

**IN THE MATTER OF THE
TORONTO COMPUTER LEASING INQUIRY**

**REPLY SUBMISSIONS OF MFP FINANCIAL SERVICES LTD.
(January 24, 2005)**

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I. INTRODUCTION AND OVERVIEW

1. Throughout the Inquiry, MFP Financial Services Ltd. ("MFP") has been concerned that the City's true intent has been to turn this process into an adversarial proceeding, and to use the resulting record, the publicity, and the report generated by the Inquiry to harm MFP and gain an advantage in the civil proceedings it instituted against MFP in early 2001.

2. The City Submissions confirm MFP's worst fears. Abandoning any pretence of a balanced, fair assessment of the record, the City Submissions are replete with highly aggressive allegations, mainly directed at MFP, which has been labelled throughout as a "corporate predator".

3. Predictably, this highly charged label, and the sensational allegations it accompanied, attracted maximum publicity, adding to the prejudice already sustained by MFP in a result of the media coverage of the Inquiry.

4. This is a regrettable, and, it must be said, abusive manipulation of the Inquiry Process. The City Submissions do not reflect a balanced, fair assessment of the record. Unfortunately this approach adds to the existing public hyperbole which has portrayed the computer leases as an enormous financial scandal. To the casual observer, it appears that tens of millions of dollars have gone missing through a mysterious, unexplained expenditure of over

\$85,000,000.00 for goods and services worth only \$43,000,000.00, seemingly resulting in huge ill-gotten profits to MFP.

5. As the City well knows, the opposite is true. One might have expected the City to use the opportunity, through its submissions, to correct the public misapprehension that exists.

Whatever mistakes may have been made, there is no mystery about certain basic facts:

(a) the City has actually received over \$80 MM worth of computer assets and services, which it was using when this Inquiry was called, continued to use as of December 2002, and wished to keep:

“A: The City got \$80.5 million as far as I know worth of product, that they used --

Q: Yes –

A: -- and --

Q: --and continue to use?

A: Yes.

Q: Yes.

A: And didn't want to lose.”¹

(b) The \$80+ MM figure represents the actual cost from third parties, not MFP, for which the City has received value; the public perception that the City has paid over \$80MM for goods and services having a value of only \$43MM is mistaken:

“Q: ... you would have wanted to make sure that this was as complete and accurate as possible in terms of conveying the parameters or the context to the issue to City Council?

A: Of course.

Q: All right. So, I take it you would agree with me to the extent that there has been or is a perception prevailing in the public that the City has lost, you know, tens of millions of dollars, or that it acquired \$43 million worth of equipment but paid double for it, and somebody is out there walking

¹

Lastman Transcript; December 3, 2002 84:6-13

around with \$40 or \$50 million of unaccounted for money, those perceptions, if they've arisen from this whole process, that would be unfortunate and inaccurate; is that fair?

A: I can't control perceptions. Essentially what I've always indicated is that even though we may have spent \$80 million in computer equipment, which was in excess of what was approved, we do have the computer equipment.

Q: Yes.

A: So we have received value for the computer equipment.²

(c) the City's own financial analysis indicates that for the original \$43MM worth of equipment and software, the MFP leases as written, while not as inexpensive as originally believed, were the least expensive option and still represented a "pretty good deal" for the City:

“The extrapolated actual lease payments on the original \$43 million worth of equipment and software based on the October, 1999 rates exceeded the RFP cost (with the purchase option exercised) by \$1.3 million (\$48.2 million compared with \$46.9 million). The table also shows that the total actual cost of the lease on the \$43 million worth of equipment and software was less expensive than had the City financed the purchases with debentures. In other words, while the financial benefit was reduced between the quoted and the extrapolated actual costs, it was still at a lower overall cost than had the City borrowed the funds. Finally, the analysis shows that the next lowest bidder's price adjusted to October, 1999 rates was marginally lower than the debenture cost, but higher than the extrapolated MFP cost.”³

* * *

“Q: To the extent that the public has been left with the impression that the City has been kind of taken to the cleaners here and charged rates that are way more than other competitors, or way more than the cost of debentures,

² Griffiths Transcript; September 9, 2003; 222:5-25

³ COT029991 at 30057-58

et cetera, in respect to this \$43 million, this analysis would indicate that's just plain wrong?

A: I would agree."

“Q: No, and – and my question was focusing on the \$43 million that we keep reading about so much, and the public is undoubtedly confused about. From my client’s point of view, the analysis that I’ve taken you through with respect to Table 1—

A: Hmm hmm.

Q: -- would appear to indicate from the City’s own calculations, that while the savings may not have been as much, the City still got a pretty good deal on that \$43 million; is that – that fair?

A: It’s fair.

Q: Yeah, it’s unfortunate that message doesn’t seem to be out for the taxpayers and ratepayers or the City to understand; do you agree?

A: I would agree, because the press kept printing the higher figure and how much they were out forty (40) some odd million dollars and things kept leaking and leaking, and at no time did I use those figures”.⁴

* * *

“Q: ...And it goes on to also show that the total actual cost of the lease on \$43 million worth of equipment and software was less expensive than had the City financed the purchases with debentures.

In other words, while the financial benefit was reduced between the quoted and extrapolated actual costs, it was still at a lower overall cost than had the City borrowed the funds.

Finally, the analysis shows that the next lowest bidders price adjusted to October 1999 rates was marginally lower than the debenture costs but higher than the extrapolated MFP costs.

That analysis is not something that you were aware of before just reading it now, I take it?

A: That’s right, but that’s not surprising.

Q: I’m not suggesting it is.

⁴ Lastman Transcript; December 3, 2002; 83:18-24; 84:14-25 – 85:1-6

A: Yes.

Q: And that would suggest that the City appears to have gotten a reasonably good deal in respect of the \$43 million that we've heard of again and again?

A: From what you've read.

Q: Well I'm reading from the City's own document?

A: Yes, from the City's document."⁵

(d) while there is a continuing debate about some of the financial issues relating to the computer leases, the City's own best analysis, arrived at after an extensive review with the benefit of an expert leasing consultant,⁶ indicates, with reference to the entire package of leasing transactions with MFP (involving rental payments in excess of \$100MM over 5+ years) that the City might have saved up to \$5.9MM had it proceeded differently:

“Q: ... this represented the City's best analysis of the potential extra costs, if any, that it may have incurred as a result of the leases that it actually entered into as contrasted with going the debenture route?”

A: That's correct.

Q: And again, if I'm not going to get into potential issues about these calculations, but, according to the City's own numbers, **the potential difference over the five (5) years, involving the financing of over \$80 million worth of equipment, the potential difference was less than \$6 million; is that right?**

A: The 5.8 million?

Q: Yes.

A: That's right.

⁵ Garrett Transcript; December 9, 2002; 185:16-25 – 186:1-16

⁶ Griffiths agreed that the figures referred to represented the City's "best analysis" (September 9, 2003, at p. 221). This analysis was done after the City hired Greg Dorbeck for the express purpose of providing it with expert financial advice regarding the MFP leases during the KPMG review.

Q: And so that's the order of magnitude that one the City's own analysis or best analysis, it considered itself to be potentially out, at that point in time; is that right?

A: That's correct.”⁷

6. The record at the Inquiry also makes it clear that the \$80+MM worth of goods and services acquired by the City for value were ordered through a combination of the Y2K initiative and subsequent Departmental budgets; the aggregate value of all the goods and services received has been reconciled to these sources⁸, as has the quantum of the assets on lease.⁹

7. As noted, instead of emphasizing these important facts, the City Submissions go out of their way to attack MFP at virtually every turn, thereby contributing to the continuing public misconception about the leasing contracts.

8. The MFP Reply Submissions address the most egregious allegations in the 1200 page City Submissions:

(1) with respect to the negotiation and execution of the Master Lease:

⁷ Griffiths Transcript; September 9, 2003; 221:10-25 – 222:1-3

⁸ This analysis was undertaken by Mr. Wilkinson: see Wilkinson Affidavit, para 155(3) and Exhibit D thereto. This analysis was not challenged and is consistent with many documents filed at the Inquiry that indicated that individual departments placed assets on lease pursuant to their own, apparently approved, budgets. See, e.g., COT031628-31629 and COT074547. Mr. Kerr, the expert called by the Commission, agreed that the assumptions utilized in Wilkinson's analysis were reasonable (see Transcript, September 15, 2003 at pp. 183-184, 190-191). Exhibit D to Mr. Wilkinson's Affidavit does not appear to be reproduced in his transcript. The portions of this exhibit detailing Mr. Wilkinson's analysis are attached as Appendix A.

⁹ Wilkinson Affidavit, paragraph 155(4) and Exhibits D (extract) and E thereto.

- (a) the evidence indicates that the City itself recognized and requested that a Master Lease, and not its RFQ, should constitute the primary document governing the contractual relations between the parties (paras. 16 to 19 below);
 - (b) the City reviewed and negotiated the terms of the Master Lease on an arms length basis. In this process the City had access to independent consulting and legal resources (paras. 23 to 32 below);
 - (c) the City's contention that there are fundamental inconsistencies between the Master Lease and the MFP response to the RFQ has no merit (paras. 33 to 61 below);
 - (d) there is no basis to conclude that MFP did anything wrong in the negotiation and execution of the Master Lease (paras. 62 to 63 below);
- (2) with respect to the City's decision to enter into 5 year instead of 3 year leases:
- (a) the City was contemplating such a decision before the RFQ and before selecting MFP as a lessor, as a means of lessening the budget pressures it was under and delivering the promise of a zero tax increase (paras. 65 to 72 and 74 to 76 below);
 - (b) the City requested MFP (and at least one other vendor) to identify models for it to consider to assist with its budget pressures, including longer term leases. MFP did so (para. 73 below);

- (c) MFP reasonably expected that the City would analyze these options independently and the City intended to do so (paras. 81 to 86, 107 and 109 below);
 - (d) The City was well able to conduct its own analysis of the options considered, which was not overly complicated (paras. 95 to 98 below);
 - (e) the City decided to proceed with five year leases to alleviate its budget pressures and achieve a flat line leasing budget and so instructed MFP (paras. 72 and 110 below);
 - (f) MFP did not derive any benefit from this decision and did not deceive or mislead the City in any way in this process (paras.99 to 100 below);
 - (g) the so-called "Jakobek amendment" was in reality a unanimous motion passed by the Policy and Finance Committee which was not linked to any intent by Mr. Jakobek or anyone else to benefit MFP. There is no evidence of any such intent or influence in the nearly 200 days of evidence adduced in Phase I of the Inquiry (paras. 77 to 80 below);
 - (h) the City allegations of an improper conspiracy by MFP to "pull" a "bait and switch" on the City are completely unfounded (paras.102 to 111 below).
- (3) with respect to the lease re-write issue;
- (a) the lease documents which the City signed plainly indicated the term of the re-write and MFP had a reasonable expectation and belief that the issues associated with them would be reviewed by the City (paras. 118 to 120 below);

- (b) when the City claimed (over a year after the fact) that it did not understand that the rewrite had caused its leases to be extended, MFP offered to revert to the 5 year lease term originally selected by the City, but the City refused (para. 122 below);
 - (c) the City did not rely upon any representation by Dash Domi, the existence of which first surfaced over 3 years after the fact (para. 121 below);
 - (d) the City will use the leased assets for the full term of the re-written leases, and for at least 8 additional months, in direct contradiction to its contention that the leased assets were obsolete and of no value at the end of five years (para. 123 below).
- (4) with respect to the City contentions that MFP encouraged Mr. Domi to enter into inappropriate relationships with certain of its representatives, and is responsible for an illicit \$25,000.00 payment to Mr. Jakobek:
- (a) the record shows that the entertainment engaged in by MFP was no different than the actions of many other vendors (paras. 142 to 147 below);
 - (b) the City knew of and condoned these promotional activities, did nothing to notify MFP or anyone else that they were inappropriate, and itself sponsored similar activities and encouraged vendors to participate in them (paras. 148 to 150 below);
 - (c) MFP did not encourage or create any "inappropriate relationships" (paras. 151 to 155 below);

(d) there is no evidence whatsoever that MFP had any involvement in or knowledge of any of the facts or circumstances relating to the alleged \$25,000.00 payment to Mr. Jakobek, and this allegation was not even put to MFP's former President when he testified as the last witness in TCLI (paras. 156 to 165 below).

9. These submissions also address the City's allegation that MFP is responsible for the City's complaints regarding its Oracle contract (paras. 127 to 135 below) and for its failure, to date, to recover \$1.7 MM in Provincial Sales Tax (PST) paid in respect of the sale leaseback assets (paras. 136 to 139 below). The City's allegations about these issues are vexations.

10. The City's attacks on MFP can best be described as disingenuous and malicious. They are unworthy of an important public institution like the City of Toronto.¹⁰ They appear to be intended to garner inflammatory headlines and to divert attention from the actual record. Unfortunately, it must be conceded that the City has been successful in achieving these objectives.

11. MFP's Reply Submissions conclude by observing that while the City has devoted nine chapters in its 1200 page submission to highly critical reviews of the role and responsibility of MFP and numerous individuals, the City has failed to acknowledge its own responsibility. Similarly, the City Submissions fail to examine the role and responsibility of those who are ultimately responsible for the City's actions: the elected members of City Council. MFP

¹⁰ It is tempting to use a disparaging moniker to describe the City, again and again, in these submissions, as the City did in its endless references to MFP as a "corporate predator." "Mendacious Municipal Bully" is a phrase that might be used. But MFP will refrain from stooping to this level.

identifies, in paragraph 175 to 179 hereinafter, what could have, and should have, been included in this “Lost Chapter” of the City Submissions.

II. ALLEGED IMPROPRIETIES RELATING TO THE MASTER LEASE

12. The City Submissions make several aggressive allegations about the Master Lease and its negotiation. According to the City, MFP intentionally "resiled" from contractual commitments supposedly contained in its response to the RFQ, "pulled a bait and switch", and engaged in "sharp practice".

13. Such attacks are typical of the City's 1200 page tome. So too is the City's fixation on attempting to construct blameworthy conduct out of whole cloth and placing responsibility upon MFP and other persons no longer engaged by the City (in this instance, Mr. Power and Mr. Fecenko).

14. The initial plank in the City Submissions that MFP acted unethically is grounded in a complaint that MFP did not want its response to the RFQ to govern the contractual terms with the City. Supposedly, this is indicative of misconduct and constitutes the first step in MFP's alleged improper "bait and switch" stratagem.

15. There are many fallacies in this theory.

16. Most importantly, it ignores completely the fact that it was the City itself who created a tender document which stipulated that the RFQ would not constitute the governing contract between the City and the successful bidder. Paragraph 1.1.3 of the RFQ not only contemplates a subsequent Master Lease Agreement but makes it clear that that document would regulate the rights and obligations between the parties:

"The respondents will enter into a leasing agreement with the City through a Master Lease Agreement. This Master Lease Agreement will outline the terms and conditions for leasing. Schedules to the Master Lease Agreement will provide details of equipment and costs by client department within the City." (Underlining added.)

17. No doubt, if the City wished to draft a tender document which created a binding contract, it could have done so. It did not. Similarly, if there were particular responses which the City wished to elevate into contractual commitments, it could have that too. In fact, it did so with respect to one specific term in the RFQ: paragraph 1.1.11 which reads as follows:

"All lease rates and other financial figures included in the Respondent's submission will be considered to constitute a final and binding commitment."

18. Of course, this clause must be read in conjunction with the remaining provisions of the document which the City decided to issue, which make it clear that lease rates quoted in the responses would be valid for 90 days and that subsequent leases would be entered into, if the City elected to do so, at variable rates (see RFQ, paragraphs 1.1.16 and 1.1.17).

19. The inclusion of a specific provision that gives rise to a binding commitment through the delivery of a response spelling out financial terms for a limited period of time, coupled with paragraph 1.1.3 of the RFQ, provide clear evidence that the City wanted its contractual relations with any successful bidders to be governed by a subsequently negotiated Master Lease Agreement, not the RFQ. The fact that MFP had the same intention can hardly be criticized, let alone be evidence of an improper "bait and switch" scheme.

20. Before addressing the next element of the City's attack on MFP, it must be observed that MFP's response to the RFQ made no secret of the intended structure of any resulting contract between MFP and the City, or of the specific terms of the contractual documents which MFP

intended to propose if MFP was one of the successful bidders. In this regard, MFP's response to paragraph 1.1.3 of the RFQ referred to and attached its usual Master Lease as Appendix A. This document was Master Lease Agreement No. 784 between MFP and the City of Toronto, which in turn attached a sample Equipment Schedule and the Program Agreement which the City had executed previously.¹¹

21. As the above documents indicate, the basic contractual structure utilized by MFP was already known to the City through its existing lease arrangements with MFP¹². The evidence confirms that such arrangements were well known to the City representatives, and that such a structure was not unusual in the leasing industry.¹³

22. Lest there be any doubt about this issue, the Master Lease attached to MFP's response to the RFQ also reflected MFP's intention, in common with the City as noted above, that the subsequently executed contractual documents would govern the relationship between the parties: see the entire agreement clause contained in paragraph 26 of Appendix A to MFP's response¹⁴.

23. The next element of the City's attack consists of various complaints about the events leading up to the execution of the Master Lease. Surely, the parties must have understood, expected and believed that they were looking out for their own interests and negotiating at arms length. Quintessentially, this is what these types of discussions are all about.

¹¹ COT023413, at 23448 and following. See e.g., COT003680, COT023135, COT032350 (Program Agreement)

¹² coto (Master Lease) (Equipment Schedule)

¹³ Wolfram Evidence, Transcript, September 28, 2003 at pgs. 131 – 132; see also, eg. Dell response to 1.16 and 1.17 of the RFQ, which contemplate such a structure.

¹⁴ Exhibit 47, Tab 1 2 pg. 7 of Master Lease Agreement 784

24. The record indicates that the City had access to whatever assistance it deemed necessary in this process. Based upon the records filed with the Inquiry, the City had a virtually unlimited budget to hire whatever leasing or technical consultants it deemed necessary¹⁵. And it had access to one of Toronto's largest and most experienced law firms, with particular expertise in IT and Y2K related matters¹⁶. The retainer agreement contemplated a significant budget for such legal fees¹⁷, Mr. Power had frequent contact with the specialist designated at the law firm (Mr. Fecenko)¹⁸, and the City paid the law firm \$279, 675.00 in calendar 1999 for its services pursuant to this retainer¹⁹.

25. So, the City was not lacking for expertise or resources in the discussions leading up to the execution of the Master Lease. And, as noted above, it knew precisely what MFP's standard contractual documents provided, and had every opportunity to consider and insist upon whatever changes it wanted in those documents.

26. The record indicates that Mr. Power carefully considered the draft Master Lease and identified numerous issues and concerns.²⁰ There is no evidence that MFP did anything to constrain him, or anyone else advising the City, in this review. MFP was not privy to the internal deliberations among Mr. Power, Mr. Fecenko, Ms. Viinamae, or, for that matter, to the extent and effectiveness of any internal dialogue and exchanges involving City Legal, IT or

¹⁵ Several witnesses testified about the extensive retention of consultants in the aftermath of amalgamation. COT019307 gives some indication of the quantum: \$29 MM in 1998 and \$159 MM in 1999 (COT019310). See also Griffiths, Transcript, September 9, 2003 @ pgs. 219 – 220.

¹⁶ See Brendon Power, Transcript, March 9, 2003, at pg. 201, March 24, 2003 at pgs. 142, 151, and 158.

¹⁷ COT006447. Elsewhere, there is a reference to a potential annual budget of \$3MM, although it is possible that only \$750,000 was approved.

¹⁸ COT041846

¹⁹ COT029795

²⁰ COT015674

Finance in this process. As would have been the case for any other reasonable vendor, MFP assumed and believed that the City was doing whatever it deemed necessary to protect its interests in arriving at a satisfactory Master Lease.²¹

27. The City Submissions improperly impugn Mr. Wilkinson's integrity in this process. Apart from the fact that allegations of impropriety now being advanced were not squarely put to him during his cross examination, as fairness would have required, no criticism of Mr. Wilkinson is warranted. He was simply presenting draft documents to the City, which were in substance similar (if not identical to) the attachments which had been appended to MFP's response to the RFQ. He was entitled to assume that the City was already aware of and familiar with those documents, both from the City's prior experience with MFP and from whatever current internal review it was then conducting including, to Mr. Wilkinson's knowledge, resort to outside counsel. There is no basis to characterize Mr. Wilkinson's actions as "sharp practice" in any way, shape, or form.

28. The evidence also indicates that MFP was willing to agree and did agree to several of the changes requested by Mr. Power, both at his own initiative and as a result of the advice he received from Mr. Fecenko.²²

29. The final version of the precedence clause²³ is one example and warrants review in light of the City Submissions.

30. In MFP's standard form Master Lease, there is an entire agreement clause which contains no reference to the RFQ or MFP's responses thereto. The draft document apparently

²¹ Wilkinson Affidavit, paras. 54, 56, 61 and 62

sent to Mr. Fecenko contains a revised form of this clause which does refer to the RFQ and MFP's response.²⁴ Mr. Fecenko reviewed this clause and made specific suggestions to Mr. Power to change its wording²⁵. Mr. Power in turn raised the clause with MFP and the language proposed by Mr. Fecenko was agreed upon by MFP and inserted into the contract.²⁶

Apparently there was a miscommunication or misunderstanding between Mr. Fecenko and Mr. Power regarding the removal of certain additional wording about which Mr. Fecenko had identified concerns.²⁷ That misunderstanding has nothing whatsoever to do with MFP.

31. From MFP's perspective, it received a proposal, and agreed to certain specific wording changes requested by City. The resulting clause was a product of back and forth discussions, it referred to both the RFQ and MFP's response, and it included those documents as part of the Master Lease. Thus, those documents were not removed from the Master Lease; rather they were subordinate to the other contractual documents. As a result, if a given Equipment Schedule (for example) contained a term which was contrary to a response contained in the RFQ, the Equipment Schedule would govern. But, if the RFQ response contained a commitment which was not overridden in this manner, that provision still applied.

32. It is plain from Mr. Fecenko's evidence that the City fully understood and was content with the above result:

²² See Evidence of Mr. Power, March 24, 2003 at pgs. 151 – 173. See also Affidavit of Kim Harle, para. 21
²³ COT020598, COT020604 at para. 26(6)

²⁴ COT011126

²⁵ COT003675

²⁶ The first sentence in para. 26(6) of the executed Master Lease adopts the wording suggested by Mr. Fecenko to Mr. Power. See also Power, Transcript, March 26, 2003 at pg. 71.

²⁷ Fecenko Affidavit, para 32

- (1) Specifically, the City knew full well that there might be inconsistencies between the documents: these were expressly contemplated by the very existence of a precedence clause;
- (2) In addition, it is plain that the City was content with the order of precedence outlined in the Master Lease as this was specifically dismissed with Mr. Fecenko (Fecenko Affidavit, para 29);
- (3) Finally, it is obvious that the City knew and understood that it could and should review the RFQ response to identify any business issues that were material to it, and deal with those issues in the negotiation of the Master Lease if it wished to do so. In this regard, Mr. Fecenko's interview with KPMG (COT012575) makes it clear, as does his affidavit²⁸, that the City understood that it was its own responsibility to review any business terms that were important to it and identify any resulting issues for inclusion in the final contractual documents.
- (4) Mr. Fecenko's interview with KPMG is also noteworthy in that it indicates that the City and its outside legal counsel had previously dealt with situations where there had been a tender document, followed by negotiations resulting in a Master Lease governing the contractual relations, and understood and had previously recognized that a review or comparison between these two documents was "a matter for the business people" at the City to conduct (see COT012575 at

²⁸ The information provided to KPMG by Mr. Loreto was to the same effect: see Fecenko Affidavit, para. 36.

12576). In other words, the process that was followed in the case of the MFP Master Lease was nothing new.

33. The final element of the City's attack on MFP is a claim that there were four specific "bait and switch" aspects to the contractual terms entered into by the City. According to the City the four clauses referred to in its submission were fundamentally inconsistent with MFP's RFQ response and represented specific manifestations of MFP's intention to resile from its so-called contractual obligations thereunder.

34. For starters, as detailed above, there could not possibly be any element of "bait and switch" in these circumstances. Neither the City nor MPF ever intended that the RFQ would constitute the legally binding document defining their relations. More importantly, MFP did nothing to deceive the City. At the risk of repetition, just like the City, and in keeping with its pre-existing fully-disclosed contractual structure, MFP preferred to have a separate legal document governing the contractual relations. That document was negotiated at arms length, in circumstances where the City had access to independent counsel, and where absolutely nothing was hidden. Some "bait and switch"!

35. Leaving this basic context to one side, none of the four so-called "bait and switch" clauses alleged in the City Submissions reveal any departure from pre-existing commitments.

36. Before reviewing these four specific provisions, MFP reiterates its objection, which it expressed on several occasions during the course of the Inquiry, to the City's attempt to debate the meaning of contractual provisions contained in the Master Lease. This was and is improper. It calls for legal conclusions outside the proper scope and mandate of the Inquiry, and is being

used to assist the City's position in its ongoing litigation with MFP. The review which follows does not waive these objections. Rather, the submissions which follow have been included in these Reply Submissions solely to place the City's allegation of "bait and switch" misconduct in perspective. They are intended to show that whatever interpretation a trial Court might place upon a given contractual term, the contents of the Master Lease, when viewed fairly, do not support the City's allegations of an intentional, dishonest "bait and switch" scheme undertaken by MFP through Mr. Wilkinson and Ms. Harle.

37. Firstly, the City alleges that MFP resiled from its commitment to provide asset management services at no cost. This is untrue. The additional costs referred to by the City in its submissions represent the rental costs resulting from the City's agreement to lease the equipment detailed for an extra three to four months as a result of the lease re-write process. In return, the City retained the right to use the equipment for that period, and has continued to do so to this day. As detailed in MFP's Closing Submissions and in Section IV below, this cost is not an asset management fee.

38. Secondly, the record indicates that from the very beginning of its relationship with the City, MPF provided extensive asset management services at no charge. It assigned Lee Ann Currie to assist the City in identifying and organizing the sale lease-back process. As the evidence makes only too clear²⁹, the City records were so chaotic and disorganized that Ms. Currie was physically seconded to the City on a full time basis for many months. The evidence

²⁹ See Currie Affidavit, para 8-12, 18-22

of the City witnesses indicates that this was of great assistance to the City in managing the process.³⁰

39. Mr. Wilkinson also spent extensive time and effort assisting the City in its reconciliation of the sale lease-back transaction. This was a job normally undertaken by the City itself, but it could not do so because of its internal disarray.³¹ As in the case of Ms. Currie, Mr. Wilkinson did this at no charge to the City.

40. In addition, Mr. Wilkinson met with City representatives on several occasions and discussed at length the procedures which MFP had found to be effective in assisting other clients with asset management. If the City had provided MFP with the missing cost centre information (which was supposed to have been available by the Spring of 2000), the City would have had an effective asset management and forecasting system in place long before now. Mr. Wilkinson remained available to assist in the process and to develop the system contemplated by his presentations. Instead, the City's actions resulted in a discontinuation of these efforts. As of September 2003, the City still had no such system.³²

41. Throughout, all of MFP's assistance, explanations, and time were provided at no charge to the City. MFP fully honoured its stated intention to provide asset management services to the City as explained in the RFQ.

³⁰ Evidence of Ms. Bulko, August 13, 2003 @ pg. 118, Line Marks, August 14, 2003 @ pg. 171.

³¹ See, eg. Evidence of Al Schultz, September 5, 2003 @ pgs. 175 – 179; Ken Colley, September 4, 2003 @ pgs. 131 - 133

³² Evidence of Chris Kerr, September 19, 2003 @ pgs. 147 and 160

42. The City next argues that MFP resiled from its obligation regarding the pick-up and delivery of lease equipment free of charge. When considering this submission it is important to actually read the words of the RFQ clause and the response thereto:

1.1.2 The Respondents must indicate any additional costs, to the City, associated with picking up and delivery of leased equipment replaced under the leasing arrangements.

Read and Understood.

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

This provision applies to the pick-up and delivery costs of "leased equipment replaced under the leasing arrangements".

43. None of the contractual documentation contradicts or resiles from this obligation.

44. In this regard, paragraph 16 of the Master Lease reads as follows:

"RETURN OF EQUIPMENT:

Lessee shall at the termination of an Equipment Schedule, at its sole expense, return the Equipment to Lessor (at such location as shall be designated by Lessor within Canada) in the same operating order, repair, condition and appearance as on the Commencement Date, reasonable wear and tear excepted, with all engineering changes prescribed by the manufacturer or Maintenance Organization, incorporated therein, including without limitation, manufacturer's certificate of maintainability ensuring the Equipment is up to all current revision level specifications whether mandatory or otherwise, and Lessee shall arrange and pay for such repairs (if any) as are necessary for the manufacturer or Maintenance Organization to accept the Equipment under a maintenance contract at its then standard rates. If the Equipment is of such type that the manufacturer does not provide such certification, then Lessee shall return the Equipment in the same condition that Lessee received it, normal wear and tear excepted. Lessee agrees that any name or other identification of Lessee shall be removed from the Equipment upon its return and that such Equipment shall be free and clear of all claims, liens and encumbrances." (underlining added)

45. The obligation engaged by this clause is to return the equipment in good working order, i.e. **"in the same operating order, repair, condition and appearance as on the commencement date, reasonable wear and tear excepted"**. The extent of this cost cannot be defined in advance: it is this future potential obligation, not a pick-up or delivery expense (i.e. an out of pocket transportation cost) which is at the heart of this clause.

46. For the reasons articulated in paragraph 36 above, the Commission ought not to arrive at any definitive conclusion about the legal interpretation of this or any other clause. It suffices to say that the above construction is consistent with the actual conduct of MFP when the Councillor leases were refreshed in late 2000/early 2001. Aside from its willingness to overlook the failure of the City to act in a timely way in connection with the end of lease arrangements at that time, there is no suggestion in the evidence that MFP charged the City anything for pick-up and delivery costs associated with the return of that equipment, given the fact that it was being replaced by new equipment under leasing arrangements with MFP.

47. The City also argues that the following provision of the Equipment Schedules entered into by the City shows that MFP improperly resiled from its "pick-up and delivery" response to the RFQ:

“Lessee shall be responsible for all transportation charges for delivery of the Equipment to Lessee’s premises specified above and for all unloading, rigging, unpacking, assembly and installation of the Equipment.”

48. As noted above, and is evident from the City submission, the RFQ response relates to the pick up and delivery to MFP of equipment, which, is replaced under leasing arrangements during or at the end of a lease. The provision of the Equipment Schedule referred to by the City submission clearly applies to the pick-up and delivery of product acquired at the outset of

the lease, e.g. desktops shipped by Dell to the City. It stipulates that the costs (if any), for the delivery of such products to the City, and the installation of such assets at the outset of the lease are for the City's account. This has nothing whatsoever to do with the pick-up and delivery clause in the RFQ and MFP's response thereto.

49. The fact that the City would cite this clause as evidence of the so-called "bait and switch" scheme, when its provisions have no application whatsoever to the pick-up and delivery references in the RFQ indicates the lengths to which the City has decided to go to unfairly impugn MFP and the honesty of its representatives.

50. Thirdly, the City argues that MFP has resiled from its response to Article 1.1.20 of the RFQ:

1.1.20 From time to time the City may require payment flexibility in terms of deferring payments into a future fiscal year. The Respondents must specify the ability to do this at the same leasing costs as the original lease and any other costs associated with this type of arrangement

Read and Understood.

The City may delay a lease payment into the following fiscal year. There is a delay payment adjustment which would equal the difference between the future value of the payment being delayed to the time of payment at a rate equal to prime less the amount of the payment being delayed.

51. This too is a groundless allegation.

52. It is true that if the City fails to pay on time in accordance with its contractual obligations, it is liable to pay interest at 24%: this obligation is triggered by the operation of paragraph 4 of the Master Lease, which stipulates that rent "**shall begin to accrue on the commencement date and shall be due and payable in advance**".

53. "Commencement Date" is a defined term³³. It means "**the date set forth in the equipment schedule or in the certificate of acceptance**". This makes it clear that the date on which the City's obligation to pay rent crystallizes is not fixed by the Master Lease. Rather, it is defined by whatever Commencement Date is stipulated in a subsequent Equipment Schedule or Certificate of Acceptance. Obviously (as the City well knew), in any given quarter, the City could propose a different Commencement Date. In other words, it was open to the City, anytime it contemplated entering into a new Equipment Schedule, to notify MFP that it wished to defer the Commencement Date of its financial obligations, in the manner contemplated by the RFQ, and to provide for this in the resulting contractual documents.

54. The above interpretation is completely consistent with MFP's response to Article 1.1.9 of the RFQ:

1.1.9 The Respondents must explain any optional payment arrangements available and the benefit of those options to the City.

Read and Understood.

MFP is known to provide very flexible lease payment options. The lease may be established based on monthly, quarterly, semi-annual, annual or stepped lease payments. This will allow the City to select the payment method that best matches cash flow or budgetary constraints. For example the City may start a new initiative that results in revenue being generated during the summer months. In this case the lease may be structured with lease payments due in the summer months. Another scenario might be to structure lease payments around the time when the City collects its property tax. Keep in mind the earlier payments are made against the lease, the more value we can give for those payments.

We also offer the option to prepay future lease payments. A prepayment credit will be issued in favour of the City. This credit will be the difference

³³ Master Lease para. 1, COT020598.

between the lease rent to be prepaid and the present value of this rent discounted at 4%.

The City may also delay a lease payment into the following fiscal year. There is a delay payment adjustment which would equal the difference between the future value of the payment being delayed to the time of payment at a rate equal to prime, less the amount of the payment being delayed. (underlining added)

The foregoing contemplates that at the time of any given Equipment Schedule or Certificate of Acceptance, the City could elect different payment options depending upon the particular circumstances which then existed.

55. Thus, if in a given quarter, the City identified a need to obtain flexibility by deferring payments to a future budget cycle, it would have been required to notify MFP of such an election and to provide for this in the resulting Equipment Schedule and Certificate of Acceptance. Presumably this would have required a specific review and decision by someone in authority at the City (whoever that might be) to postpone the payments for budget reasons and to incur the future interest expenses in addition to financing cost already inherent in the quarterly lease rate factors.

56. The City never did so.

57. Having failed to exercise any such election, the City was then bound to pay on the usual Commencement Date. The City's default thereunder, not any failure of MFP to stand by its response to the RFQ, triggers the interest obligations under the operative provisions of the Master Lease.

58. Finally, the City argues that the Master Lease precludes it from up-grading equipment, contrary to what is contemplated in MFP's response to the RFQ.

59. MFP does not agree with the interpretation of the up-grade provisions in the Master Lease set out in the City Submissions. MFP's RFQ response stated that MFP would accommodate upgrades in relating to existing equipment, but made it clear that this was "... **provided this does not damage or in any way devalue the existing leased equipment.**" This is consistent with Clause 19 of the Master Lease, the opening provisions of which require consent when an upgrade affects the existing equipment.

60. More fundamentally, MFP welcomes up-grades as a part of its dynamic leasing business. They often extend and expand existing leasing arrangements, and have the potential to generate additional revenue for MFP³⁴. As explained by Mr. Wilkinson, he considered that up-grades were part of MFP's normal business, and he did not think it necessary to include contractual terms committing MFP to consent to such upgrades.

61. In considering Mr. Wilkinson's evidence on this issue, it is important to remember (as the City Submissions recognize) that there are two ways in which upgrades could occur. The resulting contractual changes were intended to be, and by necessity would have to be, the subject of a rent to be agreed upon at some future date, which in turn would be dependent upon several indeterminate factors.³⁵ Mr. Wilkinson was completely correct in stating that it was unnecessary to include these future, unknown and incalculable elements of potential new lease arrangements in the Master Leases. The inclusion of such a term would be a meaningless and unenforceable "agreement to agree".

³⁴ Wilkinson Affidavit, paras 40-42 and Exhibit A thereto.

³⁵ As outlined in MFP's response to para. 1.1.6 of the RFQ.

62. Before leaving the topic of the Master Lease, it is appropriate to observe that the City Submissions imply that Mr. Wilkinson and Ms. Harle were jointly engaged in a pattern of intentional deception and misconduct designed to improperly disadvantage the City. This was not squarely put to either witness, but it is fair to say that the gist of their evidence was that they were acting routinely and normally in the process of negotiating the Master Lease, that they thought that there was nothing untoward or unusual in that process, and that they did not in any way attempt to improperly act to the City's disadvantage or engage in any unethical conduct³⁶. There is no basis to reject this evidence.

63. It is submitted that MFP and Wilkinson were fully justified in assuming that the final version of the Master Lease was satisfactory to the City. There is no validity to the City's allegations of misconduct, sharp practice, or "bait and switch" in relation to the Master Lease. These attacks have no place in this Inquiry and the City's attempts to enlist the Commission's assistance in its civil proceedings by seeking such findings should not be countenanced.

III. ALLEGED BAIT AND SWITCH: THE CITY CHOOSES A FIVE YEAR LEASE

64. The City's characterization of its own decision to enter into 5 year, instead of 3 year leases, as a classic bait and switch resulting from deception by MFP is unfair and untenable.

65. Contrary to the City Submissions, it is absolutely clear that the City initiated the request that MFP provide models that might be worthy of consideration, in order to alleviate the budgetary pressures it was facing³⁷.

66. These pressures resulted from several circumstances:

³⁶ See Wilkenson Affidavit, para. 54-62, Item, Harle Affidavit, para. 17-22.

- (1) the fact that the recent amalgamation had not, in the short run at least, produced the cost savings which had been hoped for;
- (2) the fact that there were significant, one time restructuring costs, resulting from (among other things) the termination of employees;
- (3) Provincial downloading of significant responsibilities and services (and related costs), to the City.³⁸

67. Standing alone, these circumstances would have created serious financial constraints. But they were aggravated by the Mayor's election promise of a zero tax increase - a goal which was made clear to everyone and which placed extreme pressure on City Staff to squeeze out every possible saving in the round of budget submissions being prepared in late 1999³⁹.

68. Contrary to the position advanced in the City's one-sided submission down playing the impact of the zero tax increase mandate, the importance of and difficulties resulting from these marching orders was made clear by several City witnesses at the Inquiry⁴⁰.

69. The significance of the zero tax increase directive is also confirmed by several contemporaneous documentary records:

- (1) COT015685 makes reference to the general instructions and principles circulated to all Commissioners by the CAO requiring them to exercise extreme

³⁷ Evidence of Kathryn Bulko, August 13, 2003 at pgs. 23-25; Al Shultz, September 9, 2003 at pgs. 189-190
³⁸ Evidence of Mike Garnett, December 5, 2002 at pgs. 75-79

restraint in preparing their budget submissions in late 1999. This document states, in part:

" The City Administration is striving for a 0 percent increase across the corporation. Therefore, we need to develop a flat line budget in the Department and in each of the Divisions after we have accounted for year 2000 amalgamation savings and the annualization of previous years savings."

The document went on to give instructions requiring that the budgets incorporate reductions aggregating 5% to accommodate anticipated financial pressures.

(2) COT032212 is a memo from Ms. Liczyk to Ms. Glover, which reflects actual operational realities resulting from the foregoing directives. This document states that:

"Clearly, the 2000 budget process will be a challenge as we attempt to meet the objectives of Council and the CAO to flat line costs so that there will be a zero mill rate increase in 2000."

It also identified the "cost of desktop leasing" as one of the pressures.

(3) COT052202 is a presentation relating to the IT operating budget submission for 2000. As required by the constraints and instructions referred to above, this document reflects the efforts that IT was required to make, and had been making, to reduce its budget requests in late 1999: see COT052203, referring to significant IT Budget Reductions.

³⁹

In Garrett's evidence on December 5, 2002, he agreed with Commission Counsel's suggestion that at times it was like going to war to achieve the zero percent tax increase (Transcript, December 5, 2002 at

70. In addition to feeling the pressures resulting from the need to find ways to reduce the City budget in absolute dollars, the City's IT and Finance Staff had also concluded that it was desirable to have an IT budget which was not subject to significant year to year variations.

71. Staff's recognition that it was desirable to have a longer term, flat lined IT budget, and that leasing was one means to achieve this, is evident from several documents, prepared contemporaneously with the City's decision to enter into five year leases. Examples reflecting this thinking include:

(1) the explanatory notes describing the advantages of leasing in the documents which were widely circulated in late 1999 and early 2000 to establish the City's leasing rules:

“ADVANTAGES: LEASING VS. PURCHASE

- **improvement in managing budget. There is an even cash flow...**
- **Easier to respond to client demands without large capital spikes.”⁴¹**

(2) a power point presentation⁴² made to WES in January 2000 which states:

- “Advantages: maintains even cash flow, simplifies budgets”**
- **“and provides regular & consistent payments.”**

72. The desirability of both a lower absolute budget for 2000 and a longer term flat line for IT were not ideas or wishes that were induced or created by MFP. Rather, these considerations had formed part of the thinking of IT and Finance all along. In this regard, Jim Andrew was in

⁴⁰ pgs. 75-79; see also December 6, 2002 at pgs. 139-140, 181).
⁴¹ See references in para. 65-67, and see evidence of Jeff Griffiths, September 9, 2003 at pgs. 145-146
COT013070
⁴² COT074537 at 74539-40.

favour of leasing long before Dash Domi or Rob Wilkinson came upon the scene⁴³, because leasing allowed IT to be financed as a commodity, without the need to return periodically to persuade City Council that significant capital expenditures were needed.

73. The fact that Finance and IT had analyzed leasing as a funding option and were persuaded that it made sense through their January 1999 internal discussions⁴⁴, is made clear by COT075428.⁴⁵ This document also indicates that the City was looking at options for an extended refresh (implying a longer use of the equipment) and was inviting vendors to provide ideas for the City to consider. See Sue Cross's notes and memo (COT075428 at COT075430) which records the City's request to DFS to: **“look into what other options would be available for the City, considering its current financial constraints.”**

74. Another indisputable fact that forms part of the context relevant to any fair assessment of the record in relation to the City's decision to select 5 year lease terms, is the reality that while the City had no established refresh plan or policy, its Senior Staff recognized that the City would NOT be replacing all of the desktop and related equipment and software every three years, in one fell swoop.

75. This was obvious for several reasons. Firstly, the general budgetary constraints facing the City, and its overall aversion to increasing its capital budget (particularly for IT) suggests that a wholesale refresh every three years was highly unlikely. Secondly, everyone recognized

⁴³ See COT025495 which refers to Mr. Andrew's support of leasing in December, 1997.

⁴⁴ See COT013706. This was before Mr. Domi was assigned to the City account.

⁴⁵ This memo refers to the City's decision in February 1999 to lease its SAP system (COT025271). It states that Ms. Liczyk was sold on the idea of leasing and that “she indicated that in a previous discussion with

that it was desirable to avoid the enormous logistical difficulties, disruptions, and costs inherent in such a rapid replacement in one year⁴⁶. Thirdly, the combination of the Y2K deadline and amalgamation, generating as they did the need to refresh all of the City's desktop and related systems quickly, were not going to repeat themselves.⁴⁷ And, finally, City Staff recognized that it was highly likely that the equipment in question would have a useful life in excess of 3 years and be used for a longer time frame. This would assist in meeting the politicians' wishes to achieve a zero tax increase and with the budget difficulties,⁴⁸ and formed part of the analysis which is reflected in the materials which resulted in the report to the City Policy and Finance Committee⁴⁹.

76. In summary, as of May 1999: (1) IT and Finance supported leasing, (2) there was extreme pressure on all Staff to pare their budgets and deliver a zero tax increase, (3) Staff recognized that a flat lined IT budget was desirable and that leasing could deliver this, (4) a gradual refresh of the equipment which the City was in the course of acquiring was highly likely,⁵⁰ (5) it was also likely that the equipment in question would be used for more than 3 years, and (6) leasing vendors were asked to make suggestions for the City to consider in advancing these optional objectives.

77. The record indicates that there were brief discussions between City Staff and Mr. Jakobek in an attempt to clarify the intention of the Policy and Finance Committee's July 20,

Jim Andrew with respect to the purchasing of new equipment for SAP, they know (sic) had to come up with a way to pay for them.”

⁴⁶ Evidence of Bulko, August 12, 2003 at pgs. 197, 213-216.

⁴⁷ Garrett, December 9, 2002 at pgs. 137-137.

⁴⁸ Lastman, December 3, 2002 at pgs. 117-118, 123, 145.

⁴⁹ Evidence of Pagano, March 3, 2003 at pg. 199.

1999 amendment⁵¹. However there was no controversy at the Policy and Finance Committee meeting and the motion passed unanimously. Neither Staff nor anyone else objected to the amendment nor was there any attempt to unwind it in the period between July 20 and July 27, 1999 (the date when the matter went to City Council). This absence of any debate or controversy is consistent with the factual context outlined above, as was the amendment itself.

78. All of this supports the conclusion that the so-called "Jakobek amendment" had nothing whatsoever to do with MFP, or Mr. Domi, let alone Mr. Wilkinson's September 21, 1999 presentation which allegedly caused the so-called bait and switch. To suggest that that amendment was an instrument to implement any alleged bait and switch scheme is completely without foundation. And to characterize MFP's response to the City's own requests for assistance and ideas as a deceptive bait and switch scheme is a complete and utter distortion of the record.

79. In advancing the theory that Mr. Wilkinson was engaged in a non-existent "divide and conquer" strategy, the City Submissions also conveniently ignore the documentary evidence showing that IT and Finance were in communication about the issues just before, during, and after the September 21, 1999 meeting.⁵²

⁵⁰ See also, Garrett, December 9, 2002 at pg. 144; Colley, September 4, 2003 at pg. 147; and COT071865.

⁵¹ See Affidavit of Wanda Liczyk, para. 168-170; see also, COT012761, a memo which appears to expect that questions about extending the use of the computer equipment might be raised at this meeting.

⁵² See COT015551, COT074704, and COT064006. See also COT029302 which shows that Mr. Wilkenson (who was supposedly keeping IT in the dark) forwarded materials relating to the meeting to Mr. Andrew.

80. Another plank in the City's theory is that Tom Jakobek was secretly helping MFP behind the scenes in September 1999.⁵³ There is not one scrap of evidence to support this speculative allegation. NONE of the City witnesses suggested that Mr. Jakobek contacted them or did anything at all to influence or discuss the City decision to enter into 5 year leases with MFP. Similarly there is no note, no memo to file, no email, not a single piece of paper in the entire data base reflecting any involvement at all by Mr. Jakobek in this decision. And, as alluded to in MFP's Closing Submissions, by letters dated March 31, April 1, and April 2, 2004, MPF requested that a survey of witnesses be undertaken⁵⁴ to avoid any such suggestion or innuendo. In the absence of any evidence, the City's submission that Tom Jakobek assisted or intervened in relation to the City decision should be recognized for what it is: a grossly improper, but sensational, allegation that is devoid of any substance.

81. The City Submissions also address the work of its Finance Department, and Mr. Brittain in particular. In keeping with the general theme and approach which permeates the City Submissions, great efforts are made to insulate and distance existing Senior Staff (most notably Mr. Brittain) from any role in the decision. This is a distortion of the record.

82. Certain facts are not disputed. Mr. Brittain occupied a senior position with significant responsibility. He was in charge of financial analysis for the City. Whether or not he was assigned to review the financial issues relating to longer lease terms in early July, as alleged by Ms. Liczyk, it is obvious that the reason for Mr. Brittain's attendance at the September 21, 1999 meeting was to listen to and consider the ideas/models put forward by Mr. Wilkinson for the

⁵³ City Submissions, Chapter 10, para. 103.

City's consideration. It is also obvious that it was part of Mr. Brittain's responsibility to provide financial analysis and advice in relation to any decisions arising from the exercise.

83. This common sense, logical conclusion is corroborated by the notes relating to the meetings on September 21 and 22, 1999, some of which only surfaced on the eve of Mr. Brittain's testimony.

84. These materials make it clear that the issue of an extended lease term, and gradual refresh options were indeed discussed at the September 21 meeting with Mr. Wilkinson, and that they were reviewed in follow up meetings with Finance immediately thereafter, held for the express purpose of discussing the pros and cons of what had been presented.⁵⁵

85. Despite Mr. Brittain's amnesia with respect to these events, it is also clear that he, and Mr. Altman, conducted some analysis with respect to the 5 year lease concept. Although he purported to have no recollection of any of the details (or, some might say, anything at all) of the meetings held to consider the extended lease options, Brittain contended that it quickly became apparent as a result of a rudimentary analysis which he conducted over lunch one day that it made absolutely no sense for the City to move to a five year term. And so, according to the City Submissions, that was the end of Mr. Brittain's involvement, and he had no role in the decision to enter into 5 year leases.

86. This theory defies common sense.

⁵⁴ See Appendix B hereto.

⁵⁵ See COT013063, COT013064, COT015570, COT015770, and COT064006. See also Evidence of Line Marks, August 14, 2003 at p. 171.

87. The City describes Mr. Brittain as a diligent, careful person. Accepting this characterization, he must surely have been aware that the issue of whether the leases should be for 3 or 5 years was an important one for the City to consider. Whatever attraction existed in lower annual operating costs, and a more even budget resulting from a longer term, the careful, diligent, Mr. Brittain must have known that these potential benefits warranted careful analysis by HIM, or someone else in his Department.

88. The careful, diligent Mr. Brittain could not have failed to appreciate the significance of the decision reached on or about October 1 to proceed with five year leases. He was copied on Ms. Viinamae's email of October 1 announcing this decision. Even if this was the only evidence that Mr. Brittain was told of this decision, it strains credibility, given his involvement in the earlier meetings and discussions, the importance of the issue and his alleged conclusion that longer leases made no sense, that he simply failed to notice that a decision had been made to enter into 5 year leases.

89. But the October 1 memo is not the only evidence bearing upon Mr. Brittain's knowledge of the decision to proceed with 5 year leases. The record indicates that he was involved in the ensuing meetings and discussions to establish the leasing rules and procedures which implemented the recommendation contained in the report adopted by City Council that there be a central administration of the leasing program. These discussions and materials refer to 5 year leases.

90. Brittain was also directly involved in the budget review which commenced in late 1999, which required an examination of the lease commitments which had been entered into so that a report could be prepared for the Budget Advisory Committee.⁵⁶

91. Following his initial review of an initial spreadsheet, Mr. Brittain made changes to and jointly authored a revised spreadsheet⁵⁷ which, once again, showed the existence of 5 year leases.

92. In the face of this documentary evidence, even Mr. Brittain did not suggest that he remained ignorant of the decision to enter into 5 year leases. Of course, had he done so, he would have been confronted with his own memorandum to Wanda Liczyk dated January 6, 2000.⁵⁸ In light of the City's submission dismissing the significance of the savings realized by the decision to extend the lease term, and attempting to shift responsibility from the City to MFP through its "bait and switch" allegation, this memo takes on additional importance and it is worth quoting in its entirety:

" I have updated Lana's spreadsheet based on our meeting this morning as attached. Also attached is Council's report authorizing the leasing. The total lease costs on the \$43m. has dropped from \$14m. to \$11.6m. because of 5 yr. vs. 3 yr. on equipment, but new costs for leasing other equipment and software/maintenance adds \$4.7m. and SAP and Public Health adds \$1.7m. This is partially offset by revenues from Public Health and funds already in the IT budget for a net overall cost in 2000 of \$15.5m. I have netted out the base debt charges that have been included in the 1999 budget re: the \$43m. debenturing, for a net overall impact in 2000 of \$14.1m. "

⁵⁶ COT013081

⁵⁷ See COT005240, COT013539, and COT064008

⁵⁸ COT064007

93. Mr. Brittain's knowledge of the 5 year lease term did not end with the above memo. Despite his aversion to ongoing involvement by Finance, and despite Ms. Viinamae's request in early January that a "point person" from Finance be assigned to assist in the leasing program, Brittain continued to be involved in this leasing program through at least January – February 2000. Once again, contrary to the City submission, the documentary record establishes that he continued to receive documents that not only showed that the leasing program was ongoing, with additional assets being ordered from time to time, but also that 5 year leases were entered into.⁵⁹

94. In short, the record is overwhelming that Mr. Brittain was fully aware of the City's decision to enter into 5 year leases. He was aware of and made a point to identify the savings resulting from the decision in the memo quoted above. On his own evidence, he did NOTHING to dissent from this decision, which one would have expected given the conclusion he claims to have arrived at based upon his "rudimentary" analysis. The reality is that Brittain was and is a careful, diligent employee. In the circumstances which prevailed in late 1999 and early 2000, moving to a five year term did make sense to the City. Had Mr. Brittain truly held a different opinion, he undoubtedly would have sounded the alarm, and taken steps to review the decisions that had been reached, or at least ensured that no new leases for 5 year terms be entered into. He did none of those things.

95. Another fallacy contained in the City submission is the contention that the City had no understanding of the supposed intricacies of the leasing issues, and that its Finance Department

⁵⁹ See COT036633 and COT015529.

was, in effect, incompetent to do its own analysis of the financial issues. This is a necessary, but untenable, component of the City's "bait and switch" theory.

96. First, the City itself has acknowledged that Mr. Brittain and his colleagues in the Finance Department are capable, qualified, and well able to conduct the necessary leasing analysis.⁶⁰

97. Second, the documentary record contradicts the City's contention that the analysis was beyond the capability of its Finance Department. MFP has previously referred to the leasing analysis which Mr. Brittain prepared at the request of Councillor Layton.⁶¹ This document demonstrates an awareness and understanding of leasing issues. Another example of Mr. Brittain's knowledge, expertise, and ability can be found in his report analyzing the pros and cons of leasing, as opposed to purchasing, the City's light fleet replacement vehicles. This document demonstrates a sophisticated understanding of the financial issues inherent in leasing, including an awareness of the external benchmarks that can be used to evaluate the financial merits of a given leasing proposal, with or without a full set of competing lease rate quotations.⁶²

98. Thirdly, even if it were true that Ms. Liczyk, Mr. Brittain and their colleagues were unable to understand or evaluate leasing issues, they had access to whatever legal and consulting expertise they deemed necessary to obtain assistance. Surely, if the careful, diligent

⁶⁰ See Garrett, December 5, 2002 at pp. 138-139, December 6, 2002 at pp.35-38, and December 9, 2002 at p.150.

⁶¹ COT057016

⁶² COT056998

Mr. Brittain had had any qualms about his abilities, or felt that any additional resources were necessary, additional assistance would have been sought.

99. Fourthly, there is no basis to accuse Mr. Wilkinson of misleading the City. This was not even put to him in cross-examination, probably because there is not a scrap of evidence to support such an allegation. Everyone knew that Wilkinson was providing ideas and models for the City to consider, at the City's request.⁶³ His models showed that there were financial consequences resulting from a move to a five year lease – precise costing figures were not necessary to understand that (as the documents he gave to the City showed), in principle, a 3 year lease (in the context of a gradual refresh) was initially more expensive, but that at the back end of the five year term, the cost of a five year lease was higher.⁶⁴

100. The City's complaint that a separate "lease rate factor" sheet was not sent to the City has no basis. Obviously, someone at the City advised MFP that it had decided to opt for a longer term. On or about September 29, 1999, Mr. Wilkinson was considering 5 year rates, and reviewing the cost of debentures. He selected a 5 year rate that was still advantageous to the City (see para. 5(c) herein), and as set out in MFP's Closing Submissions, there was no financial windfall or benefit to MFP as a result of this change.⁶⁵

101. As has been acknowledged in Chapter 10, para. 156 of the City Submissions, the contract sent to the City contained the precise costing for the first 5 year lease, including any necessary information about the lease rate factor. Amazingly, the City appears to be arguing

⁶³ Marentette testified that he would expect the City to review such models independently: April 17, 185-186. See also, O'Neil, June 11, 2003 at p.191.

⁶⁴ See Wilkinson Affidavit, para. 69-77 and COT026780 – 809, COT036589, COT026815, and COT029302

⁶⁵ Wilkinson Affidavit, para. 76, COT026824.

that it did not realize this commitment for a \$20MM lease contained pricing details, and that this was an element of deception by Mr. Wilkinson!

102. It is further submitted that not only is there no credible basis in the record to support the City's "bait and switch" allegations, but they are also inherently highly improbable.

103. The scheme alleged by the City would have required MFP to have almost supernatural insight and knowledge of a bizarre combination of circumstances, highly improbable in themselves, but nonetheless existing or occurring in the City in the late summer and fall of 1999. Unless MFP had special knowledge of these circumstances, which even the City did not, it cannot responsibly be suggested that MFP intended to exploit them, much less that it in fact did so.

104. The City's "bait and switch" theory relies upon the following hypotheses:

- (1) Liczyk would neither analyze, nor direct anyone to analyze 5 year leases;
- (2) Brittain, would do an analysis as requested, would conclude that 5-year leases made no sense, but would not share the result of that analysis with anyone;
- (3) Mr. Andrew and Ms. Viinamae would have strong objections to placing the assets on lease for 5 years, but would simply accept a direction from Finance to go to 5 year leases for all equipment, without making any protest or even engaging in any discussion with Finance;
- (4) Finance (Liczyk, Brittain) would believe that IT would take charge of any necessary analysis regarding whether 5 year leasing was advantageous, whereas IT would believe that such analysis was within Finance's area of responsibility and expertise;

- (5) In the result, no analysis would be made;
- (6) The City would not realize that the lease sent to it for execution in early October contained pricing information and would not review that information;
- (7) When Brittain recognized that 5-year leases had been entered into, revised Ms. Viinamae's spreadsheet, and wrote to Ms. Liczyk expressly referring to the savings realized from the 5 year leases, he would nonetheless remain silent about his rudimentary analysis showing this made no sense.

105. Each of the foregoing circumstances is, in itself, not something one would expect in an organization such as the City of Toronto. Even allowing for disruption and confusion brought about by municipal merger, Y2K issues and the like, it stretches credulity beyond the breaking point to even suggest that MFP, or anyone, could have foreseen all of these circumstances converging so as to create an opportunity to "pull" a "bait and switch".

106. Moreover, even if one suspended disbelief, and assumed for a moment that Mr. Wilkinson and the others at MFP were somehow able to discern what all of the high-ranking City officials and employees (Liczyk, Andrew, Brittain and Viinamae) supposedly had missed, it is nevertheless ridiculous to think that MFP would pursue such a deceptive scheme, as the City would have the Commissioner believe. Any such scheme would inevitably fail, and the perpetrator be exposed if even one of the constellation of circumstances had not been in place, destroying all that had gone before and forever alienating a large and potentially profitable and long-term customer.

107. This makes no logical sense. It is not what happened. Rather, MFP honestly believed that it had responded to the City's inquiries appropriately, that it had provided models for the

City to consider, that the City had conducted its own analysis, and that the City was highly satisfied with the savings and flat line impact that resulted. This is precisely what was stated in the testimonials in which Mr. Andrew, Ms. Liczyk and Ms. Viinamae participated in.⁶⁶ MFP would hardly have drawn attention to these arrangements if it knew they were a result of a calculated deception.

108. In assessing the City's "bait and switch" theory, and the related contention that the move to 5 year lease was promoted or orchestrated by Mr. Jakobek, it is also relevant to consider the evidence relating to the usage of the equipment. Apart from the earlier references in this Reply, the record also makes it clear that the City, and a number of other Councillors, are of the opinion that the useful life of the computer equipment in question extends beyond three years, and that savings could be realized by so extending the leases:

- (1) in April 2000, Councillor Chow proposed a motion at the Budget Advisory Committee advertent to five year leases and the potential savings resulting therefrom;⁶⁷
- (2) Councillor Pitfield has expressed the view that the computer equipment has a useful life in excess of three years;⁶⁸
- (3) the City, after extensive study, has concluded that the overwhelming majority of its Staff should keep their equipment for 48 – 60 months.⁶⁹

⁶⁶ COT029096
⁶⁷ COT034438 at COT034443
⁶⁸ COT042689
⁶⁹ COT061884 at COT061887

Councillor Jakobek, whatever questions exist regarding his credibility about other issues raised at this Inquiry, was not alone when he raised the issue of using the computer equipment for more than three years on July 20, 1999.

109. The City's "bait and switch" allegation is a vicious attack upon MFP in general and Mr. Wilkinson in particular. It is contrary to all of the evidence. Given the nature of the attack, it is appropriate to emphasise the evidence of Mr. Kerr who testified that:

(1) a leasing company dealing with the City would reasonably expect the City to be informed about leasing issues;⁷⁰

(2) a vendor would reasonably expect the City to do its own analysis of a change in strategy from a 3 year to 5 year lease, and it was the City's responsibility to decide this independently;⁷¹

(3) the financial analysis entailed is not that complicated, and one which the City could and should be able to do;⁷²

(4) if the City had any doubt about its ability to undertake the analysis, consultants were readily available to assist;⁷³

(5) the decision to proceed to a 5 year lease is not strictly a financial decision – considerations such as the anticipated longer use of the equipment, budget pressures,

⁷⁰ Evidence of Chris Kerr, September 15, 2003 at pp. 4-7.

⁷¹ Evidence of Chris Kerr, September 15, 2003 at pp. 99, 167-168, and 171.

⁷² Evidence of Chris Kerr, September 15, 2003 at pp. 111-112

⁷³ Evidence of Chris Kerr, September 15, 2003 at p. 110.

and the extension of equipment life cycles because of such financial constraints, are all potentially relevant to such a decision;⁷⁴ and

(6) his analysis did not factor in the above referenced issues nor did he make any inquiry with the City about them.⁷⁵

110. The truth is that the City entered into 5 year leases as a result of its own decision to look at other options, it saved over \$2.4 MM in 2000 alone, and smoothed out its IT budget as a result.⁷⁶ The City was well able to assess and did assess the benefits of proceeding in this manner. It entered into the 5 year leases with its eyes wide open, and the resulting financial obligations were fair and reasonable – as the City has acknowledged, the financial terms of the extended leases (after the rewrite) are still better than the debenture options which were available for the City to consider (see para. 5(c) herein).

111. In these circumstances, the City's "bait and switch" allegations are disgraceful. They should be rejected in no uncertain terms.

IV. LEASE REWRITES

112. No useful purpose would be served by repeating the details of what has already been set out in MFP's Closing Submissions on this issue.

113. The fact is that Mr. Wilkinson had extensive experience with asset management. He had developed a system with other clients of MFP that had been very useful in tracking assets,

⁷⁴ Evidence of Chris Kerr, September 15, 2003 at pp. 100, 111.

allocating costs, and facilitating projections and related analysis of computer assets on lease. In order to utilize this program, like assets needed to be on one lease.

114. No doubt there may be other ways and means of tracking assets, providing asset management reports and facilitating the related financial projections and analysis. Indeed, it was suggested in evidence that the City already had such a system. However, like any system or process, such alternatives are only useful if they work. Clearly, whatever system the City had, it did not work. Clearly, Mr. Wilkinson's historical experience with specific clients, utilizing an algorithmic model with like assets on one lease, had worked. He explained this in several meetings to City Staff, including Ms. Liczyk. At the time of those meetings, no new lease terms had been proposed or considered.

115. This issue boils down to a simple one: was it MFP's fault that the City apparently conducted no analysis of the term which was selected when the desktop and other assets were placed on the rewritten leases?

116. There is no dispute that the term purposed by MFP extended the existing leases, on average by approximately 3 – 4 months. Similarly, there is no dispute that as a result of this the City obtained the contractual right to keep and use the equipment for a longer period (until March 31, 2005), but also agreed to make additional lease payments, which aggregated approximately \$2.5MM.

117. This cost has nothing to do with asset management, per se. It results from the extension of the lease term agreed upon when the pre-existing leases were rewritten.

⁷⁵ Evidence of Chris Kerr, September 15, 2003 at p. 102.

118. It is obvious that when several leases of differing terms are combined into one common lease, with the monthly payments remaining constant, there is a potential, and easily calculable cost, which may result.⁷⁷

119. The expert evidence indicates that it would be a reasonable expectation of a vendor that the City could analyze the financial ramifications of this change.⁷⁸ As detailed in MFP's Closing Submission, Mr. Wilkinson expected that the City would do this, and Ms. Liczyk had the same expectation.

120. The evidence detailed in MFP's Closing Submission, and in Mr. Wilkinson's examination on September 23, 2003 (at pp. 151-163) indicate that (1) each new lease was a 2 page document which stated in bold type the new lease term; and Mr. Wilkinson thought this was clear to the City; (2) the City was making inquiries about numerous other matters proximate to the delivery of the new leases. Mr. Wilkinson had every reason to believe that the City knew what it was doing.

121. The record also makes it clear that despite reviewing and authoring several documents which refer to the lease "rewrites" and which reflect the new term of the leases, and despite a further briefing from Mr. Wilkinson about the issue, the City Staff did not seek to change the rewrites until the summer or early Fall of 2001. Even at that time, there was no complaint that MFP had misled the City in any way. The first time any such allegation surfaced was in November 2001, although in fairness Ms. Liczyk did make it clear that she had not relied on the statement she then attributed to Mr. Domi.

⁷⁶ See Garrett, December 9, 2002 at p. 144.

122. When the City indicated that it had concerns about the extended term of the lease rewrite, MFP did not respond by telling the City that it was bound by the contract which clearly spelled out the duration of the rewritten leases, or take issue with the somewhat incredible assertion by the City that it had not realized that there had been any extension. As an attempt to resolve the problem and work with its client, MFP offered to revert to the 5 year lease term. The City refused.

123. The City is still using the leased assets. It will be using them on March 31, 2005. It still will be using them in December, 2005.

124. On these facts there is no merit to the City's allegations in relation to the lease rewrite.

V. OTHER SPECIFIC ACCUSATIONS

125. MFP's Closing Submission did not attempt to duplicate the 1200 page submission which the City had advised it was preparing. Similarly, these Reply Submissions do not address every inaccuracy or erroneous criticism contained in the City Submissions.

126. However, those submissions contain some additional allegations which require a response.

(a) Oracle

127. In substance, the City contends that MFP should be faulted for failing to explain the terms of the City's Oracle contract to Ms. Viinamae, and that MFP should have advised the City about the pros and cons of leasing software. According to the City "**Once again, MFP**

⁷⁷ Evidence of Chris Kerr, September 15, 2003 at p. 115.

knowingly profited at the City's expense and knowingly exploited Viinamae's lack of knowledge and sophistication about leasing costs and leasing contracts"⁷⁹.

128. With respect to the City's decision to lease software, it is clear from paragraph 1.1.21 of the RFQ that this is something that the City decided to do long before MFP was chosen as its lessor:

"1.1.21 The City may from time to time negotiate separate corporate license agreements for major software acquisitions and expects the Respondents to incorporate these costs into a lease agreement. The respondents must indicate a willingness and ability to comply with this requirement." [Underlining added].

129. This document was the subject of internal review, drafting and decision making by many experienced City Staff members. The decision to lease software reflected in Article 1.1.21 had nothing whatsoever to do with MFP.

130. The requirement that respondents to the RFQ provide leases for the City's software is also consistent with the decision which the City itself made in January – February 1999 to lease its SAP system. At that time, the specifications included in the informal solicitation issued by the City⁸⁰ shows that the City intended to finance its acquisition of licenses and services (i.e. assets similar to those which it acquired through the Oracle contract) through leasing. Once again, this decision had nothing to do with MFP: it was made after discussion and consultation among IT and Finance.⁸¹

⁷⁸ Evidence of Chris Kerr, September 15, 2003 at p. 116.

⁷⁹ City Submissions, Chapter 13, para. 8.

⁸⁰ COT025271 – COT025273

⁸¹ See para. 73 herein.

131. In short, the City had an intention to lease software long before November 1999, as a result of its own internal deliberations. In so deciding, it had access to whatever consulting or other resources (including extensive exposure to literature and conferences from the Gartner Group⁸²) it deemed appropriate. The City never sought advice from MFP about this decision, and when MFP was approached in the Fall of 1999 and responded to a request for a quote for software, MFP was simply fulfilling the requirement in the City's RFQ that it be willing to **“incorporate such costs in a leasing agreement.”**

132. As to the City's supposed ignorance and/or misunderstanding of its contract with Oracle (in particular, the payments thereunder), the record indicates that:

- (1) the City had been engaged in discussions, negotiations, and study of potential Oracle transactions for several years;⁸³
- (2) the City had access to, and had used independent outside counsel in its assessment of the Oracle options;⁸⁴
- (3) the prospective Oracle agreement was discussed at the Y2K Committee on numerous occasions, and resulted in a significant (\$11,000,000 +) order signed by Mr. Garrett pursuant to the special authority delegated in the November 1998 Y2K report adopted by City Council;⁸⁵
- (4) all of the terms of Oracle contract were negotiated directly between the City and Oracle, without any involvement of MFP, and

⁸² COT064190 – COT064232

⁸³ See Affidavit of Stephen Wong, para. 17, and 45-51.

⁸⁴ See Affidavit of Mark Fecenko, para. 39-48.

(5) MFP was simply asked to finance the resulting contractual obligations by providing a lease quote. It did so, in clear terms which defined the City's financial obligations.

133. If Mr. Garrett was justified in assuming that the issues relating to the Oracle contract (including its terms!) had been carefully reviewed by senior City Staff before he signed the order,⁸⁶ so too was MFP. And, as Mr. Wilkinson testified,⁸⁷ if the City had any questions about the Oracle lease arrangements, he would have answered them. No witness has suggested otherwise.

134. In these circumstances, it is preposterous to argue that Mr. Wilkinson knew or should have known that the City was unaware of the terms of its own contract with Oracle, that it and all of its representatives/advisors were ignorant of the payments called for thereunder, and that it needed or expected advice about the wisdom of leasing software.

135. The City's complaint of "exploitation" by MFP in relation to the Oracle transaction is another example of an unfounded accusation designed to unfairly harm MFP's reputation.

(b) PST Rebate

136. It is surprising that the City has included its failure to recover approximately \$1.7MM of PST in its criticism of MFP. Actually, perhaps it is not surprising given the City's inclination to include everything but the kitchen sink (and perhaps even that) in its shopping list of allegations against MFP.

⁸⁵ COT030456

⁸⁶ Evidence of Garrett, December 6, 2002, pp. 21-25, 82-85.

⁸⁷ Evidence of Wilkinson, September 23, 2002, at pp. 77-80.

137. Given the fact that these are reply submissions, this document will not review in detail all of the evidence relating to the pitiful efforts of the City to address the Province's double collection of PST as a result of the sale lease-back transaction. MFP commends the cross examination of Mr. Colley on this issue to the Commission⁸⁸. In summary, this evidence, the documents referred to therein, and the evidence of Mr. Rabadi show that:

- (1) the City was well aware at an early stage of the need to address the issue of the recovery of the PST payments which had already been made on the sale lease-back equipment;
- (2) by the Fall of 1999, the City knew that the plan which Mr. Rabadi had in mind to deal with this issue would not work;
- (3) at or about the same time, the City also was aware of the need to assemble information to show that it had possessed an intention to lease at the time it acquired the sale lease-back assets – this was expressly identified a short time later by Ms. Viinamae in her January 2000 list of leasing questions;
- (4) documentation did exist to show that although the final approval of a leasing program, including the selection of a leasing company, did not occur until July 1999, the City did have an intent to lease by at least January, 1999;
- (5) the City did not act expeditiously to deal with the issue nor did it prepare a thorough, cogent presentation of the available documents. It also failed to gather the anecdotal evidence (e.g. Andrew's support for leasing, the unavailability of the 10 year

⁸⁸

Cross-examination of Mr. Colley, September 4, 2003. pp. 10-107.

debenture option; the City's financial constraints which corroborated an intent to lease, etc.) relevant to this issue. Rather, the City let many months go by, and then tried to recover \$1.7MM through a telephone call placed to an unknown (presumably relatively junior) Provincial public servant, without any articulation of the relevant documents or backup facts;

(6) when this (predictably) failed, the City still did not assemble or present the available evidence in a coherent, cogent way – at the Inquiry itself, Mr. Colley asked counsel for MFP to ensure that the relevant documents put to Mr. Colley in cross examination were made available to the City, as “those documents would still be valuable”!⁸⁹

(7) In early 2001, after its woeful failure to recover the PST already paid in respect of sale leaseback assets, the City still directed MFP to add significant additional sale leaseback assets to the computer leases.

138. Mr. Wilkinson testified that he discussed the PST issue with the City, and that the City was aware of what it needed to do. He was always available to assist if requested but never heard anything more about the issue until much later⁹⁰. His evidence was not contradicted, nor was it challenged in cross examination.

139. It is difficult to imagine a more groundless allegation of impropriety.

(c) **Alleged Improper Entertainment and Relationships involving Domi, Andrew, Liczyk, Jakobek, and other City Staff**

⁸⁹ Evidence of Colley, September 4, 2003 at pp. 106 - 107

⁹⁰ Wilkinson Affidavit, para. 79-81

140. MFP does not intend to repeat, but relies upon, its earlier submissions regarding the content, quantum, and particulars of the entertainment and related issues set out in paragraphs 257-295 of its Closing Submissions.

141. There is no dispute that MFP engaged in entertaining City staff. However, the extent of this entertainment is grossly exaggerated by the expense records submitted to MFP by Dash Domi. In fact, in its own submissions the City has recognized the inaccuracy and unreliability of Domi's expense account records⁹¹. Even accepting the City's Submissions regarding MFP's level of entertaining between Domi and each of Jakobek (City Submissions, Chapter 5, pp. 37-38), Andrew (City Submissions, Chapter 5, pp. 41-47), and Liczyk (City Submissions, Chapter 5, pp. 49-56), the actual amount of entertaining cannot fairly be characterized as extraordinary in the context which existed at the time.⁹²

142. The point has already been made⁹³ that City staff and representatives of other vendors testified that entertaining by MFP was consistent with standard industry practice and entertaining efforts conducted by other vendors⁹⁴. Scott Marentette of Dell Financial Services testified that at the relevant period relating to the computer leasing RFQ he expected that MFP

⁹¹ City Closing Submissions, Chapter 5, Page 73, Paragraph 249

⁹² The City Submissions rely upon various policies in arguing that MFP acted improperly. But these must be interpreted and approached with common sense, and in light of the relevant context. The application of the general policies of the leasing association to which MFP belongs is surely affected by the degree of sophistication of the customer, the expectations as to the level of due diligence by the lessee, and industry practice. And MFP's expense policies are standard: an employee does not normally need to be told that it is inappropriate to submit misleading expense reports, or be given an extensive course on how to fill out a relatively simple form.

⁹³ See para 264 of MFP's Closing Submissions, and notes 486-488 referenced therein.

⁹⁴ It is submitted that this is cut and dried: see Affidavit of Lana Viinamae, para 150-151; Transcript April 17, 2003 (Scott Marentette – Dell Financial), pp. 131-134 and 178-182; Transcript June 11, 2003 (Dan O'Neil – Bombardier Capital), pp. 59 to 66; Transcript April 14, 2003 (Rob Simone – Dell Financial), pp. 36:23 – 37:8, 136:13 – 141:4., and 185:14 to 190:17; Affidavit of Jim Andrew, para. 81.

and other competing vendors were entertaining City staff⁹⁵. In addition, testimony from competing vendors indicates that it would not be unusual industry practice to have a greater level of entertainment of a particular client where that company has an existing business relationship with the client, and similarly that higher levels of entertainment would not be unusual where the sales staff assigned to a particular account has responsibility for only a limited number of client accounts⁹⁶.

143. The City Submissions purport to describe, and downplay, entertainment by other vendors. It is submitted that the City Submissions on this point are inaccurate.

144. Based on a limited review of only the available calendar entries of Mr. Andrew, Ms. Viinamae and Ms. Liczyk, it is clear that many vendors spent considerable time and resources entertaining these and other members of City staff. The entertainment included numerous meals, gala dinners, concerts, high profile fundraising events, a cooking course, tickets to all sorts (hockey, baseball, basketball, golf tournaments) of sporting events (including access to corporate boxes and marquees), a ski trip to Collingwood, innumerable golf outings (both individual and corporate), as well as trips or proposed trips to New Orleans, Augusta, Georgia, Scotland, Colorado, and New York.

145. Appendix C hereto is a list of entertainment entries based solely on the calendars produced by Mr. Andrew, Ms. Liczyk, and Ms. Viinamae.⁹⁷ Had the internal expense account

⁹⁵ Transcript April 17, 2003 (Scott Marentette – Dell Financial), pp. 178:2 to 182:23

⁹⁶ Transcript April 14, 2003 (Rob Simone – Dell Financial), pp. 185:14 to 190:17

⁹⁷ See Appendix C - Sample of entertainment City staff by vendors other than MFP (from January 1998 to June 2001). Despite repeated requests, the City did not produce Mr. Andrew's electronic calendar for 2000. It should be added that this compilation is not intended to single out the individuals, or vendors listed. If all of the calendars of the City personnel had been produced, a more comprehensive listing could have been compiled.

records and corporate promotional files of the vendors in question been available, Appendix C would likely reveal a greater level of entertaining by those vendors, both in relation to these individuals, and many other City staff.⁹⁸

146. With or without allowing for the incompleteness of the information available from the electronic calendars of City staff, it is clear that it was absolutely routine for City employees (IT Staff in particular, but not limited thereto) to be offered (and accept) virtually every form of business entertainment known⁹⁹.

147. Although these activities would contravene the conflict policy in effect at the City today, this new policy was only "rolled out" in March 2001. The entertainment conducted by MFP in 1999, 2000 and early 2001 was not subject to the City's current conflict policy, nor was MFP's entertaining of City staff materially different from the entertainment conducted by many other vendors at the City of Toronto during the relevant time period.

148. The record amply supports the conclusion expressed in the City's internal memo that the foregoing entertainment practices were condoned by the City, particularly its IT Division.¹⁰⁰

MFP, like other vendors, was entitled to expect City personnel to be aware of whatever prohibitions existed. The MFP witnesses stated, without contradiction, that had anyone advised

⁹⁸ As the Commissioner noted on September 9, 2003 (pgs. 209 – 210), access to internal expense documentation may, depending on the circumstances, suggest that additional entertainment had occurred.

⁹⁹ The database contains only partial records of the calendars of the IT and Finance employees. And, as was recognized during the Inquiry, the information derived from these records does not provide a full picture of the entertainment in question – the only way to do so would be to subpoena (with the same vigour applied to any recalcitrant vendors as was applied to Mr. Lyons) all of the relevant individual and corporate expense account records and to undertake a comprehensive analysis, as was done with MFP's records in this case.

¹⁰⁰ COT012037 at 12040, Item (h); Mr. Griffith made it clear that the City had only examined the entertainment entries relating to MFP, and that he was not suggesting in this report to City Council but MFP was the only vendor who had engaged in such entertainment (Griffiths, September 9, 2003 at pgs. 198-203, 207)

MFP that the entertainment it offered was inappropriate or unacceptable, it would not have continued to invite City personnel to the events in question. No one so advised MFP. Mr. Wolfraim also testified that when the City announced its new conflict of interest guidelines, MFP changed its entertainment practices with the City. He was not cross examined or contradicted on this evidence.

149. In this context, it is a gross overstatement to allege that MFP "unleashed" Dash Domi upon defenceless City personnel, allegedly as part of MFP's modus operandi as a "corporate predator".

150. The hypocrisy inherent in the City Submissions is perhaps best illustrated by its argument that MFP should be criticized for its role as one of the sponsors of Mayor Lastman's golf tournament. It is submitted that it would be unjust to criticize MFP for permitting its sales staff to entertain potential clients, particularly when the evidence before the Commission establishes that entertaining by MFP was a standard industry practice and did not result in nor was it calculated to be a method of deceiving the City.

151. As to alleged and improper relationships referred to in the City Submission with respect to Mr. Jakobek, MFP relies upon the contents of its Closing Submissions which refer to the reasonable inferences arising from Mr. Domi's telephone contacts with Mr. Jakobek, and the Philadelphia trip. Insofar as the as the City contends that it is improper and suspicious for a Councillor to have any contact with vendors, MFP submits:

- (1) Mr. Jakobek was not the only Councillor who availed himself of entertainment offered by MFP (see, for example the Anderton memo referring to the presence of other

Councillors at the MFP leased box, as well as the evidence of Ms. Liczyk and Mr. Andrew to the same effect);

(2) MFP was not the only vendor which had, or sought to have, contact with Mr. Jakobek, as is evident from the DFS documents;

(3) Mr. Jakobek was known to be a hands-on Councillor who intervened in areas of interest to him,¹⁰¹ and was a sceptic with respect to computers and technology.

152. MFP also relies on the contents of this Reply, and its Closing Submissions, regarding the so-called Jakobek amendment, the exaggerations in its internal memoranda referring to Mr. Jakobek, and the allegations relating to the \$25,000 withdrawal by Mr. Domi.

153. With respect to Mr. Andrew, MFP has acknowledged that the gift of a pen was inappropriate, but Mr. Domi did this on his own and it was promptly returned. While MFP's entertainment of Mr. Andrew would not be permissible under the current rules, as detailed above, it was not materially different than any other vendor, or potential vendor.

154. With respect to Ms. Liczyk, there is evidence that, over time, she and Mr. Domi became friends. This likely occurred after the death of Ms. Liczyk's mother in mid-2000.¹⁰² It is submitted that there is no reason to reject Ms. Liczyk's evidence about this relationship, or the late night phone call referred to in the City Submissions.¹⁰³ Given the circumstances of that phone call as described by Ms. Liczyk, it is callous for the City to submit that that call, in and of itself, is evidence of an improper relationship.

¹⁰¹ Including, according to Mr. Griffiths, internal Staffing issues; December 5, 2002 at pgs. 53 – 55.

¹⁰² According to Ms. Scarcollo's KPMG interview: COT012899

¹⁰³ Affidavit of Wanda Liczyk, paras. 116, 117, 121, 281-282, 287-289. See also her extensive testimony on November 5, 2003 about the phone calls from Mr. Domi.

155. It is submitted on all the evidence that the Commissioner should not conclude that there was an improper relationship between Mr. Domi and Mr. Jakobek, Mr. Andrew, or Ms. Liczyk, much less that MFP encouraged the development of any such alleged improper relationships.

(d) Alleged Improper Payment to Jakobek

156. As noted in MFP's Closing Submission, MFP did not attend the hearings which dealt with the Jakobek bank records and the allegations relating to the \$25,000 supposedly received by Mr. Jakobek from Dash Domi. Hence, MFP's submissions were limited, and succinct.

157. The City Submissions now argue that the \$25,000 payment was a reward for the "Jakobek amendment", and that MFP was/is responsible for Mr. Domi's conduct in making this alleged payment.

158. These submissions are utter nonsense.

159. There was and is nothing sinister or unusual about the so-called Jakobek amendment, which more fairly, should be called the Policy and Finance Amendment. Whatever label it attracts, that amendment simply reflected the unanimous opinion of the members of the Policy and Finance Committee that the computer equipment should not be replaced every three years, that its use could be stretched for a longer period, and that an effort should be made to achieve budget savings as a result. None of this had anything to do with any favour or benefit to be conferred on MFP. No witness at the Inquiry testified that Mr. Jakobek intervened to influence the evaluation of the responses to the RFQ, or any of the decisions made in the lengthy leasing administration which followed.

160. If anyone paid Mr. Jakobek even so much as \$1.00 for the "Jakobek amendment", it was a payment made for nothing.

161. Furthermore, as stated in MFP's Closing Submissions, the evidence does not support a finding that any such payment was made. Certain aspects of the City Submissions arguing in favour of such a finding warrant comment:

(1) The City argues that there are inconsistencies between the evidence of Tie and Dash Domi and that these alleged differences support the conclusion that Dash Domi made the payment to Jakobek.

(2) There is no way to sugar coat the implication of this argument. Although the City Submissions stop short of using this language, the reality is that the City is claiming that Tie Domi has committed perjury as part of a conspiracy with his brother to lie under oath to this Inquiry.

(3) The bottom line is that Tie Domi's birthday fell on November 1, 1999. He swore under oath that he received a large number of \$1,000 bills from his brother at that time. The substance of this evidence is not undermined or affected by the fact that he and Dash Domi may have differed in some of the details relating to the birthday party, the delivery of the card, or exactly how many bills it contained.

(4) It is respectfully submitted that the alleged discrepancies between the Domi brothers' evidence do not show that they conspired to lie to the Commission. Rather, they prove the opposite: if their evidence matched in every detail, that would be

suspicious, and potentially indicative of a concerted, rehearsed plan to deceive the Inquiry.

(5) No doubt it would have been preferable (and more prudent on Tie Domi's part), to advise Commission counsel in advance that he spent \$1,000 bills at Pusateris and at the Royal Versailles jewellery store. But the subsequent inquiries made by Commission counsel confirmed that Mr. Domi had indeed spent \$1,000 bills at Royal Versailles, and that such bills were routinely accepted at Pusateris, thereby providing some corroboration for Tie Domi's version of events.

(6) The City Submissions also contain a detailed summary and analysis of the convoluted evidence regarding the many Jakobek family bank accounts and real estate transactions which occupied the attention of the Commission during the final days of hearings.

(7) The City's analysis of that evidence raises numerous issues and unanswered questions regarding the Jakobek family testimony and their bank accounts. Whatever conclusions may be reached about the credibility of the Jakobek witnesses, one thing appears to be clear: significant amounts of cash were deposited in the Jakobek accounts in the months prior to Dash Domi's withdrawal of \$25,000 from his account.¹⁰⁴

(8) This suggests that the funds used to pay Mr. Jakobek's AMEX bill came from sources other than Mr. Domi. It certainly confirms that Mr. Jakobek had large sources of cash which had nothing to do with Mr. Domi.

¹⁰⁴ Grant Thornton report, para. 2.4.1, 2.4.2.2, and 2.5.1 (1).

162. Had a full year of the Jakobek accounts been subpoenaed and analyzed, this might have shown that the cash receipts in October, 1999 represented a normal monthly quota for Mr. Jakobek. This would have provided further support for the conclusion that whatever the source of the Jakobek family cash receipts, they had nothing to do with Dash Domi and that his late October withdrawal of funds was purely coincidental with the payments to Mr. Jakobek's AMEX account.

163. In all of these circumstances, the Commission ought not to make a finding that Dash Domi paid Mr. Jakobek \$25,000.

164. In any event, it is clear that MFP had no involvement in or connection with any such alleged payment. No witness testified otherwise. No contrary suggestions were put to Mr. Wolfraim by counsel for any of the parties with standing when he testified during the recall phase of the Inquiry. Commission Counsel also did not ask Mr. Wolfraim any questions about these issues. As the Commissioner is undoubtedly aware, this was no accident - it resulted from a conscious decision reflecting the fact that, whatever inferences anyone might argue should be drawn about the circumstantial evidence surrounding the \$25,000 withdrawal, there was no evidence whatsoever to indicate that Mr. Wolfraim or any responsible person at MFP had any knowledge of, let alone any involvement in or responsibility for any alleged illicit payment.

165. The City Submission that MFP is responsible for and should be criticized for the alleged illicit \$25,000 payment to Mr. Jakobek should be rejected in the clearest and most unequivocal manner.

(e) **Blackout Period**

166. MFP's Closing Submissions refer to the confusing and contradictory evidence regarding the duration of the so-called "blackout" period, and to the absence of any written rule or notice regarding the precise meaning or even the existence of this rule¹⁰⁵.

167. In light of the City's Submissions, it is important to emphasise that the anecdotal evidence about this subject related, in general, to contacts involving discussions or attempts to influence the substantive aspects of a public tender or its evaluation, as well as entertainment activities which, in theory, could create a perception of inappropriate influence during a sensitive period when an RFQ or RFP was under active consideration.

168. It is submitted that this evidence did not relate to all types of contact: as Mr. Andrew himself testified, it was accepted practice for there to be communications from vendors during the so-called blackout period (Andrew affidavit, paragraph 48). And several other witnesses testified that it was common for a salesperson to inquire about the status of a tender, i.e. when and where the City would consider and decide upon bids.¹⁰⁶

169. The record also indicates that:

- (1) Mr. Andrew himself initiated calls to Domi during the "blackout" period (see City Submissions, Chapter 21, para. 108-109);
- (2) DFS was following the status of the RFQ closely – it was aware of the status of the RFQ as of the July 6 meeting of the Policy & Finance Committee, and that

¹⁰⁵ MFP Closing Submissions, para. 43(2), note 79.

consideration of the leasing RFQ would likely go over to the July 20, 1999 meeting;¹⁰⁷

- (3) there is no evidence that Mr. Beattie (the contact person designated in the RFQ) had any contact with Mr. Domi during the blackout period.

170. In these circumstances, it is submitted that the following inferences are reasonable:

- (1) Given the very senior position which Mr. Andrew held, Mr. Domi (a “rookie” in the City's parlance) would reasonably have concluded that whatever the blackout period might entail, it did not preclude casual inquiries which did not involve any substantive discussions or lobbying about the outcome of the RFQ;
- (2) DFS's representatives, and, likely, representatives of some other vendors, made inquiries to find out when, where, and by whom the decisions about the RFQ were to be made;
- (3) it is likely that Mr. Domi made the same types of inquiries of Mr. Andrew and Mr. Jakobek;
- (4) The resulting contacts were perfunctory, and were likely of the nature described by Mr. Andrew and others at the Inquiry as commonplace.

¹⁰⁶ Evidence of Pagano, February 26, 2003 at pg. 55. Dave Beattie, March 31, 2003 at pgs. 109-110; Affidavit of Jim Andrew, para. 48; John Rollock, June 10, 2003 at pgs. 172-173, 175; Dan O'Neil, June 11 at pgs. 79-82.

¹⁰⁷ Evidence of Sue Cross, May 6, 2003 at pgs. 73-76

171. The absence of any evidence that Mr. Jakobek intervened in the evaluation process, and the short duration of the calls which the City contends were received by Mr. Jakobek supports these conclusions.

172. It is further submitted that whatever brief discussions may have occurred between Mr. Domi and City representatives/personnel during the blackout period, the July 20 note referred to in MFP's Closing Submissions also supports the conclusion that these contacts did NOT include any substantive discussion or improper leak of information. This note was extracted from a large volume of internal diaries prepared by a former MFP employee, Christine Vivaldo, which MFP turned over to the Commission as soon as they came to light. It is the kind of document that no one would ever expect to be produced or reviewed as evidence, and contained a telephone message from Mr. Flanagan to Ms. Payne.

173. The message was on the same day that Mr. Domi attended the Policy and Finance Committee meeting, and it seems logical to conclude that Mr. Flanagan spoke to Mr. Domi that day. Given his normal exuberance and tendency to exaggerate, if Mr. Domi had been told by Mr. Jakobek, or anyone else, that MFP had won the RFQ, he would not have told Flanagan about the possibility of MFP succeeding (something that was obvious, dating back to his attendance with Mr. Pessione when the bids were read out). Had Mr. Domi been privy to sensitive information from any substantive discussions with Mr. Jakobek or anyone else, Mr. Domi would have said so to Flanagan in no uncertain terms, and it is likely that this would have been reflected in Flanagan's message to Payne.

174. It is submitted that if the City wished to establish a clear "blackout" rule, both as to its duration or meaning, it would have been easy to do so. If such a rule had existed, it would also

have been easy to communicate this clearly to vendors and their representatives, by including it in the RFQ. The City did neither. It is further submitted that the evidence does not support a finding that Mr. Domi violated the blackout rules, that he obtained any confidential information, or that MFP derived any other advantage through whatever brief telephone contacts Mr. Domi had in this time frame. That said, Mr. Domi should have directed his inquiries about the status of the bid to Mr. Beattie, but he was probably not alone in making such inquiries of others.

VI. CONCLUSION: THE LOST CHAPTER AND THE MISSING ANALYSIS

175. For the foregoing reasons, it is respectfully submitted that the City's allegations that MFP has been guilty of numerous "bait and switches," and "sharp practice," and that it has encouraged inappropriate relationships, and condoned or participated in an alleged illicit \$25,000 payment to Mr. Jakobek, are completely groundless. They represent an improper effort by the City to turn this Inquiry into an adversarial proceeding to assist the City in its litigation against MFP.

176. Although the City has devoted no less than nine chapters in its Closing Submissions to a review (containing, generally, highly aggressive and negative conclusions) about the role and responsibility of MFP and numerous other individuals, there is a glaring omission in the City Submissions: a chapter entitled "The Role and Responsibility of City Council."

177. It is further submitted that this Lost Chapter could have and should have highlighted the following facts and the unanswered questions which they raise:

- (1) City Council knew, or ought to have known, that further leasing initiatives, and reports, were expected as a result of recommendation #4 in the report it received and adopted in its July 27 – 29, 1999 meeting.
- (2) Subsequently, City Council received several reports which indicated that the leasing program was continuing, that the assets on lease were significantly in excess of \$43MM, and that the length of the leases was not the three year term alluded to in the July, 1999 report to the Policy and Finance Committee:
 - (a) A March 15, 2001, Report to Budget Advisory Committee, “2001 Operating Budget – Non Program Expenditures and Revenues Supplementary Report” (COT031894), at pp. 2-3 (31895-6), item A (4), notes as follows:

“Under the City’s Y2K project, \$43.0 million of hardware and system software was acquired with leasing costs totalling \$13.5 million being budgeted in 2000.

In order to support the expanded infrastructure, software licenses for products such as office automation tools, online report viewing, testing, databases and desktop management were required as part of the Y2K platform. The costs for these software products totalled \$23.4 million with total leasing costs of \$5.0 million required, bringing the 2001 request to \$18.5 million.

A report is being prepared on the closure of the City’s Y2K project that identifies these costs. A cost allocation algorithm will be developed in 2001 so that these costs can be allocated to the programs.”
 - (b) Item 2.1 of The City of Toronto 2001 Operating Plan and Budget (COT032171) is titled “Computer Equipment and Software Leasing Program”, and describes, *inter alia*, the CMO’s role in providing “full Information and Technology hardware and software leasing service”. The applicable “leasing rules” (COT032171) and certain lease terms are also described, which make it clear that IT leasing is an ongoing activity, and that “Desktop PCs, Notebooks, Servers & Scanners will be leased over 60 months” (COT032172; underlining added).

(c) The Y2K Status Report, dated March 12, 2001 (COT035037), directed to the Budget Advisory Committee and apparently subsequently referred to Council, indicated that “A total of \$160.9 million has been spent in the Y2K project. The majority of these expenditures were for resources, hardware, software, servers and network equipment” (underlining added; see item 3 on page 2 of the report, COT035038). Among the attachments to this report is a table titled “Y2K Project Summary”, which is reproduced below. It clearly indicates that, as of December 31, 2000, the capital cost of hardware and software under lease was in excess of \$73MM:

Y2K Project Summary			
<u>Operating Budget Impact</u>			
<u>Computer Leases</u>			
	HARDWARE	SOFTWARE	TOTAL
<u>Capital Cost of Hardware and Software under Lease</u>			
PLANNED			
Balance - December 31, 1999	34,000,000	9,150,000	43,150,000
New Hardware being funded by programs	5,500,000		5,500,000
New Software acquired in Y2K rollout		24,350,000	24,350,000
Balance - December 31, 2000	<u>39,500,000</u>	<u>33,500,000</u>	<u>73,000,000</u>
ACTUALS			
Proof:			
Hardware and software leases	35,010,179	33,554,436	68,564,615
Less: Leases expired in 2000	-1,876,927		-1,876,927
Add: Hardware funded by programs	5,500,000		5,500,000
Add: Councillors' leases	880,000		880,000
	<u>39,513,252</u>	<u>33,554,436</u>	<u>73,067,688</u>
VARIANCE	<u>-13,252</u>	<u>-54,436</u>	<u>-67,688</u>

None of these reports resulted in any objections or questions about the quantum of assets on lease, or the length of the leases.

- (3) The budget variance process, which generated reports to sub-committees of City Council for the express purpose of identifying departures from approved expenditures, was operating normally throughout the relevant time period. This

process presumably generated reports to Councillors indicating that the leasing program was over budget:

(a) Evidence of Ken Colley, September 4, 2003:

“Q: . . . Do I take it that the reference in paragraph 35 to the statement that

“Standard variance reports for non-program were not developed.”

That’s meant to refer to the monthly form of variance reports?

A: Yes, that’s correct.

Q: All right. Because there were, as I understand it, quarterly variance reports, the second type that I asked you about, prepared in the normal course and submitted to Budget Advisory, in respect of leasing, is that right?

A: With respect to all parts of the City’s operation, which included leasing, yes.”

(page 165)

. . .

“Q: And as a further example, under the next Tab 20, Begdoc 15561, and the bottom again, is a couple of e-mails, this is in October of 2000, the last e-mail it starts out with:

“Hi Rup [I’m not sure if that’s Rup or who - - anyway it says] operating variance report for the nine (9) month period and it’s September 30, 2000 along with a year end projection is due for submission on October 27th.”

And again, I take it that would be one (1) of the quarterly variance reports that budget or Accounting Services division would prepare?

A: This is quarterly variance report that Budget Services division would prepare.

Q: Budget Services division. And would that again be one (1) that would go to the Budget Advisory Committee?

A: Yes, it would.

Q: And those are a couple of examples, and again, in terms of what you observed or perceived through your involvement in this matter, did it appear to you that the normal budget variance reporting process to the Budget Advisory Committee were being followed?

A: Yes, it did.

Q: And did you ever get the sense or impression that the staff responsible for preparing those reports and submitting those reports were -- were trying to hide anything or do anything out of the -- the ordinary course?

A: No, I did not.”

(pages 167-168)

...

“Q: Did you ever hear of any problem or any issue, feedback if you will, from the Budget Advisory Committee, raising any issues or questions or concerns?

A: No, I did not.”

(page 168)

(b) Evidence of Al Shultz, September 5, 2003

“Q: All right. And I want to ask you about -- quickly about Tab 19, Begdoc 67320, you've given evidence, I think there's evidence both in your affidavit and, to some extent, in your testimony this morning, pertaining to tracking and who had what responsibilities in that regard.

I take it you'll have reviewed the evidence of Mr. Colley about variance reports and the like that came up yesterday afternoon?

A: Yes, I was actually here during that part of it.

Q: All right, and you subscribe to that portion of his evidence?

A: Yes, I do.

Q. All right. And, so, in terms of tracking, I guess it's -- one can define tracking in different ways, but there's a Budget Services responsibility in terms of variance reports?

A: That's correct, they're responsible for the -- the actual formal production of a report and the presentation to Committee.”

(page 184)

...

Q: All right. And then at the bottom of that page I was asking about quarterly variance reports earlier, and it's – it records a – attributes, to you, a statement:

“Quarterly variance reports are produced, which should have highlighted the spending in excess of budget and original Y2K computer estimate of 43 million.”

That's the purpose of those reports; is that fair?

A: That was my – that was my understanding at that point in time, yes.

Q: All right. Well, that is the purpose of such – one (1) of the purposes of such reports, isn't that right?

A: It is, yes.

Q: All right, and I take it you've not reviewed all the quarterly variance reports, or the backup associated with those reports?

A: No, I did not, but, I guess in consistence with what Mr. Colley said yesterday afternoon, is the capital budget reports were something that were not produced in 1999 or 2000.

Q: No, I – I appreciate that, but in – in providing a variance report for an operating budget variance, if it's – if it's a material variance, there's going to be some backup provided as to why that variance occurs; right?

A: That is correct.

Q: And – and that will, in the case of additional assets being put on computer lease, generating additional operating costs, one (1) would expect in the type of process that – that has been described, that that kind of backup information will reveal that additional assets are being put on lease, additional yearly expenditures are being incurred, and that's perhaps one (1) of the reasons for the variance; correct?

A: That is correct.

Q: So – so even though it may not be called a capital variance report, you would expect in the normal course that kind of information would come to light through that process; is that fair?

A: To some extent, that's correct.”¹⁰⁸

(pages 195-196)

¹⁰⁸ See also Shultz, June 24, 2003 at pgs. 12-13, 23-26. COT066500. And, for a document referring to the type of briefing notes that accompany budget submissions, see COT066500.

- (4) There are a number of instances when City Council had requested or directed further reports from Staff, but City Council did nothing to follow up on these requests. Aside from the recommendation and reports called for in the initial leasing report, the most notable example is the April 3, 2000 motion proposed by Councillor Chow and adopted unanimously by the Budget Advisory Committee on that date:

“A. Councillor Chow moved that:

...

“(3) the Commissioner of Corporate Services and the Executive Director of Information and Technology be requested to report back to the Policy and Finance Committee on the leasing contracts for computers, replacement of same and the City policy, including software packages, and monies that could be saved if the leasing contracts could be extended beyond three years.” (COT034438, at 34443, underlining added).

Nothing was done to follow up on this request.

- (5) There were other reports to City Council which should have resulted in follow up enquiries of some kind to ensure that the initiatives and problems identified in the reports in question were being dealt with. For example:
- (a) In a report to the Audit Committee dated June 23, 1998 (COT029594), the City Auditor made the following observations and recommendations with respect to over-expenditures in the IT division of the former City of Toronto:
- “... In addition, the hiring of 11 additional staff late in 1997 and the payment of lieu time to IT staff at the end of the year, despite variance reports projecting an over expenditure, made an already significant deficit, worse” (at COT029595);
 - there was a “lack of formal financial control procedures with respect to the purchase/payment process, and more importantly expenditure control, within the Division” (COT029596);

- “Funds for computer and related equipment purchases being provided in both the Capital Infrastructure project account and an ‘at large’ operating account, [complicated] the monitoring of expenditures against budget” (COT029596);
- “The disabling of the ‘funds availability’ check on the new system” was a factor which contributed to the failure to identify over-expenditures in the Division (COT029596);
- “In spite of the advice from Budget staff and variance reports indicating an over-expenditure, computer purchases continued to be made, additional staff hired and lieu time paid to IT staff” (COT029597, underlining added);
- “The over-expenditures that occurred in the former City of Toronto clearly demonstrates the need for effective budget control procedures to monitor expenditures/commitments against budget so that unanticipated over-expenditures, in both the operating and capital accounts, can be prevented” (COT029598, underlining added);
- “It is our understanding that Finance staff are in the process of developing budget control and related processes, and will communicate these to appropriate City staff as soon as possible” (COT029598, underlining added).

(b) In a subsequent report to the Audit Committee, dated November 20, 1998 (COT029620), the City Auditor concluded that,

- “Various problems and issues were identified during the June 30 variance reporting exercise. A number of these problems have been resolved, and Finance continues to work with departments to resolve any new or outstanding issues so that subsequent management reports will be more reliable.” (COT029623)
- “While the new financial information system will help address many of the current problems, Finance must ensure appropriate compensating procedures and effective management information exist in the interim, to assist departments in their overall responsibility for budgetary control.” (COT029623)

(c) In a report titled “Information Technology Systems”, apparently written sometime in 2000, it is stated that,

“As the City moves towards electronic service delivery to enhance service, and data warehousing to enhance decision support, new and heavy demands will be

placed on the City's IT infrastructure. The City is currently in the process of developing a comprehensive IT strategy which will review the strategic positioning of its infrastructure and services in order to effectively meet the overall IT needs of the City." (COT039053, at 39055; underlining added).¹⁰⁹

There is no indication of any action by City Council to monitor whether these problems and initiatives had been acted on.

178. Instead of voluntarily producing all of the records relevant to the obvious questions arising from the above documented facts, the City only responded to specific demands from Commission Counsel, and ignored requests from MFP that City Councillors be asked to produce any records or files relevant to their knowledge of and/or participation in decisions and deliberations about the City's computer leasing program.

179. By ignoring these issues, and by refusing to accept overall responsibility, as a sophisticated public institution, for any of the facts examined by this Inquiry, the City has provided a most unfortunate object lesson to its Staff: resist at all cost any acknowledgement or recognition of accountability. So long as those individuals at the pinnacle of the City, i.e. the Mayor and its elected representatives, continue to castigate MFP through unfounded allegations of intentional wrongdoing, and so long as they refuse to recognize any accountability themselves, or to approach the facts with any vestige of fairness or balance, the City will have learned nothing from this Inquiry. In that event, the benefits one would expect to result from the Commissioner's recommendations will be illusory at best.

January 25, 2005

All of which is respectfully submitted

¹⁰⁹ See also, Wilkinson Affidavit, para 156(5), Exhibit F thereto, and COT064190 – COT064232.

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