TORONTO EXTERNAL CONTRACTS INQUIRY

The Honourable Madam Justice Denise Bellamy
Commissioner

REPLY SUBMISSION OF THE CITY OF TORONTO

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I. Introduction

1. This reply submission is not intended to deal with every point in other parties' submissions with which the City disagrees. Silence on any particular issue, assertion or argument should not be taken as agreement with conclusions or acknowledgement of factual accuracy.

2. Rather, the City has identified certain key issues which either require factual correction, or which cannot go unanswered.

II. TMACS Phase

a) Response to Wanda Liczyk's submission

i) Liczyk's Allegations of sexism

3. Wanda Liczyk's submission asserts that this phase of the Inquiry, in conception and execution, was sexist. This assertion is soundly refuted by the detailed documentary and persuasive *viva voce* evidence adduced at the Inquiry. The weight of that evidence clearly establishes that Liczyk misused her position to favour a supplier with whom she had a personal relationship.

4. Moreover, Liczyk's submission fails entirely to address the clear, convincing, and largely undisputed evidence that her former lover remained her close friend and confidante until the day she left the City in May 2001.[1] This omission suggests that she continues to ignore that she was in a serious conflict of interest with Saunders independent of her intimate relationship with him.[2]

5. City employees, male and female, are of course entitled to have close personal friends, intimate and otherwise. What they are not permitted to do is give those people contracts.

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[1] TMACS City submission, paras.14-15
[2] TMACS City submission, paras.16-19

6. Liczyk supports her allegation that the Inquiry is sexist and intended to publicly humiliate her by suggesting in paragraph 9 of her submission that, in September 1999, following the NOW Magazine article:

> A review of the matter was conducted by the City Auditor and he satisfied himself that there was nothing untoward or inappropriate about the City's selection of TMACS and the City's water billing system WMACS. However, three years later, it is now seen as appropriate to play the issue out in a public forum.

7. Liczyk's argument that she was effectively vindicated by the City Auditor is fundamentally flawed because:

a. In her September 14, 1999 memo to the Auditor (the "Griffiths Memo"),[3] Liczyk failed to mention that she had any relationship whatsoever with Saunders, and in fact tried to distance herself from him.[4] There is no evidence the Auditor did anything other than receive the September 14, 1999 memo. However even if the Auditor thought after reading it that there was nothing untoward or inappropriate in the selection of TMACS and WMACS, it would have been because Liczyk failed to disclose relevant information to him.

b. The Auditor did conduct a forensic audit in 2002, and came to the conclusion in his Audit Report there was something untoward and inappropriate about the billing practices of Beacon and Remarkable and the lack of administrative controls over them.[5] However, the Audit Report explicitly expressed no opinion on the appropriateness of the selection of TMACS2.[6] What the Auditor still lacked, of course, was disclosure from Liczyk and Saunders as to the nature of their relationship.

[3] TEC007498
[4] TMACS City submission, paras.284-287
[5] PR029717 and Griffiths Affidavit paras.9-12
[6] PR029717 at 29721 and Griffiths Affidavit para.8

8. Until this Inquiry, the City knew there were some irregularities in the relationship with Beacon and Remarkable, but didn't know the extent of the irregularities, or how they came about. The Inquiry has "gotten to the bottom of" those questions which were legitimately the subject of a public inquiry.

ii) That "the writing was on the wall" was "historical revisionism" advocated by the City

9. Paragraph 78 of Liczyk's submission states that: "(t)he theory that the 'writing was on the wall for Tax Manager 2000' because of Liczyk's, and others', preference for TMACS is historical revisionism advocated by the City of Toronto."

10. Two witnesses gave evidence that "the writing was on the wall" for TXM: Ed DeSousa[7] and Bob Ripley.[8] The City's counsel did not interview either of them. The City's counsel did not assist in preparing their affidavits. The City's counsel had no communication with them prior to commencement of their evidence. It is unfair to suggest that either witness was influenced by any position taken by the City of Toronto before or during the Inquiry.

11. Similarly, Audrey Birt[9] and Brenda Glover[10] gave evidence supporting the conclusion that the "writing was on the wall" for TXM, though they did not use those specific words. Again the City's counsel had no communication with either of them prior to the commencement of their evidence. There is no basis to conclude that their evidence was part of any exercise in "historical revisionism".

iii) "Wanda made me do it" and "epiphanies from higher beings"

12. Paragraph 85 of Liczyk's submission states: "Not one of these people (referring, it appears, to DeSousa and Ripley) was strong enough to defend what they had expressly stated at the time. Instead, they essentially state: 'Wanda

[7] DeSousa Affidavit para.30; DeSousa 10/26/2004 at 77-78, 81 and 87
[8] Ripley 10/21/2004 at 100, 147 and 174
[9] Birt Affidavit paras.44-47; Birt 10/19/2004 at 162-165
[10] Glover 10/18/2004 at 199-200; Glover Affidavit para.40

made me do it', despite all documented evidence to the contrary." As with their evidence that "the writing was on the wall", Liczyk argues their evidence should be rejected.

13. The Commissioner may decide whether or not DeSousa and Ripley ought to have expressed their views more clearly at the time of the events. As a separate matter she may also determine whether or not their evidence is credible on the issue of their motivation at the time of the events. On the latter issue the Commissioner should consider the following factors:

a. Neither DeSousa nor Ripley benefited by testifying as they did. To the contrary, it would have been easier for them to have simply stated that they believed at the time that TMACS2 was a better system than TXM, and that's what caused them to make their recommendations. They could not be criticized for holding an honest belief in the superiority of one system over the other.[11]

b. Even if DeSousa and Ripley believed that the City was determined to criticize Liczyk whatever the evidence (as Liczyk argues), they had no reason to tailor their evidence in order to assist the City: they hadn't worked at the City for more than five years, they have other jobs, they owe the City no loyalty.

14. In short, Ripley's and DeSousa's explanations about their reluctance to express opposition to Liczyk's agenda were credible.

15. Similarly, in paragraph 7 of Liczyk's submission, it is argued that "Carbone's epiphany at paragraph 74 of her affidavit, in which she realizes that she may have unwittingly become Ms Liczyk's pawn, was truly inspired by some higher being. It is truly fiction."

[11] Brunning and Shultz, both former City employees (as are Ripley and DeSousa), testified that they thought TMACS2 was a better system than TXM. No one criticizes them for that belief; certainly not the City.

16. In fact, Carbone's "epiphany" was inspired by reading the Beacon proposals that Liczyk hid from her in 1998.[12] It does not lie with Liczyk to suggest that Carbone's motives were improper, and her testimony tainted, after having intentionally kept Carbone in the dark.

iv) When, not if, TMACS2 would be used

17. Paragraph 100 of Liczyk's submission states that "Carbone agreed that it wasn't a question of 'if' TMACS would be used, but rather a question of 'when'. (Carbone transcript, November 5, 2004, p.240)"

18. This is an incorrect summary of Carbone's evidence. What Carbone actually said was that it was only a question of when, not if, the City would sever its relationship with Mississauga and bring TXM in house.[13] Carbone was clear that she was not prepared to select TMACS2 until there was a full evaluation of both TMACS2 and TXM to see if Jim Andrew's preliminary conclusions were borne out.[14]

v) Date Liczyk requested proposals from Saunders to convert TXM to TMACS2

19. Paragraph 109 of Liczyk's submission states that: "In anticipation of the eventual conversion, Beacon and Remarkable were requested by Liczyk in August 1998 to outline the cost and their ability to convert the five instances of Tax Manager to TMACS. Work outlined in the proposal included preparatory work that was required in September 1998."

20. This is entirely incorrect. Liczyk requested the proposals outlining the conversion from TXM to TMACS2 before July 17, 1998, not in August 1998.

[12] Carbone Affidavit paras.73-74
[13] Carbone 11/25/2004 at 239-240
[14] Carbone 11/5/2004 at 220-223; Carbone Affidavit para.29

Liczyk admitted she requested them from Saunders.[15] The proposals were dated July 17, 1998 and she signed them on August 1, 1998.[16]

vi) Carbone's knowledge of conversion to TMACS2 preparatory work

21. The same paragraph 109 of Liczyk's submission (respecting preparatory work for conversion to TMACS2) states that: "Carbone was aware that Beacon and Remarkable were doing this preparatory work based on a September 22, 1998 email, copied to Bob Ripley. (Carbone Transcript, November 5, 2004, p.58)"

22. This mischaracterizes the evidence. The September 22, 1998 email:

a. was not copied to Bob Ripley;[17] and

b. was not copied to Carbone;[18]

23. Carbone testified that she did not recall seeing the email, nor being involved in preparatory work at that time, though she stated that it was possible.[19]

vii) Issue of stopping TXM payments was the "stuff of legend"

24. Paragraph 140 of Liczyk's submission state that "the issue of the stopped payments to the City of Mississauga through this inquiry was the stuff of legend." The paragraph goes on to point out that the City had paid up to April 1998, and that the next invoice was received by the City on September 1, 1998, so "there was nothing to stop payment on" and that "those misinformed, as noted above, pointed to the non payment of invoices as a reason why the Tax Manager project

[15] Liczyk Affidavit paras.138 and 184; Liczyk 11/9/2004 at 72-73
[16] TEC007518 and TEC007521
[17] TEC011079; Carbone 11/5/2004 at 61-62
[18] TEC011079; Carbone 11/5/2004 at 61-62
[19] Carbone 11/5/2004 at 61-62

was not delivering on its promised milestones. This is wrong and another excuse."

25. While Liczyk's submission on this issue is correct that there was no payment to stop between April and August 1998,[20] it is incorrect to suggest that stopping payment was irrelevant or that the witnesses were simply making excuses for TXM's problems.

26. As outlined in the City's main submission,[21] Liczyk directed payments be cut off in early 1998 and directed Carbone to follow up in June 1998. This demonstrated Liczyk's intent throughout 1998 to undermine TXM and the partnership with Mississauga.

27. The factual error made by certain witnesses demonstrated nothing more than a lack of awareness of the timing of invoices. It was not "another excuse" for TXM's shortcomings. They were correct in their understanding that Liczyk had directed the TXM funding be cut off, and they correctly interpreted it as showing her lack of commitment to TXM. Based on this knowledge, they had a reasonable basis to conclude that the writing was on the wall for TXM.

viii) Transparency of expenses in 1999 Y2K Beacon and Remarkable contracts

28. Paragraphs 164 and 168 of Liczyk's submission refer to Carbone's testimony about a discussion Jim Andrew had with Liczyk in 1999 pertaining to how expenses should be dealt with for Beacon and Remarkable. The submission suggests that what should be taken from Carbone's evidence is that Liczyk preferred to show the expenses "so that they would be transparent and could be reviewed."

29. However, Carbone never stated that she understood Liczyk's intent was that the expenses would be reviewed. Carbone simply stated in the passages

[20] TMACS City submission para.157

cited that Andrew relayed to her that Liczyk wanted the expenses shown in the way they had always been shown, which would be more "transparent" than increasing the hourly rate in lieu of charging for expenses. Carbone further stated she understood that nothing else would change: the billing arrangements would continue as they had before.[22] This meant that no one would be reviewing Beacon and Remarkable's expenses, as had been the case since pre-amalgamation North York.

b) Response to Jim Andrew's submission

i) Edwin Ngan's ability to run TMACS2

30. Paragraph 62 of Andrew's submission states that Edwin Ngan testified that, in the absence of Saunders and Maxson, he would have been able to resolve any problems with TMACS or get the necessary assistance to resolve any problems.

31. This mischaracterizes the evidence by suggesting that this was the case throughout the relevant time period. Ngan actually testified that:[23]

a. he could have stepped in for Saunders and Maxson to keep TMACS1 running;

b. he could only have stepped in for Saunders and Maxson to keep TMACS2 running at some point in 2000; and

c. to this day, he has to involve others in order to resolve some TMACS2 issues because he does not know every aspect of the system.

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[21] TMACS City submission para.153-158
[22] Carbone 11/5/2004 at 97-98, 159-150 and 194-196
[23] Ngan 10/27/2004 at 177-179

ii) Why Carbone started signing invoices

32. Paragraph 114 of Andrew's submission states that Carbone "took responsibility" for authorizing Beacon's invoices following her appointment in April 1998.

33. This incorrectly suggests Carbone took responsibility on her own initiative, and is wrong about the date. Liczyk directed Carbone to sign the invoices[24] and Carbone began doing so in August 1998.[25]

iii) Shultz's expectation about reviewing expenses

34. Paragraph 126 of Andrew's submission cites Al Shultz as having stated that he (Shultz) would have expected Carbone in reviewing the invoices, to have also reviewed the expenses.

35. While this is what Shultz said in his affidavit, in his oral testimony, he made clear that he conveyed to Carbone that the practice was to not subject their expenses to scrutiny or to request receipts.[26] Thus, Shultz had no expectation that anyone would be reviewing the expenses.

[24] Carbone Affidavit para.86
[25] Carbone 11/5/2004 at 142; TEC057101
[26] TMACS City submission, para.306; Shultz 11/2/2004 at 212-213

III. Desktop Phase

a) Response to Dell's submission

i) Reason for the hearing

36. Paragraphs 22-26 of Dell's submission suggest that the reason there were 14 days of hearings involving 11 witnesses was because of City shortcomings in document production.

37. One could also make the argument that 14 days of hearings involving 11 witnesses were necessary because of the inaccurate contents of three Dell emails,[27] which gave rise to legitimate suspicions of wrongdoing, and which were the focus of extensive affidavit and oral evidence.

38. One could also argue that Dell's failure to maintain records that speak to Jeff Lyons' role and activities on behalf of Dell (because, for reasons the Dell witnesses could not adequately explain, Dell did not monitor his work and thus did not really know what he did),[28] significantly contributed to suspicions of improper conduct and the need for 14 days of hearings and 11 witnesses.

39. In fact, the hearings took place because the process by which Dell was selected as the sole supplier of the City's Y2K PCs was opaque. The documents the City produced at a late date did not change that fundamental fact.

ii) Jurisdiction re Dell's code of conduct

40. Paragraph 349 of Dell's submission asserts that "the Commissioner has no jurisdiction to make any findings or any recommendation with respect to the conduct of the Dell employees by reference to Dell's internal Code of Conduct." A lengthy argument to support this position continues through paragraph 376. The

[27] TEC046780; TEC046788; TEC047024
[28] Kelly 11/24/2004 at 89-90 and 280-282; Mortensen 11/25/2004 at 108-112; Toms 11/29/2004 at 147-155

general point is that the Commissioner has no jurisdiction to enquire into and make findings about "private" or "internal" company matters.

41. This argument has no merit. In exchange for the substantial pecuniary benefits of securing government contracts, a company like Dell accepts the risk that, if a public inquiry is held, some of its internal affairs will no longer be private. If it does not want to assume that risk, it ought not do business in the public sector.[29]

42. As stated in the City's main submission, the City does not make any allegation that Dell's entertaining of City employees was inappropriate in the time and context in which it took place.[30] Consequently, the City made no submission on the Dell Code of Conduct or how it was administered. However, the City submits that it is well within the Commissioner's jurisdiction to make findings of fact with respect to the conduct of Dell employees in relation to Dell's Code of Conduct if she deems it appropriate to do so in order to discharge her mandate.

43. Paragraph 350 of Dell's submission states that inquiring into and making findings about Dell's Code of Conduct "would involve the Commissioner making findings with respect to compliance with the contracts of employment as between Dell and its own employees…", and paragraph 355 further states:

> While Dell concedes that these Terms of Reference make interactions between the City employees and Dell employees relevant areas of inquiry, matters as between Dell and its own employees are beyond even the widest construction of the TECI Terms of Reference.

44. Dell concedes the Commissioner can make findings with respect to the conduct of its employees, but takes the position that she may not make findings about how Dell governed those employees, including its Code of Conduct, because that is a matter of private employment relations. This is a distinction without a difference.

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[29] *Consortium Developments (Clearwater) Ltd. v. Sarnia (City)*, [1998] 3 S.C.R. 3 at para.27
[30] Desktop City submission, para.5

45. Dell's employees are not free agents acting in a vacuum. They work under the direction and policies of their employer. It would be unfair and illogical to evaluate the actions of Dell's employees without reference to the governance structure under which they laboured. Indeed, it would undermine the intent of the *Municipal Act*. Even though s.100 (now s.274) of the *Municipal Act* permits investigation into "any person having a contract with the [municipality]", Dell's interpretation would effectively eliminate the person with the contract (in this case Dell) as a subject of the Inquiry, substituting instead its employees.

46. If one accepts Dell's argument, there would be no basis on which to find that individual Dell employees were directed, encouraged or assisted by their employer to engage in such inappropriate activities. This would protect the company, but not its employees, from criticism. In effect, Dell's "jurisdictional" argument merely offers up its employees as a shield to protect the company.

47. Dell's Code of Conduct, on its face, absolutely prohibits all entertainment of and gifts to government employees,[31] contravention of which may result in discipline up to and including termination.[32] Therefore, when Dell employees entertained City staff, however minimally, they did so in breach of the clear words of their own Code of Conduct. The obvious question that arises from this fact is, why would they do so? The oral evidence of the Dell witnesses was that Dell administered its Code of Conduct differently than it appears on its face,[33] and Dell's closing submission states that the conduct of those witnesses complied with the Code as it "was actually implemented in practice."[34]

48. In short, matters of internal governance, including internal codes of conduct, are relevant to understand how and why employees act the way they do, and to establish a standard by which to judge their behaviour.

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[31] TEC056256 at 056262 and 056263
[32] TEC056256 at 056258
[33] Kelly 11/24/2004 at 144-150, 241-250; Mortensen 11/25/2004 at 238-248; Toms 11/29/2004 at 213-223 and 299-301
[34] Dell submission, para.372

49. In the *Report of the Waterloo RIM Park Inquiry*, ("Waterloo Inquiry") Mr. Justice Sills:

a. examined the MFP Code of Conduct;[35]

b. examined the Canadian Finance & Leasing Association Code of Ethics;[36] and

c. explicitly considered "whether the ethical standards set forth in the CFLA Code of Ethics and MFP's Code of Conduct were adhered to", and made findings of breaches of those Codes by MFP employees.[37]

50. Mr. Justice Sills also made explicit findings about MFP's poor governance of its sales staff in the context of the transaction he was examining.[38] He did so because it was an important piece of the puzzle he was mandated to assemble.

51. The Terms of Reference of the Waterloo Inquiry authorized Mr. Justice Sills, among other things:

> (a) to inquire into all aspects of the conduct of the City of Waterloo, its council, staff and professional advisors retained in regard to the negotiation of the RIM Park financial agreements relating to the circumstances under which the City of Waterloo entered into the RIM Park financial agreements……
>
> *******
>
> 2 The Commissioner in conducting the inquiry into the circumstances by which the City of Waterloo entered into the RIM Park financial agreements, shall only inquire into the conduct or internal affairs of the other parties to the RIM Park financial agreements as is necessarily incidental to the primary Inquiry, and he is empowered to ask any question as the Commissioner may consider as necessarily incidental or ancillary to obtain a complete understanding of the conduct of the City of Waterloo in entering into those agreements.

52. In other words, the Waterloo Inquiry Terms of Reference started from the assumption that the Commissioner would be able to inquire into the internal

[35] *Report of the Waterloo RIM Park Inquiry* at 230-232
[36] *Report of the Waterloo RIM Park Inquiry* at 230-232
[37] *Report of the Waterloo RIM Park Inquiry* at 232, 238-239, 253, 254, 258, 263, 266,
[38] *Report of the Waterloo RIM Park Inquiry* at 270-271

affairs of suppliers like MFP, and then restricted that power so as to only allow the Commissioner to do so when "necessarily incidental" to the principal aims set out in the Terms of Reference.

53. The TECI Terms of Reference empowered the Commissioner, in respect of the Desktop Phase:

> 5 To investigate and inquire into all aspects of the purchase of the computer hardware and software that subsequently formed the basis for the computer leasing RFQ that is the subject of the Toronto Computer Leasing Inquiry.
>
> 6 To investigate and inquire into all aspects of the matters set out above, their history and their impact on the ratepayers of the City of Toronto as they relate to the good government of the municipality, or the conduct of its public business, and to make any recommendations which the Commissioner may deem appropriate and in the public interest as a result of her inquiry.
>
> AND IT IS FURTHER RESOLVED THAT the Commissioner, in conducting the inquiry into the matters set out above in question to which the City of Toronto is a party, is empowered to ask any questions which she may consider as necessarily incidental or ancillary to a complete understanding of these matters;
>
> And for the purpose of providing fair notice to those individuals who may be required to attend and give evidence, without infringing on the Commissioner's discretion in conducting the inquiry in accordance with the terms of reference stated herein, it is anticipated that the TECI may include the following:
>
> 1 an inquiry into all relevant circumstances pertaining to the various matters referred to in this resolution, the basis of and reasons for making the recommendations for entering into the subject transactions and the basis of the decisions taken in respect of these matters
>
> 2 an inquiry into the relationships, if any, between the existing and former elected and administrative representatives of the City of Toronto……..and any representatives of companies or persons referred to in paragraph 5 above at all relevant times…"

54. The TECI Terms of Reference give the Commissioner a broader scope of inquiry into "necessarily incidental" matters than did the Waterloo Inquiry Terms of Reference. That power is phrased permissively in the TECI Terms of Reference rather than in the restrictive manner of the Waterloo Inquiry Terms of Reference.

55. The TECI Terms of Reference expressly contemplated an inquiry into all aspects of the transaction between Dell and the City. The TECI terms expressly contemplated an inquiry into all relevant circumstances pertaining to the

transaction, and into the relations between employees of the City and employees of Dell. Finally, the TECI terms expressly contemplated that the Commissioner could inquire into anything necessarily incidental or ancillary to a complete understanding of these matters.

56. If the Commissioner were to conclude that entertainment by Dell had an effect on the City's selection of Dell as its sole PC supplier, it is inconceivable that Dell's governance of employees who dealt with the City -- including its Code of Conduct which expressly pertains to entertainment of government employees -- is not a necessary consideration to a complete understanding of that issue.

57. Further, Dell's proposed distinction at paragraph 354, between the jurisdiction to ask questions in order to gain an understanding of an issue, and the jurisdiction to make findings about that issue is entirely without merit. Making findings of fact is, of course, one of the most basic purposes of a public inquiry. There would be no point in empowering a Commissioner to ask questions if she could not answer them.

58. The cases cited by Dell for the proposition that a commission of inquiry established under the *Municipal Act* cannot inquire into the internal affairs of another corporation are inapposite.

59. In particular, the assertion in paragraph 366 of Dell's submission that *Black Diamond Oil Fields v. Carpenter Dist. Ct. J.* (1915), 24 D.L.R. 515 (Alta C.A.) "is directly applicable to this Inquiry" is misguided. *Black Diamond* concerned an inquiry the Province of Alberta convened under the *Act Respecting Inquiries Concerning Public Matters* "into and concerning the promotion, incorporation, management and operation of the various companies incorporated by and under the authority of the Companies Ordinance……..". The court found "not the slightest suggestion that the information to be gained from the inquiry is to be used for any legislative or any other public purpose", and that "the inquiry is limited almost entirely to the private affairs of the companies and stock

exchanges…"[39] That is, it was a public inquiry whose entire focus was the internal operations of private companies.

60. Similarly, Dell's reliance on the *MacPump Developments* and *Mississauga Hydro*[40] cases is unhelpful. Dell cites them for the proposition that one municipal corporation cannot inquire into the internal affairs of another municipal corporation under the *Municipal Act*, and suggests there is an analogy to be drawn to this situation. These cases might be relevant had the City of Toronto called an inquiry with the principal purpose of inquiring into the affairs of Mississauga or another municipality (or a company), but it didn't.

61. Rather, the appropriate municipal analogy involves the evidence the Commissioner has received in the TMACS phase of TECI from the Cities of Brampton and Mississauga. The Commissioner heard evidence from employees of those Cities as to their internal affairs and dealings with third parties.[41] In particular, the Commissioner received evidence from John Wright, an employee of Brampton, respecting Brampton's contract with Beacon to purchase the TMACS system.[42] The evidence was necessary in order to gain a complete understanding of the principal topic of the TMACS phase: the dealings between Beacon and the City of Toronto. Strictly speaking, however, the Brampton contract was Brampton's internal affair (and Beacon's for that matter). On Dell's theory, hearing this evidence involved inquiring into the internal affairs and contracts of another municipality (and a private company), and making findings in relation thereto is therefore *ultra vires* the Commissioner's jurisdiction.

62. The *MacPump Developments* and *Mississauga Hydro* cases speak only to situations where the pith and substance of the inquiry is the internal affairs of another municipality. They do not apply to situations where the principal subject of the inquiry is a transaction involving the municipality that called the inquiry.

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[39] *Black Diamond Oil Fields v. Carpenter Dist. Ct. J.* (1915), 24 D.L.R. 515 (Alta C.A.) at para.11
[40] *MacPump Developments v. Sarnia (City)* (1994), 20 O.R. (3d) 755 at 764 (C.A.); *Hydro Electric Commission of Mississauga v. City of Mississauga* (1975), 13. O.R. (2d) 512 (Div.Ct.)
[41] Affidavit of John Wright; Affidavit and evidence of Debbie Barrett
[42] Affidavit of John Wright; City TMACS submission, paras.256-270

63. In contrast, considerable assistance can be gained by consideration of the leading case on the jurisdiction of public inquiries, the Supreme Court of Canada decision *Consortium Developments.*[43] *Consortium* was decided in the context of the same constituting statute and as well Terms of Reference similar to the TECI Terms of Reference.

64. The Supreme Court in Consortium stated:[44]

> The power to authorize a judicial inquiry is an important safeguard of the public interest, and should not be diminished by a restrictive or overly technical interpretation of the legislative requirements for its exercise.

65. The "overly technical" position advocated by Dell would severely restrict the scope and usefulness of public inquiries. It would preclude a full picture emerging of the events in question. It would have meant that Mr. Justice Sills could not have inquired into and made findings about whether MFP's internal governance encouraged or led to its employees' behaviour in their dealings with the City of Waterloo. It would mean the Commissioner in TCLI could not inquire into and make findings about whether MFP's internal governance encouraged and facilitated Dash Domi's activities. It would mean the Commissioner in TECI could not inquire into and make findings respecting Beacon's contract with Brampton.

66. Dell sold a lot of computers to the City. If, in order to explain how that happened, the Commissioner deems it necessary to make findings about Dell's Code of Conduct and compliance therewith, she is entitled to do so.

iii) Jurisdiction re blackout period

67. Paragraph 48 of Dell's submission appears to assert that the Commissioner has no jurisdiction to find there were any unwritten terms or even

[43] *Consortium Developments (Clearwater) Ltd. v. Sarnia (City)*, [1998] 3 S.C.R. 3
[44] *Consortium, supra* at para.26

a "mere understanding" about a "blackout period" that governed the August RFP, citing the recent Federal Court Trial Division decision in *Stevens v. Canada*.[45]

68. The City takes no position as to what the Commissioner should find with respect to whether there were or were not any unwritten terms or understandings regarding the August RFP. However, it is the City's position that the Commissioner does have jurisdiction to make findings on that issue should she consider it appropriate to do so.

69. *Stevens v. Canada* is very particular to its facts, and great care should be taken that its reasoning is not extended beyond them. In that case, the plaintiff Sinclair Stevens sought to set aside the report of Mr. Justice Parker (the "Parker Report") on the basis that Mr. Justice Parker had no jurisdiction to define what "conflict of interest" is and then measure Stevens' conduct against that definition.

70. The relevant part of the terms of reference constituting the Parker Inquiry stated that Mr. Justice Parker was to inquire into and report on:

> whether the Honourable Sinclair M. Stevens was in real or apparent conflict of interest *as defined by* the Conflict of Interest and Post Employment Code for Public Office Holders and the letter from the Prime Minister to the Honourable Sinclair M. Stevens of September 9, 1985…"[46] [*italics added*]

71. However, the Code of Conduct referred to in these terms of reference contained no definition of "conflict of interest". Mr. Justice Parker himself established a definition of "conflict of interest" for the purposes of his Report,[47] and went on to find Stevens to have been in a conflict of interest six times during his tenure as a Minister.[48]

72. The court held that Mr. Justice Parker had no jurisdiction to create his own definition of "conflict of interest", when the terms of reference specifically required him to use the definition in the Conflict of Interest and Post Employment Code for

[45] *Stevens v. Canada (Attorney General)*, 2004 FC 1746
[46] *Stevens v. Canada, supra* at para.6
[47] *Stevens v. Canada, supra* at para.30
[48] *Stevens v. Canada, supra* at para.14

Public Office Holders.[49] That is, the Court determined that the terms of reference were very specific as to the source of the definition, and Mr. Justice Parker did not use that definition (nor could he, as there wasn't one).

73. It could be argued that the court's highly technical reading of the terms of reference rendered the terms of reference void *ab initio* because they could never be fulfilled, but even if the decision is correct, it has no wider application. It stands for the very limited proposition that where terms of reference require a particular definition of a term be used against which someone's conduct will be measured, that definition must be used. It does not stand for the general proposition that commissioners of public inquiries are in general precluded from defining terms such as "conflict of interest" (or any other standard of conduct) and evaluating conduct against that standard.

74. The TECI Terms of Reference are general in nature and do not require the use of any specific definition. Consequently, *Stevens v. Canada* is inapplicable.

iv) The amendment

75. The City's main submission makes clear that there is no evidence to support there being a causal relationship between Councilor Shiner's amendment and the December RFQ. Nevertheless, it is important to respond briefly to Dell's submission on this issue.

76. Dell's submission goes to great length to establish that Councilor Shiner's explanation for his amendment is not credible.[50] It is not clear why such a credibility point is relevant to Dell's theory of the case, since Dell's submission:

[49] *Stevens v. Canada, supra* at paras.33 and 36
[50] Paragraphs 119 to 176 of Dell's submissions deal with the amendment and surrounding circumstances.

a. asserts that the City always intended to buy from Dell;[51]

b. asserts that when Dell lost the August RFP, this did not prohibit the City from buying from Dell;[52]

c. asserts that the December RFQ was simply part of a usual, fair and transparent process;[53]

d. does not explain how the amendment let Dell "back in the door";

e. does not assert any cause and effect relationship between the amendment and the December RFQ;

f. does not assert that Lyons, Andrew or anyone else persuaded Councilor Shiner to move the amendment.

77. By scrupulously avoiding any assertion that there was a cause and effect relationship between the amendment and the December RFQ, Dell appears to accept the City's assertion that the amendment issue is a "red herring" in terms of the ultimate result.[54] In this context, it is unclear why Dell thought it necessary to try to impugn Councilor Shiner's evidence, but its submissions on this issue should be rejected.

b) Response to Lana Viinamae's submission

i) Whether she knew Dell was Tier One or not

[51] Dell Submission paras.58-59, 61, 187 and 199
[52] Dell submission paras.37-44 and 383
[53] Dell submission para.229 and 381-385
[54] At para.158 of Dell's submission Dell suggests that the amendment wasn't "totally divorced from the subsequent 'special bid pricing' or 'december mini-RFQ' for the desktops", but never suggests how it was related. At para.160 Dell states "that the Amendment was not needed for the purpose stated", but there is never an explanation of the purpose for which it was needed other than that it was to require a report on the specifications for the desktops being acquired by the City (para.150).

78. Paragraph 53 of Viinamae's submission states that Dave Toms testified that he didn't have any sense, from his meetings with Viinamae, that she knew Dell was Tier One.

79. Toms actually stated that he didn't have any sense one way or the other as to whether she knew Dell was Tier One.[55]

ii) Steering Committee "approval"

80. Paragraph 66 of Viinamae's submission states that Andrew's evidence "suggested" that what was asked of Viinamae was not to obtain Audit "approval" but instead to obtain Audit's "position".

81. It also must be pointed out, however, that in the same exchange Andrew testified he did not know at the time that Audit did not "approve" things, although he knows that now.[56]

[55] Toms 11/29/2004 at 252-253
[56] Andrew 1/26/2004 at 247

IV. Ball Hsu Phase

a) Response to Jeff Lyons' submission

i) Competing or parallel contributions

82. Paragraph 25 of Lyons' submission states: "as verified by Commission Counsel on January 17th, 2005, as a result of investigations made by Commission staff, no parallel or competing contributions occurred."

83. While Commission Counsel stated this on the record, it turned out to be in error. Sue Cross contributed $450 to Lorenzo Berardinetti's campaign on BHA's behalf, and BHA contributed $300 directly. These donations were made in at the same fundraising event on May 30, 2000.[57] Thus, although the $750 donation limit was not exceeded, there were in fact parallel contributions on this occasion.

ii) Relevance of Lyons not being charged by the OPP

84. Paragraphs 26-29 of Lyons' submission state that, because the OPP "cleared" him through the absence of any charges, and the OPP's determination is "final", he must be presumed innocent, and further that the Commissioner has no jurisdiction to enquire into matters relating to a breach of the *Municipal Elections Act*.

85. This argument has previously been rejected by the Supreme Court of Canada in *Consortium* and it should be rejected here. In that case, the OPP issued a press release advising that their investigation had been concluded and revealed "no evidence of the commission of any criminal offence."[58] Despite the fact that there was overlap in the subject matter of the OPP investigation and the

[57] Lyons 1/17/2005 at 208-212; TEC026007 at 026020. Lyons' company HMS Investments and his employee Nav Mangat also made donations at this fundraiser
[58] *Consortium, supra* at para.7

mandate of the Inquiry, the Court found such matters to be within the Inquiry's jurisdiction.[59]

86. The OPP "cleared" Lyons of nothing, and the OPP's decisions are irrelevant to the Commissioner's role. While the Commissioner is not permitted to make findings of guilt or innocence, she is entitled to make findings of misconduct based on the facts as she finds them, and to make recommendations arising therefrom.[60] That the police do not charge someone with a particular offence does not mean the Commissioner is precluded from making findings pertaining to the same factual matrix which are relevant to her Terms of Reference.

87. The only indication in the evidence of why the OPP did not charge Lyons is found in a Globe and Mail article on December 11, 2002:[61]

> In an interview yesterday, OPP Detective-Superintendent William Crate admitted the investigation established that "a technical violation of the Municipal Elections Act" – Mr. Lyons's use of his junior assistant to channel illegal corporate contributions to favoured political candidates – did indeed occur. He added, however, that government lawyers considered it to be "so minor that a charge is not warranted."

88. Thus, the only indication as to why the OPP did not charge Lyons gives rise, not to a presumption of innocence but, instead, the opposite. That said, what the OPP did or did not do in no way affects the Commissioner's fact finding role.

iii) Jurisdiction over comments to the media

89. Paragraph 46 of Lyons' submission asserts that "representations made by a private citizen to members of the media are beyond the jurisdiction of the City of Toronto. It is respectfully submitted that the consideration of such allegations are *ultra vires* this Inquiry."

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[59] *Consortium, supra* at paras.50-52
[60] *Jakobek v.Bellamy* (2004), 188 OAC 259
[61] TEC023575

90. The City relies upon and repeats its legal submission above regarding the Commissioner's jurisdiction in the Desktop Phase reply submission.[62]

91. In short, while it would likely be *ultra vires* the *Municipal Act* for the City to have called a public inquiry with its principal subject being Lyons' interactions with the media, those interactions are necessarily incidental or ancillary to a complete understanding of the relationships, if any, between existing and former elected representatives of the City and BHA.[63] That is, Lyons' representations to the media about his involvement in funneling BHA's campaign contributions to Councilors are relevant to obtaining a complete understanding of the relationships between BHA and City Councilors.

92. In any event, the only use the City sought to make of this evidence in its main submission was as it pertained to Lyons' credibility on other matters. The City submits that the media evidence can be used to assess credibility on matters within the Commissioner's Terms of Reference in TECI and TCLI even if this issue is itself outside the Commissioner's Terms of Reference.

ALL OF WHICH IS RESPECTFULLY SUBMITTED on March 21, 2005

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Paliare Roland Rosenberg Rothstein LLP
Barristers and Solicitors

[62] Section III(a)(ii)

[63] The TECI Terms of Reference contemplate: "*an inquiry into the relationships, if any, between the existing and former elected and administrative representatives of the City of Toronto, the Tax System Consultants, Ball Hsu & Associates Inc., and any representatives of companies or persons referred to in paragraph 5 above at all relevant times".* The Terms of Reference also empower the Commissioner "*to ask any questions which she may consider as necessarily incidental or ancillary to a complete understanding of these matters*."