TORONTO COMPUTER LEASING INQUIRY

The Honourable Denise Bellamy, Commissioner

Ruling

Regarding a Motion by Tom Jakobek and Deborah Morrish

There has been a correction to page 5.
One of Mr. Jakobek's AMEX payments was incorrectly listed as $7,400.
The correct amount is $7,300.
Revised May 10, 2004

Introduction

Mr. Tom Jakobek is a former Councillor for the City of Toronto who has previously testified at the Toronto Computer Leasing Inquiry. The Commission has summoned him and he has agreed to return to answer questions that have arisen as a result of evidence heard since he testified in May 2003. At the same time, the Commission wishes to question him about new evidence, about which Dash Domi has recently testified when he too was recalled to the Inquiry. Mr. Jakobek refuses to respond to the summons to answer these questions, arguing that I should give the information to the police because it is constitutionally impermissible for me to examine this new evidence at a public inquiry. If I do not agree, then he asks that I state a case to the Divisional Court, or adjourn this matter so that he can bring an application before the Divisional Court to quash the summons. Since hearing argument on this motion on April 26 2004, we have been served with Mr. Jakobek's application to the Divisional Court.

Ms. Deborah Morrish is Tom Jakobek's wife. She holds power of attorney for her father, Mr. Kenneth Morrish. In two affidavits provided to the Inquiry, Mr. Jakobek referred to his father-in-law as the source for certain funds that are of interest to the Inquiry. As Mr. Morrish is unable to testify due to illness, I have summoned his power of attorney to answer specific questions. Ms. Morrish has accepted service of the summons, but asks for an adjournment to bring an application before the Divisional Court to quash the summons. We have now been served with her application to the Divisional Court.

Conclusion

In light of the nature of the applications to the Divisional Court, it would not be appropriate for me to refuse the requested adjournments. Accordingly, I will grant a brief adjournment to Mr. Jakobek and Ms. Morrish to allow them to proceed with their applications before the Divisional Court on the understanding that they will take all steps necessary to obtain an expedited hearing.

For reasons indicated below, I decline to exercise my discretion to turn this matter over to the police, I will not limit the recall evidence to only the areas desired by Mr. Jakobek, and I do not believe I have the jurisdiction to state a case to the Divisional Court.

Overview

Judicial inquiries in Canada have a lengthy legal history and are a valued social institution. In *Phillips* v. *Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97 at paragraph 62, Mr. Justice Cory explained what judicial inquiries mean to Canadian society and the communities in which we live:

> One of the primary functions of public inquiries is fact-finding. They are often convened in the wake of public shock, horror, disillusionment, or skepticism, in order to uncover "the truth" … In times of public questioning, stress and concern, they provide the means for Canadians to be apprised of the conditions pertaining to a worrisome community problem …

It was for precisely this reason that Toronto City Council established the Toronto Computer Leasing Inquiry. The City's computer leasing deal with MFP Financial Services Ltd., originally understood by City Council to be worth $43 million, had exceeded $80 million. Three year lease terms had come to exceed five years. City Council's initial attempts to understand how these events had occurred raised far more questions than answers. Accordingly, City Council voted to establish a judicial inquiry with terms of reference to uncover the truth about this complex computer leasing transaction. The Terms of Reference require me to investigate "all aspects" of this transaction, including any "malfeasance, breach of trust, or other misconduct".

Over the past two years, the Commission has conducted investigations and heard the testimony of witnesses as required by the Terms of Reference. We have heard from 107 witnesses in 165 hearing days, on different aspects of this complex leasing transaction and on related issues. A partial list of important topics on which evidence has been presented exceeds sixty in number (see Appendix A).

Pursuant to my Terms of Reference and as part of these investigations, the Commission has considered the possibility of misconduct, intentional or unintentional. We did not do so out of any preconceived notions, but in response to information we received. On the eve of starting the hearings on September 30, 2002, we received information that, if believed, would constitute serious misconduct under my Terms of Reference, and could also be criminal behaviour. I contacted the Ontario Provincial Police to investigate. At their request, the Inquiry was adjourned for two months. Ultimately, no charges were laid.

As required by our Terms of Reference, we too investigated this information. In April and May 2003, Commission Counsel called evidence relating to the allegations investigated by the OPP. At the hearings, we made public all related documents, including the entire police brief. Much cross-examination centred on a statement allegedly made by Jeffery Lyons, lobbyist for Dell Financial Services Limited, to two of his DFS clients. DFS was bidding on the tender issued by the City of Toronto in 1999 to finance a significant acquisition of computers before Y2K. At the

meeting with his clients, Mr. Lyons is alleged to have said words to the effect that "Tom says it's worth $150,000" and that MFP and others "would pay 150 grand". DFS lost the bid; MFP won.

There was considerable cross-examination about whether the alleged statement should be interpreted to mean a bribe, a success fee, a contingency fee, a shakedown, etc. This allegation though, if true, is inextricably linked to the transaction the Commission is now investigating. If this statement was made, then further examination of it is necessary for two reasons. I need to understand the relationship between a lobbyist, a City Councillor, and the City's suppliers. And I need to understand whether and how the relationship affected the computer leasing transaction. This is clearly within my Terms of Reference. Indeed, it would be irresponsible of me as a Commissioner to turn a blind eye to such alleged potential misconduct.

The Commission continued its investigations even after witnesses gave evidence on this issue. It was but one of many avenues of inquiry that we pursued both in and out of the public hearing room.

The Commission's investigations led us to evidence that, if believed, may show that money changed hands improperly. Our investigations also led us to explanations that, if believed, may show that no money changed hands improperly. To date, we have no objectively verifiable dispositive evidence one way or the other. To resolve this possible conflict in the evidence, to treat everyone fairly, and to properly inform the public, it is necessary to hear all this evidence in public, where it can be tested under oath by cross-examination.

Mr. Jakobek argues that the Commission cannot continue its investigation in public. He says it is "constitutionally impermissible". Instead, he wants a private police investigation. I do not agree.

Judicial inquiries are investigations conducted in public. They are conducted in public for a very compelling reason. In *Westray*, the statement of US Supreme Court Justice Louis Brandeis, "Sunlight is said to be the most powerful of disinfectants " is cited by Cory, J. in support of the important principle of openness and transparency of public inquiries in Canada.

Mr. Jakobek and Ms. Morrish argue that any allegations of possible misconduct are properly within the domain of the police and not for this public inquiry. However, the Supreme Court of Canada has repeatedly held that public inquiries can look into matters that might also be related to the criminal law. Public inquiries and criminal prosecutions both serve very valuable but very different social purposes. Inquiries cannot impose criminal guilt; they cannot punish. On the other hand, inquiries can look broadly at a complicated problem and make wide-ranging recommendations for reform, which criminal prosecutions cannot do. Therefore, not only is it permissible, it is vital that both inquiries and criminal prosecutions be able to examine the same alleged misconduct in their own different ways and for different purposes.

Important as public inquiries are, they can clearly affect those publicly investigated. The Supreme Court of Canada has directed that "no matter how important the work of an inquiry may be, it cannot be achieved at the expense of the fundamental right of each citizen to be treated fairly": *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System in Canada – Krever Commission)*, [1997] 3 S.C.R. 440 at paragraph 31. I am in complete agreement with that pronouncement.

I will address Commission Counsel's treatment of Mr. Jakobek and Ms. Morrish below. It is evident to me that Commission Counsel has treated them fairly at all times.

The highly public nature of inquiry proceedings can affect reputations. I am sensitive to this on behalf of all witnesses whom I have summoned to this Inquiry to testify. It is another reason why everyone affected by a public inquiry must be treated fairly. It is also for that reason that I have repeatedly cautioned the public not to jump to conclusions without hearing all the evidence. As recently as April 19, 2004, I cautioned people to listen to the evidence in the recall portion of the Inquiry with an open mind and not to draw any conclusions based on it alone, as this evidence is but a small component of the entire body of evidence that has already been presented in this Inquiry.

Nevertheless, concern for reputation alone cannot halt the important work of a public inquiry. The Supreme Court said in the *Blood Inquiry* decision at paragraph 39:

> ...I doubt that it would be possible to meet the need for public inquiries whose aim is to shed light on a particular incident without in some way interfering with the reputations of the individuals involved.
>
> … it is clear that commissioners must have the authority to make those findings of fact which are relevant to explain and support their recommendations even though they reflect adversely upon individuals.

The issue of reputation raises a practical point. Mr. Jakobek has maintained vigorously that there is an innocent explanation to all the Commission's concerns about possible improper payments. I welcome that explanation under oath, where it can be properly examined. When the Toronto Computer Leasing Inquiry began its public hearings in December 2002, I stated in my opening speech that "one important role of public inquiries can sometimes be to show the public, where it is warranted, that groups or individuals suspected of wrongdoing or tarnished by rumour have in fact done nothing wrong."

Despite that, Mr. Jakobek takes the position that he should not be required to testify. The issues about which Mr. Jakobek wishes not to testify have recently received much publicity, partly, it must be said, because of the timing of Mr. Jakobek's motion. Had he brought this motion on or before April 19, 2004, none of the evidence of either investigator Bruce Durling or the recall testimony of Dash Domi would have been in the public domain. Instead, Mr. Jakobek waited until the completion of Mr. Domi's testimony, even though the Commission had informed him well in advance, of the evidence that it intended to present.

In any event, Mr. Jakobek has provided an innocent explanation in the form of an affidavit. Still, he resists the opportunity to fully present his innocent explanation publicly in the witness box at the Inquiry. I find this perplexing. Even more perplexing is Mr. Jakobek's attempt to advance his innocent explanation through his counsel during argument on this motion, which is not evidence at all. But perhaps most perplexing is Mr. Jakobek's lawyer's claim that Mr. Jakobek has now found documents to support his client's innocent explanation, documents that "completely destroy" Commission Counsel's "assumption", yet he refuses to provide these

documents to this Inquiry. To exacerbate this confusion, Mr. Jakobek's lawyer is prepared to give these same documents to the police.

Mr. Jakobek maintains that it would be unfair to continue my public investigation. However, since he claims there is an innocent explanation, one not yet properly presented in public at the hearings, it would be unfair not to continue.

This Inquiry and the Criminal Law

The alleged statement "Tom says it's worth $150,000", *etc*. was the focus of vigorous cross-examination in April and May 2003. I have made no findings yet on whether this statement was even made as alleged, and if it was made, what meaning should be attributed to the words. However, if this statement was in fact made, one possible interpretation is that Mr. Lyons was soliciting an improper payment from DFS to help DFS win the City's computer leasing business. When the public hearings turned to other subjects in 2003, Commission Counsel continued confidential investigations into the alleged statements. There is evidence that points both toward and away from misconduct. That evidence follows.

Mr. Dash Domi was the lead MFP contact person with the City of Toronto, hired without prior computer leasing experience. In short order, he developed extensive telephone and personal contact with Tom Jakobek, who was then a City Councillor and Chair of the Budget Committee. Mr. Jakobek made a motion in committee, which passed unanimously, but which in hindsight might be construed as favourable to MFP and its commissioned salesman, Dash Domi.

The MFP transaction was finalized on October 1, 1999, and Mr. Domi received $1.2 million in bonus and commission. The first installment of approximately $94,000 was paid into his account on October 29, 1999. On November 1, he withdrew 25 one thousand dollar bills. He telephoned Councillor Jakobek at 3:46 p.m. and again at 4:45 p.m. Two minutes later he entered the parking garage under City Hall, the building in which Councillor Jakobek had an office. He acknowledged that it was likely he saw Mr. Jakobek at that time. Mr. Domi left the parking garage 13 minutes after he arrived.

Mr. Jakobek's American Express Card statement shows charges on November 1, 1999 for a $14,000 family trip to Disney World. The trip began five days later, on November 6. In September, October, and December 1999, Mr. Jakobek paid his American Express bill, issued on the 13th of each month, in full, usually shortly after the statement date. For November, the American Express records show that Mr. Jakobek prepaid, all on November 3, a total of $21,000 in four payments of $3,700, $4,000, $6,000 and $7,300.

Mr. Dash Domi has sworn an affidavit, and has testified recently, that the $25,000 in one thousand dollar bills, was given to his brother Tie Domi on November 1st to repay personal loans of about $40,000. Tie Domi has sworn an affidavit saying he received "around" $25,000 "on or about" November 1st. November 1st 1999 was his thirtieth birthday. Tie Domi has not yet testified.

Mr. Jakobek has said he received the $21,000 that was deposited onto his American Express card bill from his father-in-law, Mr. Kenneth Morrish. He says in his affidavit that he neither recalls whether the payments were made by cash, cheque, or bank draft, nor does he remember who

made them or where they were made. We have been informed that Mr. Morrish is incapacitated and that his daughter Deborah Morrish exercises power of attorney over his financial affairs.

I make no comment at present on the ultimate meaning, significance or probative value of this evidence. However, what I have heard to date, does raise questions about the possibility of improper payments related to the computer leasing transaction in my Terms of Reference. This is particularly the case if considered in conjunction with the alleged statement about $150,000 mentioned earlier.

Commission Counsel wish to question Mr. Jakobek about the events described above. Commission Counsel also want to ask Ms. Morrish about her attempts to obtain her father's financial documents that are relevant to this Inquiry. These are the questions Mr. Jakobek and Ms. Morrish do not want to answer because they say that, in so asking, this Inquiry is conducting an impermissible criminal investigation.

The Supreme Court of Canada Case Law

The Supreme Court has repeatedly held that public inquiries may fully investigate possible misconduct, and make findings of misconduct about acts that might also attract criminal liability. The simplest demonstration of the Supreme Court's repeated affirmation of this principle lies in passages from *Consortium Developments (Clearwater) Ltd. v. Sarnia*, [1998] 3 S.C.R. 3. *Consortium* is the most helpful single reference because it is the latest Supreme Court case on point and it summarizes the earlier jurisprudence.

In *Consortium*, the Supreme Court made the following statements that in my view answer Mr. Jakobek's and Ms. Morrish's concerns:

1. … the general constitutional rule that permits provincial inquiries that are … directed to provincial matters (in this case local government) to proceed despite possible "incidental" effects on the federal criminal law power was affirmed by Lamer J. [in *Starr* v. *Houlden*, [1990] 1 S.C.R. 1366] at p.1409 … "it is clear that the fact that a witness before a commission may subsequently be a defendant in a criminal trial does not render the commission *ultra vires* the province". [*Consortium*, paragraph 51]

2. The decision in *Starr* cannot be taken as a licence to attack the jurisdiction of every judicial inquiry that may incidentally, in the course of discharging its mandate, uncover misconduct potentially subject to criminal sanction. [*Consortium* paragraph 50]

3. The ruling in [*A.G. Canada* v. *Commission of Inquiry on the Blood System*, [1997] 3 S.C.R. 440] ought to be applied to the present case to hold that not only may the Commissioner acting under the second branch of s.100 [now s.274 of the Ontario *Municipal Act*] inquire into, as part of his larger mandate, conduct which may have potential criminal or civil consequences, but may in his report (per Cory J. at paragraph 57) " … make findings of misconduct based on the factual findings, provided they are necessary to fulfill the purpose of the inquiry as it is described in the terms of reference". [*Consortium* paragraph 39]

4. … in the *Blood Inquiry* case … the Krever Inquiry … was held to be within its jurisdiction to make findings of misconduct, even misconduct carrying potential civil or criminal liability, provided such findings were properly relevant to the broader purposes of the inquiry, as set out in its terms of reference. [*Consortium* paragraph 52]

5. The *Blood Inquiry* case endorsed the earlier line of cases in this Court giving broad scope to provincial inquiries … The *Westray* case [*Phillips* v. *Nova Scotia*, [1995] 2 S.C.R. 97] is particularly interesting in comparison to the facts of this case because at the time the mine managers were called to testify before the Commission they were in fact simultaneously facing charges …The affirmation of the correctness of those decisions by a unanimous Court in the *Blood Inquiry* case renders the division of powers ground of appeal untenable in this case as well.

Here, a criminal prosecution has not even been initiated concerning the issues about which these witnesses have been asked to give evidence. At present, neither is a suspect.

I am aware of the Supreme Court's warning in *Consortium*, at paragraph 49, that despite having valid terms of reference, a commission must not "undertake a substitute police investigation as in *Starr*". It is argued that I must stop only those parts of the Inquiry that relate to the evidence of possible improper payments, because it is only in that respect that I have crossed an impermissible constitutional boundary. I do not agree. In addressing possible misconduct during my investigations and hearings, I must focus attention not on whether the same misconduct might fall within the criminal law, but rather whether the investigation is, to use the words from the case law above "necessary to fulfill the purpose of the inquiry as it is described in the terms of reference" or "properly relevant to the broader purposes of the inquiry, as set out in its terms of reference". If I am looking into potentially criminal conduct that does not fulfill my terms of reference, then and only then has the impermissible constitutional border been crossed.

Turning now to the facts before me, further investigation into possible improper payments involving Mr. Jakobek and Mr. Dash Domi is "necessary to fulfill the purpose of the inquiry", and "properly relevant to the broader purposes of the inquiry". How can I properly evaluate the leasing transaction if I ignore the possibility that improper payments might have been a factor in helping the winning bidder? How can I be seen to have inquired into "all aspects" or "all relevant circumstances" if I simply ignore the possibility that improper payments were made? How can I be seen to be treating all affected parties fairly if I leave the evidentiary story half-completed?

The cases discussed in *Consortium* also explain that investigation of misconduct potentially subject to criminal liability must be no more than "incidental" to discharging my mandate. Misconduct is "incidental" to an inquiry's terms of reference if the inquiry is aimed at understanding a fuller picture than the misconduct itself. For example, it is clear from the *Walkerton Report* at Part I, pages 182-184 that the Commissioner found the misconduct of the Koebel brothers to be a critical causal component of the tragedies that ensued. It is equally clear that the Koebels' conduct was at least potentially subject to criminal liability. Yet the Walkerton Inquiry did not overstep any constitutional boundaries because the misconduct was part of a

much more comprehensive inquiry into the delivery of water services to a community and a province.

Any findings I might make about improper payments fall into the category of incidental, as that term is discussed above. The record of this Inquiry brings into clear focus the reality that investigations of possible improper payments are simply one part of a much more comprehensive investigation into a complex computer leasing transaction.

The Scope of Effective Public Inquiries

If Mr. Jakobek and Ms. Morrish are correct, and investigation by a judicial inquiry into potentially criminal misconduct is prohibited, public inquiries will become ineffectual.

Inquiries are established when something significant to the public appears to have gone seriously wrong. It is vitally important that an impartial investigator seek the fullest possible explanation. When this happens, misconduct is not always the root cause. Systemic failures, institutional inadequacies, innocent error may be responsible for these events. But an impartial investigator will eliminate none of these possible causes presumptively. That is why, if Mr. Jakobek and Ms. Morrish succeed, and serious misconduct must be constitutionally removed from every public inquiry's menu of investigative options, public inquiries will become ineffectual. A judicial investigation limited to uncovering innocent explanations may be no investigation at all.

Commission Counsel Have Treated Mr. Jakobek Fairly

Mr. Jakobek alleges that he has been unfairly targeted by Commission Counsel blinkered with "tunnel vision". The record demonstrates otherwise. Commission Counsel have, through extensive contact with Mr. Jakobek, given him every opportunity to address their concerns in all areas of this Inquiry's investigations that relate to him.

Indeed, counsel for the City suggests that Mr. Jakobek has demonstrated throughout a consistent pattern of selective co-operation. The evidence certainly seems to support this assertion. In addition, Mr. Jakobek admitted under oath that he lied repeatedly to the press and to one of his own lawyers regarding a flight to Philadelphia with MFP representative Dash Domi. While in the witness box he gave two contradictory explanations for one of the lies to his lawyer. It also appears he lied to his second lawyer.

Mr. Jakobek's pattern of conduct has given Commission Counsel every reason to approach his statements with care, and seek whatever independent corroboration might exist. After repeated requests from Commission Counsel for more details about the American Express payments, they were told that "nothing further will be forthcoming from Mr. Jakobek at this time". In these circumstances, not only are Commission Counsel right to persist in seeking explanations from other sources, they have an obligation to do so.

The same pressing need for independent verification applies to Mr. Jakobek's claim, made during his lawyer's submissions on this motion, that he has helpful information recently uncovered. Mr. Jakobek has not agreed to provide it to Commission Counsel. He refuses to answer questions about it under oath, and he has lied to his own lawyers on two previous occasions in this Inquiry. Thus it would be wrong for me at this point to give evidentiary value

to Mr. Jakobek's statement made in this manner. But it does seem to signal an apparent desire on the part of Mr. Jakobek to manage very tightly what he gives to Commission Counsel, and how he gives it. It also signals that Mr. Jakobek is withholding his full co-operation from this Inquiry, refusing paradoxically even to provide information which he insists would exonerate him.

I am further troubled by this: Mr. Jakobek is unwilling to answer questions in the witness box on possible improper payments, but he is willing to let his untested affidavits remain on the public record, and indeed to amplify them through a written press release from his lawyer which is, of course, not under oath.

This Inquiry has no power to punish, no power to award damages, and no power to consider, much less find, criminal or civil liability. Mr. Jakobek is fully protected by an array of statutes, cases, and the *Charter*, from any direct or derivative adverse civil and criminal consequences that might otherwise flow from co-operating with this Inquiry. He received a summons, and thus had a legal obligation to provide helpful information. Commission Counsel's investigations are confidential. It has been the general practice of Commission Counsel to grant witnesses full confidentiality during the interviews, so that any statement made in a confidential interview cannot be used against Mr. Jakobek in the witness box.

Media Coverage

Part of Mr. Jakobek's complaint of unfairness emanates from the media coverage of the evidence called between April 19 and 21, 2004 pertaining to possible improper payments. From the Commission's point of view, I am satisfied that everything that could have been done to treat Mr. Jakobek fairly in the circumstances was done. Mr. Jakobek had many opportunities to affect the conduct of the investigation and the calling of the evidence. He was fully apprised of the substance of the evidence well before it was made public. He cannot complain about the public impact of the evidence when he had an opportunity to challenge it before it was called but chose not to do so.

Further, Mr. Jakobek's choice of timing of this motion is unfair to Mr. Dash Domi. Mr. Domi faced the publicity accompanying the evidence in issue. It is hard to see why Mr. Jakobek should be treated any differently.

There is another answer to Mr. Jakobek's complaint about media coverage. The response comes from the judgement of Cory J. in *Westray* at paragraph 115: "The public appetite for information and the tremendous media response to it arise from the nature of the event itself. An inquiry may increase the appetite, but it is not responsible for its creation."

I would add that the events before me go to the heart of effective municipal government. Open government at all levels, combined with an informed voting public, are both very important to the continued vibrancy of our democratic traditions. Therefore, a widespread public appetite for matters of municipal government is to be welcomed and encouraged. It cannot be forgotten that what is in issue before me is, after all, the conduct of those entrusted by us to govern us responsibly. Elected and unelected public office holders must accept, generally speaking, public scrutiny as both necessary and proper. Media coverage of public inquiries is an important link in the transmission of information from the hearing room to public awareness and understanding.

Focusing as Mr. Jakobek does on the adverse personal impact of publicity wrongly overlooks a critical public dimension of judicial inquiries. Mr. Justice Samuel Grange made this point cited by Cory J. in the *Westray* decision at paragraph 63:

> I remember once thinking egotistically that all the evidence, all the antics, had only one aim: to convince the commissioner who, after all, eventually wrote the report. But I soon discovered my error. They are not just inquiries, they are *public* inquiries … I realized that there was another purpose to the inquiry just as important as one man's solution to the mystery and that was to inform the public. Merely presenting evidence in public, evidence which had hitherto been given only in private, served that purpose. The public has a special interest, a right to know and a right to form its opinion as it goes along.

In sum, Mr. Jakobek had every protection the law can afford. Commission Counsel demonstrated patience with him over many months, and made careful efforts to explain what they needed from him and why. It is in this factual and legal context that I find his limited co-operation perplexing, and his claim of unfair treatment without merit.

In so far as his comments about publicity are concerned, Mr. Jakobek is essentially seeking an order for relief of an anticipated *Charter* breach in the event that he may be charged with a criminal offence based on the same evidence that is before me. This is highly speculative. In any event, the onus to establish such a breach is on Mr. Jakobek. He has not discharged that onus of demonstrating a high degree of probability that the harm feared will actually occur.

Any suggestion by Ms. Morrish's of unfairness likewise lacks merit. Her husband's sworn statement caused this Inquiry to require information from her. Despite months of contact Commission Counsel still have no information. It is now fair to ask Ms. Morrish to explain her efforts.

A Police Investigation

Mr. Jakobek has asked that I refer the information related to possible improper payments to the police for a criminal investigation. I decline to do so for the following reasons, many of which are discussed in greater detail above:

- This Inquiry has the legal power to investigate the issue, and has done so fairly.
- This Inquiry has a very different mandate, one which a police investigation could not possibly fulfill.
- Nothing prevents the police from conducting an investigation now or following this Inquiry, as was the case in the Walkerton and Blood Inquiries. In the meantime, co-operating with this Inquiry will not prejudice anyone in any criminal investigation which might ensue.
- There was already an early police investigation of this issue.
- We are near the completion of this Inquiry, and the new City Council stated in January 2004 that it wishes to receive my recommendations as soon as possible.
- Part of the evidence in issue has already been presented at the hearings. The full picture must emerge.

- The good faith of Mr. Jakobek's request for a police investigation is undermined by his counsel's simultaneous assertion that there is no evidence of wrongdoing by Mr. Jakobek.

The Resolution is Too Vague

Ms. Morrish's counsel argues that the City of Toronto Resolution fails to specify the particular misconduct to be inquired into, and is therefore unacceptably vague. Ms. Morrish's argument is essentially about how people affected by an Inquiry receive the details they need about potential wrongdoing to respond fairly. That detail need not be in the initial resolution that establishes the inquiry. It can be provided during the course of the inquiry, accompanied by sufficient time to prepare and respond.

I have already addressed this issue in detail in my Ruling on an application for particulars by Mr. Ball Hsu in the related Toronto External Contracts Inquiry. That Ruling is on the Inquiry website, www.torontoinquiry.ca. I will not repeat the analysis but will simply summarize the key points. They flow from the *Consortium* case in the Supreme Court where the same argument was made and rejected.

The main purpose of an inquiry is to shed light on a problem whose causes are not immediately apparent. As stated by the Supreme Court in *Consortium* at paragraph 30, "if the municipality had a sufficient grip on the relevant facts to give detailed particulars, there might be no need for an inquiry". Therefore, the Court rejected the proposition that a municipality must specify the particular misconduct that caused the problem in issue before the inquiry's investigations have begun.

On the other hand, an inquiry's powers cannot be unlimited. Therefore, the Supreme Court has held that the subject matter, or the problem whose root causes are being sought through an inquiry, must be set out intelligibly. This gives an inquiry some limits and some focus without pre-determining the inquiry's investigative path.

What then of persons affected by allegations of wrongdoing if the inquiry's investigation reveals the possibility of such wrongdoing? The Supreme Court in *Consortium* held that the municipality in the resolution establishing an inquiry cannot possibly give fair notice of potential misconduct that is yet to be uncovered. However, the Court also held that every commissioner of an inquiry must be fundamentally fair. Thus the commissioner, not the municipality, must provide fair notice of possible misconduct, and a fair chance to respond.

The principles from *Consortium* were followed here. The Resolution establishing this Inquiry makes no reference to particular misconduct against named individuals. The City rightly made no assumptions about what this Inquiry would or should find before investigations began. Ms. Morrish's reliance on *Godson* v. *Toronto* (1890), 18 S.C.R. 36 does not assist her, given the narrow reading of that case in *Consortium* at paragraph 38. The Toronto Computer Leasing Inquiry Resolution bears a striking similarity to the one approved in *Consortium*. I assume this was no accident. Indeed the TCLI Resolution improves on the one in *Consortium* because it refers specifically to "malfeasance", thus placing all parties on notice that this inquiry will go in that direction if the evidence so requires.

Further, as discussed above, I find that Ms. Morrish received the particulars she needed to respond fairly to what was required of her. Commission Counsel seeks the financial records she controls. Her husband has, by his sworn statements, made those documents relevant. Commission Counsel have repeatedly explained why the documents are necessary for the Inquiry.

Ms. Morrish Has No Relevant Evidence to Give

This argument has no merit. Mr. Jakobek swore in two affidavits that, to the best of his recollection, his father-in-law gave him $21,000 to pre-pay his American Express card for the trip to Disney World in November 1999. Ms. Morrish controls her father's financial records. Commission Counsel seek financial documentation from the fall of 1999. Despite repeated requests, Commission Counsel have received no answers. Ms. Morrish must now simply explain her efforts to retrieve the documents, so that if required, this Inquiry can assist in obtaining the available material.

Stating a Case to Divisional Court

I have been asked to state a case to the Divisional Court on the issues argued. As I read the *Public Inquiries Act*, that option does not appear to be procedurally available to me. A judge appointed to head a commission under section 100 of the *Municipal Act* R.S.O. 1990, Chapter M.45, has only "all the powers of a commission under Part II of the *Public Inquiries Act."* The power to state a case comes under Part I section 6 of the *Public Inquiries Act.* The only power I have to state a case to the Divisional Court lies in Part II section 8 (contempt). The Supreme Court of Canada in *Consortium* (at paragraph 31) acknowledged a similar limitation when dealing with section 5(2) of the *Public Inquiries Act* (also located under Part I) and it was for this reason that we specifically incorporated section 5(2) into our Rules of Procedure [rights of persons before misconduct found].

Conclusion

For the reasons stated above, I am rejecting on their merits all complaints made before me by Mr. Jakobek and Ms. Morrish. The relief sought before me is denied. The request that I state a case to the Divisional Court is denied. However, as I said above, in light of the nature of their applications to the Divisional Court, I do not believe it would be appropriate for me to refuse their requests for an adjournment of the Inquiry hearings to permit them to pursue their remedies in another forum. I will, therefore, grant a brief adjournment on the understanding that they will take all necessary steps to have the applications for judicial review heard at the earliest possibility.

Having adjourned the hearings, I am aware of the cost to the taxpayer, coupled with other undesirable consequences of adjourning hearings so near to completion of the evidence in this Inquiry. The drawbacks are large enough that delay must be avoided wherever possible. There is a pressing need to continue, especially in light of Justice Cory's remarks in *Westray* (paragraph 66) "Every Inquiry created must proceed carefully in order to avoid complaints pertaining to excessive cost, lengthy delay..." and that "the longer this public inquiry is postponed, the greater the likelihood of increasing public disillusionment, frustration and mistrust" (paragraph 71).

Having expressed those concerns, I recognize that Mr. Jakobek and Ms. Morrish are entitled to pursue their rights in another forum, and those rights must prevail. I am confident counsel will work co-operatively to minimize the delay in pursuing those rights.

Commission Counsel:	Mr. David Butt and Ms Daina Groskaufmanis
Counsel for Tom Jakobek:	Mr. Alan Gold
Counsel for Deborah Morrish:	Mr. Morris Manning, Q.C., and Mr. Jonathon Feasby
Counsel for the City of Toronto:	Mr. Robert Centa and Ms. Linda Rothstein

Motion heard:	Monday, April 26, 2004
Ruling released:	Friday, April 30, 2004

APPENDIX 'A'

Partial List of Issues Considered by the Toronto Computer Leasing Inquiry

- Governance structure within the City of Toronto
- Role of the Mayor
- Role of the Chief Executive Officer
- Role of Councillors
- Relationship of Councillors vis-à-vis staff
- Role of lobbyists
- City of Toronto conflict of interest policies
- Pressures facing the new City of Toronto, including amalgamation, provincial government downloading, staff reductions, integration, Y2K
- The City's response to the Y2K problem, including the Year 2000 Budget and financial controls
- Early efforts of MFP at the City of Toronto (i.e., pre-amalgamation)
- Councillors' computer leases (in 1996 and in 2000)
- MFP policies re expenses, conflict
- How MFP finances leases
- MFP's management structure
- MFP's sales structure
- Profitability of leases at MFP
- The hiring of Dash Domi by MFP

- The supervision of Dash Domi
- Expenses charged by Dash Domi and others (notably Vince Nigro) at MFP
- Basic principles of leasing transactions
- Purchasing policies and procedures at the City of Toronto
- How purchasing was involved in the RFQ and MFP leases
- Tendering policies (i.e., RFPs, RFQs, RFIs)
- Structure of the City Legal Department
- The role of City Legal in the MFP lease negotiations
- The role of external legal counsel in the MFP lease negotiations
- Statements by Jeffery Lyons to Dell Financial Services
- Allegations by Paula Leggieri
- SAP (finance software) – how it works, what it does, and how it functioned in the case of MFP leases
- Structure of the Finance Department
- The role of various Finance Department staff in the RFQ and administration of the MFP leases
- Oracle software – what it is, how and why it was acquired, the usage of Oracle licences
- The structure and operation of the City of Toronto Contract Management Office
- How the leasing process worked administratively
- The role of senior City staff (Jim Andrew, Wanda Liczyk and Lana Viinamae) in the lease transaction
- Lobbyists (as part of Good Government panels) including level of appropriate interaction between lobbyists and public office holders, functions of lobbyists, and the effectiveness of a lobbyist registry

- Procurement (as part of Good Government panels) including effective procurement policies, contact with public office holder(s) during the tendering process, and contract management

- Governance (as part of Good Government panels) including changes to the structure of City Council, power and authority of the Mayor, the roles and responsibilities of members of Council, the structure of the Council itself, and smaller community or neighbourhood councils

- Ethics (as part of Good Government panels), including the need for an Integrity/Ethics Commissioner, and fostering an ethical culture within an organization