”. While the $43 million was a figure that I&T was confident about and

[109] COT015671, 46:1:46.
[110] Rabadi 07/03/2003 at 119-120; Power 03/24/2003 at 83-84.
[111] Rabadi 07/03/2003 at 81.
[112] Rabadi 07/03/2003 at 67-69; COT014320, 46:1:40; COT012257, 56:2:7; COT014219, 46:1:36.
[113] Brittain 07/29/2003 at 59; Rabadi 06/25/2003 at 67-68.
[114] Rabadi 07/03/2003 at 69-70; Brittain 07/29/2003 at 60.
[115] Liczyk 11/04/2003 at 39.

had planned for, anything beyond that was "in long term planning", and "we didn't know what beyond 43 looked like".[116]

70. Liczyk aptly summarized the Finance view of the leasing program described in the P&F Report, and the specific approval obtained for the use of lease financing to acquire $43 million worth of computer equipment, when she described the lease program as an umbrella program, with approval given to a specific transaction under that umbrella:

> [A]t the point that this report was being written, my understanding of what we were trying to accomplish, was to describe, in general, what a leasing program could do, just like a debenturing program could do, but in this particular report we had one (1) transaction immediately to describe, and ask for approval from Council for.[117]

71. Beattie[118] in PMMD, and Brittain[119], Altman[120] and Rabadi[121] in Treasury, together with Liczyk[122], were all consistently of the view that the P&F Report obtained Council approval for a total asset value of $43.15 million, with an acceptable 5-10% overage, given that the $43.15 million was a best estimate of the City's needs at the time.[123]

72. Brittain was on vacation for almost all of the relevant time frame within which the report was being drafted. He was away from the office from June 30 to July 14, 1999.[124] He received early drafts of the P&F Report until June 29, 1999.[125] These early drafts contained a reference to a $43 million cap in the recommendations section.[126] Brittain understood that the reference to the $43 million cap had been removed from the

[116] Power 03/25/2003 at 175-176.
[117] Liczyk 11/3/2003 at 198.
[118] Beattie 04/01/2003 at 165.
[119] Brittain Affidavit, para. 27, 07/09/2003 at 150.
[120] Altman 07/09/2003 at 138.
[121] Rabadi 07/03/2003 at 67.
[122] Liczyk 11/04/2003 at 59.
[123] Brittain Affidavit, para. 27, 07/09/2003 at 150.
[124] Brittain Affidavit, para. 29, 07/09/2003 at 151.
[125] Brittain 07/28/2003 at 122.
[126] Brittain 07/31/2003 at 64.

recommendation section because it was only an estimate, but had been left in the section of the report detailing the financial analysis. Brittain had no discussion with anyone in I&T as to why they removed the $43 million reference from the recommendations.[127]

73. Altman explained that he understood from a discussion with I&T that the $43 million cap was removed from the recommendation section because they did not want to be specifically bound to a total figure when part of that number was an estimate. He further understood the estimate to be within a 10% range.[128]

f) I&T vendor of record concept

74. The evidence from Power, Andrew and Viinamae was very different from that given by the Finance witnesses. Power testified that he did not expect the acquisition of computer hardware and software to be limited to $43 million, or even that that amount would have been committed by the end of the 90 day guarantee period. Moreover, Power understood that additional amounts, such as the 4000 desktops referenced in the RFQ, would also be put on lease through the leasing program with MFP. [129] Similarly, Andrew testified that he never intended that there would be a cap of $43.15 million dollars worth of hardware and software.[130]

75. Whatever Andrew's and Power's understanding or intentions, their "vision" of the leasing program was not reflected in the P&F Report,[131] nor was it communicated to Rabadi in response to questions he raised.[132] Similarly, Beattie testified that nothing in the RFQ itself, or in the bidders' responses to the RFQ, indicated to him that I&T contemplated such a vendor of record concept.[133]

[127] Brittain 07/31/2003 at 65.
[128] Altman 07/08/2003 at 83.
[129] Power 03/24/2003 at 131.
[130] Andrew 10/02/2003 at 104.
[131] Power 03/25/2003 at 177.
[132] Power 03/25/2003 at 132.
[133] Beattie 04/01/2003 at 177-178.

76. Power testified, and other members of I&T confirmed, that I&T viewed the relationship with MFP as that of a "vendor of record", meaning that the City would acquire all of its computer hardware and software from MFP for a three year period.[134] The use of $43 million of equipment and software in the RFQ was simply to permit the City to determine the lowest bidder, who would become the vendor of record for an indeterminate amount.[135]

77. Both Power and Andrew explained that once MFP was selected as the vendor of record, the City could put any amount of equipment on lease, for any lease term, throughout the three year period during which MFP was the vendor of record.[136] Following the expiry of the three year vendor of record period, the City would issue a new tender for a leasing provider. If the successful bidder at that time was someone other than MFP, the new leasing provider would have to buy out all of the existing MFP contracts, or there would be "old overhanging leases" with MFP while new leases were entered into with the new lease provider.[137]

78. Power testified that he thought that he was trying to put forward:

> [a] report requesting approval for MFP to be the vendor of record for leasing with an analysis of the cost of leasing based on the – a number like $43 million as an example but the number wasn't going to be $43 million forever. It would increase over time.

79. Power agreed that the P&F Report "doesn't look like that".[138]

80. Power could not explain why this vision of a vendor of record was not reflected anywhere in the P&F Report.[139] Power was not aware of these details of the vendor of record concept having been provided to City Council, although he understood that both Viinamae and Andrew shared his understanding of the nature of the relationship with

[134] Power 03/06/2003 at 61, 65; Andrew 10/02/2003 at 88-89.
[135] Power 03/25/2003 at 174.
[136] Power 03/06/2003 at 61-62; Andrew 09/29/2003 at 69-70.
[137] Power 03/26/2003 at 231, 247-248, 253.
[138] Power 03/24/2003 at 98.
[139] Power 03/24/2003 at 96-100.

MFP.[140] Similarly, Andrew agreed that the P&F Report made no mention of this "I&T vision" of the vendor of record relationship with MFP. He also agreed that it was not possible to glean an understanding of this vision from the P&F Report.[141] Power agreed that it would have been a good idea to include this information in the P&F Report so as to inform Council of I&T's intent with respect to MFP.[142]

81. This concept of MFP as a vendor of record to the City for a period of three years came from Power and Andrew.[143] They were both familiar with this concept from their experience working in the provincial government.[144] Although Power testified that he would have had a discussion with people from Treasury about I&T's intent to enter into a vendor of record relationship, Rabadi denied ever being advised of this intent, either at the outset of the RFQ process, or during the evaluation and report writing which followed. Altman described his understanding that, whether the term vendor of record was used or not, Council approval for leasing with MFP was limited to $43 million.[145] Brittain also testified that he always understood that Council approved a transaction limited in scope to $43 million (give or take up to 10%[146]),and not a vendor of record relationship as that term was used by I&T.[147] Brittain explained his understanding of the term vendor of record to be "the vendor who was going to be providing the $43 million worth of equipment".[148] He said:

> The report contemplated a fixed amount of equipment plus or minus … for $43 million. … [Y]ou can't possibly read the Council report and come away with the conclusion that it would be an open-ended Vendor of Record arrangement.[149]

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[140] Power 03/26/2003 at 247-248.
[141] Andrew 10/02/2003 at 119.
[142] Power 03/24/2003 at 112.
[143] Power 03/27/2003 at 224-225.
[144] Power 03/06/2003 at 61, 261; Power 03/27/2003 at 120-123.
[145] Altman 07/09/2003 at 138.
[146] Brittain Affidavit, para. 27, 07/09/2003 at 150.
[147] Brittain 07/28/2003 at 29.
[148] Brittain 07/28/2003 at 156.
[149] Brittain 07/29/2003 at 158.

82. According to Power, neither he nor Viinamae thought it necessary to seek further approval from Council to put amounts over and above $43 million on lease with MFP, due to the nature of the vendor of record relationship.[150]

83. Power identified one of the risks associated with this type of vendor of record relationship to be the uncertainty of future lease rates.[151] However, Power would not acknowledge that either he or Andrew bore any responsibility for failing to consider the financial impact to the City of the difficulties of maintaining competitive lease rates in the absence of a tender process during the vendor of record relationship. Rather, he contended that this was the responsibility of Finance, “to make sure those kinds of things work[ed]”. He did not communicate either this specific expectation or his open-ended version of the leasing program more generally to Finance.[152]

84. A possible alternative model which would have given the City competitive lease rates whenever it proposed to put additional equipment on lease was to enter into contractual arrangements with multiple vendors of record, who would be asked to provide rates which could be compared as required.[153] Wolfraim testified that MFP actually expected the RFQ to result in this type of multi-vendor relationship at the time MFP prepared its response to the RFQ.[154] This was not contemplated by I&T, as the vendor of record relationship with MFP was effectively an exclusive one.[155] Given the complexity of asset management the multiple vendor model described by Wolfraim was not feasible or practical. MFP would have known this.

[150] Power 03/25/2003 at 178.
[151] Power 03/25/2003 at 235.
[152] Power 03/25/2003 at 225.
[153] Power 03/27/2003 at 231-233.
[154] Wolfraim 12/19/2002 at 24-25.
[155] Power 03/27/2003 at 144.

6. Information not specifically addressed in P&F Report

a) Changes to lease rate factors after 90 days

85. The RFQ requested, and the various responses provided, guaranteed lease rates for a period of 90 days from June 11, 1999, the due date of the RFQ. Ultimately this date was understood by the City and MFP to extend to October 1, 1999.[156] Although the RFQ requested that responses provide a price mechanism to determine future lease rates after the expiry of the 90 days, MFP's response to the RFQ did not enable the City to determine at the time what MFP's lease rates would be after the 90 day period had elapsed.[157]

86. No mention was made in the P&F Report of the fact that the lease rates quoted by MFP in its response to the RFQ were only valid for 90 days, or that the mechanism provided by MFP to determine what future lease rates might be after that date was uncertain at that time.[158] Rabadi, Liczyk, and Brittain all agreed that this was not a relevant consideration, because no future price mechanism could provide the information necessary to do an adequate analysis, as unknown future debenture rates would be needed to perform an appropriate comparison. The financial analysis, and ultimately the Council Report, was therefore structured in such a way as to limit the amount of equipment placed on lease to the amount expected to be received within the 90 day period. According to the information provided by I&T, this amount was close to $43 million. The P&F Report contemplated that any amount in excess of $43.15 million would be subject to a further report to Council.[159]

87. Liczyk explained that "it wasn't the practice of the City to include in all the reports to Council on procurement activity what was the length of time that a price was good for; that was not a usual element of reports".[160] If there was not expected to be any problem in meeting the 90 day price guarantee period, in terms of completing the

[156] Rabadi 06/26/2003 at 11-12.
[157] Power 03/27/2003 at 208.
[158] Power 03/24/2003 at 128-129.
[159] Rabadi 06/25/2003 at 80-81; Rabadi 07/02/2003 at 52.

procurement within that time, then Liczyk would not have expected to see any reference to it in the P&F Report.[161] Furthermore, in her experience, Council knew from its experience in approving procurement awards that quoted prices were only good for a fixed period of time.[162]

88. Rabadi testified that even if a future price mechanism had been provided by MFP or the other bidders, he could not rely entirely on that mechanism; he would have had to do a review at the relevant time in order to compare the new rates to whatever debenture rates existed at that time. As he explained:

> [W]e cannot potentially rely on the price mechanism anyway, even if we did receive a price mechanism, we would have to revisit the analysis and see whether it's [sic] still compares to the debenture interest rate … [I]t would be implied that we would have to revisit the analysis to compare it to the debentures and take a report back to Council and Committee.[163]

89. It was because of these inevitable difficulties with any future price mechanism that Rabadi decided to limit his analysis to the quoted prices based on an assumption that the $43 million worth of equipment would be received by September 1999, when the prices quoted in the RFQ responses would still be in effect.[164] Rabadi relied on the information he received from Power and Viinamae in I&T in concluding that the vast majority of the $43 million of equipment would be received within the 90 day period within which MFP's quoted lease rates were guaranteed. Therefore, he did not need to consider any risks from future lease rate changes.[165] Liczyk testified that she would have expected her staff to rely on such information from I&T in assessing and managing any financial risk to the City with respect to changes to future lease rates after the expiry of the 90 days.[166]

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[160] Liczyk 11/04/2003 at 48.
[161] Liczyk 11/04/2003 at 55.
[162] Liczyk 11/04/2003 at 49.
[163] Rabadi 06/25/2003 at 61-62.
[164] Rabadi 06/25/2003 at 79, 88-89; Rabadi 06/26/2003 at 190.
[165] Rabadi 06/25/2003 at 72.
[166] Liczyk 11/04/2003 at 25-26.

90. Rabadi further testified he was not concerned about the risk that all of the $43 million might not be received within the 90 days as the purpose of the requirement to report back to Council for the balance of the equipment in recommendation 4 of the P&F Report was to deal with any computer equipment or software not received by September 1999.[167]

91. Liczyk explained that the fact that she and the “Finance group” understood this to be a one-time transaction, with one applicable interest rate, meant that there was no need for anyone in her group to check the reasonableness of the interest rate adjustment mechanism.[168] She also testified that she took out the reference in an early draft of the P&F Report to an assumption that “leasing rates remain at the existing level for future cycles” because of her intention to recommend a one-time transaction for $43 million to which future lease rates were not relevant. She explained that, in any event, the inclusion of this reference in the early draft was only intended to pertain to lease rates at the end of three years, when the City would re-evaluate its options for replacing the computer equipment.[169]

92. I&T failed to consider in any meaningful way the impact of a 90 day guarantee period, and what would happen to lease rates after 90 days. In particular, no one in I&T appears to have turned their mind to the implications of changes to future lease rates in the context of the vendor of record scenario I&T envisioned for the relationship with MFP.

93. Power was focused only on his expectation that an exclusive vendor of record would streamline administrative issues for the City, and did not turn his mind to the lack of competitive lease rate quotes for future acquisitions.[170] Andrew did not think through the vendor of record concept sufficiently to advert to this issue. Viinamae was similarly vague. If I&T truly expected that the City would put equipment on lease on an ongoing basis over a three year period, then the need for competitive quotes against which to

[167] Rabadi 06/25/2003 at 67; Rabadi 06/26/2003 at 133.
[168] Liczyk 11/04/2003 at 69.
[169] Liczyk 11/04/2003 at 30-32, 37.

measure MFP's future lease rate changes should have been a primary concern. If Andrew, Viinamae, or Power had turned his/her mind to this issue when they were designing the leasing program, then this would have been identified as a major shortcoming of the exclusive vendor of record "vision". Thoughtful consideration would have revealed how ill-conceived an idea it was.[171]

94. Power attempted to explain that he understood that any changes to the lease rates after the initial 90 days would be reviewed on a quarterly basis by the CMO once it was in operation.[172] He did not explain how this would be done in the absence of competitive lease rates, or what would be done until the CMO came into existence. In addition, Power testified that it was his understanding that the quarterly letters received from MFP setting out the operative lease rates for the upcoming quarter were to be sent to "Finance", where he assumed an analysis would be done on those rates. In particular, he stated that Viinamae had informed him that Colley in "Finance" would be responsible for this analysis.[173] Power was unable to explain how Colley, who had no experience in leasing, and who would be without the benefit of competitive lease rate information from a re-tender, would be able to conduct any kind of meaningful analysis of the competitiveness of MFP's future lease rates.[174] Moreover, Power had no direct knowledge of Colley actually receiving these lease rate factors.[175] Colley denied ever having seen or reviewed lease rate factors, or having been asked to do anything like this by Power.[176]

95. In fact, Power did not warn anyone at the City of the need to assess the commercial competitiveness of the future quarterly lease rates received from MFP in the context of a "vendor of record" scenario with MFP. He merely assumed that "Finance" would set up some mechanism to permit such an assessment, without the

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170 Power 03/27/2003 at 221-222.
171 Andrew 10/02/2003 at 119-120.
172 Power 03/27/2003 at 219.
173 Power 03/27/2003 at 220-221.
174 Power 03/27/2003 at 225-228.
175 Power 03/25/2003 at 164.
176 Colley Affidavit, para. 9, 09/02/2003 at 236-237.

need for any input from him.[177] He further assumed that the City could have negotiated quarterly lease rates with MFP, but was vague on how this might be done in the absence of any comparable or competitive lease rate information from other vendors.[178]

96. Colley testified that the issue of negotiating or reviewing lease rate factors was never raised at any of the numerous meetings and discussions he had with the CMO when finance-related functions were being transitioned to him in the first half of 2001. Colley understood that this was a process that was already in place, and that someone associated with the CMO had responsibility for ensuring that the necessary due diligence was in place. It did not occur to him that the CMO might not have the necessary financial expertise to do this.[179]

97. On at least one occasion in early October 1999, Power was the person responsible for requesting lease rates from MFP. In fact these were the first lease rates anyone at the City requested from MFP. Nevertheless, Power did not attempt to negotiate these rates with MFP or instruct anyone else to do so.[180] Nor was Power aware of anyone at the City attempting to negotiate quarterly lease rates with MFP.[181] Power's explanation of how the City would deal with charges to the lease rates after the 90 day guarantee does not make sense, and should not be believed. Rather, the evidence is clear that Power did not turn his mind to this fundamental issue in any meaningful way.

b) 3 year lease term

98. The P&F Report recommended a leasing contract with MFP for three years. Liczyk had the members of Treasury involved in drafting this report (Rabadi, Altman and Brittain) understood this to mean a one-time contract for a three year term. They could not understand how else this recommendation could be interpreted, particularly in the

[177] Power 03/27/2003 at 221-222.
[178] Power 03/24/2003 at 49.
[179] Colley 09/04/2003 at 177-178.
[180] COT036609, 62:1 at 313.
[181] Power 03/24/2003 at 50-51.

context of the RFQ and the financial analysis, which were both premised on a lease term of 36 months, at lease rates guaranteed only until September 1999.[182]

99. Indeed, the most reasonable interpretation of the language used in the P&F Report supports the understanding held by Treasury that the lease term was to be for three years.[183] This is illustrated clearly when considering the two options outlined at page 4 of the P&F Report, both of which are premised on a three year lease term. What differs in each case is only the period of use of the equipment, which varies between three years in the first option, and five years in the second option.[184] The P&F Report's conclusion that leasing was preferable to debenturing was based squarely on a comparison of each of these two options, each with a three year lease term, with debenturing. It was on that basis that the decision to lease was recommended, and adopted by Council. Accordingly, Council authorized a three year lease term.

100. Nonetheless, Power and Andrew testified that they understood the reference to three years in the recommendations of the P&F Report to mean the City would enter into a vendor of record relationship with MFP for three years. This interpretation left open the length of individual lease contracts, provided they were entered into within the three year period in which MFP was the vendor of record for the City.[185] This interpretation ignores the 36 month lease term upon which the RFQ, the evaluation of the responses, the comparison of leasing to debenturing, and the P&F Report, were all premised.

101. Treasury's interpretation of the three year reference to describe <u>the length of the lease</u> with MFP is consistent with the parameters of the RFQ, the method of evaluation of the responses to the RFQ, a reading of the P&F Report as a whole, and the Financial Control And Purchasing Bylaws of the City. Nothing in any of these documents supports the alternative interpretation propounded by the I&T witnesses. Moreover, the subsequent amendment made by Jakobek at the P&F Committee meeting of July 20,

[182] Liczyk 11/03/2003 at 253.
[183] Andrew 09/29/2003 at 72.
[184] COT032202 at COT032205, 46:1:63.

1999 and adopted by Council on July 27, 1999, which purported to make possible the extension of the lease term to longer than three years, only makes sense in the context of a defined three year lease term.[186]

c) End of lease term issues

102. Kerr was critical of the City's, and in particular Power's, analysis of the responses to the RFQ for inadequately addressing end of lease term issues.[187]

103. Power testified that he would not have expected Rabadi to understand that there might be additional operational issues, such as the cost of upgrades, buyouts, end of term options, and the like. He agreed that it was incumbent on him to advise Rabadi of such issues for the purpose of his financial analysis if I&T thought they were relevant.[188] In particular, Power conceded that it was not fair to assume anyone in Finance should or would have known about factoring refresh costs into their financial analysis.[189]

104. Power did not inform Rabadi about these other operational issues.[190] Power also agreed that operational issues should not have formed part of Rabadi's analysis, as such prospective issues could not be built into an analysis of bid prices.[191] He testified that the discussions with Treasury were all about how to get the program going, not about how to get out at the end of it.[192]

105. Power was aware from his previous experience at the Province that issues could arise with existing lease contracts when the three year vendor of record relationship came to an end, if the existing lease provider was replaced at that time, unless specific arrangements were in place to permit the new leasing provider to buy out all of the pre-

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[185] Power 03/26/2003 at 247-248.
[186] The Jakobek Amendment is discussed in more detail in Chapter 8.
[187] Kerr 09/15/2003 at 204-205.
[188] Power 03/27/2003 at 201-202.
[189] Power 03/06/2003 at 98-99.
[190] Power 03/27/2003 at 206.
[191] Power 03/27/2003 at 204-205.
[192] Power 03/06/2003 at 99.

existing or "overhanging" leases. Despite this knowledge, this issue was not addressed in the RFQ, in the contract with MFP, or in any discussions with MFP.[193] Nor did Power alert anyone else at the City to this issue.

[193] Power 03/26/2003 at 249, 252, 256-257.