1. Overview

1. MFP used a three stage agreement process: the Master Lease Agreement, the Program Agreement, and multiple Equipment Schedules. The Master Lease Agreement ("MLA") provided various terms and conditions that were relevant to other agreements in the lease structure. The MLA was neither the only, nor even the most important contract document between the City and MFP. However, the MLA was the first document signed. The MLA represented MFP's first successful bait and switch: MFP baited the City with the favourable terms in its response to the RFQ, and then switched the terms in the MLA.

2. MFP drafted the terms and conditions of the MLA. These terms and conditions were significantly inferior to those MFP agreed to in its response to the RFQ. Once MFP was awarded the contract, it abandoned its response to the RFQ. Indeed, MFP's calculated objective was revealed by internal MFP documents, which demonstrated that MFP intended to discard the terms of its response to the RFQ so that its relationship with the City would be governed by the terms of the MLA.

3. The differences between MFP's response to the RFQ and the MLA is indicative of MFP's larger *modus operandi*. Over the course of its dealings with the City, MFP significantly altered its position on several key aspects of the leasing program. The promises MFP made during its initial presentations to the City were diminished in its response to the RFQ, and then further weakened or flatly contradicted in the MLA. MFP tendered its bid for the lowest price, with the intention of changing the terms of each subsequent contract that would govern its relationship with the City.

4. One of the reasons that MFP was able to achieve its bait and switch was Power's failure to use outside legal counsel, Fecenko, effectively. Power did not bring Fecenko to the table, nor did he provide Fecenko with all the relevant documents.

5. Fecenko, in turn, was at fault for providing Power with an unqualified three line opinion that the contract was "commercially reasonable". Fecenko's opinion was

essentially baseless as Fecenko had not reviewed the RFQ, MFP's response to the RFQ or the final version of the contract documents.

6. Loreto cannot be faulted for relying on Fecenko's opinion. There was no reason for him to duplicate review of the contract documents when he had a clean, unqualified opinion from outside counsel on precisely that issue. Loreto appropriately approved the MLA as to form.

2. Negotiations between the City and MFP

7. The MLA set out only some of the terms and conditions for the lease transaction. Kerr noted that a key part of entering into a multi-million dollar leasing arrangement was for each party to try to negotiate favourable terms and conditions into the MLA.[1] Kerr provided examples of significant terms and conditions, which included items such as interest on past due payments and interim rent.

a) MFP's standard negotiation tactic: avoid being bound by its bid

8. Wilkinson stated that MFP's standard practice was to use the MLA as the basis for the contractual obligations, supplemented by the Program Agreements and the Equipment Schedules contemplated in the MLA.[2]

9. Wilkinson explained that MFP's usual practice was to resist treating the RFQ or the response thereto as the basis for the contractual document.[3] He explained that the reason for this was that the response to the RFQ was written in narrative, non-legal language. This explanation is not credible. MFP could easily have translated the promises in its response to the RFQ into more precise language without altering the substance of the promises. Instead, MFP fundamentally changed the legal rights and obligations of the parties and wrote the new terms in contract language. Furthermore, there is no reasonable explanation why MFP would begin negotiating the formation of its legal relationship with the City using a standard form agreement rather than the bid document.[4] This standard form agreement included few of the representations contained in MFP's response to the RFQ.

10. None of this was accidental. It was a premeditated and routine MFP operating procedure.

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[1] COT080176 at COT080182, 61:1:Report.
[2] Wilkinson Affidavit, para.58, 09/16/2003 at 61-62.
[3] Wilkinson Affidavit, para.58, 09/16/2003 at 62.
[4] Wilkinson 09/22/2003 at 182.

11. On July 14, 1999, Kim Harle ("Harle"), MFP internal counsel, sent an email to Pessione and Domi following her review of MFP's response to the RFQ. Harle was extremely concerned that MFP might actually have to live up to its promises in its response to the RFQ because Pessione had not included MFP's standard 'weasel words' that would permit it to avoid its obligations. The email read as follows:

> Sandy and Dash, I have been reviewing our response to the RFQ with a view to starting to draft the necessary revisions to the master lease and Program Agreement already in place.
>
> …
>
> P.S. Sandy, I could not find in our response the standard qualification paragraph set out in section 1 of my June 4 memo. There is case law which suggests that upon acceptance of a proposal under an RFP/RFQ, a binding contract is formed. This qualification would help preclude an argument based on this case law that our proposal forms a binding contract. Since we want our relationship to be governed by our master lease or other acceptable formal, negotiated documentation, this qualification is imperative. If you have any questions, please let me know.[5]

12. The sentiments contained in Harle's email were echoed in an internal MFP memo regarding fleet vehicle leasing.[6] On May 25, 2000, Mark Robinson sent a four page memorandum to, *inter alia,* Wolfraim, Stevens, and Michaelson. One paragraph of the memorandum was titled "Proposal of a binding Offer". It reiterated MFP's interest in ensuring that the terms of its response to a bid were not binding:

> The RFP states that each proposal constitutes an irrevocable and binding offer. This means that if the City accepts our proposal we are bound to our response, without any changes and cannot walk away unless we are prepared to be sued for damages. Drafting of the response in such a way that we do not provide definitive "yes" or "no" answers will be very important.[7]

[5] COT080060, 18:3:36.
[6] COT083836, 18:3:14.
[7] COT083836 at COT083827, 18:3:14.

b) Timing of negotiations

13. MFP and the City, primarily Wilkinson and Power, began discussing the MLA shortly after the August 3, 1999, meeting between MFP and the City at the Holiday Inn.[8] Discussions continued through to the signing of the MLA and the first Equipment Schedule.[9]

14. On August 12, 1999, Wilkinson left a voice-mail message for Payne. The message was partially transcribed by Payne's assistant as follows:

> Rob W – update re: C of Toronto
>
> They met several times w/ them this week, Jim Andrews [sic] etc. & looks like things are going pretty well & that the contract will be signed probably next wk. They probably have sent contract to their lawyer by now. There were some minor comments which Rob reviewed w/ Suzanne [Michaelson] & will meet again w/her Tuesday.
>
> Brendan Powell [sic], formerly w/ MBS, is involved. Not sure if he is an MFP supporter but he seemed fine in the mtg., brought by Jim to help w/ Y2K mainly. Will further update you when you're in.[10]

15. Wilkinson testified that he was simply updating Payne with respect to a relevant actor in the MLA negotiations.[11] Wilkinson explained that he was concerned that Power had been part of an earlier decision at the province.[12]

16. Wilkinson's comment that he was "not sure if [Power was] an MFP supporter" was extremely unusual. One does not normally view the parties with whom one is negotiating at arm's length through the lens of whether or not they are supporters. In theory, Power and the rest of the City representatives were there to protect the City's interests. The fact that MFP looked for supporters on the City side of the table is

[8] Wilkinson Affidavit, para.54, 09/16/2003 at 60.
[9] Power 03/24/2003 at 139.
[10] COT042142 at COT042160, 11:3:7.
[11] Wilkinson 09/22/2003 at 208.
[12] Wilkinson 09/22/2003 at 209.

troubling, but consistent with its approach of establishing inappropriate relationships with key decision makers.

c) Power led the negotiations for the City

17. Power admitted that he was the only individual who negotiated and acted on the City's behalf with respect to the MLA.[13] He stated that Viinamae instructed him to coordinate the activities of MFP and the City with respect to the leasing contract and that he kept her apprised of issues that arose during negotiations.[14] Power confirmed that on occasion Viinamae attended his meetings with Wilkinson regarding the MLA.[15]

18. Viinamae, however, testified that she understood that Power was working with Andrew with respect to the negotiations.[16] Power stated that he neither met with Andrew regarding the negotiation of the MLA, nor discussed it with him.[17] Andrew claimed that he had no role with respect to the MLA because he delegated the responsibility for conducting the negotiations to Power.[18] His evidence in this regard appears to be inconsistent with Wilkinson's message to Payne.

19. Wilkinson testified that he could not recall any meetings with Andrew about the form or substance of the MLA.[19] Wilkinson testified that a number of individuals from I&T attended the MLA negotiation meetings on behalf of the City, including Bulko, Marks, and Power.[20] However, during the course of the MLA negotiations, there were also parallel meetings between City staff and MFP.[21] These meetings focused on implementing the leasing program, and included topics such as the sale leaseback transaction and refresh strategy. In his testimony, Wilkinson indicated that these meetings may have overlapped with meetings about the MLA:

[13] Power 03/27/2003 at 266.
[14] Power 03/24/2003 at 141; Power 03/27/2003 at 266.
[15] Power 03/24/2003 at 149.
[16] Viinamae 10/30/2003 at 34.
[17] Power 03/25/2003 at 128-129.
[18] Andrew 10/02/2003 at 196-197; Power 03/25/2003 at 128.
[19] Wilkinson 09/22/2003 at 205.
[20] Wilkinson 09/18/2003 at 79.
[21] Wilkinson Affidavit, para.63, 09/16/2003 at 64.

> Well, any -- any dealings that we had were in the context of a meeting that included others like Lana, Kathryn Bulko. Like, we -- we were often going to a meeting to talk about leasing in general, or different issues, as it related to leasing and the master lease negotiation obviously was part of that whole process.[22]

20. Wilkinson perceived that Power was responsible for the MLA and that Power attended the majority, it not all, of these meetings.[23]

i) Finance and outside counsel should have been involved

21. Finance was not involved in the MLA negotiation process. Liczyk swore that she had no involvement with the MLA.

22. Both Finance and I&T should have been involved in the negotiations. Kerr listed a number of factors for the consideration of both Finance and I&T. The significant factors for both departments were the lessee obligations and the lessor obligations.[24] The additional significant factors for Finance specifically were:

a. calculations for lease rates, including notification/justification process for changes;

b. calculations for extensions, buy-outs, and early returns;

c. interim rent charges; and

d. late charge interest rates.[25]

23. The significant factors for I&T specifically were:

a. equipment return obligations;

[22] Wilkinson 09/16/2003 at 215.
[23] Wilkinson 09/18/2003 at 210.
[24] COT080176 at COT080212, 61:1:Report.
[25] COT080176 at COT080212, 61:1:Report.

b. repair charges for damaged equipment;

c. definition of normal wear and tear;

d. flexibility for early returns;

e. provisions for extending the lease, including required notifications; and

f. available reporting and management tools.[26]

24. As will be explained below, Power did not meaningfully include outside legal counsel during the negotiations. This was a critical error.

d) Wilkinson led MFP's negotiating team supported by internal counsel

25. Wilkinson was the business person in charge of the MLA on behalf of MFP and was entirely responsible for conducting the negotiations. Wilkinson and Payne had dealt with Power during his time with the provincial government.[27] Wilkinson knew that Power had some prior leasing experience. Wilkinson understood that the City perceived Power to be its leasing expert, and that Power had drafted the 1999 RFQ.[28] Wilkinson did not agree with Pessione's assessment of Power; namely, that Power was a poor leasing expert for the City, although he acknowledged that Pessione knew Power better than he did.[29]

26. Wilkinson considered Harle to be the principal actor for MFP during the negotiating phase of the MLA, as she drafted the terms and conditions of the MLA.[30] However, Harle testified that had very little direct contact with City individuals regarding the MLA.[31] She did not attend any meetings or participate in any conference calls. She

[26] COT080176 at COT080212, 61:1:Report.
[27] Wilkinson Affidavit, para.55, 09/16/2003 at 60-61.
[28] Wilkinson 09/18/2003 at 222.
[29] Wilkinson 09/22/2003 at 214-215.
[30] Wilkinson 09/22/2003 at 180.
[31] Harle 11/24/2003 at 40.

remembered one short phone call with Power related to attaching the RFQ to the MLA.[32] Harle's evidence should be accepted over Wilkinson's more general recollection. Harle clearly played a supporting, behind the scenes role to Wilkinson, who fronted the MFP negotiations with the City.

27. Wilkinson agreed that Harle was informed about the terms of MFP's response to the RFQ.[33] Wilkinson also agreed that Harle had the primary responsibility for reviewing the response to the RFQ and incorporating it into the MLA.

28. Harle was assigned to some of the City's leasing transactions.[34] In her affidavit, Harle indicated that she was asked to review the City's RFQ in early June 1999.[35] On June 4, 1999, Harle prepared a memorandum that highlighted certain issues for MFP.[36] The memo was addressed to Pessione and Domi, and was also circulated to the Master Lease Committee. The Master Lease Committee was an informal committee of individuals from MFP departments who discussed proposed changes to an MLA with respect to a given leasing transaction. In her memo, Harle referred to the necessity of ensuring that the arrangement with the City was governed by the MLA and the Program Agreement.[37]

29. Harle had no further involvement with the City leasing transaction until July 14, 1999 when she reviewed MFP's response to the RFQ and emailed Pessione and Domi as described above.[38]

30. Harle's July 14, 1999 email was sent two weeks before Council accepted MFP's bid. Although Council did not approve the P&F Report until July 27, 1999, MFP was already drafting its MLA in anticipation of being awarded the contract. Harle indicated that it was not unusual to draft a contract before a transaction was finalized, and that

[32] Harle Affidavit, para.22, 11/24/2003 at 13.
[33] Wilkinson 09/22/2003 at 186.
[34] Harle Affidavit, para.8, 11/24/2003 at 8.
[35] Harle Affidavit, para.9, 11/24/2003 at 8.
[36] COT027540, exhibit 2 to Harle Affidavit; COT027541, exhibit 3 to Harle Affidavit.
[37] COT027541, exhibit 3 to Harle Affidavit.
[38] Harle Affidavit, para.17, 11/24/2003 at 11; Pessione 02/13/2003 at 78-79.

she often drafted contracts before MFP was certain that it had successfully won a bid.[39] Stevens agreed with Harle that it was not unusual for MFP to work on draft MLAs prior to the successful bidder announcement.[40]

31. However, there was another internal MFP document that suggested MFP already knew that it would be awarded the deal. Payne's message book contained a transcribed entry dated July 20, 1999:[41]

> Mike F. Reviewed deals with Kim Harle re: C. of Toronto. Does someone have a write up on deal to see pricing and related issues, e.g. terminations. Wants more details on deal because heard we have possibly been awarded deal. Can you or direct him to who has those details.[42]

32. Flanagan testified that he did not remember any conversation related to whether or not MFP had won the deal.[43]

33. In the end, the negotiations of the MLA occurred almost exclusively between Wilkinson and Power.

[39] Harle Affidavit, para.18, 11/24/2003 at 11.
[40] Stevens 02/17/2003 at 59-60.
[41] COT042142 at COT042158, 11:3:7.
[42] COT042142 at COT042158, 11:3:7.
[43] Flanagan 02/18/2003 at 138.

3. The exchange of draft agreements

34. The negotiation process began by exchanging draft agreements.[44] On August 5, 1999, Harle provided a revised version of the City's MLA to Wilkinson. By August 10, 1999, Power had received and reviewed MFP's draft proposal for the MLA.[45]

35. During this process, Wilkinson did not have much discussion with Power. Instead, the City requested changes to the MLA, which MFP considered. MFP then sent a revised draft back for the City to review.[46] Wilkinson did not recall that the negotiations encountered any difficulties.[47]

36. On August 10, 1999, Power sent an email to Andrew and Viinamae.[48] In the email, he outlined some of his concerns with the draft MLA. He prefaced his comments with the note that the business issues needed to be settled prior to the "legal scrubbing". Power explained that the term "legal scrubbing" referred to involving legal counsel.[49] His primary concerns were as follows:

> The City is in default if an equipment schedule payment is not made within 5 days of the due date. I suggest we don't agree to that.
>
> The contract provides for termination in the event funds are no longer available but it doesn't provide for termination without cause. I suggest it have one complete with cost tables.
>
> A lot of equipment will be moved from time to time so we need to reach an agreement on asset management and control (whose asset management system will be used? This will be particularly important when there are upgrades or modifications).
>
> The "equipment" definition should include software.
>
> There is a clause that states that the equipment schedules remain in force notwithstanding the termination of the agreement. This should be considered carefully before agreeing. Do I see "rolling windows"?

[44] Wilkinson Affidavit, para.55, 09/16/2003 at 60-61.
[45] Power 03/24/2003 at 142; COT015674, 63:8:38.
[46] Wilkinson Affidavit, para.61, 09/16/2003 at 63.
[47] Wilkinson Affidavit, para.58, 09/16/2003 at 61-62.
[48] COT015674, 63:8:38.
[49] Power 03/24/2003 at 139.

> We should have reporting requirements in the contract as well as a definition of contractual authority i.e. who can order equipment? Who signs the equipment schedules? Who authorizes payment?[50]

37. Power explained that the term "rolling windows" referred to renegotiating the lease schedule for increasingly longer terms or staggering the implementation of new equipment on a lease schedule.[51] A five year lease term with a planned three year refresh would seem to meet Power's definition of a rolling window. He confirmed that "several" discussions with Viinamae about these issues ensued, but he could not recall a discussion with Andrew.[52]

38. On August 17, 1999, Wilkinson sent an email to Viinamae and Power.[53] The email attached revised draft agreements for the MLA and the Program Agreement.

[50] COT015674, 63:8:38.
[51] Power 03/24/2003 at 147-148.
[52] Power 03/24/2003 at 149.
[53] COT015675, 62:1 at 202.

4. Role of the City's external and in-house legal counsel

a) Overview

39. The MLA was never adequately reviewed by the external legal counsel retained by the City. MFP dictated the terms of the MLA documents in a manner that permitted it to execute its bait and switch and to obtain a contract that was inconsistent with its own previous representations and the City's previous stipulations. In the face of robust legal review, MFP would not have successfully dictated the terms of its contractual relationship with the City.

40. Throughout the negotiation process, Power was the primary representative from I&T, with some assistance from Viinamae. Neither Power nor Viinamae recognized the importance of meaningful legal review. Instead, they treated legal scrutiny as a hurdle to be overcome after all negotiations were over. Accordingly, I&T failed to seek appropriate legal input into the contract documents. Power also failed to provide relevant documents to the City's external counsel.

41. External legal counsel failed to conduct a meaningful review of the MLA. Outside counsel should not have provided a legal opinion, including an opinion as to the commercial reasonableness of the MLA, without having reviewed the RFQ and MFP's response to the RFQ.

b) Role of City's outside legal team at Faskens

42. On March 10, 1999, the City retained the law firm then known as Fasken Campbell Godfrey ("Faskens") to assist with the Y2K Project.[54] Since the majority of the leasing program pertained to Y2K equipment, Power used Faskens for the legal review of MFP's MLA documents. Fecenko, a lawyer at Faskens, represented the City under

[54] COT006447, 26:1:2.

letter retainer agreement with Faskens. Loreto, a lawyer in Legal Services, had some minor interest in the MLA process.

43. Fecenko agreed with Loreto's testimony that the role of Faskens was as described in the retainer agreement: the provision of "legal services in relation to Year 2000 issues as requested from time to time". The retainer agreement read:

> . . . [A]ny work to be done on a transaction that appears to have a bearing on City corporate, priorities or policies is first discussed with the City Solicitor or his representative.[55]

44. Fecenko did not believe in 1999, nor did he believe at the time of the Inquiry, that the legal services he rendered in relation to the MFP MLA had a bearing on City corporate priorities or policies.[56]

45. Fecenko testified that he spoke with Loreto about how to proceed with the MFP matter.[57] Loreto believed that it would be an unnecessary duplication of effort for both of them to review the applicable legal documentation. Loreto instructed Fecenko to review the applicable legal documentation for the purposes of stating that it was "approved as to form" for signature by Legal Services.[58]

c) The role of Legal Services: Loreto

46. The City's retainer agreement with 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.[59]

[55] COT006447 at COT006448, 26:1:2; Fecenko 04/07/2003 at 38-41.
[56] Fecenko Affidavit, para.18, 04/03/2003 at 16-17.
[57] Fecenko Affidavit, para.19, 04/03/2003 at 17-18.
[58] Fecenko Affidavit, para.19, 04/03/2003 at 17-18.
[59] COT006447 at COT006448, 26:1:2.

47. Power maintained that he did not know that he was required to copy all correspondence between the City and Faskens to Legal Services, and specifically to Loreto.[60] He testified that he did not believe that this requirement was part of the Faskens retainer agreement. Power assumed that correspondence was copied to Loreto simply as a courtesy.[61] His practice was to involve Legal Services in issues that touched upon City policy.[62] Accordingly, Power did not copy all of his Faskens correspondence to Loreto, nor did he phone Loreto to keep him abreast of the leasing transaction. Fecenko swore that his failure to copy all of his correspondence to Loreto was an unintentional oversight.[63] Viinamae was not copied on any of the correspondence between Power and Fecenko.[64]

48. Loreto was not involved with the MLA negotiations. He did receive a copy of Fecenko's opinion letter.

d) Power did not involve legal prior to MLA negotiations

49. Power did not approach either the City's external legal counsel or Legal Services until the period of MLA negotiations.[65] He testified that he assembled the RFQ largely from boilerplate provisions that had already been approved by Legal Services.[66] Power did not consider the RFQ to be contentious, and therefore did not consider having it reviewed by legal counsel.

e) Power did not routinely seek legal review of contracts

50. During his tenure at the Y2K Project office, Power did not submit every contract to legal review.[67] Neither Andrew nor Viinamae had advised Power of the appropriate

[60] Power 03/24/2003 at 164-165.
[61] Power 03/24/2003 at 164-165.
[62] Power 03/24/2003 at 165.
[63] Fecenko Affidavit, para.19, 04/03/2003 at 17-18.
[64] Power 03/26/2003 at 164.
[65] Power 03/27/2003 at 270.
[66] Power 03/27/2003 at 270.
[67] Power 03/05/2003 at 200.

time to involve legal counsel.[68] He testified that he sent contracts for legal review in two situations:

a. where there was a definite point of law at issue; and

b. where a term of the contract had to be changed in order to properly execute the agreement. [69]

51. Power confirmed that he made the decision to involve external legal counsel with respect to the MFP documents, likely without direction from Viinamae.[70] Power tried to resolve all of the business issues prior to forwarding the contracts for legal review.[71] In his August 10, 1999 email to Andrew and Viinamae, he noted that outstanding items still had to be negotiated prior to sending the contract for "legal scrubbing".[72] Power testified that he expected Fecenko to provide such legal advice regarding the terms and conditions of the MLA.[73]

f) August 18, 1999, Power forwarded Fecenko the draft contracts

52. Power believed that it was appropriate to involve Fecenko when the City had resolved all the other issues or got to the point where they could not resolve the issues.[74] Fecenko testified that he first learned of the MLA on August 18, 1999, in a voicemail message left by Power.[75] Later that day Power sent an email to Fecenko, which attached the draft MLA and the Program Agreement for Fecenko's review.[76]

[68] Andrew 10/02/2003 at 197.
[69] Power 03/05/2003 at 200.
[70] Power 03/24/2003 at 152.
[71] Power 03/27/2003 at 10-11.
[72] COT015674, 63:8:38.
[73] Power 03/27/2003 at 13.
[74] Power 03/24/2003 at 152.
[75] Fecenko Affidavit, para. 25, 04/03/2003 at 22.
[76] COT011121, 23:1:25; Fecenko Affidavit, para.25, 04/03/2003 at 22.

Power asked Fecenko to review the attachments. Fecenko replied with an email agreeing to read the draft documentation that morning.[77]

53. Fecenko was aware that the MLA and Program Agreement followed a RFQ and MFP's response to the RFQ.[78] He testified that he asked Power for a copy of the RFQ and the response to the RFQ in order to "understand the deal".[79] He claimed that Power informed him that the documents only contained business terms, that they had been reviewed by the "finance people" who were experts in reviewing business terms, and that the review of the documents was outside the scope of what Power wanted him to review.[80] Fecenko stated that these instructions were consistent with the retainer agreement.[81] Fecenko relied on Power's statements as confirmation that these documents were unnecessary for the purposes of his legal review.[82] Fecenko's position is somewhat difficult to understand. The fact that "finance people" reviewed the documents is irrelevant to Fecenko's ability to understand the deal. Even if these were Power's instructions, Fecenko should have pressed to see the documents to inform his opinion.

54. Power could not recall whether Fecenko had asked him for additional documentation.[83] However, he acknowledged that he told Fecenko that the RFQ and MFP's response contained business terms that had already been reviewed by City experts.[84] He testified that if Fecenko had asked for further documents, he would have provided them.[85] For that reason, Power concluded that as he had not provided further documents to Fecenko, he must not have been asked to do so.[86] He could not recall with certainty whether or not he provided Fecenko with the following documents:

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[77] Fecenko Affidavit, para.25, 04/03/2003 at 22.
[78] Fecenko Affidavit, para.26, 04/03/2003 at 22-23.
[79] Fecenko Affidavit, para. 27, 04/03/2003 at 23.
[80] Fecenko Affidavit, para. 27, 04/03/2003 at 23.
[81] Fecenko Affidavit, para. 27, 04/03/2003 at 23.
[82] Fecenko Affidavit, para.27, Fecenko 04/03/2003 at 23.
[83] Power 03/27/2003 at 21-22.
[84] Power 03/27/2003 at 51-52; Power 03/31/2003 at 26.
[85] Power 03/24/2003 at 161.
[86] Power 03/24/2003 at 161.

a. the RFQ;

b. the MFP response to the RFQ;

c. the P&F Report; or

d. the Council Report.[87]

55. Power was fairly certain that he did not provide Fecenko with the July 27, 1999 Council Report granting the City authority to enter into the leasing transaction. In effect, Power limited Fecenko's review to the four corners of the MLA and the Program Agreement. Power admitted that if he had sent the RFQ and MFP's response to the RFQ to Fecenko, there would have been a better probability of protecting the City's interests.[88]

g) August 19, 1999, Power demands a response from Fecenko

56. On August 19, 1999 at 8:10 a.m., Fecenko sent an email to Power.[89] He told Power that he would phone him later that morning to answer any of his questions.

57. Power asked Fecenko to review the MLA and the Program Agreement in a very short time frame. On August 19, 1999 at 12:07 p.m., the day after Power first sent the MLA to Fecenko for review, Power sent Fecenko an email asking for the suggested changes by that same afternoon:[90]

> Mark, I would like to get your changes to the MFP lawyer this afternoon. If they incorporate the changes then the contract will be ready for signing. Tomorrow is important because a number of the City executives go on vacation.[91]

[87] Power 03/24/2003 at 153-154.
[88] Power 03/27/2003 at 276.
[89] COT011123, 23:1:26.
[90] COT011117, 23:1:23.
[91] COT011117, 23:1:23.

58. Fecenko testified that he had a long conversation with Power about the terms and conditions of the MLA on August 19.[92] Fecenko made notations on his copy of the draft MLA for the purposes of this conversation.[93]

59. One of Fecenko's concerns was the need to incorporate the terms of the RFQ and the response to the RFQ into the MLA. He advised Power that it was customary for the response to the RFQ to be paramount to the MLA. Fecenko indicated that this did not concern Power. Fecenko raised other concerns as well. Fecenko explained the consequences of any potential inconsistencies between the terms of the contract documents, and Power advised him that there were no such inconsistencies:

> I … referred him to Section 24 of the Master Agreement that had an interest rate of 24 percent for overdue accounts. I asked if either the RFQ or the Proposal dealt with this financial point and offered a more advantageous rate. The answer was "that's fine".[94]

60. As set out below, MFP had committed to permit certain overdue accounts to be carried at prime, not 24%.

61. The entire agreement clause contained a paramountcy provision. The language proposed by MFP reads:

> In the event there is a conflict or inconsistency between any of (a) the Equipment Schedule, (b) the Program Agreement, (c) this Master Lease; and d) Exhibits 1 and 2 to this Master Lease, the following priority shall prevail: (1) the Equipment Schedule, (2) the Program Agreement, (3) this Master Lease; and (4) Exhibits 1 [the RFQ] and 2 [MFP's response] which, for clarity, are superseded by this Master Lease and Program Agreement.[95]

[92] Fecenko Affidavit, para. 29, 04/03/2003 at 24-26.
[93] COT011126, 23:1:27.
[94] Fecenko Affidavit, para. 29, 04/03/2003 at 24-26.
[95] COT011126 at COT011132, 23:1:27.

62. Fecenko and Power discussed the paramountcy of the different agreements. Power agreed with Fecenko's advice on the order of paramountcy set out in Fecenko's August 19, 1999 memorandum:[96]

> The Master Lease and the Program Agreement should not "supercede" Exhibits 1 and 2. Replace the last sentence of the first paragraph with the following:
>
> > In the event of any conflict or inconsistency between the terms of this Agreement and the following documents, the conflict or inconsistency shall be resolved in accordance with the following order of precedence:
> >
> > i. Equipment Schedule;
> >
> > ii. Program Agreement;
> >
> > iii. Master Lease;
> >
> > iv. Exhibit 2 [MFP's response to the RFQ]; and
> >
> > v. Exhibit 1 (the RFQ).[97]

63. Fecenko's August 19, 1999 memorandum raised four issues for Power to consider during his negotiations with MFP. Fecenko indicated that the memorandum did not contain all of the issues that he had discussed with Power.[98] Power could not recall whether or not Fecenko had expressed concerns apart from those set out in his memorandum.[99] The memorandum raised four specific issues.

a. broaden the language of section 8.2 "Disclaimer of Warranties of Lessor";

b. change the notice provisions of section 17 "Default by Lessee";

c. change the order of precedence in section 26 "Entire Agreement"; and

[96] COT015747, 63:8:44a.
[97] COT015747, 63:8:44a.
[98] Fecenko Affidavit, para. 31, 04/03/2003 at 26-27.
[99] Power 03/24/2003 at 163.

d. broadening the ability to use section 33 “Fiscal Funding”.[100]

64. On the morning of August 20, 1999, Power emailed Fecenko.[101] The email advised Fecenko as to the outcome of Power’s negotiations with MFP:

> 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.[102]

65. Power testified that he would have discussed these changes with Viinamae.[103] Specifically, they discussed the fact that MFP would not agree to the default by lessee provision, and Viinamae accepted the change as it stood.[104] However, Power testified that the notice provision and the number of days it required would have been a concern for Viinamae. The issue regarding the onus of such notice may not have attracted either Viinamae’s or his own attention.[105]

66. In his affidavit, Fecenko indicated that he did not request or review the final version of the lease documents or realize that the final, executed lease documents did not fully reflect his memorandum in the manner represented by Power.[106] Specifically, the MLA ultimately changed the order of paramountcy such that Exhibits 1 and 2 were superseded by the MLA or the Program Agreement:

> 26 (b) In the event of any conflict or inconsistency between the terms of this Master Lease and the following documents, the conflict or inconsistency shall be resolved in accordance with the following order of precedence: (i) Equipment Schedule, (ii) Program Agreement, (iii) Master Lease, (iv) Exhibit 2 and (v) Exhibit 1. Exhibits 1 and 2 are superseded by this Master Lease and the Program Agreement . . .

[100] COT015747, 63:8:44a.
[101] COT011119, 27:1:16.
[102] COT011119, 27:1:16.
[103] Power 03/24/2003 at 166-167.
[104] Power 03/24/2003 at 166-168.

h) Fecenko's opinion letter

67. On August 20, 1999, Power asked Fecenko for a memorandum confirming the commercial reasonableness of the MLA.[107] Fecenko sent Power an email advising him that he would fax his opinion letter later that day.[108] Later on August 20, 1999, Fecenko faxed his opinion letter to Power.[109] The opinion letter was only three lines long and read, in its entirety:

> Re: MFP Financial Services Ltd. Master Equipment Lease Agreement No. 838 ("Master Lease"), Equipment Schedule and Program Agreement No. PA1 (collectively the "Drafts")
>
> 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.[110]

68. Fecenko testified that he used the term "commercially reasonable" for the specific purpose of meeting Power's goal of attaining the approval of Legal Services.[111] He did not intend for the opinion letter to imply that the leasing transaction itself was commercially reasonable. Instead, he intended his opinion letter to imply that the documents referred to therein were standard in both form and content for such a transaction:[112]

> 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.[113]

69. Fecenko did not believe that it was part of his mandate to ensure that the agreements the City was entering into actually reflected the business deal underlying

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[105] Power 03/24/2003 at 168.
[106] Fecenko Affidavit, paras. 32-33, 04/03/2003 at 27-29.
[107] COT011119, 27:1:16.
[108] COT006329, 27:2:3.
[109] COT011120, 26:1:5.
[110] COT011120, 27:2:3.
[111] Fecenko 04/03/2003 at 103-104.
[112] Fecenko 04/03/2003 at 104.

the agreements. His role, as he perceived it, was simply to review the boilerplate and give an opinion as to whether there was anything unusual in the boilerplate.[114] Such an opinion was, however, of little value to the City.

70. Fecenko forwarded Power's August 20, 1999 email (which confirmed that he would send an opinion letter) to Loreto in Legal Services.[115]

71. Power testified that he also forwarded Fecenko's opinion letter to Loreto.[116] Legal Services was not involved with the MLA negotiations until August 20, 1999. Power testified that he informed Loreto that Fecenko had reviewed the draft documents. Loreto did not ask Power what additional information he provided to Fecenko, nor did he ask for a copy of Power's file.[117]

72. Fecenko was aware that Loreto would be relying on his opinion letter for his decision to approve the MLA as to form. Indeed, Fecenko acknowledged that Loreto was the intended audience of the letter, even though it was addressed to Power. Based on the instructions that Loreto had given him earlier, Fecenko was well aware that Loreto was not reviewing any of the contract documentation.[118] Despite this knowledge, Fecenko did not inform Loreto orally or in writing that he had not reviewed the RFQ or the response to the RFQ, nor did he inform Loreto that he had not seen the final draft of the MFP documents.[119] Finally, Fecenko failed to inform Loreto that he thought there should be a legal review of the Equipment Schedules.[120]

73. Loreto testified that he stamped and initialed the MLA as "approved as to form" based on Fecenko's commercial reasonableness letter.[121] He relied on Fecenko's opinion letter as confirmation that the terms and conditions of the MLA were standard

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[113] Fecenko 04/03/2003 at 161.
[114] Fecenko 04/03/2003 at 162.
[115] Fecenko Affidavit, para. 32, 04/03/2003 at 27-29; COT006329, 26:1:4.
[116] Power 03/24/2003 at 174.
[117] Power 03/24/2003 at 172.
[118] Fecenko 04/07/2003 at 26.
[119] Fecenko 04/07/2003 at 30.
[120] Fecenko 04/07/2003 at 56.
[121] Loreto Affidavit, para.11, 04/01/2003 at 210.

terms for such an agreement.[122] Loreto did not confirm the commercial reasonableness of the MLA because he was relying on Fecenko's expertise.[123] He relied on Fecenko to know which documents should be reviewed in order to adequately write an opinion letter.[124] Loreto did not read or review the draft MLA prior to stamping and initialing it. He reasonably relied on Fecenko's opinion. Further, the City Clerk's office had already signed off on the Council authority for the MLA prior to his approval as to form.[125]

[122] Loreto Affidavit, para.11, 04/01/2003 at 210.
[123] Loreto, 04/01/2003 at 239-243.
[124] Loreto 04/02/2003 at 181.
[125] Loreto Affidavit, para.10, 04/01/2003 at 209-210.

5. The MFP Agreement Structure

74. MFP used a three stage agreement process – the MLA, the Program Agreement, and the Equipment Schedules. Wilkinson agreed that MFP used this contractual model to entrench MFP as a long term supplier of leasing services:[126]

> Q: I understand that, but what – the model is set up in such a [way] as it will become – it's to facilitate not just the immediate transaction that's the subject of perhaps a tender, but ongoing projects as well?
>
> A: Yes, the – the way the program's set up, that's right.[127]

75. The MLA set out some important terms and conditions,[128] such as asset management and equipment return costs, the right to upgrade the equipment during the term of the lease, and the impact of payment delays.[129] However, the MLA did not fix the length of the lease or any lease rates.[130] Program Agreements and Equipment Schedules contained very significant terms and conditions in their own right.

76. Both Viinamae and Power failed to recognize that the MLA was not the only, nor even the most important, contract between MFP and the City. The Program Agreement and the Equipment Schedules contained other, arguably more important contract terms and conditions. For example, the Equipment Schedules set out the terms for termination of the leases. Section 26 of the MLA provided that all Equipment Schedules and any Certificates of Acceptance are part of the entire agreement between the City and MFP.[131]

77. Fecenko testified that he knew that he had to satisfy himself with respect to all of the MFP documents, including the MLA, the Program Agreement, the Equipment

[126] Wilkinson, 09/18/2003 at 157-158.
[127] Wilkinson, 09/18/2003 at 157-158.
[128] COT036732 at COT036740, 33:2:27.
[129] Wilkinson 09/23/2004 at 5.
[130] COT036732 at COT036740, 33:2:27.
[131] COT012140 at COT012146, 63:8:34

Schedules, the RFQ, and MFP's response to the RFQ.[132] Despite this, Fecenko never reviewed the RFQ or MFP's response. However, he expected that Legal Services would review the subsequent contract documents required to effect the leasing transaction.[133]

a) The Program Agreement

78. The Program Agreement was designed to handle multiple acquisitions over a period of time.[134] Ongoing acquisitions meant that invoices were continuously coming through a supplier, usually on a monthly basis. Accordingly, the City was not required to negotiate each time it wished to place more equipment on lease. Ashbourne testified that the Program Agreement provided a streamlined acquisition process.[135] Harle explained that the Program Agreement permitted the lessee to order new equipment over the course of a quarter, all of which would be placed on one Equipment Schedule.[136] Accordingly, the Program Agreement permitted a single Equipment Schedule per quarter instead of multiple schedules over a quarter, one for each new order of new equipment. Harle clarified that MFP used both an MLA and Program Agreement because not all customers were eligible to operate under a Program Agreement:[137]

> It really, the Program Agreement program is really for those customers that have good credit because, basically over the course of that -- of that quarter, MFP is paying for equipment that has not yet put on lease.[138]

79. The Program Agreement incorporated by reference the terms and conditions of the MLA. It also provided terms and conditions that were relevant to the Equipment Schedules. For example, Section 4.1 of the first Program Agreement provided that the parties would execute an Equipment Schedule for any equipment accepted by the City

[132] Fecenko 04/03/2003 at 147.
[133] Fecenko Affidavit, para. 37, 04/03/2003 at 31.
[134] Ashbourne 12/17/2002 at 195.
[135] Ashbourne 12/17/2002 at 195.
[136] Harle 11/24/2003 at 79.
[137] Harle 11/24/2003 at 80.
[138] Harle 11/24/2003 at 80.

during the preceding quarter within fifteen days of the commencement of each quarter. Section 2 of the Program Agreement provided for termination by either party upon 30 days notice to the other party. However, such termination did not affect any Equipment Schedule entered into prior to the termination of the Program Agreement. Therefore, the effect of terminating the Program Agreement is that the City could not order and lease any further equipment under that Agreement. Instead, it would have to start a new Program Agreement. The Program Agreements did not indicate the length of the lease or any financial terms.

b) The Equipment Schedules

80. Equipment schedules were agreements that referred to the MLA and/or the Program Agreement.[139] The Equipment Schedules incorporated by reference the terms and conditions of the MLA and, where applicable, the Program Agreement. Equipment schedules that referred only to the MLA were identified by the suffix “838-xx”, where “xx” was the number of the schedule. Equipment schedules that referred to both the MLA and the Program Agreement were called “Program Agreement Equipment Schedules”, and were identified by the suffix “PA1-xx”, where “xx” was the number of the schedule.[140]

81. The Equipment Schedules had three major purposes: to describe the leased equipment; to establish the term of the lease; and to set out the lease rental payments.[141] Therefore, the Equipment Schedules provided the terms of the lease and described the financial obligations of the City. Section 26(b) of the MLA provided that the Equipment Schedules took precedence over the MLA and the Program Agreement.

82. Harle testified that, unlike the MLA and the Program Agreement, the Equipment Schedules were prepared by Currie, the portfolio administrator.[142] Harle was not

[139] COT036732 at COT036740, 33:2:27.
[140] COT036732 at COT036740, 33:2:27.
[141] COT036732 at COT036740, 33:2:27.
[142] Harle 11/24/2003 at 100.

involved in drafting Equipment Schedules for the City, except for those related to software.[143]

83. During the MLA negotiation process, Fecenko reviewed only a blank form of an Equipment Schedule. He understood that the terms of the Equipment Schedules were paramount over all of the other contract documents.[144] Despite this understanding, Fecenko did not tell anyone at the City about the importance of having a lawyer review the Equipment Schedules.[145] Instead, Fecenko expected Power to know that the Schedules should be subjected to legal review.[146] Power agreed that he was aware that the Equipment Schedules were required to complete the leasing transaction.[147] He knew that an Equipment Schedule to the MLA had to be executed in order to effect the leasing acquisition.[148]

c) The Certificates of Acceptance

84. The Certificate of Acceptance confirmed to MFP that the equipment contained in a given Equipment Schedule was delivered and accepted by the City. Wilkinson testified that MFP sent COA's to the lessee once a month.[149] At the end of each quarter, MFP consolidated the COA's into an Equipment Schedule.

85. The Certificate of Acceptance indicated to MFP that the City had received the equipment and MFP should pay the supplier. MFP required the Certificate of Acceptance because the City was responsible for ordering and receiving the equipment. Upon receipt of the equipment, MFP sent the City a Certificate of Acceptance. By the City's signature on the Certificate of Acceptance, it confirmed that it had received all of the equipment in good working order. On the basis of the executed Certificate of

[143] Harle 11/24/2003 at 101-102.
[144] Fecenko 04/03/2003 at 190-191.
[145] Fecenko 04/03/2003 at 194-195.
[146] Fecenko 04/03/2003 at 196.
[147] Power 03/27/2003 at 73.
[148] Power 03/25/2003 at 51.
[149] Wilkinson 12/16/2002 at 113.

Acceptance, MFP paid the supplier of the equipment. Then, the City transferred title to the equipment to MFP through a Bill of Sale, and leased it from MFP.

6. The signing and backdating of the MFP contract documents

a) MLA 838-1

86. Brian Stevens signed the MLA on behalf of MFP. Wilkinson testified that, while he did not know whether Stevens reviewed the MLA prior to signing it, he believed that Stevens would have relied heavily on the fact that MFP's legal counsel had reviewed the agreement.[150] Wilkinson did not have any discussions with Stevens about the variances between the terms of the response to the RFQ and the terms of the MLA.[151]

87. Power explained that City contracts required two signatures: one from the City Clerk and the other from the CFO and Treasurer.[152] In this instance Shultz, for the CFO and Treasurer, and Jeff Abrams ("Abrams"), for the City Clerk, signed the MLA on behalf of the City.[153] City contracts also required the stamp "approved as to form" to be affixed by the City Solicitor's office.[154] Loreto initialed Doyle's stamp on the signatory page of the MLA.

88. The MLA was executed "as of" July 30, 1999.[155] The MLA was likely signed on or before September 29, 1999, as evidenced by a stamp on the signature page. The MFP file-path printed on the signatory page shows the date August 20, 1999, which was likely the date that MFP created or printed the document. Some documents indicate, and Viinamae confirmed, that the MLA was sent to the City Clerk on August 23, 1999.[156] All parties agreed that the MLA was signed in August or September 1999.

89. Harle believed that the MLA was signed by the end of August 1999.[157] She understood that MFP backdated the MLA to July 30, 1999 because that was the date

[150] Wilkinson 09/23/2003 at 21-22.
[151] Wilkinson 09/23/2003 at 22.
[152] Power 03/24/2003 at 175.
[153] COT012140 at COT012147, 63:8:34.
[154] Power 03/24/2003 at 176.
[155] COT012140 at COT012147, 63:8:34.
[156] Harle 11/24/2003 at 84, 98.
[157] Harle 11/24/2003 at 84-85.

that Council approved the leasing transaction. She did not participate in this decision.[158] Harle believed that someone at MFP instructed her to backdate the MLA to July 30, 1999.

90. The City submits that backdating contracts should not be encouraged. It should be clear on the face of a contract when that contract was signed and by whom. If the date the contract was to take effect was different from the date the contract was signed, that too should have been clearly set out on the face of the contract.

b) Program Agreement PA1-1

91. The original Program Agreement ("PA1-1") was executed on October 1, 1999.[159] Viinamae signed PA1-1. She could not recall whether she signed the document on October 1, 1999, or in that time frame. Stevens signed the Program Agreement on behalf of MFP. Viinamae also signed an Amending Agreement dated July 30, 1999. The Amending Agreement backdated the operative date of the Program Agreement to July 30, 1999.[160] The tagline on the Amending Agreement indicated that Harle produced the document. She could not recall drafting the Amending Agreement and did not know why the Program Agreement was backdated.[161] Harle's expectation was that the MLA and the Program Agreement would have been signed at the same time.[162]

c) Equipment Schedules

92. The City entered into fifteen Equipment Schedules with MFP, three of which were cancelled and rewritten as five Equipment Schedules in July 2000.[163] MFP usually issued an Equipment Schedule once per quarter. The first Equipment Schedule for the City was Equipment Schedule 838-1.[164] Equipment Schedule 838-1 was signed by

[158] Harle 11/24/2003 at 86.
[159] COT020610, 18:1:2.
[160] COT020617, 18:1:3.
[161] Harle 11/24/2003 at 96, 98.
[162] Harle 11/24/2003 at 99.
[163] COT036732 at COT036739, 33:2:27
[164] COT020648, 18:1:5.

Viinamae with a commencement date of October 1, 1999. The Equipment Schedules were signed by one or both of Liczyk and Viinamae. The signing of the Equipment Schedule 838-1 is discussed in detail in Chapter 10.

93. There were additional terms and conditions contained in the Equipment Schedules which structured the City's contractual relationship with MFP. First, s. 5 provided that the lessee may terminate the Equipment Schedule, so long as: the lessee has given written notice to the lessor; has paid all rent and other payments due to the lessor; has returned the equipment to the lessor; and has paid the termination payment.[165] The termination payment was a multiple of the termination factor and the total equipment cost. Second, s. 7 provided that the lessee was responsible for all delivery costs, including the costs of unpacking, assembly, and installation.[166]

[165] COT003093 at COT00309-4.
[166] COT020648 at COT020649, 18:1:5

7. MFP's MLA does not reflect its response to the RFQ or its earlier representations

94. MFP resiled from the commitments it made to the City in its response to the RFQ. In some cases, representations contained in MFP's response to the RFQ were flatly contradicted by the MLA, in other cases they were simply excluded from the MLA.[167]

95. Wilkinson claimed that he did not review the drafts of the MLA that he forwarded from Harle to the City for fairness or accuracy of the business terms in the response to the RFQ.[168] He was simply a conduit for the MLA to pass from Harle to Power. This is nonsense. Wilkinson was clearly involved in setting the business terms contained in the MLA. The Commissioner asked Wilkinson why Power did not deal directly with MFP's legal counsel. Wilkinson agreed that such direct dealings "probably would have been better".[169]

96. In his affidavit, Wilkinson acknowledged that the City was concerned about which document would have priority for any later issues of interpretation.[170] Wilkinson was therefore aware that the City was interested in ensuring that the RFQ and MFP's response to the RFQ were incorporated as contract documents. Accordingly, Wilkinson was aware that the City wanted the commitments that MFP had made in its bid incorporated in the contract. Yet he took no steps to ensure this result:

> Q: You knew that the City was interested in making sure that commitments that MFP had made in its bid were incorporated in the contract?
>
> A: Right.
>
> Q: You knew it at the time?
>
> A: Yes.

[167] Wilkinson 09/22/2003 at 184.
[168] Wilkinson 09/22/2003 at 195-196; Wilkinson 09/23/2003 at 20-21.
[169] Wilkinson 09/23/2003 at 9-10.
[170] Wilkinson Affidavit, para. 58, 09/16/2003 at 61-62.

> Q: And from where you sat as -- as the business person from MFP's side of things, you had no difficulty with that, did you?
>
> A: No. No.
>
> Q: You were satisfied that the business commitments that MFP had made, in its bid, were ones that MFP would live with in any contract documents?
>
> A: Yes.[171]

97. MFP resiled from the commitments it made in its response to the RFQ in four areas:

a. asset management;

b. equipment return costs;

c. the right to upgrade the equipment during the term of the lease; and

d. the effect of payment delays.

98. Power agreed that he was ultimately responsible for discrepancies between the terms of MFP's response to the RFQ and the terms of the MLA and Program Agreement:

> Q: So, it's fair to say, sir, is it not that the fact that the contract in that respect may operate differently than their bid, is a result of oversight?
>
> A: Yes.
>
> Q: And it's your oversight, sir, is that right?
>
> A: Yes.[172]

[171] Wilkinson 09/22/2003 at 198.
[172] Power 03/27/2003 at 278.

a) Asset management costs

99. Section 7 of the RFQ required respondents to identify any costs that may be incurred, separate and apart from lease rates.[173] The RFQ asked for a response for each of "Asset management costs" and "Asset management costs associated with relocation of equipment". MFP entered "$0" beside each question. In short, MFP promised to provide the City with free asset management services.[174]

100. Wilkinson acknowledged that MFP's response to the RFQ contemplated free asset management services. Wilkinson admitted that he never told anyone at the City that, despite the commitments contained in MFP's response to the RFQ, there would be a charge for asset management services.[175] Power admitted that he did not notice this discrepancy.[176] MFP engaged in a clear bait and switch by promising free asset management services but then excluding that promise from the MLA.

101. Harle testified that asset management services were always provided at no cost to MFP's customers, and that she could not recall a situation in which MFP charged its customers for such services.[177] She explained that s. 26(b) of the MLA referred to technical services, such as project management services. Harle believed that the intention of MFP was always to provide asset management services free of charge, and that she would have readily incorporated such a term into the MLA at the City's request.[178]

102. MFP continually tried to have it both ways. It told the City that it would not be bound by the bid and would instead rely on the strict terms of the (inferior) contract signed with the City. When the City noticed that the strict term of the contract was not as beneficial, MFP asked, with a wounded tone, 'why won't you trust us to go beyond the terms of the contract to do right by you, our leasing partner?'

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[173] COT006104 at COT006118, 46:1:66.
[174] COT072876 at COT072902, 62:4:9.
[175] Wilkinson 09/23/2003 at 12-13.
[176] Power 03/24/2003 at 156-157.
[177] Harle 11/24/2003 at 64.
[178] Harle 11/24/2003 at 68.

b) Free pick up and delivery of equipment

103. In its response to the RFQ, MFP promised free equipment pick up and delivery of equipment. The terms MFP provided in the MLA imposed the entire cost of equipment pick up and delivery on the City.

104. Section 7 of the RFQ set out a table that required respondents to identify any costs that may be incurred, separate and apart from lease rates.[179] The table contained a row for "Costs associated with pickup and delivery". MFP responded "$0" for this row.[180] Similarly, section 1.1.2 of MFP's response to the RFQ read:

> There will be no additional costs to the City, associated with picking up and delivery of leased equipment replaced under the leasing arrangements.[181]

105. The terms of the MLA were drastically different. Section 10.1 of the MLA specified that the City would pay "all delivery, installation, transportation, rigging, drayage and insurance charges with respect to the Equipment".[182] Paragraph 16 read:

> The lessee shall at the termination of an equipment schedule, <u>at its sole expense,</u> return the Equipment to Lessor (at such a location as shall be designated by Lessor within Canada) in the same operating order, repair, condition and appearance as on the Commencement Date, reasonable wear and tear excepted . . . [emphasis added][183]

106. The City's obligation to bear all of the costs for the delivery of equipment was repeated in Equipment Schedule 838-1:

> Lessee shall be responsible for all transportation charges for delivery of the Equipment to Lessee's premises specified above and for all unloading, rigging, unpacking, assembly and installation of the Equipment.[184]

[179] COT006104 at COT006118, 46:1:66.
[180] COT072876 at COT072902, 62:4:9.
[181] COT072876 at COT072882, 62:4:9

107. Wilkinson did not deny that MFP changed its position. Instead, he blamed the City for failing to raise the issue during the negotiation phase.[185] Wilkinson admitted that that there was no discussion between MFP and the City with respect to the change of either of these terms of the RFQ.[186]

108. The City may have been careless. However, MFP deliberately altered its position from its response to the RFQ and never identified the issue during negotiations. This type of sharp practice is not what the City would have expected from a company that promised to be its leasing partner and to live up to the obligations it accepted by filing its response to the RFQ.

c) Right to upgrade

109. The third area where MFP pulled a bait and switch between its response to the RFQ and the MLA was the City's right to upgrade the equipment during the term of the lease. Wilkinson drafted this section of MFP's response to the RFQ.[187] Section 1.1.6 of MFP's response to the RFQ specified the upgrade of equipment.[188] MFP provided that the City could upgrade products at any time during the lease term:

> All leasing options offered by MFP provide for the upgrade of products at any time during the lease term. MFP recognizes the need for customers to replace technology and our leases provide the flexibility to accommodate such changes. In some instances, the upgrades may be significant and the City may wish to consider refinancing the entire system. MFP will support these requirements. MFP is independent of any equipment manufacturer. The City may choose to upgrade the equipment irrespective of the manufacturer of the upgrade parts provided this does not damage or in any way devalue the existing leased equipment. The services related to any upgrade may also be included as part of the lease financing.[189]

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[182] COT012140 at COT012142, 63:8:34.
[183] COT012140 at COT012142, 63:8:34.
[184] COT020648 at COT020649, 18:1:5.
[185] Wilkinson Affidavit, para.60, 09/16/2003 at 63.
[186] Wilkinson 09/22/2003 at 222.
[187] Wilkinson 09/23/2003 at 20.
[188] COT072876 at COT072884, 62:4:9.
[189] COT072876 at COT072884, 62:4:9.

110. MFP's response went on to describe two possibilities for managing upgrades. One possibility was to upgrade existing leased equipment or add new equipment. The other possibility was to exchange existing leased equipment for new equipment. The rent for both options was based on the type of equipment, the cost of purchase, the interest rates, and the length of lease term for the equipment. However, the rent for the second possibility was also determined by the fair market value of the returned equipment and the remaining lease obligations.[190]

111. Wilkinson did not ensure that the MLA provided for these options.[191] He stated that these factors were obvious and did not perceive that these factors needed to be entrenched contractually.[192] Wilkinson admitted that he did not know of any communications between MFP and the City regarding MFP's views on this matter.[193]

112. However, the City's ability to exercise the rights promised by MFP in its response were severely limited by ss. 5 and 33 of the MLA. Section 5 stated that each Equipment Schedule was a net lease and was non-cancelable:

> [The] Lessee's agreement to pay all obligations thereunder, including but not limited to Rent, shall be absolute and unconditional. Lessee's obligations shall not be subject to any abatement, reduction, setoff, defense, counter-claim or recoupment whatsoever. Except as otherwise expressly provided herein, the Equipment Schedule shall not terminate, nor shall the respective obligations of Lessor or Lessee be affected, by reason of any defect in the Equipment, the condition, design, operation or fitness for use thereof, or to damage to, or any loss or destruction of the Equipment, or any Unit thereof from any cause whatsoever, the prohibition of or other restriction against Lessee's use of the Equipment or the interference with the use thereof by any private person, corporation or governmental authority, or as result of any war, riot, insurrection or act of God. It is the express intention of Lessor and Lessee that all Rent and other amounts payable by Lessee pursuant to the Equipment Schedule shall be, and continue to be, payable in all events throughout the initial Term, or any renewal term, thereof.[194]

[190] COT072876 at COT072885, 62:4:9.
[191] Wilkinson 09/23/2003 at 28.
[192] Wilkinson 09/23/2003 at 29.
[193] Wilkinson 09/23/2003 at 20.
[194] COT012140 at COT012141, 63:8:34

113. Wilkinson explained that s. 5 was the standard clause in the standard form MLA.[195] He agreed that if the City had approached MFP and asked them to reconcile s. 5 with the terms of the RFQ, MFP would have looked into the issue.[196] However, Wilkinson did not testify that MFP would have changed the terms of the MLA to match the terms of its response to the RFQ. Instead, he testified that MFP had to be very careful to preserve the net lease provision in its lease contracts.[197] Wilkinson admitted that the MLA, on its face, locked the City into leasing the same equipment throughout the term of the lease without a right to upgrade, in direct contradiction to what MFP had agreed to provide in its response to the RFQ.[198]

114. Section 33 contemplated a right of termination on the part of the City in the event of a fiscal funding failure. However, as indicated in Fecenko's memo, the City's ability to use this section was extremely limited.[199] It applied only where the Lessee neither: (i) prepared or estimated; nor (ii) appropriated, authorized or expended, sums for the Lessee's fiscal year immediately following the fiscal year of termination in respect of the use, purchase, lease, or other acquisition of any computer equipment whatsoever.

115. The MLA also restricted the City's broader requirement that it be entitled to "make any upgrades, alterations or attachments to the leasing equipment".[200] In s.1.1.13 of its response to the RFQ, MFP agreed to this requirement.[201] However, in the MLA, s.19 provided that MFP had to consent to any additions or replacements:

> Lessee shall not, without prior written consent of the Lessor, add, affix, or replace any part, component, accessory or upgrade to the Equipment. [202]

[195] Wilkinson 09/23/2003 at 35.
[196] Wilkinson 09/23/2003 at 37-38.
[197] Wilkinson 09/23/2003 at 36-37.
[198] Wilkinson 09/23/2003 at 37.
[199] COT015747, 63:8:44a
[200] COT006104 at COT006106, 46:1:66.
[201] COT072876 at COT072887, 62:4:9.
[202] COT012140 at COT012144, 63:8:34.

d) Delayed payments

116. The fourth bait and switch involved the interest rate attached to certain delayed payments by the City. Wilkinson also drafted this section of MFP's response to the RFQ.[203] Section 1.1.20 of the RFQ provided that the City might have required payment flexibility to defer payments into a future fiscal year.[204] Section 1.1.9 of the RFQ also asked respondents to explain any optional payment arrangements.[205] The RFQ required respondents to specify the ability to do this at the same leasing costs as the original lease and to identify any other costs associated with this arrangement. In its response to the RFQ, MFP agreed that the City could delay a lease payment into the following year:

> There is a delay payment adjustment which would equal the difference between the future value of the payment being delayed to the time of payment at a rate equal to prime less the amount of the payment being delayed.[206]

117. MFP used this same paragraph twice in its response to the RFQ – first, as part of its response to s. 1.1.6, and second, as its entire response to s. 1.1.20.[207] Wilkinson testified that the option to delay payments was an option that was unique to the City.[208]

118. Section 24 of the MLA was significantly less favourable for the City than MFP's representations in its response to the RFQ:

> All Rent and other amounts from to time owing under the Equipment Schedule not paid when due shall bear interest, payable on demand from the due date to the date of payment at the rate of twenty-four per cent (24%) per annum (two per cent (2%) per month), or if such rate shall exceed the maximum rate of interest permitted by law, then at such maximum rate.[209]

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[203] Wilkinson 09/23/2003 at 20.
[204] COT006104 at COT006107, 46:1:66.
[205] COT006104 at COT06106, 62:4:9.
[206] COT072876 at COT072890, 62:4:9.
[207] COT072876 at COT072886, COT072890, 62:4:9.
[208] Wilkinson 09/23/2003 at 29-30.
[209] COT012140 at COT012145, 63:8:34

119. MFP offered the prime rate in its response and obtained 24% in the MLA.

120. Wilkinson testified that s. 24 was the standard clause in the standard form MLA.[210] This does not assist MFP. If it knew that the standard provision called for a 24% interest rate similar to that imposed by credit card companies, its motives in proposing prime in the RFQ response become even more suspect. The offer of prime was the bait in advance of the 24% switch.

121. Further evidence in support of the City's submissions is found in a Harle email. On July 14, 1999, before MFP even won the bid, Harle sent an email to Pessione and Domi, in which she pointed out that the adjustment amount cited in MFP's response to the RFQ was inadequate and needed to be changed.[211] She expressed concern about the business propriety of MFP's commitment under paragraph 1.1.20, and suggested the MFP needed to extricate itself from this commitment:

> Our response to Section 1.1.20 provides that the City may delay lease payments into the following fiscal year, as long as it pays an adjustment calculated at prime. This response, from a funding perspective, is not adequate - the rate is too low. Please contact Brian and me to discuss.[212]

122. This email evidences MFP's early intention to resile from terms of its response to the RFQ. MFP clearly had no intention of living up to this promise, which was made for the purpose of convincing the City to choose MFP.

123. In addition, s. 17.1 of the MLA provided that an event of default occurred where the City failed to make any payment required under the Equipment Schedule within ten days of the due date.[213] This clause was also inconsistent with the terms of the response to the RFQ.[214]

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[210] Wilkinson 09/23/2003 at 32-33.
[211] COT080060, 18:3:36.
[212] COT080060, 18:3:36.
[213] COT012140 at COT012143, 63:8:34
[214] Wilkinson 09/23/2003 at 33.

124. Wilkinson testified that he did not know of any communications between MFP and the City with respect to MFP's desire to depart from its response to the RFQ.[215] He did not make any effort to ensure that this option was available to the City in the terms of the MLA.[216]

e) Kerr's reservations about the terms of the MLA

125. Kerr expressed misgivings about certain terms and conditions of the MLA.[217] Kerr's concerns included some of the terms discussed above, for example interest on past due payments, interim rent, and shipping costs.[218]

126. However, his primary concern was the definition of "equipment" in the MLA.[219] On page one of the MLA, MFP defined "equipment" as everything listed in an Equipment Schedule.[220] The MLA provided the City with early termination options, buy-out options, and lease extension options (collectively, the "Options"). The problem was that the Options applied only to "equipment", not to "units".

127. Kerr indicated that the MLA did not clearly provide the City with the right to entitlement to apply the Options to anything less than all of the equipment on a lease schedule.[221] The City had lease schedules containing thousands of computers, which required flexibility at the unit level. For example, lease schedule 838-5 contained 10,000 desktop computers. If the City wanted to return, refresh or terminate 10 computers leased on schedule 838-5, it would have to refresh or return all 10,000 computers at the same time.[222]

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[215] Wilkinson 09/23/2003 at 20.
[216] Wilkinson 09/23/2003 at 30.
[217] COT080176 at COT080182, 61:1:Report.
[218] COT080176 at COT080182, 61:1:Report; Kerr 09/11/2003 at 31-32.
[219] COT080176 at COT080182, 61:1:Report.
[220] COT012140 at COT012140, 63:8:34.
[221] COT080176 at COT080182, 61:1:Report.
[222] Kerr 09/11/2003 at 33-34.

128. MFP was well aware of this difficulty, and drafted the terms of the MLA accordingly, in such a way that the City could not effectively exercise its options without MFP's agreement, which presumably would come at a price.

8. The City's internal approval process for the MLA

a) The role of Legal Services

129. Legal Services was generally involved in a transaction in either of two ways:

a. it provided all legal services connected to the transaction; or

b. it worked with outside legal counsel to provide legal services connected to the transaction.[223]

130. In rare circumstances, Legal Services deferred entirely to external legal counsel for the provision of legal services connected to a transaction. The Y2K Project was one such occasion.[224]

131. Doyle stated that Legal Services did not play any role with respect to the negotiation of the MLA because of Faskens' involvement. He further stated that Faskens did not take instructions from Legal Services regarding the MLA.[225] The terms of the retainer agreement specified that Faskens would obtain instructions only on matters of City corporate governance, priorities and policies from the City Solicitor. On transactional matters, Faskens was to obtain instructions from Viinamae or her designate.[226] Loreto instructed Fecenko to review the applicable legal documentation for the purposes of stating that it was "approved as to form" for signature by Legal Services.[227]

[223] Doyle Affidavit, para.8, 04/07/2003 at 84.
[224] Doyle Affidavit, para.9, 04/07/2003 at 84.
[225] Doyle Affidavit, para.13, 04/07/2003 at 86-87.
[226] COT006447, 26:1:2; Loreto Affidavit, para.4, 04/01/2003 at 205-206.
[227] Fecenko Affidavit, para.19, 04/03/2003 at 17-18.

132. Doyle testified that the practice at the City required that the City Solicitor approve a document “as to form” before the Clerk’s office signed it.[228] The City Solicitor’s approval as to form indicated that Legal Services was satisfied that:

a. the parties were correctly named;

b. all of the pages were included;

c. there was a place for execution; and

d. the authorization stamp and the approval as to form stamp were affixed.[229]

133. In circumstances where Legal Services had provided all of the legal services connected with a transaction, approval as to form also meant that the document reflected what Council had authorized.[230] Loreto swore that the purpose in having Legal Services approve a contract as to form was to obtain assurance that the terms and conditions and language in the form of agreement were considered "normal" or "standard".[231] Loreto initialed Doyle’s “approved as to form” stamp.[232]

134. Legal Services was not directly involved with the MLA process until August 20, 1999. As described above, Power advised Fecenko that the MLA required a City stamp confirming that the agreement had been “approved as to form”.[233] Fecenko offered to provide a letter stating that the legal terms and conditions reviewed were commercially reasonable. On August 20, 1999, Power contacted Loreto regarding the approval of the MLA.[234] Power testified that he informed Loreto that Fecenko had reviewed the draft documents. Loreto did not ask Power what additional information he provided to

[228] Doyle Affidavit, para.15, 04/07/2003 at 87-88.
[229] Doyle Affidavit, para. 16, 04/07/2003 at 88.
[230] Doyle Affidavit, para.17, 04/07/2003 at 88.
[231] Loreto Affidavit, para.7, 04/01/2003 at 208.
[232] Doyle 04/07/2003 at 116.
[233] Fecenko Affidavit, para. 30, 04/03/2003 at 26.
[234] Power 03/24/2003 at 171-172.

Fecenko, nor did he ask for a copy of Power's file.[235] Loreto testified that he stamped and initialed the MLA "approved as to form" based on Fecenko's commercial reasonableness letter.[236]

b) The role of the City Clerk

135. The *Municipal Act* stipulated that Council shall appoint a Clerk.[237] The City Clerk's office was a division of the Corporate Services Department. The head of the City Clerk's office was the City Clerk. During the relevant time frame, Novina Wong ("Wong") was the City Clerk. For Council-related matters, the City Clerk reported directly to Council. For all other matters, the City Clerk reported to the CAO.[238]

136. Bylaw 39-1998 pertained to the execution of documents on behalf of the City.[239] It was adopted by Council on February 6, 1998. Bylaw 39-1998 authorized the City Clerk and the CFO and Treasurer, or their respective designates, to sign all documents necessary to give effect to matters approved by Council, or approved by municipal officials under delegated authority. Doyle testified that the practice at the City required that the City Solicitor approve a document as to form before the Clerk's office signed it.[240] Doyle indicated that there was also a practice whereby the City Clerk signed an authorization statement, which confirmed that Council had approved the contract.

137. The City Clerk's designate signed the MLA for two different reasons. The first signature appeared under a handwritten stamp indicating that the MLA was authorized by City Council. In his affidavit, Doyle indicated that the City Solicitor or designate would reference the appropriate Council authority on the agreement.[241] Legal Services stamped the MLA and checked the Council report. However, the City Clerk was

[235] Power 03/24/2003 at 172.
[236] Loreto Affidavit, para.11, 04/01/2003 at 210.
[237] *Municipal Act*, R.S.O. 1990, c. M. 45, s. 73.
[238] Hart, 06/12/2003 at 171.
[239] 28:1:2.
[240] Doyle Affidavit, para.15, 04/07/2003 at 87-88.
[241] Doyle Affidavit, para.15, 04/07/2003 at 87-88.

responsible for signing the Council authority stamp.[242] He agreed that whoever filled out the stamp would review the Council report.[243] This is a confusing distinction:

> Q: So are you telling me that when the legal representative puts on the Council authority stamp and fills it in, after reading the Council report, and looking at the contract to make sure that it accords with that Council authority, they're not actually saying that that's right?
>
> A: We're saying that's right with the approved as to form stamp. The other one -- it's just a courtesy for the Clerk.
>
> Q: If it's just a courtesy for the Clerk, but you're looking at the Council authority, and a legal representative is reading the Council authority, and is also reading the contract, but you're not -- you're not verifying anything, you're not approving anything?
>
> A: No, we did that with, the approved as to form stamp. What we're doing is -- the Clerk has to do the same kind of thing. The Clerk is saying, this is authorized by this particular Council decision. All we did -- all we're doing is trying to help them a bit by --
>
> Q: Filling it in --
>
> A: -- putting in the authorized -- what's it say, by this report adopted by Council at this meeting. So, the Clerk can just come come back and say, that isn't it, you've got it all wrong. And then that could start an interesting exchange.[244]

138. The second signature of the City Clerk appeared as one of the required signatories to the MLA. The latter was clearly required and authorized by Bylaw 39-1998.

139. The fine distinction that Doyle discussed with respect to the Council authorization stamp is unclear on the issue of accountability. Legal Services signed the MLA "approved as to form", and relied entirely on external counsel in its assessment that the MLA was "commercially reasonable". Then, Legal Services placed a handwritten stamp on the MLA that certified that the MLA "appeared" to be authorized by the Council report. However, Legal Services renounced responsibility for affirming that the MLA was

[242] Doyle 04/07/2003 at 127.
[243] Doyle 04/07/2003 at 122-123.
[244] Doyle 04/07/2003 at 127-128.

authorized by Council, and passed this task to the City Clerk. It is not clear from the evidence that the City Clerk was aware of this task. Hence, there was a potential gap in responsibility with respect to confirmation that Council authorized the MLA.

140. During the relevant time period, Abrams was the acting City Clerk.[245] In an email to Viinamae dated August 20, 1999, Power confirmed that he had spoken with Abrams, and that Abrams was prepared to sign the MLA:[246]

> I spoke with Jeff Abrahams [sic] 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.[247]

141. Power followed up on this email update to Viinamae with another email.[248] This email advised Viinamae that Liczyk had to approve the contract on Monday, as she was on vacation after that date.[249] Abrams ultimately signed the MLA both as the designate of the City Clerk on behalf of the Lessee, and as the designate of the City Clerk under the Council authorization handwritten stamp.[250]

c) The CFO and Treasurer

142. In her affidavit, Liczyk acknowledged that, as the CFO and Treasurer for the City, she or her designate was required to act as statutory signing officer for every City contract.[251] She relied entirely on Legal Services and the originating department to have done all due diligence on the legal and business terms, respectively, of every contract.[252] Liczyk believed that it was widely understood that she did not perform any due diligence with respect to the contracts that she signed.[253] Liczyk often signed

[245] Power 03/24/2003 at 174-175.
[246] COT015641, 23:1:84.
[247] COT015641, 23:1:84.
[248] Power 03/24/2003 at 175.
[249] COT015641, 23:1:84.
[250] COT012140 at COT012147, 63:8:34
[251] Liczyk Affidavit, para.47, 11/03/2003 at 25.
[252] Liczyk Affidavit, para.47, 11/03/2003 at 25.
[253] Liczyk Affidavit, para.48, 11/03/2003 at 25.

contracts without reading them.[254] However, she tried to do a "quick read through" of staff reports, or Committee or Council reports.[255]

143. Shultz was delegated signing authority on behalf of the CFO and Treasurer.[256] Shultz speculated that Council delegated this authority through a report. He testified that he received multiple contracts in a week. Accordingly, if he received a contract that was approved by Legal Services, then he signed on behalf of the CFO and Treasurer without reviewing the contents of the document.[257] Shultz also referred specifically to the stamp that confirmed Council authority for the contract. He testified that this also made him secure about signing the contract.

144. On August 23, 1999, Andrew and Viinamae sent a covering letter, three copies of the MLA, and a copy of Fecenko's opinion letter to Liczyk and Wong.[258] Viinamae signed this letter on Andrew's behalf. The covering letter referenced the three attached copies of the MLA for Liczyk and Wong's approval. Liczyk confirmed that she delegated the signing of the MLA to Shultz.[259] Liczyk testified that the Andrew/Viinamae covering letter provided sufficient authority for Shultz to sign the MLA without review.[260]

145. In the result, Finance did not even review the terms and conditions of the MLA.

[254] Liczyk 11/18/2003 at 146-147.
[255] Liczyk 11/18/2003 at 147.
[256] Shultz 09/05/2003 at 116.
[257] Shultz 09/05/2003 at 116-117.
[258] COT004685, 63:8:43a.
[259] Liczyk 11/17/2003 at 139.
[260] Liczyk 11/17/2003 at 140.