

**IN THE MATTER OF THE TORONTO EXTERNAL CONTRACTS INQUIRY:
BEACON AND REMARKABLE**

REPLY SUBMISSIONS OF WANDA LICZYK

Introduction

1. These submissions respond to the written closing submissions of the City of Toronto (the “City”).

The City’s Submissions

2. The City has throughout the course of this Inquiry advanced two far reaching, and somewhat competing, theories as to how the TMACS and WMACS systems were developed and ultimately adopted as the tax and water revenue software systems of the City. The “lesser” theory advanced by the City suggests that Liczyk championed the North York tax system without regard to process because she was determined to have the tax system she had wanted from the outset. The second “higher” theory is that she championed the North York system because of an ill-founded loyalty to a former boyfriend. Neither of these theories conforms to the facts.

3. The City’s submissions vacillate between these two theories, frequently in the absence of supporting evidence, with reference to fragments of evidence and with the use of overly broad assertions and hyperbole. The alternative, more simple, linear theory that legitimate decisions were made in relation to the selection of the City’s billing systems is dismissed out of hand by the City.

4. The City finds itself in an odd situation in that on the one hand, the City is the party which called for a public Inquiry into the tax system selection process to ostensibly facilitate an impartial review of the facts. On the other, the City has now become the strongest advocate of a particular position and has set out to prove its case which seems to have become single minded and exclusively directed at Liczyk.

5. The City insists that Liczyk conspired to develop a tax software system without proper authority and ultimately plotted to ensure that the tax system was chosen as the tax solution for the newly amalgamated City of Toronto. Simultaneously, the City alleges that as the Treasurer of the City, Liczyk made the unilateral decision to adopt tax and water revenue software systems to benefit a person with whom she had a relationship which ended seven years previously.

6. The City's first theory presumes that while Liczyk was a fairly low ranking official at the City of North York, she was able to manipulate the ongoing development of TMACS. Once reaching a position of authority, she would be able to single-handedly, bypass existing approval procedures and manipulate and overpower fellow bureaucrats who would placate and give way to Liczyk out of fear for their jobs and political consequence.

7. Not surprisingly, the City is unable to point to any clear, uncontradicted evidence to support this conspiracy theory. Instead, throughout its submissions, the City employs overly broad and aggressive language to bolster an otherwise unsupportable theory. The City alleges that Liczyk made "false representations" to her superiors and colleagues, she continued the development of TMACS2 with "the full intention of replacing TXM with TMACS2 when the *"time was right"* [emphasis added], she "camouflaged" her efforts to have the City adopt TMACS2, she "denied" the TXM project resources and "cut off funding to the TXM project".

8. As Liczyk's reply submissions will demonstrate, the City employs this extreme and overreaching language in order to "camouflage" the fact that there is no clear and reliable evidence to support these allegations.

9. Secondly, to support the City's higher theory that TMACS and WMACS were adopted by the newly amalgamated City of Toronto for the benefit of Michael Saunders, the City alleges

that once becoming the Treasurer of the City, Liczyk “remained close friends, *probably very close friends*” with Mr. Saunders, Liczyk was “furiously loyal” to Mr. Saunders and that he was one of Liczyk’s “most trusted advisors and confidants”. [emphasis added]

10. These bold allegations remain unsubstantiated throughout the course of the City’s submissions.

11. There is evidence before this Inquiry that Liczyk believed that TMACS was a better, more adaptable and more suitable tax system than TXM. There is also evidence that notwithstanding numerous assurances from those responsible for the development and implementation of TXM at the newly amalgamated City, TXM was not delivered on time, was delivered in fragments and ultimately failed to serve the business requirements of the newly amalgamated City. It is for this reason that the decision was ultimately made to abandon TXM and adopt TMACS. As the City states in paragraph 3 of its submissions, “There is no issue about whether TMACS2 and WMACS performed their required functions. TMACS2 and WMACS both work, and have been in use as the City’s tax and water revenue software systems since 1998 and 1999, respectively.”

“City Overview”

12. At paragraph 4 of the City’s submissions, the City alleges that Saunders and Maxson worked “mostly unsupervised” for the amalgamated City of Toronto. This allegation ignores the evidence of Giuliana Carbone who testified that it was her job to supervise and manage Saunders and Maxson. This supervisory role included examining and approving the invoices submitted to the City by both Saunders and Maxson. (Carbone Affidavit, para. 96) There is no evidence before this Inquiry that Liczyk ever instructed Carbone not to do her job. The City also ignored

the evidence that Liczyk requested Carbone to formalize the contractual agreements with Beacon and Remarkable in May 1998 and that Carbone admits that she had discussions with Jim Andrew regarding formalizing written agreements with Beacon and Remarkable as of May 1998. (TEC016851, p.7)

13. Paragraph 7 (a) of the City's submissions alleges that in 1997 Liczyk refused to accept the decision of the Transition Team to adopt the TXM system for the newly amalgamated City. This allegation is false. The evidence is that Liczyk assigned project leads to the TXM project who would facilitate its success. Liczyk appointed Estelle Lo immediately following Brenda Glover's appointment as the H.R. Executive Director. There is again no evidence that Liczyk interfered with Lo's management of the project. In 1998, Liczyk replaced Lo with Ed DeSousa, another known advocate of TXM.

14. Paragraph 7 (b) alleges that Liczyk made efforts to ensure that the TXM Team knew that she had grave concerns about the system. As DeSousa testified, Liczyk's concerns in this respect were legitimate. (DeSousa Transcript, October 26, 2004, p.252 line 6) Carbone also had real concerns about the lack of progress of the TXM project and the continued non-delivery of the modules required by the City of Toronto.

15. Paragraphs 7 (d) and 7 (e) allege that Liczyk "falsely represented" that TMACS2 continued to be developed only as a "backup" to TXM and she in fact continued the development of TMACS2 as a competitor of TXM. These allegations ignore Carbone's admission that Toronto "needed a backup" and that it was "very reasonable" to have TMACS in place as a backup system. (Carbone Transcript, November 4, 2004, p.226 and 294) Carbone further testified that "[Liczyk] was trying to protect the City, if we hadn't...if she hadn't made the

decision early on to keep TMACS as a backup, I don't know what we would have done, there would have been no options...". (Carbone Transcript, November 5, 2004 p.68)

16. Paragraph 9 (f) of the City's submissions allege that Liczyk attempted to "cover up" the true nature of her relationship with Saunders. The evidence before this Inquiry is that a number of Liczyk's colleagues at the City of North York knew or suspected that she was at one time engaged in a relationship with Saunders. Following the publication of the Now Magazine article, which was arguably leaked by a City staffer, it was open to City officials to take various courses of action. They ultimately chose to do nothing. This can hardly be considered a "cover up".

17. Paragraph 14 alleges that the "weight of the evidence" before this Inquiry supports the conclusion that Liczyk and Saunders were "probably very close friends", that Liczyk was "furiously loyal to Saunders" and that Saunders was one of "Liczyk's most trusted advisors and confidants". The City's repetitive use of extreme and overreaching language seeks to disguise the fact that it does not reference any evidence to support these allegations.

18. Furthermore, the allegations made against Liczyk ignore the reality that people working together do become friends without putting themselves in a conflict of interest. The fact that Al Shultz admitted in his evidence that he and Saunders were also friends who spoke frequently on the phone and that Shultz visited Saunders in the United States (Shultz Transcript, November 2, 2004 p.40, 254, 231-233) do not appear to be relevant to the City.

19. Paragraph 15 (a) of the City's submissions indicates that Liczyk placed 75 telephone calls to Saunders at his hotel from the beginning of 1998 to May 2001. This averages two telephone calls per month.

20. Paragraph 15 (b) further alleges that a great number of these telephone calls were placed between the hours of 10:00 p.m. and 11:00 p.m. As Liczyk testified, at the time of amalgamation, she worked very long hours at the City before going home and continuing to work. The City's allegations fail to consider that the only opportunity that Liczyk may have had to contact Saunders with respect to his ongoing work at the City, or otherwise talk, was during these late hours. The City's allegations also fail to consider Schulz's evidence that he too received phone calls from Liczyk when she was driving home from work. (Schulz Transcript, November 2, 2004 p.30, line 11)

21. Paragraph 15 (e) points to the evidence of certain witnesses who testified that Saunders would from time to time report directly to Liczyk and they would confer with each other in respect of certain issues. The City's attempt to insinuate that there was anything inappropriate about this reporting structure fails to take into account Cameron Currie's evidence that it was part of Saunders' responsibility as a project manager to meet with "upper management" and, in particular, to speak with Liczyk about the direction of the TMACS project. (Currie Transcript, October 20, 2004, p.171-172, 176, 195-196, 199-201) Similarly, Edwin Ngan gave evidence in respect of Liczyk's general desire to be kept up to date by the IT staff. Ngan testified that "[Liczyk] would very much like to know what is going on and she would come into the area, have discussions with Ms Gregory and Ms Lupi...she was on the scene, not sitting in an office far away and relying on reports to inform her of the progress. She was right there." (Ngan Transcript, October 27, 2004, p.112, lines 17-22)

22. Paragraph 15 (e) also relies on the evidence of certain witnesses who testified that Saunders and Liczyk attended at dinner together. The paragraph does not however reference Al

Shultz's evidence that the dinners were for the most part "working dinners" which he also attended. (Shultz Transcript, November 2, 2004, p.25)

23. At Paragraph 15 (g) of the City's submissions, the City criticizes Liczyk for "scrupulously avoid[ing] criticizing any of Saunders' behaviour until counsel for the City specifically asked her whether she had any criticisms of him on her third day of testimony." Liczyk did not deny that she had criticisms of Saunders. She simply didn't answer the question until it was asked of her.

Problems with TXM and a Switch to TMACS

24. Paragraph 24(a) of the City's submissions alleges that it was "obvious from Liczyk's evidence that she placed no trust in Vizzacchero and would never have relied on his advice..." with respect to creating TMACS2. The City does not rely upon any substantive evidence in respect of this allegation. Rather, the City provides the following editorial in the footnote to the subparagraph: "in answer to the question of whether North York had a technical team--technical group members participating in the June 1997 KPMG evaluation process, Liczyk stated: "It had Frank Vizzacchero". Although of course not discernable by looking at the transcript of Liczyk's words, the contempt and disdain in her voice was palpable in the hearing room." (City of Toronto closing submissions, para. 24(a), footnote 33) While this literary commentary provides insight into the City's bias, it is not evidence, and it was certainly not Liczyk's evidence.

25. Paragraph 26 of the City's submissions seeks to undermine Saunders' and Maxson's systems development skills. Specifically, the City alleges that "neither Saunders nor Maxson had any experience with PowerBuilder and they learned how to use it on the job, at the expense of the City of North York. In support of this allegation, the City extracts only portions of Ngan's

evidence. Contrary to the assertion that “they learned how to use it on the job” Ngan clearly and unequivocally testified that he never observed Saunders learning the program on the job. (Ngan Transcript, October 27, 2004, p.232, line1) Furthermore, Ngan testified that he himself began researching development tools. Not only did he research, he bought the license and made the presentation to the MIS team in July 1995. (Ngan Transcript, October 27, 2004, p.229, lines 14-16) Ngan further testified that he and Maxson together developed proof of concepts for small projects and taught City staff how to use the new tools so that in 1998 City staff would have the benefit of two years of experience with the current tools. (Ngan Transcript, October 27, 2004, p.149, 229-230)

26. In paragraph 28 of the City’s submissions, the City urges the Commissioner to find that “Liczyk’s evidence that Vizzacchero was responsible for both the adoption of PowerBuilder/Oracle and the recommendation to create TMACS2 using these tools, was an attempt to distance herself from those decisions.” While this is certainly one interpretation of Liczyk’s evidence, it fails to consider that both Liczyk and Shultz acknowledged throughout their testimony that the ‘team approach’ was typical of the manner in which the City of North York administration functioned. (Liczyk Affidavit, p.6, para 22) (Schultz Transcript, p.248, lines 5-25, p.249, lines 1-25, p.250, lines 1-5) This team approach necessarily meant that group discussions regarding future direction of IT were ongoing but ultimately certain members of the team were responsible for the decisions.

27. In paragraphs 30, 31 and 32 of its submissions, the City argues that TMACS2 was not an “upgrade” of TMACS1 but was rather an entirely new system. This is untrue. TMACS2 was the same tax system as TMACS1 simply transferred onto a different platform. It was in essence the same book written in more sophisticated language. It was the natural evolution of the system

and other systems being developed in North York since 1995. As Brunning testified “...it’s the-- functionality and the user requirements were taken and basically what they did was copied and put into a new language. So, a copy as to source code to source code, no, because it was different, but taking my needs and what I had and copying that and giving me that same functionality at the end.” (Brunning transcript, November 11, 2004, p.115, lines 11-17) Brunning’s Affidavit further provided that “...the existing TMACS program was simply copied into a new language which duplicated the existing program. The City of North York did not rewrite the specifications or the business processes because this had already been done extensively with the first version of TMACS in the early 1990’s. There were, however, some slight modifications and changes to the new versions of TMACS, primarily resulting from Current Value Assessment and its legislation and rules of application.” (Brunning Affidavit, p.29)

28. At paragraphs 33 and 34 of its closing submissions, the City asserts that all of the former municipalities, including North York, agreed to the manner in which the 1997 selection process would unfold. This assertion misses the real point which is that while the municipalities may have consented to the proposed process, that process was never undertaken. Both Ripley and DeSousa testified that in their view, the process was rushed and decisions were made too quickly. (Ripley Transcript, October 21, 2004, p.63) (DeSousa Transcript, October 26, 2004, p.40-42)

29. DeSousa further testified that, in his view, the notion proposed by Brunning and Deloitte & Touche, to consult with all amalgamating municipalities to identify their unique business requirements and in essence to “start with a blank page”, was not the proper procedure to follow. (DeSousa Transcript, October 26, 2004, p.180-183) (Brunning Affidavit, p.40, 46)

30. Brunning testified that she “recommended that both projects continue until October, and review them at that time. Bob Ripley stated that nothing would change, and that it would be too late to change direction and supported Ms Birt.” (Bunning Transcript, November 3, 2004, p.220, lines 12-17)

31. Contrary to the assertion made in paragraph 35 of the City’s submission that “the Transition Team’s process of decision-making was never challenged”, Margo Brunning in fact testified that “I didn’t know what authority the Transition Team had whether it was binding or not...I don’t know whether systems choices needed to be confirmed or not and whether that was the final decision.” (Bunning Transcript, November 11, 2004, p.236)

32. Paragraph 36 of the City’s submissions asserts that Sutherland’s evidence that if the Treasurer or other senior staff member wished to reverse a Transition Team decision after amalgamation, he would have expected that this reversal would ultimately have been reported to City Counsel, fails to reference Sutherland’s later testimony that “all individuals are different...some would have wanted to get approval...some would have been comfortable enough making decisions based on their own experiences and senior in authority.” (Sutherland Transcript, October 20, 2004, p.107, lines 1-4)

33. Similarly, the City relies on Brenda Glover’s evidence concerning her expectation that Liczyk would have reported her decision to reverse the Transition Team decision to City Counsel at paragraph 37 of its submission. Yet the City fails to acknowledge that when the Commissioner asked Glover directly as to whether any by-laws existed that someone could look at with respect to how to deal with Transition Team decisions, Glover responded that there were

not. Glover further confirmed that in 1997, the City of North York was free to spend its money as it deemed appropriate. (Glover Transcript, October 18, 2004, p.208-210)

The Back-up System

34. In paragraph 43 of the City's submission, the City acknowledges that while Sutherland did not recall Liczyk advising him on July 15, 1997 that North York was going to continue to develop TMACS2, the City fails to acknowledge that Sutherland also testified that "...it would be prudent to have a back-up if you've got one...". (Sutherland Transcript, October 20, 2004, p.65, line 6)

35. The City further fails to acknowledge the evidence of Al Shultz when he confirmed that Liczyk communicated her decision to continue to develop TMACS to the Treasurers and to the Transition Team. (Shultz Transcript, November 2, 2004, p.124)

36. As a number of witnesses also testified, there was great concern among many at this time that TXM was not going to be ready when it was promised to be and the result would have been disastrous. In this respect, Al Shultz acknowledged that Liczyk was concerned that TXM was not going to be ready in time and that these concerns were justified. Specifically, he testified that "...if that was the case and all of a sudden tax bills had to go out and there was no tax system available, there was a major problem. So there needed to be a back-up plan." (Shultz Transcript, November 2, 2004, p.121-122)

37. Similarly, Brunning testified that "the fear was that the system wouldn't be designed and delivered on time, and that was a risk that all of us shared...in having gone through the development of a system and implementation of it, we know there is always those other little

things that happen that you don't anticipate, and you don't build into your timeframe...and recognizing that the Scarborough/Mississauga project had started and been aborted and started up again, and after working with, I believe it was CGI at the time, then in fact it was a greater risk with this group delivering the product." (Brunning Transcript, November 3, 2004, p.240, 242-243)

38. The City's submission that TMACS1 could have been used as the back-up is ill-founded. The TMACS upgrade was already in progress prior to the amalgamation and it incorporated changes to CVA and the associated regulations. These upgrades would have had to be made to TMACS1 in any event. Furthermore, the purpose of a back-up system was not to simply issue the 1998 final tax bills in the event that TXM failed to deliver. The purpose of TMACS as a back-up system was to ensure that the City would have a fully functional modern and efficient tax billing system to use if the TXM project proved to be inadequate. The use of TMACS as a back-up was not a 'one off' solution for the 1998 final tax bills as the City has suggested.

Problems with TXM and the Switch to TMACS

39. The City's theory that Liczyk was at all times conspiring and planning to adopt TMACS as the tax system software for the newly amalgamated City of Toronto notwithstanding the decision of the Transition Team, ignores contrary evidence that once the decision was made, Liczyk worked toward the successful implementation of TXM and that ultimately, Liczyk simply wanted a functioning tax system. DeSousa testified that, in his view, once the decision was made Liczyk did not want anything to jeopardize the successful development of TXM. (DeSousa Transcript, October 26, 2004, p.146)

40. DeSousa further testified that when he was acting as the project lead, Liczyk never suggested switching to TMACS and “was actually working for the successful completion of Tax Manager 2000.” (DeSousa Transcript, October 27, 2004, p.6, 58)

41. Brunning, an admitted advocate of TMACS, rejected the suggestion that Liczyk was determined to see TXM fail. She stated that “...if it was true, I wouldn’t have been working and started working with the group, the steering committee in February 1998...if it was, I wouldn’t have invested the amount of time that I did with Tax Manager. I mean, I had a lot of other things on my plate as I’ve said.” (Brunning Transcript, November 3, 2004, p.267, 271)

42. In paragraph 84 of the City’s submissions, the City adopts only a portion of DeSousa’s evidence that, in his view, TMACS2 would eventually become the City’s tax system. The City again fails to acknowledge that DeSousa testified that he was not pressured to switch to TMACS2. (DeSousa Transcript, October 27, 2004, p.6)

43. The City also fails to include DeSousa’s evidence that he acknowledged that Liczyk had concerns in respect of the TXM completion date and that these concerns were legitimate. (DeSousa Transcript, October 26, 2004, p.252-254)

44. Perhaps most glaringly, the City, throughout its submissions, fails to acknowledge that in January 1998, DeSousa in fact recommended the continued development of both systems because continuing with both systems was “the smart thing to do” and the recommendation was not made to “get in Liczyk’s good favours.” (DeSousa Transcript, October 26, 2004, p.252-257)

45. In paragraph 90 of the City’s submissions, the City incorrectly summarizes Carbone’s evidence when it states that Liczyk “made it clear to Carbone that she preferred TMACS and

trusted Saunders.” Carbone’s evidence is more accurately stated in her affidavit which reads “...Liczyk briefed me on the Transition Team’s selection of the TXM system for the amalgamated City of Toronto. However, TXM was supposed to have been completed by the end of March 1998 and was not ready when I started as the Director of Revenue Services in May 1998. Wanda has serious concerns regarding whether the system would be ready in time for billing the 1998 final taxes and whether it would be able to meet the needs of the largest municipality in Ontario.” (Carbone Affidavit, p.11)

46. In her evidence before this Inquiry, Carbone stated that, “Wanda expressed her concerns about the fact that the project had missed certain milestones, and that the fact that we did have to get the tax bills, at the time we were aiming to get the tax bills out by the beginning of July, July 30th due date, I believe, when I first started, that’s what the direction was.” (Carbone Transcript, November 4, 2004, p.256)

47. Carbone went on to say that at her first briefing, “[Liczyk] let me know about the two systems and that the Transition Team had selected the Tax Manager 2000, and that she had concerns. By the time I came on, it had already missed some major milestones. So she was concerned...and I believe it was at that meeting that she asked me if I could *assess the situation*, she had concerns that we weren’t going to be able to get the bill out and her priority was to get that bill out.” [emphasis added] (Carbone Transcript, November 4, 2004, p.304-305)

48. Later, in responding to a question concerning how the May 1998 demonstration came about, Carbone testified that, “well, I did decide to have a demonstration, that was my way of ...of *assessing the situation*...I had to become familiar with the systems in order to *assess the*

situation, so I could make a recommendation. But the demonstration part, that was my decision.” [emphasis added]

Recommendation to Carbone and Carbone’s Recommendation to Liczyk

49. At paragraph 132 of the City’s submissions, the City urges the Commissioner to draw the inference that, after having requested, received and signed the May 15 proposals, “aspects of Carbone’s plan came as a surprise to Liczyk.” The fact is that there is no firm evidence before this Inquiry with respect to the timing of the request, receipt and execution of the May 15 proposals.

50. The City further urges the Commissioner to draw the inference that Liczyk immediately communicated Carbone’s “surprising news” to Saunders. There is likewise no evidence before this Inquiry to support the inference that Liczyk was the one who communicated Carbone’s preliminary findings to Saunders in advance of the delivery of Carbone’s May 26, 1998 written recommendations. In fact, it is equally as plausible that Carbone herself communicated her findings to Saunders. The City argues that Liczyk must have conveyed the information to Saunders as there is no other explanation for Saunders May 20, 1998 email to Carbone, Liczyk and Shultz which states, “Julia [sic], if you believe that we should go to TMACS on the fall [sic], why don’t we just keep North York on the system...I sent this to Wanda and Al to see if they see a problem with running two systems. Sorry if this is a mistake I don’t like giving up.” In advancing this argument however, the City fails to consider Carbone’s own evidence concerning this email. Carbone’s evidence concerning the email was as follows: “What I take from that email...what I said is we’d do a customized system using TMACS as the platform. So what he’s telling me, if you are going to use TMACS in the platform at the fall leave us as RMACS.”

Carbone goes on to acknowledge that she did not see anything unusual with Shultz and Liczyk being copied on this email. In this respect, she testified that, “I was also still so new, maybe he thought, you know, I needed a sounding board...”. Carbone did not describe this email as being one of the incidents where she believed that Saunders had “gone over her head”. (Carbone Transcript, November 4, 2004, p.342-345)

51. The Commissioner should draw close attention to paragraph 147 of the City’s submissions where the City urges the Commissioner to find that emails such as the one described above and subsequent emails concerning the status of the development of TXM and TMACS2 “were merely a ruse.” Such bold allegations are typical of the City’s unsubstantiated allegations and moreover, its preference to make bold assertions even in the face of documentary evidence concerning the actual intentions and actions of the key parties to this Inquiry at the time the events were transpiring. Respectfully, these documents are the best evidence of what people were thinking and doing at the time.

Final Billing at North York

52. At paragraph 149 of the City's submissions, the City references Carbone's testimony that throughout June, 1998, Carbone intended to have North York convert from TMACS2 to TXM, but Liczyk intervened and recommended to her that North York stay on TMACS2 for main billing. The City fails to mention that in paragraph 44 of her affidavit, Carbone also states that "Liczyk intervened and *recommended, as a precaution*, that I allow North York to stay on the fully functional TMACS system rather than having to switch to TXM, which was not functional. She said that if we have to convert North York to TXM we could do so at a later date. I changed my position at that meeting and allowed North York to stay on TMACS for the 1998 final billing." [emphasis added] When she testified before this Inquiry, Carbone acknowledged that there were "...a lot of bugs being found in TXM" and that Liczyk "...was getting concerned and getting a little nervous...so she approached me and asked me to reconsider...". (Carbone Transcript, November 5, 2004, p.20)

53. Contrary to the City's assertion, Liczyk did not instruct or direct Carbone to allow North York to stay functional with TMACS. She made the decision after considering Liczyk's perspective. Furthermore, there was nothing wrong or inappropriate about that decision in the circumstances.

The Allegation that Liczyk Cut Funding for TXM

54. Contrary to the City's assertion that Liczyk was responsible for suspending payment to Mississauga, the fact is that Liczyk was utterly unaware of whether, in June of 1998, there were proper processes for issuing and paying purchase orders and signing off on payments. (Liczyk Transcript, November 9, 2004, p. 80) Notably, Carbone in fact testified that no directions were

made to stop any payments between the time that she commenced her job as Director of Revenue through to August 26, 1998. (Carbone Transcript, November 5, 2004, p. 242-245)

55. The City argues that "...the most likely chronology of events is that Liczyk directed payments to Mississauga be suspended in early 1998, and then directed Carbone to follow up in June 1998." There is no evidence of any invoices rendered by Mississauga which were unpaid until September 1998.

The July 17, 1998 Beacon Proposals

56. The City argues that the Commissioner should find that the statement made by Saunders that "the City decision to go with TMACS with one database is the right decision due to the already develop Appeals processing and collector modules. Thanks again for making the selection to TMACS" confirms a secret agreement between Liczyk and Saunders prior to July 17, 1998. This argument is misdirected. There is no firm evidence identifying when these proposals were forwarded and signed. The direction toward one database using TMACS as the platform was established in May, 1998. In addition, the Beacon proposals outline a series of milestones that would accomplish the task which was anticipated to be finally completed in October 1998. Brunning acknowledged in her evidence that the move toward a full conversion to TMACS was underway in September 1998. (Brunning Transcript, November 11, 2004, p.56-58)

57. Likewise, Carbone testified that it was not a question of "if" TMACS was going to be used for the new City after final billing, but rather a question of "when". (Carbone Transcript, November 5, 2004, p.240)

58. When asked whether she would have undertaken any preparatory work in advance of her final decision as to when TMACS would be put in place for the new City, Carbone responded that “I don’t think I would have just waited until October 7th...” (Carbone Transcript, November 5, 2004, p.58)

59. This evidence is consistent with the content of Saunders’ September 22, 1998 email (copied to Ripley and Brunning) outlining the training plan to be undertaken by Corporate IT. This is also consistent with Carbone’s evidence that it was possible that she asked for a conversion plan to be created in September 1998 particularly once she returned from the early September 1998 TXM steering committee meeting believing that problems were going to arise with TXM. (Carbone Transcript, November 5, 2004, p.60) Again, the decision had already been made in May, 1999 regarding the future direction of the City. It was not a secret. It was just a question of when it was going to be put into effect.

The Adoption of WMACS by the City

60. The City of Toronto’s suggestion that Liczyk somehow surreptitiously adopted WMACS as the City’s water tax system, is further evidence of how far the City is prepared to advance their theory, regardless of how thin the foundation.

61. The vision of a consolidated tax and water billing system was not one held exclusively by Liczyk. Carbone specifically acknowledges in her briefing note to the City’s CAO on July 12, 2001 (TECO16850) that the then City Chief Administrative Office had “expressed his vision/direction of having one, consolidated “bill” for the City of Toronto”. This was also the “vision” of Johnston-Smith as part of their visioning workshop.

62. Carbone adopted and pursued this vision as part of her duties and responsibilities as the Director of the Revenue Services (Carbone Affidavit, p. 80), presumably because it made sense to have a consolidated billing system. Which it does.

63. The selection of TMACS did not presuppose the selection of WMACS. The proposition that you could not have one without the other is simply not true. An evaluation was done of the various water billing systems at the City of Toronto or available to the City of Toronto. Liczyk was not part of that evaluation. Consideration was also given to performing remedial work to the legacy systems which would have cost approximately 20 million dollars.

64. What was determined as a result of the evaluation was that WMACS, which had the same “look and feel” as TMACS, would be the most easily integrated into the tax system. WMACS was not selected because it was a “module” of TMACS. Whether or not WMACS was a “module” is debatable. The Shorter Oxford English Dictionary defines a module as a “standardized part or unit from which a complex structure is or can be assembled”. It is not necessarily a part of but is a unit that may potentially become part of an integrated system.

65. WMACS, regardless of what you call it, was selected because it was the most easily made Y2K compliant, was the least expensive and could be integrated into the tax billing system because it rested on a common software platform. Equally, one of the other water billing systems of the City could have been integrated/inter-faced with TMACS if it was found by the Evaluation Team that it was compatible or preferable. As stated above, the Evaluation Team found otherwise. The suggestion that the authors of the business case regarding a water billing solution were somehow manipulated by Liczyk is totally unfounded and not supported by the evidence.

66. Maxson, Ngan and Saunders were contracted by Corporate IT, not the Revenue Division, in 1999 because there was a scarcity of resources at the City to work toward Y2K compliance. Carbone confirms that the retainer of these consultants was “due to time constraints imposed by the immovable Y2K deadline”. (TECO16850) These three consultants also had a track record of working hard and successfully delivering projects. The other major competing system, the Banner system in Etobicoke, had been in development for implementation since 1996 without any success.

67. Saunders and Maxson had a great deal of experience in developing billing systems. The water billing system is a billing system. The water billing system used a software platform and software tools which Maxson, Saunders and Ngan were very familiar with given their experience with TMACS. Accordingly, they were an entirely appropriate team to perform the work on the development and implementation of the water billing system in such a short time frame. Presumably, again, that is why the authors of the business case, who were charged with the responsibility to make those decisions, made that choice. The suggestion that they were so feeble-minded that they could not and did not perform a proper evaluation or consider all of their options is not founded on any evidence.

68. Furthermore, Cameron Currie was assigned by Frank Vizzacchero to work on other systems, such as the election system and the public health restaurant inspection system. (Ngan Transcript, October 27, 2004, p. 193) There is no suggestion that Liczyk had any involvement with that decision either.

69. There is no evidence that the decision to develop and implement WMACS was made, directly or indirectly, by Liczyk. In fact, the evidence establishes that:

- (a) there was a common vision that the City of Toronto should have an integrated tax billing system. This idea is and was not novel or specifically attributable to Ms Liczyk;
- (b) WMACS was selected as the appropriate water billing system after an evaluation in which Liczyk had no involvement;
- (c) WMACS was an independent system which was most easily integrated with the tax billing system because it sat on a common platform. Hence, it could share database information and produce one single integrated tax bill. This served the City's interests;
- (d) Saunders, Maxson and Ngan had specialized knowledge in the development of the tax system. Their specialized knowledge and experience put them in the best position to implement and develop the WMACS tax system especially given the timing of the implementation which had to be Y2K compliant. There is no evidence that any other resources were available or were more appropriately directed at developing a water billing system; and
- (e) the selection and funding for the WMACS project was undertaken completely independently of Liczyk and was reviewed and approved by the City's former Chief Administrative Officer.

The City's Intellectual Property Rights

70. The City of Toronto's position with respect to its ownership of TMACS is correct. The City of Toronto owns TMACS and is entitled to use and modify TMACS in perpetuity. Neither Saunders nor Maxson nor Ngan has ever suggested otherwise.

71. In fact, Saunders' written communications are entirely consistent with that position. In his presentation entitled "Integrated Tax System Presentation by Beacon Software, Inc. June 17, 1997" Saunders states the City owns a version of TMACS and that it "has the source code". Mr. Saunders also states that: "Beacon has been assigned the marketing rights for the TMACS system". If Beacon owned TMACS it would of course not have to have been "assigned the marketing rights".

72. The exacting standard which the City of Toronto now uses to analyse the language used by Mr. Saunders is totally inappropriate. Mr. Saunders is not a lawyer. His choice of the word "has the source code" rather than "owns the source code" is not demonstrative of anything. The fact that he has not asserted any ownership rights in TMACS is demonstrative.

73. The City's opinion that by stating, "the City of North York owns a version of TMACS for all of its purposes with no licensing costs involved in moving from one hardware platform or increasing the number of end users using the system", somehow suggests that the City does not own TMACS is perplexing. There are no licensing costs to the City of Toronto. That statement is consistent with the position that the City of Toronto is the owner, contrary to what the City of Toronto states at paragraph 241(d) of its submissions.

74. It is further not surprising that the concepts expressed in the Dissenting Opinion with respect to the ownership and marketing of TMACS were similar to the concepts expressed by

Saunders. No one has denied that the issue of ownership and marketing of TMACS was discussed with Saunders. However, the Dissenting Opinion never asserts anything other than the City's ownership of TMACS. Nor is there any evidence that Liczyk was the author of the language used in the Dissenting Opinion about these issues. The City of Toronto conveniently ignores the fact that Al Shultz, who was at that time working closing with Saunders and Maxson in North York, was also aware of the marketing understanding with Beacon. In fact, it was Mr. Shultz who was copied on the correspondence forwarded by Frank Vizzacchero to John Wright in Brampton regarding the Brampton agreement.

75. The marketing material used by Saunders and Associates never asserts that Saunders and Associates is the owner of TMACS. How the City can suggest that Saunders and Associates implied that it was the owner by stating that it had "developed an exciting new product to meet tax administrator's needs" is perplexing. Further, the licensing agreement with Brampton clearly states that Beacon as the "vendor" either "owns or has the right to sublicense" the software. There was no evidence to suggest that this language is not standard language in a licensing agreement. The purchaser has to be assured that the grantor of the license has that legal right either by virtue of its ownership or its own licence. The fact that Beacon makes the representations and warranties in the agreement as set out in paragraph 257 of the City of Toronto's submissions is indicative only of the fact that there is privity of contract between Brampton and Beacon and therefore the representations have to have been made by Beacon and not the City of North York. That is, when Beacon states that Brampton, "recognizes that the licensed software is confidential and trade secret property which is proprietary to the vendor" that permits Beacon to enforce those rights in the event of a breach of the agreement. If the provisions read that the licensed software was proprietary to the City of North York then it

would arguably require the City of North York to enforce its rights and of course it was never contemplated that the City of North York would have a contract with Brampton. Therefore, it is respectfully submitted that the language used in the licensing agreement is not indicative of any position regarding the ownership of the software other than to confirm that Beacon had the right to act as a licensor and an “authorized distributor”.

76. When Liczyk became aware of the Brampton agreement with Beacon, she told Saunders that she did not want any agreement with Brampton interfering with the City of North York’s priorities. Upon being advised of this information Saunders negotiated the termination of the Brampton agreement. Accordingly, there was nothing for Liczyk or Shultz, who had been delegated this matter, to take to North York City Council. The matter was done and no further agreement or approval was required by the former City of North York, so none was taken.

77. There was no suggestion in the evidence that if Liczyk had been advised that Beacon intended to pursue the Brampton agreement, the agreement would not have been forwarded to City Council for approval by either Liczyk or Shultz. In fact, both Liczyk and Shultz testified otherwise.

78. The fact that Liczyk believed that the licensing fee for TXM with the City of Brampton should have been \$250,000-\$300,000 is equally consistent with the evidence that Liczyk did not see the Brampton agreement with a licensing fee of \$50,000.

79. Further, the evidence at the hearing was that the \$250,000-\$300,000 fee was consistent with the amount of funding that was requested of each the City of Etobicoke and the City of Toronto for its involvement with the development of TXM. Liczyk was provided with that information as part of the evaluation process. The \$250,000-\$300,000 was not simply made up

by Liczyk in order to frustrate the marketing attempts of the City of Mississauga, as suggested by the City of Toronto in its submissions.

Events following the Transaction

80. Liczyk never tried to hide that she and Saunders were friends. This was open and obvious to all. She did not however publicize the fact that she had had a relationship with Saunders in 1989. She did not believe it was relevant as it was not effecting or clouding her decisions with respect to work that was being performed by Saunders, Maxson and Ngan. At the time that the Now Magazine article was published in September 1999, Liczyk had a conversation with Alan Slobodsky about the article and the suggestions which were being made in the article. Liczyk did not go to Slobodsky for the purpose of disclosure. She went to Slobodsky for the purpose of advice. Slobodsky was a friend of hers and she wanted to determine whether her perspective, that the issue of the past relationship was not relevant, was well-founded. Slobodsky advised her that it was.

81. In her memo to the City Auditor, Liczyk set out what she understood to be all of the facts associated with the business decision regarding TMACS. It was the business decision that was relevant and important. Carbone assisted her with drafting the summary of relevant events as is evident from TXM2000 Summary (TECO02394) which came directly from Carbone's electronic files. There no evidence to suggest that the memo was not a bona fide effort to set out all of the relevant facts. Presumably the City Auditor was satisfied that there in fact was a good and legitimate business purpose served by choosing TMACS and WMACS as the tax and water billing systems for the City of Toronto. If the City Auditor had not been satisfied of the business justification he would have taken steps to further investigate. The City Auditor also did not follow-up and specifically request confirmation from Liczyk with respect to the suggestions

made in the Now Magazine article regarding her relationship with Saunders. Presumably he did not do so because he did not think it was relevant or appropriate to do so.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

BLANEY MCMURTRY LLP

per: William D. Anderson
Counsel to Wanda Liczyk