

TORONTO COMPUTER LEASING INQUIRY

The Honourable Denise Bellamy, Commissioner

Ruling on Standing and Funding

BACKGROUND

On February 14, 2002, Toronto City Council voted unanimously to hold a public inquiry, under s.100 of the *Municipal Act*, to inquire into all aspects of leasing contracts for computers and related software between the City of Toronto and MFP Financial Services and between the City of Toronto and Oracle Database. On March 7, 2002, the Chief Justice of the Superior Court of Justice in Ontario, the Honourable Patrick LeSage, appointed me to be the Commissioner for the Inquiry.

The full Terms of Reference can be found on the Inquiry's website at www.torontoinquiry.ca. For ease of reference, the operative sections are as follows:

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

To inquire into all aspects of the above transactions, their history and their impact on the ratepayers of the City of Toronto as they relate to the good government of the municipality, or the conduct of its public business, and to make any recommendations which the Commissioner may deem appropriate and in the public interest as a result of his inquiry.

And it is further resolved that the Commissioner, in conducting the inquiry into the transactions in question to which the city of Toronto is a party, is empowered to ask any questions which he may consider as necessarily incidental or ancillary to a complete understanding of these transactions;

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 inquiry may include the following:

1. an inquiry into all relevant circumstances pertaining to the various transactions referred to in this resolution, including the relevant facts pertaining to the various transactions at the relevant time as contained in the reports dated November 29, 2001, February 6,

2002 and January 28, 2002, 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 the subject transactions;

2. an inquiry into the relationships, if any, between the existing and former elected and administrative representatives of the City of Toronto and the existing and former principals and representatives of MFP and Oracle at all relevant times; and
3. an inquiry into any professional advice obtained by the City of Toronto in connection with the subject transactions at the relevant times.

STANDING HEARINGS

The Commission published a “Call for Applications for Standing” in relevant newspapers on May 27, 2002 advising that applications for standing were to be made in writing and received in the Inquiry offices by June 7, 2002. The notice stated that applications for standing were being invited from any person or group who had 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 five applications for standing. Hearings on the applications took place on Monday, June 24, 2002, in the Council Chambers at the East York Civic Centre, 850 Coxwell Avenue, Toronto.

Before the Hearings, the Commission had published Rules of Procedure applicable to the Inquiry, including a section on standing. Paragraph 8 contains the test for standing. 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, June 7, 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 Monday, June 24, 2002.

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 with the applications in the order in which I heard them. The first four applicants applied for full standing; the fifth, for special standing.

I have decided to grant full standing to the City of Toronto, MFP Financial Services Ltd., Lana Viinamäe and Wanda Liczyk.

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

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. Diana Dimmer)

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.

MFP Financial Services Ltd. (represented by Mr. David C. Moore and Mr. Fraser Berrill)

MFP Financial Services Ltd. will be directly and substantially affected by almost all aspects of the Inquiry. MFP has indicated that it wishes to cooperate fully with the Commission to ensure that all relevant information and evidence is provided to the Inquiry. To that end, it may be helpful to me in fulfilling my mandate. The Terms of Reference focus specifically on the transactions between the City and MFP. MFP's interests may be affected by the evidence lead at the Inquiry and, indeed, by my recommendations at the end of the Inquiry. Both MFP and the City have well-publicized lawsuits pending against each other relating to some of the matters that I have been asked to address in the Terms of Reference.

Lana Viinamae (represented by Mr. Raj Anand)

At the material time, Ms. Viinamae was the Director of the Y2K Project. She has a direct and substantial interest in many aspects of the Inquiry. She has acknowledged that her

actions and knowledge will be in issue, as she was one of the key senior staff at the material times. She was named (by title) in the Terms of Reference. Her participation may be helpful to me in fulfilling my mandate. Ms. Viinamae's interests may be affected by the Inquiry and, possibly, by my recommendations.

Wanda Liczyk (represented by Mr. William D. Anderson)

At the material time, Ms. Liczyk was the Chief Financial Officer and Treasurer of the City of Toronto. She has advised the Commission that she is prepared to make herself available and to cooperate with all our reasonable requests. She has a direct and substantial interest in many aspects of the Inquiry and her participation may be helpful to me in fulfilling my mandate. She is named (by title) in the Terms of Reference. Ms. Liczyk's interests may be affected by the Inquiry, and possibly, by my recommendations.

Canadian Union of Public Employees, Local 79 (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. Counsel for CUPE indicated that it did not appear that anyone from Local 79 was being accused of any misconduct.

Local 79 does not ask for full standing, but for special standing. Specifically, Local 79 asks for the type of special standing that was granted to certain applicants in the Walkerton Inquiry. It wishes to be granted a role of monitoring the Inquiry and having the opportunity to suggest areas to Commission counsel that it thinks should be canvassed.

Counsel for the City of Toronto did not take strong objection to special standing for CUPE. Her main concern was that the Inquiry not stray from its Terms of Reference and that the proceedings not be unnecessarily delayed or lengthened as a result of CUPE's participation.

At this early stage, it does not appear that Local 79 has a direct and substantial interest in the Inquiry. I do believe, however, that Local 79 may be in a position to be helpful to the Commission in fulfilling its mandate. Counsel for CUPE asserts that prior to amalgamation, the duties of Local 79 members included analysis, monitoring and acquisition of hardware and software, including ensuring that such acquisitions were financially and technically sound. Further, the experience of Local 79's members may be useful in identifying systemic issues with respect to the City's policies, procedures and practices. Accordingly, Local 79 may have experience to offer that may assist me in making recommendations dealing with good governance and with the public interest. It

has a collective interest that is different from the institutional interests of MFP or the City, and different from the interests of the two individual applicants.

APPLICATIONS FOR FUNDING

Both Lana Viinamae and Wanda Liczyk have asked that, if granted standing, they be able to obtain funding.

Terms of Reference

The Terms of Reference creating this Inquiry are completely silent with respect to the issue of funding.

Rule 34 of our Rules of Procedure indicates as follows: “Counsel will be retained at the expense of the witness and people with standing. The Terms of Reference do not grant the Commissioner jurisdiction to order the City of Toronto to provide funding for legal counsel”.

The City takes the position that there is no statutory jurisdiction that allows me to order the City of Toronto to provide funding. Neither section 100 of the *Municipal Act*, R.S.O. 1998, c.M.45 nor the provisions of the *Public Inquiries Act*, R.S.O. 1990, c.P.41 provide jurisdiction to award funding.

While the City takes the position that I have no jurisdiction to order the City to provide funding, it does acknowledge that I can make recommendations to the City.

Position of the City of Toronto at the Standing Hearings

Although the Terms of Reference do not address the issue of funding, I have been informed that City Council has invited me to direct the City to provide limited funding to individual applicants in certain circumstances. In a letter delivered to the Commission offices on Friday, June 21, 2002, Ms. Anna Kinastowski, the City Solicitor, wrote as follows:

We advise that we have obtained further instructions from City Council on these issues. We are instructed to invite you to direct that funding, limited to \$50,000.00 per person on receipt of invoices, be provided by the City of Toronto to individuals who have applied for and are granted standing at the Inquiry...The amount chosen represents partial funding for individuals recognizing they will only be directly involved in testifying for a portion of the hearing part of the Inquiry. It is intended that the funding identified by City Council is only available to individuals who are granted standing and who show that it is fair and reasonable that they be provided with some funding in order to allow them to participate at the Inquiry.

At the Standing Hearings, counsel for the City clarified that it is the City's intention that it be the Commissioner and not the City who should make the decision about whether it is fair and reasonable for an individual to receive funding. Counsel for the City took the further position that I do not have jurisdiction to order the City of Toronto to pay anything in excess of \$50,000.00 per person. If I believe that a larger amount should be made available, counsel said I should instead make a recommendation to the City. The recommendation would then be taken back to City Council for its determination. As well, counsel said the City would have no objection if I were to revisit the number at a later stage with counsel appearing before me to address that issue.

The amount of \$50,000 has apparently been chosen as a result of the following assumptions:

1. It is not in the public interest to have open-ended funding. Some parameters must be set;
2. It is not in the public interest to provide full indemnification;
3. It should not be necessary for counsel for the individuals who have applied for funding to attend the entire hearing;
4. Counsel for individuals with standing should attend the hearing only on days where the individual will be giving evidence or where evidence is being adduced which would affect their interests;
5. Only one counsel per individual should be required;
6. An assumption was made that there would be forty days of hearing. A further assumption was made that individuals with standing would be required for only half of those hearing days. Additionally, an assumption was made that a counsel fee of \$2,300 per day was reasonable. This fee was based on the new Costs Grid from the *Rules of Civil Procedure*.

Lana Viinamae

Ms. Viinamae, through her counsel, Mr. Raj Anand, contended that I do have the jurisdiction to order the City to provide funding of reasonable fees and disbursements. In the alternative, Mr. Anand asserted that I have the jurisdiction to recommend that the City provide such funding, a point conceded by the City.

In seeking funding, Mr. Anand points out that Ms. Viinamae has a clearly ascertainable interest that should be represented at this Inquiry. Her interests cannot be represented by another participant in this Inquiry; indeed, her interests are adverse to that of the City. She does not have sufficient financial resources to enable her to adequately represent her interest at the Inquiry. Currently, she is unemployed, having been removed from her position by the City in February 2002. Without funding, she will be unable to bear the financial burden of being represented at the Inquiry.

Mr. Anand has put forward a proposal for the use of funds. These funds would be used for fees and disbursements of counsel to prepare for and appear at the Inquiry. He proposes to deliver a detailed monthly bill for services rendered, together with a separate bill for disbursements. He is prepared to provide an undertaking, on appropriate terms, to ensure that any funding he receives from the City for Ms. Viinamäe would be used only for the Inquiry and not in the pursuit of her lawsuit against the City.

While he is prepared to abide by any reasonable terms with respect to monitoring and checks as to reasonableness, Mr. Anand takes the position that the cap of \$50,000 is entirely unrealistic, especially in light of the amount budgeted for the City's counsel (\$500,000 - \$750,000) and for Commission counsel. It establishes, he suggests, an uneven playing field for one side to get partial indemnity and for the City's counsel to get full indemnity. He concedes that preparation time will be greater for Commission counsel, but like all counsel, he too will be required to review all the material in his preparation for the Inquiry. Further, the theoretical amount of \$2300 per day, taken from the new Costs Grid, does not include any time for preparation, something the Costs Grid does in fact take into account.

Wanda Liczyk

Mr. Bill Anderson, on behalf of Wanda Liczyk, adopted many of the arguments made by Mr. Anand, especially with respect to the adequacy of the amount of funding being offered by the City. In his view, the \$50,000 amount appears to be a somewhat arbitrary number, which should be revisited once all those with standing have a better appreciation of how much time will actually be required. On behalf of the City, Ms. Dimmer agreed that the amount might be revisited once there is more information.

Mr. Anderson asked that I strongly recommend to the City that Ms. Liczyk be provided reasonable funding, and further that I recommend to the City that I be given the jurisdiction to make funding recommendations. Mr. Anderson has asked that he be funded to properly prepare for the Hearings.

Wanda Liczyk too is an individual, as opposed to an institutional or corporate party. She will not be able to fully participate if she does not receive some funding from the City. At present, without funding, she could not engage in anything other than a limited role.

Mr. Anderson is quite prepared to provide a billable rate and a litigation proposal once the issues have been more clearly delineated and he has had the opportunity to discuss the matter with Commission counsel. He does not intend to squander public money. Indeed, he recognizes that there would necessarily be accountability for the expenditure of public money. He would be prepared to provide a detailed bill.

MFP Financial Services Ltd.

MFP is not asking for funding at this point. It does not take the position that it cannot pay the costs of legal counsel at the Inquiry. However, MFP has put the Commission on

notice that at some future date, it may be asking me to determine that fairness requires funding to be provided to it on the basis that there is no reason why MFP should have to bear any additional costs beyond those costs that it would already have to incur in the civil litigation.

DECISION ON THE APPLICATIONS FOR FUNDING

Is there jurisdiction to order funding?

The Terms of Reference setting up the Inquiry are silent on the issue of funding. I read this silence as meaning that the City does not wish to confer power on the Commissioner to order funding. Accordingly, I have no power deriving from the Terms of Reference to order funding.

Is there power under statute to do so? I think not. The two operative statutes are the *Public Inquiries Act* and section 100 of the *Municipal Act*. Neither of them contains express language dealing with funding of applicants in situations like this. Authority to so order is not expressly conferred. In my view, only through an extraordinarily generous reading of those statutes would one be able to infer that there is power to order a municipality to fund an applicant out of the public purse. I am not prepared to interpret the statutes in that way.

Is there jurisdiction to recommend funding?

The City has acknowledged that a Commissioner may recommend funding. Indeed, they have encouraged me to make recommendations for funding up to \$50,000, and have indicated they have no objection to my revisiting that amount at a later stage in the Hearings, especially once we have a firmer estimate on the possible length of the Inquiry.

I think the City's position on a Commissioner's ability to make recommendations with respect to funding is the correct one. A number of other Commissions of Inquiry have ruled on whether or not they can provide recommendations in this regard. For example, in the funding ruling of May 14, 1987, the Commissioners of the *Royal Commission on the Donald Marshall, Jr., Prosecution*, had this to say:

[W]e do believe that, absent any prohibition, it is implicit in the Terms of Reference of any Royal Commission that it has the capacity, and indeed the obligation, to respond to any party who has been granted standing and who raises an issue of participant funding. To refuse to respond to such a request would be inconsistent with a tradition of Royal Commissions, a tradition which encourages full participation in a public and independent forum.

...

The Commission, if its findings are to be considered credible, must be perceived to be conducting fair Hearings, and to be doing everything possible to ensure that proper representation is provided for all parties whose participation in all, or some particular part, of the Hearings is required. It would be extremely unfortunate, and inconsistent with the proper administration of justice, if a necessary party were prevented from presenting its full story to the Commission due to lack of financial resources. The public interest is unlikely to be served adequately if only some interested groups and parties are represented, since necessarily that would risk having our findings influenced in favour of those parties who are either better organized or better funded.

Recommendations with respect to funding

Having decided that both Wanda Liczyk and Lana Viinamae have a direct and substantial interest in the Inquiry and having provided them with full standing, I want to ensure that they are afforded a full and ample opportunity to actively participate in the Hearings. Their role, as is that of the others with standing, is important to the success of this Inquiry. In my view, that can best be achieved by their having counsel. To that end, I adopt the comments of Madam Justice Reed in *Jones v Canada (Royal Canadian Mounted Police Public Complaints Commission)*, [1998] F.C.J. No. 1051:

The consideration that I would think would be crucial for the Commission is whether legal representation of the complainants would improve the quality of the proceedings before it. My observation is that when decision-makers have before them one party who is represented by conscientious, experienced and highly competent counsel...they prefer that the opposite party be on a similar footing. They prefer that one party not be unrepresented. An equality in representation usually makes for easier and better decision-making.

Using the City's early estimates, this Inquiry could last about forty days. This number may indeed be conservative because, in fairness to the City, at the time of making the estimates, it did not know how many people would be seeking standing or how much evidence might be called. The issues are complex. So far, there are over twenty thousand pages of documents. There are parallel civil proceedings between at least one of the individuals and the City.

Both individuals who have applied for funding are former employees of the City. Had they still been employed at the City, they would likely have been entitled to be represented by counsel hired by the City or to have been indemnified if they had hired separate counsel.

The City has put forward a good first position. I am pleased that they appear to be open to a recognition that this is indeed a first position. As the grantor of public funds, it is for the City to make the final decision on what conditions it will attach to the funds. I think it would be best for the City to approach this decision on a principled basis. To assist in that regard, I intend to make recommendations as to the sorts of conditions the City may

wish to consider. While I am aware that the City is not required to accept my recommendations, given the position they have put forward through their counsel, I fully expect that serious consideration will be given to them.

Order to the City of Toronto:

In keeping with City Council's invitation, as contained in Ms. Kinastowski's letter to me of June 21, 2002, I direct that it is fair and reasonable that Ms. Wanda Liczyk and Ms. Lana Viinamae be provided with funding to allow them to participate at the Inquiry. I direct that funding, up to \$50,000.00, on receipt of invoices, be payable by the City to each of them.

Recommendations with respect to further funding:

1. Wanda Liczyk and Lana Viinamae should be provided with the funding necessary to fully and actively participate in this Inquiry. Having said that, I make the following recommendations for the City's attention.
2. It is not in the public interest to have open-ended funding. The taxpayers of Toronto have a right to expect a principled approach to the spending of their money.
3. It is not in the public interest for public funds to be provided to individuals for their lawyer of choice at that lawyer's regular hourly rate. This principle has been implicitly recognized in every public inquiry with which I am familiar.
4. The City should establish reasonable hourly rates for senior and junior counsel for purposes of this Inquiry. The City does not have an approved policy for the retention of outside counsel similar to that of the federal or provincial government; therefore, in determining what is "reasonable", the City may wish to consider what it pays for the retention of outside counsel at a Coroner's Inquest, for example. In the alternative, and although the *Rules of Civil Procedure* do not apply to this Inquiry, the City may choose to be guided by the Partial Indemnity Scale of the Costs Grid from the *Rules* which came into effect in Ontario on January 1, 2002.
5. Whatever hourly rate or scale of compensation the City selects, it should include reasonable time for preparation by counsel as well as for attendance at the Hearings.
6. The City should either limit the number of counsel or specify the use that will be made of junior counsel. In that regard, the City should consider efficiency as well as effective representation. Counsel should undertake to make the most efficient use of their resources, using law clerks, students, and junior counsel where it is

more efficient and cost effective to do so. Where preparation time is concerned, counsel should be encouraged to use less expensive resources. Where the Hearings are concerned, it may not be effective or appropriate to have more than one counsel present at a time.

7. In principle, counsel should be entitled to their reasonable and necessary disbursements. However, the City should specify which disbursements or expenses will or will not be paid. For example, it is the obligation of Commission counsel to do a thorough and complete investigation. If one of the individuals wishes to have an issue or person investigated, the Rules of Procedure permit that individual to bring this to the attention of Commission counsel. Accordingly, it may be appropriate for the City to specify that it will not pay for investigators or experts for the parties.
8. Where appropriate, disbursement rates should be set (e.g., for photocopying or laser copies). For specific disbursements, the City may want to consider the amounts put forward in the *Rules of Civil Procedure* or to establish its own reasonable rates.
9. Limits should be set on preparation time. Since Commission counsel will be doing most of the preparation and the calling of witnesses, preparation time for individuals with standing will probably be less than that required for Commission counsel - for example, one hour of preparation for every hour in attendance at the hearing. One exception might be preparation for cross-examination of a major witness.
10. Time spent at the Hearings should be limited to a reasonable number of hours.
11. Attendance of counsel at the Hearings should be limited to attending when the party's interests are engaged. Commission counsel will be providing people with standing access to documents and to witness statements, and will be informing people with standing when certain witnesses are expected to be called. Based on this advance disclosure, people with standing should be able to anticipate when evidence that may affect their interests will be called. Further, given that transcripts of each day's proceedings are available that evening on the Commission's website, the necessity to appear at the Hearings should be limited to a direct engagement of a party's interests. This should not be interpreted as limiting counsel's attendance solely to when the client is testifying.
12. No fees incurred before February 14, 2002 (the date of Council's decision to hold a public inquiry) should be paid.
13. No fees related to any other matters (e.g. civil litigation) should be paid. There will inevitably be some overlap; however, the taxpayers of Toronto should not be expected to pay the legal fees of a party who, in another forum, is adverse in

interest to the City. While the knowledge they obtain will inevitably be of some benefit, this cannot be helped.

14. Accounts should be subject to assessment. If there are disputes about fees, they can be resolved by the appointment of an independent third party.

CONCLUSION

I have granted full standing to the City of Toronto, MFP Financial Services Ltd., Lana Viinamae and Wanda Liczyk. I have granted special standing to the Canadian Union of Public Employees, Local 79.

I have decided that I do not have the jurisdiction to order the City to provide funding to people with standing; however, I have directed that the City of Toronto provide up to \$50,000.00 funding to Wanda Liczyk and Lana Viinamae, on receipt of invoices. I have also decided that I do have the jurisdiction to make recommendations with respect to funding, and I have done so.

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.

Applications for Standing & Funding heard on:	June 24, 2002
Decision Released on:	July 3, 2002