

**TORONTO COMPUTER LEASING INQUIRY**  
**COMMISSIONER BELLAMY**

**REPLY SUBMISSIONS ON BEHALF OF**  
**MARK FECENKO**

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# REPLY SUBMISSIONS

OF

MARK FECENKO

## I. OVERVIEW

These reply submissions on behalf of Mark Fecenko (“Fecenko”) are made in response to the written submissions of the City of Toronto (“City”), Oswald Doyle (“Doyle”), and Brendan Power (“Power”). These submissions address two issues:

1. Fecenko’s review of the MFP<sup>1</sup> Draft Master Lease Agreement (“Draft Master Lease Agreement”); and
2. Fecenko’s letter of August 20, 1999 to Power regarding the commercial reasonableness of the legal terms and conditions of the Draft Master Lease Agreement and other related documents (“Commercial Reasonableness Letter”).<sup>2</sup>

In considering the submissions of the parties at the Toronto Computer Leasing Inquiry (“Inquiry”), consideration must be given to the Terms of Reference of the Inquiry as well as the Commissioner’s mandate.

The Terms of Reference state that the purpose of the Inquiry *shall be*:

“to inquire into all aspects of the above transactions [related to the acquisition of computer equipment through MFP and the acquisition of Oracle licences], 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 his inquiry.”<sup>3</sup>

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<sup>1</sup> Throughout these submissions, MFP Financial Services Ltd. is referred to as MFP.

<sup>2</sup> Document number COT011120.

<sup>3</sup> Terms of Reference for Toronto Computer Leasing Inquiry, online: [www.toronto inquiry.com](http://www.toronto inquiry.com).

It is respectfully submitted that under her mandate the Commissioner should not make findings of fault (such as a finding of professional negligence) against individuals such as Fecenko, but should confine her findings and recommendations to the good government of the City and the conduct of its business.

## **II. ISSUES**

### **REVIEW OF THE MFP DRAFT MASTER LEASE AGREEMENT:**

#### **Criticisms of Fecenko**

The criticisms of Fecenko are that:

- (i) He did not obtain and review the City's request for quotation ("RFQ") and MFP's response to the RFQ when he reviewed the MFP Draft Master Lease Agreement ("Draft Master Lease Agreement") in the fall of 1999.<sup>4</sup>
- (ii) He did not allow sufficient time for a proper review of the Draft Master Lease Agreement.<sup>5</sup>
- (iii) He did not review the final version of the Draft Master Lease Agreement and related documents.<sup>6</sup>
- (iv) He did not advise the City that the completed equipment schedules should have been reviewed by legal counsel.<sup>7</sup>

#### **Reply**

- (i) Fecenko's role as outside legal counsel to the City was clearly defined by the retainer letter between Fasken Martineau DuMoulin LLP ("Faskens") and the City

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<sup>4</sup> City of Toronto Submissions, Chapter 1, Executive Summary, p. 19, para. 58; Power Submissions, page 45.

<sup>5</sup> City of Toronto Submissions, Chapter 26, p. 8, para. 18; Power Submissions, p. 41.

<sup>6</sup> City of Toronto Submissions, Chapter 1, Executive Summary, p. 19, para. 58; Doyle Submissions, p. 14, para. 40.

(“Retainer”).<sup>8</sup> Pursuant to the Retainer, Fecenko was to provide *legal services* in relation to Year 2000 (“Y2K”) issues as requested by the City from time to time. There was no provision in the Retainer for Fecenko to provide any commercial or business advice and he was only to provide legal services in accordance with the instructions he received from the City.

Pursuant to the Retainer, Fecenko was to obtain instructions from Doyle or Brian Loreto (“Loreto”) on matters of City corporate governance, priority and policies and on transactional matters from Lana Viinamae (“Viinamae”) or her designate (who ultimately became Power).

Fecenko’s review of the Draft Master Lease Agreement was a transactional matter, and therefore in accordance with the Retainer, Fecenko took instructions from Power. Loreto was aware that Fecenko was taking instructions from Power in this regard and confirmed in his evidence that this was entirely appropriate and that Power was authorized to instruct Fecenko.<sup>9</sup> Loreto was also aware that Fecenko would only seek instructions from Loreto on transactional matters if there was something unusual or out of the ordinary about the matter.<sup>10</sup>

Throughout his dealings with Power, Fecenko was under the impression that Power was an employee of the City who had been hired by the City for his specific expertise in IT procurement.<sup>11</sup> It is submitted that this was a reasonable conclusion for Fecenko to make. Both Fecenko and Loreto had worked with Power on many prior occasions, and Fecenko in particular had had extensive dealings with Power over six months or longer and had already worked with Power on “dozens of matters” leading up to the review of the Draft Master Lease

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<sup>7</sup> City of Toronto Submissions, Chapter 26, p. 2, para. 4.

<sup>8</sup> Retainer letter dated March 10, 1999, document number COT006447.

<sup>9</sup> Loreto Affidavit, para. 5, Loreto Evidence, April 1, 2003 at p. 234, line 9 to p. 235, line 5; Power Evidence March 27, 2003 at p. 8, line 21 to p. 9, line 18.

<sup>10</sup> Fecenko Evidence, April 3, 2003 at p. 70, line 23 to p. 71, line 14.

<sup>11</sup> Fecenko Affidavit, para. 16 – 17; Fecenko Evidence, April 3, 2003 at p. 55, lines 16 – 22; Power documents, volume III, Tab 42 (Power’s business card).

Agreement.<sup>12</sup> Both Fecenko and Loreto found Power to be very capable and extremely knowledgeable in the area of IT procurement.<sup>13</sup>

As stated in his book “*Kyer and Fecenko on Computer-Related Agreements: A Practical Guide*”, Fecenko’s preferred approach is to be brought in early during an IT procurement transaction and assist from a legal perspective in the preparation of the RFP/RFQ and to otherwise be fully versed on the business deal the client is seeking to obtain.<sup>14</sup> However, the extent of Fecenko’s involvement on a transaction is a business decision made by the client. According to both Fecenko and Power, it was not Power’s standard practice to involve outside legal counsel in the business case behind a particular transaction, rather, it was more common for Power to ask outside legal counsel specific questions about specific legal issues.<sup>15</sup>

On August 18, 1999, Power instructed Fecenko to review the Draft Master Lease Agreement and the attached draft equipment schedules and program agreements. Fecenko asked Power for the RFQ and MFP’s response to the RFQ to better understand the business transaction. Power told Fecenko that these documents only contained business terms, that they had been reviewed by the City’s finance people who were satisfied with the documents and that a review of the RFQ and MFP’s response was outside the scope of what Power wanted Fecenko to do. Power’s instructions to Fecenko were limited to a request that he review the legal terms and conditions of the Draft Master Lease Agreement. Power’s evidence regarding this conversation conflicts with Fecenko’s evidence. Power testified that had Fecenko asked for the documents, he would have given them to him.<sup>16</sup> As submitted by the City (whose submissions Fecenko adopts on this specific point), the Commissioner should accept the evidence of Fecenko over that of

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<sup>12</sup> Fecenko Evidence, April 7, 2003 at p. 33, line 25 to p. 34, line 18.

<sup>13</sup> Fecenko Affidavit, para. 21, Fecenko Evidence, April 3, 2003 at p. 56, line 14 to p. 57, line 12; Loreto Affidavit, para. 6, Loreto Evidence, April 1, 2003 at p. 235, lines 2 – 16.

<sup>14</sup> Fecenko Affidavit, para. 22; Fecenko Evidence, April 3, 2003 at p. 20, line 12 to p. 21, line 1.

<sup>15</sup> Fecenko Affidavit, para. 23, Fecenko Evidence, April 3, 2003 at p. 21, lines 3 – 13; Power Evidence, March 27, 2003 at p. 10, line 20 to p. 11, line 9.

<sup>16</sup> Power Evidence, March 24, 2003, p. 161, lines 7 – 15.

Power and find that Fecenko did ask Power for the RFQ and MFP's response to the RFQ but that Power told him that these documents were not part of his legal review and he was not therefore instructed to review them.<sup>17</sup>

It was of significance to Fecenko that his discussion with Power was in respect of a "quotation request" or RFQ. It would not be unusual for this form of document to be limited to a request for quotation (i.e. business terms only) and the provision of a quotation (i.e. business terms only) by the bidder and not to include any legal terms or conditions. This is different from a request for proposal ("RFP") which is more likely to contain legal terms in addition to business terms. Power's statement to Fecenko regarding the RFQ and MFP's response to the RFQ was consistent with Fecenko's understanding of what would normally be included in an RFQ and a response thereto. Upon his review of the Draft Master Lease Agreement, Fecenko noticed that it referred to a quotation request for the lease of computer equipment and that MFP had responded to this request.<sup>18</sup> This further confirmed in Fecenko's mind that what Power had told him regarding the RFQ and MFP's response to the RFQ was accurate. Based on all of these factors, Fecenko concluded that he did not have to review these documents in order to carry out the legal review of the terms and conditions contained in the Draft Master Lease Agreement he had been instructed to perform by Power. However, had the procurement process been achieved through an RFP, it would have raised concerns for Fecenko and he would have insisted on seeing the documents.<sup>19</sup>

Loreto acknowledged that it would be reasonable for a lawyer to rely on an experienced person's view that certain documents contained business terms and were therefore not necessary to be reviewed by legal counsel.<sup>20</sup> Fecenko's and Loreto's evidence is that both of them found Power to have been a very

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<sup>17</sup> City of Toronto Submissions, Chapter 26, page 7, para. 16, first sentence.

<sup>18</sup> Excerpt from document number COT011126, draft Master Equipment Lease Agreement No. 838:

"Whereas the lessee, pursuant to a Quotation Request No. 3406-99-01735 (the "RFQ") a copy of which is attached hereto as Exhibit 1, *invited quotations for the lease of computer equipment and related software.*" (Emphasis added).

<sup>19</sup> Fecenko Evidence, April 7, 2003 at p. 67, line 19 to p. 69, line 18.

<sup>20</sup> Loreto Evidence, April 2, 2003 at p. 189 line 4 to p. 190 line 3.

experienced and knowledgeable IT procurement professional.<sup>21</sup> It is submitted that based on the information Fecenko received from Power, the fact that Power was an experienced procurement professional and the information contained in the Draft Master Lease Agreement regarding the RFQ, it was reasonable for Fecenko to conclude it was not necessary to obtain the RFQ and MFP's response to the RFQ as part of his legal review of the terms and conditions in the Draft Master Lease Agreement. It is further submitted that there is no evidence upon which a finding can be made that in these particular circumstances, Fecenko acted inappropriately in providing the legal services he did regarding the Draft Master Lease Agreement.

- (ii) In response to the City's submissions that Power set an inappropriate time line for Fecenko to review the Draft Master Lease Agreement, the draft equipment schedules and program agreements and that Fecenko erred in accepting that time line,<sup>22</sup> there is neither any evidence to this effect nor is there any evidence that the time line limited or hindered Fecenko's ability to do a proper legal review of the documents. In fact, the only evidence before the Inquiry regarding the appropriateness of the time line came from Fecenko himself who stated that the time period allotted was sufficient to do the legal review that Power had requested.<sup>23</sup> In light of Fecenko's expertise in providing legal advice of this nature, it is submitted that Fecenko's evidence should be accepted and that the Commissioner should find that the time line allotted was appropriate in the circumstances and did not impact on the quality of Fecenko's legal services.
- (iii) In response to the City's and Doyle's submissions that Fecenko did not review the final lease documents, Fecenko's evidence is that he was not provided with a copy of the final form of the Draft Master Lease Agreement and was not instructed to do so.<sup>24</sup> During his review of the Draft Master Lease Agreement and related

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<sup>21</sup> Fecenko Affidavit, para. 21, Fecenko Evidence, April 3, 2003 at p. 56, line 14 to p. 57, line 12; Loreto Affidavit, para. 6, Loreto Evidence, April 1, 2003 at p. 235, lines 2 – 16.

<sup>22</sup> City of Toronto submissions, Chapter 26, page 8, para. 18.

<sup>23</sup> Fecenko Affidavit, para. 28, Fecenko Evidence April 3, 2003 at p. 23, lines 25 to p. 24, line 12.

<sup>24</sup> Fecenko Affidavit para. 33, Fecenko Evidence April 3, 2003 at p. 29, lines 3 - 25.



documents, Fecenko testified that he and Power discussed the concerns that Fecenko had with certain of the terms and conditions.<sup>25</sup> Power confirmed with Fecenko that all but one of his suggested changes had been accepted by MFP and that the Draft Master Lease Agreement would be ready for signing once the changes were made.<sup>26</sup> It is submitted that there was no reason for Fecenko to doubt the veracity of Power's statements that the appropriate changes were incorporated into the final documents and he was not instructed by Power to review them. Accordingly, it is submitted he acted appropriately in respect of this issue.

- (iv) The Draft Master Lease Agreement that Fecenko reviewed did not effect a leasing transaction, but merely provided a template through which future leasing transactions could be subsequently entered into from time to time pursuant to an equipment schedule. Even Loreto acknowledged that the Draft Master Lease Agreement and attached documents did not include a completed program agreement or completed equipment schedules.<sup>27</sup> Fecenko's instructions from Power were limited to conducting a legal review of the terms and conditions in that draft document to determine if there was anything unusual about them. He was never requested to review a specific leasing transaction. Fecenko expected that once the City was prepared to enter into a specific leasing transaction as set out in the finalized equipment schedules and program agreement, the City's legal department or outside legal counsel would have been consulted about the transaction. Fecenko was never instructed to conduct this further review.<sup>28</sup> Further, the scope of the Retainer did not extend to providing legal advice on the City's procurement process. Had this been included in the Retainer, perhaps then it would have been incumbent upon Fecenko to ensure the City's legal department or outside counsel followed up on the finalized equipment schedules. However, it is submitted that the failure to have legal counsel (whether outside counsel or the

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<sup>25</sup> Fecenko Affidavit, para. 29 & 31, Fecenko Evidence, April 3, 2003 at p. 86, line 1 to p. 89, line 16 and p. 94 line 1 to p. 95, line 4. Document number COT003675.

<sup>26</sup> Fecenko Affidavit, para. 32, Fecenko Evidence, April 3, 2003 at p. 101, lines 3 - 25, document number COT011119.

<sup>27</sup> Loreto Affidavit, para. 10, Loreto Evidence, April 1, 2003 at p. 209, line 15 to p. 210, line 7.

City's legal counsel) review the final equipment schedules and program agreement was the responsibility of the City's IT department and Power specifically. Pursuant to the Retainer, Fecenko was only authorized to perform legal services he was instructed to perform by Power or others. He was never instructed to review the final equipment schedules and program agreement.

There has been no evidence before the Inquiry regarding the standard of care by which Fecenko's conduct should be measured except the evidence of Fecenko and Loreto. It is submitted that Fecenko conducted a proper and thorough legal review of the terms and conditions of the Draft Master Lease Agreement in accordance with the specific instructions he received from Power. Loreto's evidence is clear that he considered Fecenko to be an expert on matters pertaining to IT and that this was one of the reasons Fecenko had been retained by the City.<sup>29</sup> Loreto also testified that in light of Fecenko's expertise and the instructions that Power provided to Fecenko, it would be fair for Fecenko to review the Draft Master Lease Agreement without reviewing the RFQ, MFP's response to the RFQ and other related documents.<sup>30</sup> It is significant that Loreto testified that he did not have any problems or concerns with Fecenko's work on the Draft Master Lease Agreement.<sup>31</sup> In fact, the evidence before this Inquiry is that the City continued to retain Fecenko to provide legal services long after the Y2K retainer was completed.<sup>32</sup> It is therefore submitted that there is no evidence that Fecenko breached any standard of care applicable to him in reviewing the Draft Master Lease Agreement, and no evidence upon which the Commissioner could find that Fecenko conducted himself inappropriately in the face of the clear instructions he received from his client, the City.

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<sup>28</sup> Fecenko Affidavit, para. 37 & 38, Fecenko Evidence, April 3, 2003 at p. 31, line 16 to p. 32, line 2.

<sup>29</sup> Loreto Evidence, April 2, 2003 at p. 179 line 13 to p. 180 line 4.

<sup>30</sup> Loreto Evidence, April 2, 2003 at p. 182 line 15 to p. 183 line 3.

<sup>31</sup> Loreto Evidence, April 2, 2003 at p. 184 lines 12-15.

<sup>32</sup> Fecenko Evidence, April 3, 2003 at p. 217, line 7 to p. 218, line 5.

## **FECENKO'S COMMERCIAL REASONABLENESS LETTER:**

### **Criticisms of Fecenko**

The criticisms of Fecenko are that:

- (i) The Commercial Reasonableness Letter<sup>33</sup> regarding the Draft Master Lease Agreement, Equipment Schedule and Program Agreement was misleading and unqualified as he did not review the final versions of these documents and he did not review the RFQ and MFP's response to the RFQ in giving his opinion.<sup>34</sup>
- (ii) Fecenko failed to review Council's authority before providing his Commercial Reasonableness Letter.<sup>35</sup>

### **Reply**

- (i) In response to the criticism that Fecenko's Commercial Reasonableness Letter was misleading and unqualified as he did not review the final versions of these and related documents, his letter clearly indicated in the "Re:" line that his opinion was based only on the "drafts" he had reviewed.<sup>36</sup> Fecenko clearly indicated that he had reviewed "draft documents" in providing his Commercial Reasonableness Letter. He also understood that his letter was only to be used by the City's Legal department so that the legal stamp "approved as to form" could be applied to the documents.<sup>37</sup> Loreto also confirmed Fecenko's understanding of the purpose of the Commercial Reasonableness Letter when he indicated that, "City Legal would generally review agreements 'as to form' for proper standard clauses (liability, default) and language. *The 'business deal' would not be part of legal's responsibility, that area was with legal's 'client'. [Loreto] understands that this was the arrangement between Fasken and the Y2K Office as well.*"

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<sup>33</sup> August 20, 1990 letter to Power from Fecenko, document number COT011120.

<sup>34</sup> City of Toronto Submissions, Chapter 1, Executive Summary, p. 19 para. 58; Doyle's Submissions, p. 14 para. 39 & 40.

<sup>35</sup> Doyle's submissions, p. 14 para. 39.

<sup>36</sup> Fecenko Affidavit, para. 34, Fecenko Evidence, April 3, 2003 at p. 106, line 22 to p. 107, line 19. Document number COT011120.

<sup>37</sup> Fecenko Affidavit, para. 35, Fecenko Evidence, April 3, 2003 at p. 30, lines 9 – 18.

(Emphasis added).<sup>38</sup> Based on Power's instructions and his discussions with Loreto regarding the Commercial Reasonableness Letter and the purpose of the letter, it is submitted that there is no evidence upon which a finding can be made that Fecenko's letter was in any way misleading.

Although Fecenko was not given a copy of the final documents, he had discussions with Power after his review of the Draft Master Lease Agreement, program agreement and equipment schedule regarding the changes that should be made. Power confirmed in writing that all but one of Fecenko's suggested changes had been made to the documents.<sup>39</sup> It was reasonable and entirely appropriate for Fecenko to accept what Power said in this regard, particularly in light of the relationship that Fecenko and Power had on IT issues.

- (ii) In response to the criticism that Fecenko failed to review Council's authority before providing the Commercial Reasonableness Letter, this was the first and only time Fecenko was asked by the City to provide a written confirmation for the purpose of "approval as to form".<sup>40</sup> Power requested Fecenko to provide a letter stating that the *legal* terms and conditions of the Draft Master Lease Agreement and related documents had been reviewed, and Fecenko suggested using the phrase that the legal terms and conditions were "commercially reasonable" to capture what Power had requested.<sup>41</sup> Fecenko was not told by Power or anyone at any time that before he was to provide his Commercial Reasonableness Letter, he had to review Council's authority.<sup>42</sup> This would have been outside the scope of the Retainer, and Fecenko would have required the City, whether through the legal or the IT procurement departments, to instruct him to review Council's authority if this was part of the scope of the legal services he was being asked to

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<sup>38</sup> Fecenko Affidavit, Exhibit #2, Summary of Interview of Brian Loreto dated October 22, 2001 by J. McAuley and C. Honsberger of KPMG.

<sup>39</sup> Fecenko Affidavit, para. 32, Fecenko Evidence, April 3, 2003 at p. 101, lines 3 – 25. Document number COT011119.

<sup>40</sup> Fecenko Evidence, April 3, 2003 at p. 168 lines 13 – 25.

<sup>41</sup> Fecenko Affidavit, para. 30 & 33, Fecenko Evidence, April 3, 2003, at p. 103, line 23 to p. 104, line 17.

<sup>42</sup> Fecenko Evidence, April 3, 2003 at p. 115, line 25 to p. 116, line 7; April 7, 2003 at p. 40, line 10 to p. 41, line 9.

provide.<sup>43</sup> It is submitted that it was the responsibility of the City to instruct Fecenko to review Council's authority, particularly because this was the first time Fecenko was asked by the City to provide a letter of this sort and in light of the fact that this is a unique and peculiar requirement within the City's various departments.

### III. SUMMARY

It is submitted that legal counsel can only act in accordance with the instructions provided by their client. It is of significance that in this case, Fecenko, as a commercial lawyer, was retained by a sophisticated client to provide legal advice on a specific commercial transaction in accordance with a written Retainer. It was not open to legal counsel to act outside the scope of the Retainer or the instructions provided by Power.

It is submitted that there is no evidence that the legal advice that Fecenko provided in regard to the Draft Master Lease Agreement in any way caused or contributed to the City leasing over \$80 million in products and services from MFP when Toronto City Council had approved only \$43 million for leasing computer hardware and software. Fecenko acted professionally and reasonably and in accordance with the specific instructions he received throughout the relevant time period in providing his legal services to the City in relation to Year 2000 issues and therefore it is respectfully submitted that the Commissioner should not make any adverse findings against him.

ALL OF WHICH IS RESPECTFULLY SUBMITTED



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OF COUNSEL FOR MARK FECENKO  
GLENN A. HAINEY



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OF COUNSEL FOR MARK FECENKO  
R. REENA LALJI

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<sup>43</sup> Fecenko Evidence, April 7, 2003 at p. 39, line 9 to p. 41, line 9.