

TORONTO EXTERNAL CONTRACTS INQUIRY

The Honourable Denise Bellamy, Commissioner

Ruling on Standing

BACKGROUND

At its Council meeting on October 1, 2 and 3, 2002, Toronto City Council voted to extend the terms of reference of the Toronto Computer Leasing Inquiry by establishing a second public inquiry under s.100 of the *Municipal Act*. The City asked Acting Chief Justice Heather Smith to appoint me as Commissioner of this second Inquiry and she did so on October 23, 2002.

The full Terms of Reference can be found on the Inquiry's website at www.torontoinquiry.ca and at "Schedule A" of these reasons.

STANDING HEARINGS

The Commission published a "Call for Applications for Standing" in relevant newspapers in Canada and the United States advising that applications for standing were to be made in writing and received in the Inquiry offices by November 1, 2002. The notice stated that applications for standing were being invited from any person or group who has a substantial and direct interest in the subject matter of the Inquiry or whose participation may be helpful to fulfill the Commission's mandate.

I received seven applications for standing.

Our rules have recently been amended to recognize the anomaly of having two different inquiries with overlapping jurisdiction. In so far as standing is concerned, Rule 11.1 has been added.

Hearings on the applications took place on Tuesday, November 5, 2002, in the Council Chambers at the East York Civic Centre, 850 Coxwell Avenue, Toronto.

Before the Hearings, the Commission published Rules of Procedure applicable to the Inquiry, including a section on standing (Paragraph 8). The Rules stated as follows:

STANDING

7. Persons, groups of persons, organizations or corporations (“people”) who wish to participate may seek standing before the Inquiry.

8. The Commissioner may grant standing to people who satisfy her that they have a substantial and direct interest in the subject matter of the Inquiry or whose participation may be helpful to the Commission in fulfilling its mandate. The Commissioner will determine on what terms standing may be granted.

9. People who are granted standing are deemed to undertake to follow the Rules of Procedure.

10. People who apply for standing will first be required to provide written submissions explaining why they wish standing. Written submissions are to be received at the Commission’s office no later than 4:00 p.m. on Friday, November 1, 2002.

11. People who apply for standing will also be given an opportunity to appear in person before the Commissioner to explain their reasons for requesting standing. Applications for standing will be heard starting on Tuesday, November 5, 2002.

11.1 People with standing in the Toronto Computer Leasing Inquiry shall, upon request, be granted standing in the Toronto External Contracts Inquiry to the extent that the Commissioner determines that evidence received at this Inquiry may engage their substantial and direct interest. [A similar Rule has been added to the Rules of Procedure of the Toronto Computer Leasing Inquiry.]

12. The Commissioner has appointed Commission counsel to represent her and the public interest. Commission counsel will ensure that all matters which bear on the public interest are brought to the attention of the Commissioner. Commission counsel will have standing throughout the Inquiry.

DECISION ON THE APPLICATIONS FOR STANDING

General

I will deal first with the applications I received in which oral and written representations were made. I will next deal with the applications in which written representations only were made. Lastly, I will deal with the applications made in

this Inquiry for standing in the Toronto Computer Leasing Inquiry. These applications were received pursuant to Rule 11.1 in that Inquiry's Rules of Procedure.

I have granted full standing to the City of Toronto, Ball Hsu and Associates Inc., Mr. Ball Hsu, Dell Computer Corporation, Ms. Wanda Liczyk.

I have granted special standing to the Canadian Union of Public Employees, Local 79.

I have denied standing to Mr. Gary Walsh and Mr. Michael Senisin.

I have granted full standing in the Toronto Computer Leasing Inquiry to Ball Hsu & Associates Inc., Mr. Ball Hsu, and Dell Computer Corporation.

Full Standing includes:

1. Access to documents collected by the Commission subject to the Rules of Procedure;
2. Advance notice of documents that are proposed to be introduced into evidence;
3. Advance provision of statements of anticipated evidence;
4. A seat at counsel table;
5. The opportunity to suggest witnesses to be called by Commission counsel, failing which an opportunity to apply to me to lead the evidence of a particular witness;
6. The opportunity to cross-examine witnesses on relevant matters; and
7. The opportunity to make closing submissions.

Special Standing includes:

1. Access to documents collected by the Commission subject to the Rules of Procedure;
2. Advance notice of documents that are proposed to be introduced into evidence;
3. Advance provision of statements of anticipated evidence;

4. The opportunity to suggest areas that should be canvassed and areas for examination of certain witnesses by Commission counsel; and
5. The opportunity to make closing submissions.

REASONS FOR GRANTING STANDING

City of Toronto (represented by Ms. Linda R. Rothstein)

The City of Toronto will be directly and substantially affected by all aspects of the Inquiry and may be helpful to me in fulfilling my mandate. The City called for the Inquiry, and the Terms of Reference for the Inquiry concern issues involving the City. Further, the City is likely to be directly affected by my recommendations.

Ball Hsu and Associates Inc. and Mr. Ball Hsu (represented by Mr. Brian Heller)

Ball Hsu & Associates Inc. and Mr. Ball Hsu will be directly and substantially affected by this Inquiry. As the Terms of Reference focus specifically on the transactions between the City and Ball Hsu & Associates Inc., their interests may be affected by the evidence lead at the Inquiry and, indeed, by my recommendations at the end of the Inquiry. While Mr. Ball Hsu is not specifically named in the terms of reference, he himself has a direct and substantial interest in the Inquiry. His participation may be helpful to me in fulfilling my mandate and his interests and reputation may be greatly affected by the Inquiry and, possibly, by my recommendations.

Dell Computer Corporation (written application only - represented by Mr. Jeffrey Koch and Ms. Valerie A. E. Dyer)

While Dell Computer Corporation is not specifically referred to in the original terms of reference, City Council has clarified that paragraph 5 refers to the supply of Dell desktops and servers which were mentioned in the leasing RFQ. Dell has indicated that it is willing to cooperate fully with the Inquiry. As the evidence at the Inquiry may affect Dell's reputation and interests, Dell will be directly and substantially affected by the Inquiry. As well, Dell may be helpful to me in fulfilling my mandate.

Wanda Liczyk (written application only - represented by Mr. William D. Anderson)

Ms. Liczyk currently has standing in the Toronto Computer Leasing Inquiry and has asked for standing in this Inquiry as well. She clearly has a direct and

substantial interest in many aspects of the Inquiry and her participation may be helpful to me in fulfilling my mandate. Ms. Liczyk's interests may be affected by the Inquiry, and possibly, by my recommendations.

Canadian Union of Public Employees, Local 79 (written application only - represented by Ms. Melissa J. Kronick)

CUPE Local 79 is the bargaining agent for the 20,000 inside employees of the former Corporation of the City of Toronto and the Municipality of Metropolitan Toronto. It represents employees of the City of Toronto who have first-hand knowledge of computers and computer software. It is possible that some of its members will be called as witnesses at the Inquiry.

Local 79 does not ask for full standing, but for special standing, similar to what it received in the Toronto Computer Leasing Inquiry. At the same time, Local 79 has asked that it be permitted to reserve its rights to seek full standing on its own behalf and/or on behalf of its affected members in the event any members of Local 79 are called as witnesses and/or the Commission's investigation reveals that Local 79 and/or any of its members have a direct and substantial interest in this Inquiry.

I am prepared to grant Local 79 the same special standing that it has received in the Toronto Computer Leasing Inquiry. At this early stage, the Commission does not have sufficient information to know whether Local 79 has a direct and substantial interest. I am prepared to recognize the need for Local 79 to reserve its rights to seek full standing at a later date, should the evidence demonstrate that this is required.

Gary R. Walsh (written application only)

Gary Walsh, agent for Walsh & Walsh Court & Tribunal Agents, asks for standing on the basis that Walsh & Walsh is preparing "a complaint to be filed with the Criminal Investigations of The Competition Bureau in Hull Quebec regarding the possibility of a bid rig/price fix conspiracy in this matter". Further, Mr. Walsh says that "while an employee of the Municipality of Metropolitan Toronto [he] conducted his own criminal investigation of senior officials in his department and can provide the Commission with an inner view of the workings of the municipal bureaucracy and the urgent need for protection for employees who want to come forward and 'blow the whistle' on corruption, but fear for their jobs".

I do not believe that Mr. Walsh has demonstrated that he has a substantial and direct interest in the subject matter of the Inquiry sufficient to warrant receiving standing. The information to which Mr. Walsh may be privy may be of interest and I would encourage Mr. Walsh to provide this information to Commission

counsel. However, the information put forward in his written application is not of a sufficient nature to warrant his receiving standing, with all that this entails.

Mr. Michael Senisin (written application only)

Mr. Senisin faxed his application for standing to the Commission by returning the Commission's advertisement with the following information: "Herewith application for standig (sic) list of above matter, please keep @ (sic) posted."

There is not sufficient information in this application to demonstrate a substantial and direct interest in the subject matter of the Inquiry to warrant receiving standing.

Applications For Standing In The Toronto Computer Leasing Inquiry

Pursuant to Rule 11.1 of the Toronto Computer Leasing Inquiry, Ball Hsu & Associates Inc., Mr. Ball Hsu personally, and Dell Computer Corporation have applied for standing not only in the Toronto External Contracts Inquiry, but also in the Toronto Computer Leasing Inquiry.

To the extent that evidence received at this Inquiry may engage their substantial and direct interest, I have decided to grant them full standing in the Toronto Computer Leasing Inquiry.

APPLICATIONS FOR FUNDING

Neither Ball Hsu & Associates Inc. nor Mr. Ball Hsu is asking for funding at this point. However, they have asked for the opportunity to make further written and oral submissions with respect to funding if circumstances arise which cause their position on funding to change. I have no difficulty permitting this request, but would remind counsel to review my decision on Standing and Funding in the Toronto Computer Leasing Inquiry.

CONCLUSION

I have granted full standing to the City of Toronto, Ball Hsu and Associates Inc., Mr. Ball Hsu, Dell Computer Corporation, and Ms. Wanda Liczyk. I have granted special standing to the Canadian Union of Public Employees, Local 79. I have denied standing to Mr. Gary Walsh and Mr. Michael Senisin.

I have also granted full standing to Ball Hsu & Associates Inc., to Mr. Ball Hsu and to Dell Computer Corporation in the Toronto Computer Leasing Inquiry as I

am satisfied that evidence received at that Inquiry may engage their substantial and direct interest.

To the extent possible, I expect counsel for people with standing to cooperate with each other and with Commission counsel.

I look forward to working with those who have been granted standing.

Written applications for Standing received on: November 1, 2002

Oral applications for Standing heard on: November 5, 2002

Decision Released on: November 6, 2002

Schedule "A"

Terms of Reference

WHEREAS, under section 100 of the Municipal Act, R.S.O. 1990, c. M.45, a Council of a municipality may, by resolution, request a Judge of the Ontario Superior Court of Justice to inquire into or concerning any matter connected with the good government of the municipality or the conduct of any part of its public business;

AND WHEREAS any Judge so requested shall make inquiry and shall report with all convenient speed, to Council, the result of the inquiry and the evidence taken, and for that purpose shall have all the powers of a commission under Part II of the Public Inquiries Act, R.S.O. 1990 c. P.41;

AND WHEREAS Madame Justice Denise Bellamy was designated as Commissioner for an inquiry established by the Council of the City of Toronto under s. 100 of the Municipal Act by resolution dated February 14, 2002 ("Toronto Computer Leasing Inquiry");

AND WHEREAS Justice Bellamy has appointed Commission Counsel who have been conducting investigations including the interview of witnesses and the review of documents since that time;

AND WHEREAS the Council of the City of Toronto believes it would be fair and expedient for Madame Justice Bellamy to conduct a further inquiry into certain external contracts entered into by the City of Toronto;

AND WHEREAS the Council of the City of Toronto hopes to minimize delay in the conduct of the Toronto Computer Leasing Inquiry by requesting this further inquiry in this manner;

NOW THEREFORE the Council of the City of Toronto does hereby resolve that:

1. an inquiry is hereby requested to be conducted pursuant to section 100 of the Municipal Act which authorizes the Commissioner to investigate any matter relating to a supposed malfeasance, breach of trust or other misconduct on the part of a member of the council, or an officer or employee of the City, or of any person having a contract with it, in regard to the duties or obligations of the member, officer, employee or other person to the City, and to inquire into or concerning any matter connected with the good government of the municipality or the conduct of any part of its public business, including any business conducted by a commission appointed by the municipal council or elected by the electors ("Toronto External Contracts Inquiry" or "TECI"); and

2. Madame Justice Denise Bellamy, a judge of the Superior Court of Justice, be requested to act as Commissioner for the TECI and the judge so designated is hereby authorized to conduct the TECI.

AND IT IS FURTHER RESOLVED THAT the terms of reference of the TECI shall be:

1. To investigate and inquire into all of the circumstances related to the retaining of consultants to assist in the creation and implementation of the tax system of the former City of North York ("TMACS") including, but not limited to whether or not:
 - a. expenditures relating to consultants were accurately reported;
 - b. the need for consulting services was appropriately determined, justified and documented;
 - c. consulting services were awarded based on sound business practices and in accordance with established procurement by-laws, policies and procedures;
 - d. adequate procedures justification existed for waivers from required procedures;
 - e. consulting contracts were effectively managed to ensure the contract deliverables were achieved, expenses incurred were reasonable and justifiable, and "value for money" was obtained; and
 - f. payments were made in accordance with the terms of the contract.
2. To investigate and inquire into all of the circumstances related to the amalgamated City of Toronto's selection of TMACS.
3. To investigate and inquire into all of the circumstances surrounding the selection of consultants to develop and/or implement TMACS at the amalgamated City of Toronto ("Tax System Consultants"), including, but not limited to whether or not:
 - a. expenditures relating to consultants were accurately reported;
 - b. the need for consulting services was appropriately determined, justified and documented;
 - c. consulting services were awarded based on sound business practices and in accordance with established procurement by-laws, policies and procedures;

- d. adequate justification existed for waivers from required procedures;
 - e. consulting contracts were effectively managed to ensure the contract deliverables were achieved, expenses incurred were reasonable and justifiable, and “value for money” was obtained; and
 - f. payments were made in accordance with the terms of the contract.
4. To investigate and inquire into all of the circumstances surrounding the selection of Ball HSU & Associates Inc. consultants to provide consulting services to the City of Toronto, including, but not limited to whether or not:
- a. expenditures relating to consultants were accurately reported;
 - b. the need for consulting services was appropriately determined, justified and documented;
 - c. consulting services were awarded based on sound business practices and in accordance with established procurement by-laws, policies and procedures;
 - d. adequate justification existed for waivers from required procedures;
 - e. consulting contracts were effectively managed to ensure the contract deliverables were achieved, expenses incurred were reasonable and justifiable, and “value for money” was obtained; and
 - f. payments were made in accordance with the terms of the contract.
5. To investigate and inquire into all aspects of the purchase of the computer hardware and software that subsequently formed the basis for the computer leasing RFQ that is the subject of the Toronto Computer Leasing Inquiry.
6. To investigate and inquire into all aspects of the matters set out above, their history and their impact on the ratepayers of the City of Toronto as they relate to the good government of the municipality, or the conduct of its public business, and to make any recommendations which the Commissioner may deem appropriate and in the public interest as a result of her inquiry.

AND IT IS FURTHER RESOLVED THAT the Commissioner, in conducting the inquiry into the matters set out above in question to which the City of Toronto is a

party, is empowered to ask any questions which she may consider as necessarily incidental or ancillary to a complete understanding of these matters;

And, for the purpose of providing fair notice to those individuals who may be required to attend and give evidence, without infringing on the Commissioner's discretion in conducting the inquiry in accordance with the terms of reference stated herein, it is anticipated that the TECI may include the following:

1. an inquiry into all relevant circumstances pertaining to the various matters referred to in this resolution, the basis of and reasons for making the recommendations for entering into the subject transactions and the basis of the decisions taken in respect of these matters
2. an inquiry into the relationships, if any, between the existing and former elected and administrative representatives of the City of Toronto, the Tax System Consultants, Ball HSU & Associates Inc., and any representatives of companies or persons referred to in paragraph 5 above at all relevant times; and
3. an inquiry into any professional advice obtained by the City of Toronto in connection with the matters referred to in this resolution at the relevant times.