TORONTO COMPUTER LEASING INQUIRY

FINAL REPLY SUBMISSIONS ON BEHALF OF JEFFERY S. LYONS, Q.C.

January 24th, 2005.

Overview

On December 6th, 2004, the City of Toronto; ("the City"), provided its final written submissions that contained, *inter alia,* a variety of allegations against Mr. Jeffery S. Lyons, Q.C.; ("Mr. Lyons"). These allegations included that:

a) Mr. Lyons requested an improper payment from Dell Financial Services; ("DFS");

b) Mr. Lyons sought and obtained confidential City information/documents, and;

c) Mr. Lyons obstructed the work of the Inquiry and misled the Commissioner.

It is submitted that these allegations are unfounded, that they are not based on any evidence heard before the Inquiry and at times are so groundless that they can only be seen as intended to injure the reputation of Mr. Lyons. As such the City's allegations should be struck or afforded no merit. The purpose of the Inquiry was to hold hearings and make findings with respect to various and defined issues via it's terms of reference. The Inquiry was not mandated to be an unfettered forum for personal attacks against witnesses called.

a) Success Fee

In its submissions, the City relied on impermissible inference, supposition and conjecture to arrive at its allegation that Mr. Lyons attempted to exact a payment

from DFS for an "improper" purpose, whatever the meaning of such is. A proper examination of the evidence proves that the City's conclusion is misplaced.

Contrary to the City's submissions, Mr. Simone testified that Mr. Lyons alleged use of the name "Tom" during their May 1999 meeting may well have been misheard, or attributed from rumour, gossip, speculation and innuendo.

> *Testimony of Robert Simone*, TCLI, April 15th, 2003, at pgs. 140, 196 & 197.

Contrary to the City's submissions, Mr. Marentette in fact contradicted Mr. Simone's testimony. Mr. Marentette testified that he had no recollection whatsoever of the name Tom being used in relation to Mr. Lyons' request for a success fee.

> *Testimony of Scott Marentette*, TCLI, April 17th, 2003, at pg. 156.

Contrary to the City's submissions, Mr. Simone testified that Mr. Lyons simply stated that other companies would pay such a success fee. The City's submissions have taken the testimony of Mr. Simone inappropriately out of context as though other companies would pay for a bribe. Mr. Lyons was merely seeking a success fee, pursuant to market rates and ordinary practice that both Mr. Simone and Mr. Frank Carnevale; ("Mr. Carnevale"), agreed were normal.

> *Testimony of Robert Simone*, TCLI April 14th, 2003, at pg. 57.
> *Testimony of Franco Carnevale*, TCLI, April 30th, 2003, at pgs. 13,14,195 & 196.
> *Testimony of Robert Simone*, TCLI April 15th, 2003, pg. 108.
> *Testimony of Robert Simone*, TCLI April 14th, 2003, at pg. 23.

Contrary to the City's submissions, Mr. Lyons did in fact negotiate success fees with other lobby clients. In fact, this was definitively demonstrated in the negotiations leading up to Mr. Lyons' retainer with Dell. Mr. Lyons' written September 16th, 1998, proposal to Dell included the request for a "success bonus", to be paid in the amount of one-quarter of one percent of the value of a successful contract. **(TEC046591)**

In addition, Mr. Carnevale testified, as a lobbyist and competitor of Mr. Lyons, that he had negotiated success fees with four out of every five of his clients.

> *Testimony of Franco Carnevale*, TCLI, April 30th, 2003, at pgs. 13, 14, 195 & 196.

The City submits that, "…nothing Lyons had done for DFS…would have persuaded any reasonable client to consider a payment of such magnitude."

The City's submissions were:

a) contrary to the actual evidence heard before the Inquiry, and;

b) based solely and erroneously on the view of the City's solicitor.

There was evidence before the Inquiry, that was not contradicted, that success fees were routinely awarded, both to IT sales staff and lobbyists. In fact, Mr. Simone testified that based upon appropriate business levels, a success fee of $150,000.00 would not be unreasonable. Mr. Simone also testified that DFS paid Dell finder's fees, calculated as three-quarters of a percentage point of a successful contract. As noted earlier, Mr. Carnevale also testified that negotiating success fees was a regular activity in his practice as a lobbyist.

Testimony of Robert Simone, TCLI April 15th, 2003, at pg. 108.
Testimony of Robert Simone, TCLI April 14th, 2003, at pg. 23.
Testimony of Franco Carnevale, TCLI April 30th, 2003, at pgs. 13, 14, 195 & 196.

The City suggests that a success fee is linked to the effort, although there was no evidence of this before the Inquiry. It is submitted that a success fee is not linked to effort, but rather as the name suggests, is linked to result. The City failed to understand that a success fee is never a fee for effort made, time logged or exertion performed. A success fee is compensation for a successful result. As stated, extensive evidence from Mssrs. Lyons, Simone and Carnevale described this practice and its widespread acceptance. The City is neither an expert, nor arbiter of what a reasonable market rate or practice is. There was no evidence called before the Inquiry that a success fee is either ridiculous, unreasonable or inappropriate, as suggested by the City. In fact, evidence was heard that MFP paid Mr. Domi a success fee totaling over $1,000,000.00. There is no evidence before the Inquiry that success fees or bonuses are anything but acceptable and reasonable.

Contrary to the City's submissions, Mr. Lyons' testimony rebutted any presumption that his success fee was for an improper purpose. Mr. Lyons testified that it was the very absence of a success fee from his original retainer that led him to finally ask for one, once he came to understand the value of the contract to DFS.

Testimony of Jeffery S. Lyons, TCLI, May 12th, 2003, at pg. 119.

Contrary to the City's submissions, Mr. Lyons was not seeking to either procure or facilitate any improper payment, including any bribe. In fact the evidence, including the testimony of Mr. Simone, made it abundantly clear that even if DFS eventually paid Mr. Lyons' success fee, DFS would still have to competitively bid on the RFQ. The payment of Mr. Lyons' intended success fee was predicated upon DFS being able to competitively win the RFQ, not orchestrate it.

Testimony of Robert Simone, TCLI April 15th, 2003, at pg. 30.

Contrary to the City's allegations in Chapter 17, paragraph 109 of its submissions, there was no evidence tendered to support that Mr. Lyons' success fee was intended to allow DFS to, "…bid the lowest and permit the winning bidder to depart entirely from the bid." No evidence was heard, and no witnesses ever suggested that Mr. Lyons outlined such an elaborate scheme during his conversation with Mssrs. Simone and Marentette. No evidence ever suggested that Mr. Lyons instructed DFS to bid unusually low; secure the contract with the City; make an improper payment to Mr. Jakobek; and then escape from the constraints of the eventual contract. Such a scheme requires pure speculation and improper conjecture. The evidence was that Mr. Lyons belatedly requested a success fee, and explained to DFS that the payment did not relieve them of the burden of competitively winning the RFQ.

The City concluded its submissions that the evidence of Mr. Simone was a "portend" of the manner in which MFP succeeded in winning the bid for the City's

computer leasing transaction. As stated, these submissions are so unfounded, so untruthful and so groundless that they can only be seen as intended to maliciously injure the reputation of Mr. Lyons and acquire headlines. As such, these accusations should be struck or afforded no merit. There is no credible evidence to suggest that Mr. Lyons was attempting to procure anything other than an ill-timed success fee. Contrary to the City's submissions, Mr. Simone testified with 100% certainty that Mr. Lyons' request was for additional funds for himself and not for any bribe. Mr. Simone never thought, either contemporaneously or later, that Mr. Lyons was attempting to bribe DFS. Even after the meeting with Mr. Lyons, both Mssrs. Simone and Marentette concluded that Mr. Lyons was merely seeking more funds for himself.

> *Testimony of Robert Simone*, TCLI April 16th, 2003, at pgs. 10 & 156.
> *Testimony of Robert Simone*, TCLI April 15th, 2003, at pg. 150.
> *Testimony of Robert Simone*, TCLI April 15th, 2003, pgs. 83, 111-112.

It is respectfully submitted that the City's submissions are nothing short of "grandstanding". The evidence is clear and unequivocal that Mr. Lyons was merely seeking a success fee. By making such submissions, the City is attempting to deflect attention from the possible negligent and incompetent actions made by City staff with respect to their dealings with MFP.

Mr. Simone never varied in his testimony that Mr. Lyons was merely seeking further compensation for himself, based upon possible success. That is the evidence and the only evidence on the issue.

Furthermore, Mr. Tom Jakobek's unique accounting practices paint, at best, a tenuous and circumstantial financial relationship with Mr. Dashnar Domi; ("Mr. Domi"). To link such a precarious argument to Mr. Lyons' request for a success fee is beyond the pale of any evidentiary foundation, in either a criminal or civil court, and is *ultra vires* the jurisdiction of this Inquiry.

Furthermore, the City is inconsistent with respect to its belief in the credibility of Mr. Lyons. The City argued that Mr. Lyons' testimony is to be believed over Mr. Jakobek's with respect to their longstanding friendship. Throughout the remainder of the City's submissions, however, it is suggested that at the same time, Mr. Lyons' credibility is to be subsumed to all other witnesses. Respectfully, the City has adopted a self-serving position, claiming that Mr. Lyons is to be believed when he validates their specious argument and disbelieved when he does not.

As a result of certain media attention generated by Mr. Lyons' competition, the Ontario Provincial Police; ("OPP"), conducted an extensive investigation. The OPP ultimately found that:

> "We are sensitive to the fact that there has been a great deal of public anxiety and rumour concerning this recent matter.
>
> However, the OPP criminal investigation has concluded that based on the information received no criminal act occurred in the allegation we were asked to investigate."
>
> *Transcript of Ronald Manes*, TCLI, April 16th, 2003, at pg. 6.

Contrary to these findings, the City would paint Mr. Lyons in a light that is both wrong and unfounded, even after an extensive criminal investigation. The City has attempted to usurp the results of the criminal investigation conducted by the OPP by positing an unfounded theory of its own. The City's submissions violate the Supreme Court of Canada's ruling in *Starr v. Holden* [1990] 1 S.C.R. 1366; ("*Starr*"), which mandated that a commission of inquiry must never be explicitly or subtly used to pursue a criminal investigation. The City's submissions offend *Starr* by attempting to replace the results of a criminal investigation with its own, thereby violating Mr. Lyons' constitutional rights.

Although the City's provocative questions, suggestive cross-examination and incendiary submissions may make headlines in the media, such actions do not constitute evidence or further the purpose of this Inquiry.

b) Allegation of Obstruction and Misleading the Commissioner

The City, via its submissions, made a variety of criticisms against Mr. Lyons, ultimately charging him with having obstructed the work of the Inquiry and misleading the Commissioner. Again, these allegations are fully contested.

Mr. Lyons testified that in 2002 he both received and complied with two (2) separate summonses. Mr. Lyons willingly provided documents in his possession,

including files relating to MFP, which Commission Counsel entered into evidence.

Transcript of Ronald Manes, TCLI May 8th, 2003, at pgs. 5-6.

Mr. Lyons also instructed his then assistant, Mr. Nav Mangat to retrieve any relevant files in the possession of Morrison Brown Sosnovitch, Mr. Lyons' former law firm; ("MBS"). Contrary to the City's assertions, Mr. Mangat testified through affidavit that his inquiries were unsuccessful, which he communicated to Mr. Lyons. The fact that MBS may not have a record of Mr. Mangat's request is neither relevant nor unusual.

Affidavit of Nav Mangat, TCLI, Sworn August 26th, 2004 at paras. 11 & 13.

The confusion, inconsistent dealings, and reliability of MBS' record keeping is demonstrated by the fact that Mr. Ronald Manes, Commission Counsel, was himself informed by MBS that they did not have any files pertaining to Mr. Lyons.

Transcript of Ronald Manes, TCLI May 8th, 2003 at pg. 8.

Despite the repeated testimony of Mr. Lyons, it seems to have been lost on Commission Counsel and the City's solicitor, the distinction between lobbying and legal files. Mr. Lyons knew that legal files were both dead-suited and stored by MBS and did occasionally retrieve such. Mr. Lyons, however, had files outside his legal practice, being lobbying files, which were not dead-suited and were destroyed.

Testimony of Jeffery S. Lyons, TCLI, September 21st, 2004 at pg. 15.

The fact that MBS had no destruction procedure with respect to legal files is irrelevant, as this policy had no bearing on Mr. Lyons' own lobbying files. The fact that Nav Mangat was not familiar with any destruction policy is irrelevant, as no evidence was led that he was either responsible for or familiar with the administration of Mr. Lyons' office. The eventual boxes found by MBS were largely populated with personal notes, political correspondence and charitable activities. These facts validate Mr. Lyons' informal practice of destroying lobbying files. It is submitted that had Mr. Lyons archived his lobbying files, the boxes uncovered would have conservatively numbered in the hundreds.

Mr. Lyons, through Mr. Mangat, made reasonable inquiries of MBS, and when returned in the negative, he considered the matter closed. Only with the weight of a Commission summons did MBS later and finally take the necessary steps to locate the boxes produced to the Inquiry.

c) Confidential Documents & Information

The City, via its submissions, also leveled certain allegations against Mr. Lyons that he both sought and obtained confidential information and documents from City employees and passed such to his clients.

After the entry of Mr. Lyons' Final Submissions, on December 15th, 2004, the Federal Court of Canada provided an illuminating ruling in *Sinclair M. Stevens* v. *The Attorney General of Canada*, (2004) FC 1746; ("*Stevens*"). In *Stevens,* Mr.

Sinclair Stevens, was made the subject of a public inquiry with respect to allegations of conflicts of interest arising during his tenure as a minister of the Crown. The public inquiry, headed by the Honourable William Dickens Parker; ("the Parker Inquiry"), conducted hearings from July 1986 to February 1987. In his final Report, Commissioner Parker provided a definition of a conflict of interest and found that Mr. Stevens had violated such on six (6) separate occasions. At no time during the hearing phase of the Parker Inquiry was any substantive definition of a conflict of interest determined.

In 1987, Mr. Stevens commenced an action by statement of claim, seeking that Commissioner Parker's findings be vacated. Eventually, Justice O'Keefe reviewed the fact that no definition or standard of a conflict of interest had been found to measure Mr. Steven's conduct, during the hearing phase of the Parker Inquiry. Mr. Stevens contended that this lack of a standard was a denial of his right to procedural fairness and natural justice.

Justice O'Keefe agreed, ruling:

> "I am of the opinion that the plaintiff did not know the standard he was judged against as the definition of conflict of interest was not made to him until the Report was given to him." *Stevens* at para. 42.

At no time was a definition of either a confidential document or information put to Mr. Lyons. At no time was any evidence called to establish what confidential meant.

Mr. Lyons was forced to answer for certain information contained in two (2) memos to file**. (Begdocs 75439 & 75418**). At no point was any information contained in those documents determined, by any standard, to be confidential. This effectively robbed Mr. Lyons of making full answer and defence and put him at risk for an adverse finding by this Inquiry.

Memo #1

The April 7, 1999, document (**Begdoc 75439**), contains information. If such a document contains confidential information, it does so without any standard by which to gauge such. In essence, the memo describes two (2) things:

a) The passage of report through various committees and City Council, and;

b) The second-hand concerns Ms. Wanda Liczyk had towards leasing computer technology.

It is submitted that the passage of a Report concerning computer refurbishment/replacement is a matter of public record and is not confidential information. Second, if acquiring knowledge regarding the concerns of a City official is inappropriate, then this example cries out for a definitive standard of confidential information/documents as demanded in *Stevens*. Later, Ms. Liczyk freely admitted that her position had changed, and supported IT leasing. Her opinion was communicated during an April 23rd, 1999, meeting involving Mr. Lyons, Mr. Jim Andrew and various representatives of Dell and DFS. (**Begdoc 75431**) No controversy was leveled that such information was confidential. Mr. Lyons was not acquiring inappropriate information. Mr. Lyons was appropriately

performing his services as a lobbyist by understanding the context, concerns and practices of the City with respect to IT leasing.

Once again, the City's criticism of Mr. Lyons was made to attract headlines and to detract from City employees' conduct, given that it would have been city officials who would have had the obligation, if any, to keep confidential information confidential.

Memo #2

Mr. Lyons was also accused by the City of acquiring further confidential information, based upon a June 10th, 1999, memo to file. **(Begdoc 75418)** Again it is submitted that the City made this accusation without any standard.

The memo indicated the specific City personnel who would review and evaluate bids submitted, with an eventual report written by 'Treasury'. In contrast, by keeping such processes a secret, this would offend the transparency public institutions must apply to their internal processes.

The memo also indicated that the successful bid would be determined on price. Again, most if not all of the City's purchases, it is submitted, are founded on maximizing tax dollars and approving the least expensive bid. Any layperson would appreciate, especially in an environment of government austerity and cutbacks, that a public institution would be attracted to the least expensive bid.

Furthermore, Mr. Lyons was also accused of providing Mr. Simone and Mr. Marentette with a spreadsheet containing the lease rates of certain IT bidders. Although Mr. Lyons testified that he had no recollection of obtaining or submitting any such information, even if he had, there is no evidence to suggest that such information was confidential.

> *Testimony of Jeffery S. Lyons*, TCLI May 12th, 2003, at pgs. 164 & 188 – 190.

In fact, the only definition of a confidential document was forwarded by Ms. Susan Cross, in her capacity as an Executive Assistant to City Councillor Jane Pitfield. Ms. Cross testified that confidential City documents are, as a standard, printed on purple paper. Ms. Cross testified that at no time did she see purple documents in Mr. Lyons' office.

> *Testimony of Susan Cross*, TCLI May 6th, 2003, at pgs. 116 – 118.

Furthermore, it is respectfully submitted that should any criticism be leveled, it be against the City and its staff. In its submissions the City acknowledges that there was no evidence to suggest that Mr. Lyons used improper methods to obtain any information. It is submitted that if Mr. Lyons did receive information from City staff, this is an allegation the City, not Mr. Lyons, should answer to. Mr. Lyons, as a lobbyist, was never in any position to definitively discern between appropriate and inappropriate information or documents.

d) May 25, 1999, Memo

Mr. Lyons provided lengthy testimony at the Inquiry regarding his concurrent retainers with MFP and DFS in 1999, which are extensively overviewed in Mr. Lyons' December 6th, 2004, submissions. Mr. Lyons testified and relied upon evidence that:

a) Dell as a parent company referred his services to DFS;

b) Dell also referred his services to MFP;

c) Mr. Lyons disclosed any conflict of interest to MFP, and;

d) Mr. Lyons never acted for MFP with respect to the said RFQ.

The production of Mr. Lyons' May 27th, 1999, memo to file (**Begdoc 75424**) is both confusing and unhelpful to these proceedings. Mr. Lyons had no recollection of any conversation with Mr. Jakobek about representing MFP with respect to the said leasing RFQ. The memo, which at times is grammatically confusing, states:

> "Afterwards he indicated that Dash Domi was going around City Hall and telling the individuals that I was supporting them and he says he was confused."

There is no indication who "he" is which, it is submitted, could readily be Mr. Marentette. Even if the comments are representative of a conversation between Mr. Jakobek and Mr. Lyons, a fact that Mr. Lyons has no recollection of, they assist in proving that Mr. Lyons had not met Mr. Jakobek on behalf of MFP, as Mr. Jakobek's comments emanate, by inference, from Mr. Domi.

e) Order Requested

It is Respectfully requested that no finding of misconduct be made against Mr. Jeffery S. Lyons, Q.C. with respect to the Toronto Computer Leasing Inquiry.

_____
Greenspan, White

_____
SmithValeriote Law Firm LLP