Toronto Computer Leasing Inquiry
Toronto External Contracts Inquiry

REPORT
Volume 3: Inquiry Process

The Honourable Madam Justice
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I. Introduction: Why a Book about Process?

This volume forms part of my report on two public inquiries: the Toronto Computer Leasing Inquiry and the Toronto External Contracts Inquiry. This part of my report also stands alone, because it is about the process of the inquiries and not about the evidence I heard or my findings. Thus, this volume outlines the steps I took, along with commission counsel and other staff, to ensure that I fulfilled my mandate and that the inquiries ran smoothly.

I wanted the City of Toronto to have this information because I conducted the inquiries on its behalf.[1] In the course of this experience, I also came to believe that it was important to share what I had learned about conducting a public inquiry. The process was important, and I wanted to highlight that by putting my account of it in a separate volume. At the same time, I wanted to concentrate on the substance of the inquiries in the main report and not distract the reader with the mechanics of the process.

Something like this would certainly have been useful to me when I was appointed commissioner. I expect that it would also have been useful for the Mayor and Council before they called the inquiries. It would have helped

[1] Appendix A(i), Letter to the Chief Justice of the Superior Court of Justice Requesting Appointment of an Inquiry Judge, February 22, 2002.

them to appreciate the powers and limitations of a public inquiry, the costs, and their own role in the process. It stands to reason that, before a public body calls an inquiry and commits to spending public money on one, it should know what it is getting into. In particular, it should be aware of what a public inquiry can (and cannot) deliver.

On March 7, 2002, the Honourable Patrick J. LeSage, then Chief Justice of the Superior Court of Justice in Ontario, appointed me commissioner for the Toronto Computer Leasing Inquiry (TCLI).[2] (Later, I would be appointed to a second inquiry, the Toronto External Contracts Inquiry.) I had not conducted a public inquiry before, but since I am a judge of the Superior Court of Justice, the basic guiding principles were already familiar to me. I knew that I would be expected to decide on procedures and processes that would ensure the independence and impartiality of the inquiry. I knew that I would be expected to make sure that the hearings were as public as possible, while preserving the essential rights of the individual witnesses.[3] The principles were clear, but I had many questions about the practical side of running an inquiry and immediately set out to learn as much as I could.

I soon realized that, while there was a great deal of useful material on the functions and purposes of public inquiries generally, there was not much written guidance for the practical side, and what did exist was largely dated. Many of the practical details are not routinely on a judge's agenda: finding office space and a hearing room, hiring staff, acquiring services and equipment through competition, budgeting, and arranging for document management. I would be hiring commission counsel and other staff and I had to make sure all of them were free of any real or perceived conflict of interest. There were legal matters to deal with right away: drafting rules of

[2] Appendix A(ii), Letter of Appointment to TCLI, March 7, 2002.

[3] Justice Cory (as he then was) in *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97 at para. 183 [*Westray*]:

> In my view, the nature and the purpose of public inquiries require courts to give a generous interpretation to a commissioner's powers to control their own proceedings.... One of the functions of an inquiry is to insulate an investigation from both the legislative and the judicial branches of government. It is crucial that an inquiry both be and appear to be independent and impartial in order to satisfy the public desire to learn the truth. It is the commissioner who must be responsible for ensuring that the hearings are as public as possible yet still maintain the essential rights of the individual witnesses.

procedure, interpreting the terms of reference, reviewing the powers of a public inquiry, obtaining documents, and getting the investigations under way. I had to get on with all of these tasks, and many others, at once. Meanwhile, I had to complete the reserve decisions I had accumulated as part of my normal judicial workload. Individually, none of the inquiry tasks was a great mystery, but there was no guidebook for how to get it all done in the context of a public inquiry or the best order in which to do it.

My first stop was the City of Toronto itself. The Mayor and Council had called for the inquiry, and I expected that they would be able to tell me about budget, venue, staff, equipment, and so on. They were not able to help me in any meaningful way. They knew they had the power to call an inquiry pursuant to the *Municipal Act*,[4] but that was all. It was understandable. The last Toronto public inquiry had taken place in the late 1970s.[5]

[4] *Municipal Act*, R.S.O. 1990, c. M.45, as rep. by *Municipal Act, 2001*, S.O. 2001, c. 25, s. 484(1). The old act was repealed after these inquiries were called. Section 100 of the old act, which gave a municipality the power to call an inquiry, is s. 274 in the new act:

> 274. (1) If a municipality so requests by resolution, a judge of the Superior Court of Justice shall,
>
> (a) investigate any supposed breach of trust or other misconduct of a member of council, an employee of the municipality or a person having a contract with the municipality in relation to the duties or obligations of that person to the municipality;
>
> (b) inquire into any matter connected with the good government of the municipality; or
>
> (c) inquire into the conduct of any part of the public business of the municipality, including business conducted by a commission appointed by the council or elected by the electors.
>
> (2) In making the investigation or inquiry, the judge has the powers of a commission under Part II of the *Public Inquiries Act*, which Part applies to the investigation or inquiry as if it were an inquiry under that Act.
>
> (3) The judge shall report the results of the investigation or inquiry to the council as soon as practicable.
>
> (4) The council may hire counsel to represent the municipality and pay fees for witnesses who are summoned to give evidence at the investigation or inquiry.
>
> (5) Any person whose conduct is called into question in the investigation or inquiry may be represented by counsel.
>
> (6) The judge may engage counsel and other persons to assist in the investigation or inquiry and the costs of engaging those persons and any incidental expenses shall be paid by the municipality.

[5] Report of Judge G. F. H. Moore to the Council of the Corporation of the City of Toronto respecting the allegations of Ronald Bazkur with respect to Brian Risdon, Chief Plumbing Inspector for the said Corporation, submitted pursuant to Section 240 of the *Ontario Municipal Act*, S.O. 1970, c. 118.

Not surprisingly, almost thirty years later, they had no idea about the practical implications.

I turned next to the people who had firsthand experience—those who had led or worked on other public inquiries. My judicial colleagues were generous with their time and frank with their advice to me. Members of the bar were equally generous to my commission counsel and I thank them for their assistance.

At the same time, I read what I could find about public inquiries. I also read several inquiry reports. Many of them included a chapter or appendix about procedures and processes, but none of them addressed the practical tasks comprehensively. Later, I found an insightful collection of essays about public inquiries, edited by Professors Allan Manson and David Mullan of Queen's University Law School: *Commissions of Inquiry: Praise or Reappraise?*[6] I found this book very interesting, but it was published after I began the inquiry and I had already made many of the decisions. Besides, thorough and thought-provoking though it was, the book did not cover all the practical tasks before me.

In the end, I realized that each time a public inquiry is called, the commissioner has to start almost from scratch, gathering information through informal networks and piecing together what others have done before. Part of my reason for writing this volume was to leave my footprints, so to speak.

This is not meant to be an exhaustive "how to" for conducting a public inquiry. Many of the issues, practices, and procedures will not be applicable to other inquiries, and at the end of the day, each commissioner appointed to an inquiry will run it his or her own way, assessing and adapting to the circumstances. Moreover, some procedures that worked for a municipal inquiry will not apply in a provincial or federal setting. Nevertheless, I hope that my observations will be helpful to public bodies considering calling a public inquiry, and to the commissioners, commission counsel, counsel for witnesses or parties, and anyone who is curious about how an inquiry works behind the scenes.

6 Allan Manson and David Mullan, eds., *Commissions of Inquiry: Praise or Reappraise?* (Toronto: Irwin Law, 2003).

II. Acknowledgments

These inquiries sometimes seemed like a Herculean labour, but I had help—invaluable help. Often, the acknowledgments are buried at the back of a book. My appreciation of the people who assisted me is heartfelt and belongs at the front.

I have thanked my staff in detail in Volume 1 of the report, but I also wish to acknowledge them here. Commission counsel were Ron Manes, Patrick Moore, David Butt, Daina Groskaufmanis, and Julie Dabrusin. They were assisted by Zachary Abella, Leanne Notenboom, Barrie Attzs, and Christopher Thiesenhausen. Our policy analysts and researchers were Ronda Bessner, Julia Milosh, and Jodie Graham. Our investigators were Bill Blake and Brian Clarke. The chief administrative officer was David Henderson, and our clerical staff were Clita Saldanha, Anne Dancy, and Beverley Kozak. Heather Hogan managed our documents. Our communications officer was Peter Rehak, and our webmasters were Djordje Sredojevic and Ljiljana Vuletic. In the hearing room, I was assisted by Joyce Ihamaki, Dorothy Button, and Janet Smith (registrars), Robert Gray (deputy), Carol Geehan (court reporter), and Bernie Sandor, Kevin Best, and Cam Wheeler (sound and audio-visual). I also want to acknowledge the important contribution of the many lawyers for the witnesses and the parties with standing. And lastly, I want to thank our spouses, families, and friends for their encouragement and sustenance throughout these past three years.

For their generous and invaluable advice as I prepared for these inquiries, I particularly wish to thank the following individuals whom I consulted

because of their experience with public inquiries, either as commissioners or as counsel: the Honourable Madam Justice Rosalie Silberman Abella,[7] the Honourable Louise Arbour,[8] the Honourable Mr. Justice Robert P. Armstrong,[9] the Honourable Mr. Justice Colin Campbell,[10] the Honourable Madam Justice Eleanore A. Cronk,[11] the Honourable Madam Justice Gloria J. Epstein,[12] the Honourable Madam Justice Kathryn N. Feldman,[13] the Honourable Mr. Justice Arthur M. Gans,[14] the Honourable Mr. Justice Steven T. Goudge,[15] the Honourable Fred Kaufman,[16] the Honourable Mr. Justice Gordon P. Killeen,[17] the Honourable Mr. Justice Horace Krever,[18] the Honourable Madam Justice Jean L. MacFarland,[19] the Honourable Mr. Justice Dennis R. O'Connor,[20] the Honourable Coulter A. Osborne,[21] the Honourable Mr. Justice K. Peter Richard,[22] the Honourable Mr. Justice Ronald C. Sills,[23] and Mr. George M. Thomson.[24]

I am grateful for the guidance and confidence of former Chief Justice Patrick J. LeSage and former Regional Senior Justice Robert A. Blair, and the subsequent help and support of their successors, Chief Justice Heather Forster Smith and Regional Senior Justice Warren K. Winkler. Associate

7 In her capacity as commissioner, Royal Commission on Equality in Employment.

8 In her capacity as commissioner, Commission of Inquiry into Certain Events at the Prison for Women in Kingston.

9 In his capacity as associate commission counsel, Royal Commission into Metropolitan Toronto Police Practices (Province of Ontario) (Morand Commission); commission counsel, Mississauga Railway Accident Inquiry, Royal Commission (Grange Commission on Railway Safety); commission counsel, Commission of Inquiry into the Use of Drugs and Banned Practices Intended to Increase Athletic Performance (Dubin Inquiry); counsel to Brenda Elliot, Walkerton Inquiry.

10 In his capacity as counsel for the Department of Justice Canada, Commission of Inquiry into the Westray Mine Tragedy.

11 In her capacity as associate commission counsel, Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police (McDonald Royal Commission on the RCMP); counsel before the Mississauga Railway Accident Inquiry, Royal Commission (Grange Commission on Railway Safety); associate commission counsel, Royal Commission of Inquiry into Certain Deaths at the Hospital for Sick Children (Grange Commission); former chairperson, Boards of Inquiry, Metropolitan Toronto Police Complaints Commission; former special counsel to the RCMP Public Complaints Commission; counsel to the Ontario Provincial Police, Inquiry into the Events at Queen's Park on March 18, 1996 (the OPSEU-OPP Confrontation); counsel to the Chief Coroner of Ontario, Walkerton Inquiry.

12 In her capacity as commissioner, Dionne Quintuplets Compensation Inquiry.

Chief Justice J. Douglas Cunningham was also extremely supportive. I am indebted to the Honourable R. Roy McMurtry, Chief Justice of Ontario, for his wisdom and sage advice. My colleague the Honourable Mr. Justice Ian V. B. Nordheimer was the delegate of Regional Senior Justice Winkler in the event of a dispute surrounding issues of solicitor-client privilege. Although never required to hear an application, several times he rearranged his schedule to be at the ready when we alerted him of a possible application coming his way, and I thank him for that.

Without in any way diminishing the significance of all the assistance I received from other colleagues, I wish specifically to single out Associate Chief Justice Dennis O'Connor of the Court of Appeal for Ontario for the enormous amount of assistance he gave me, especially at the beginning of the inquiry. He had only just completed the Walkerton Inquiry and had been dealing with many of the issues I was facing. I am indebted to him for his invaluable advice. Justice O'Connor continued to be a great and constant help until he was called upon to be the commissioner of another inquiry. After that, it didn't seem fair to go on pestering him with my questions. By then, I knew from my own experience that he had his hands full.

[13] In her capacity as associate counsel, Judicial Inquiry into the Behaviour of Provincial Judge Lloyd Henriksen; associate counsel, Commission of Inquiry re His Honour Senior Judge Gordon R. Stewart; associate counsel, Commission of Inquiry into the Relationship Between Certain Individuals and Corporations and Elected and Unelected Public Officials (Patti Starr Inquiry).

[14] In his capacity as counsel, Estey Inquiry into the Operation of Air India.

[15] In his capacity as assistant commission counsel, Mackenzie Valley Pipeline Inquiry; commission counsel, Alaska Highway Pipeline Inquiry; assistant commission counsel, Inquiry into the Kingston Penitentiary Riots.

[16] In his capacity as commissioner, Commission on Proceedings Involving Guy Paul Morin.

[17] In his capacity as commissioner, City of Sarnia Judicial Inquiry (Consortium).

[18] In his capacity as commissioner, Commission of Inquiry on the Blood System in Canada.

[19] In her capacity as commissioner, Commission of Inquiry re His Honour Judge W. P. Hryciuk, Judge of the Ontario Court (Provincial Division).

[20] In his capacity as commissioner, Walkerton Inquiry; commissioner, Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar.

[21] In his capacity as commissioner, Inquiry into Motor Vehicle Compensation in Ontario.

[22] In his capacity as commissioner, Commission of Inquiry into the Westray Mine Tragedy.

[23] In his capacity as commissioner, RIM Park Financing—City of Waterloo Judicial Inquiry.

[24] In his capacity as chair of the Ontario Social Assistance Review Committee.

III. Inquiries in Canada

A. The Purpose of Public Inquiries

There have been some 450 official inquiries since Confederation[25] and there are ten commissions of inquiry going on as I write this report.[26] What purpose is served by these (often long and expensive) inquiries?

Public inquiries are often convened in the wake of public shock, horror, disillusionment, or suspicion. They are expected to uncover "the truth."[27] Inquiries are investigations, and in that sense they are informative and educational. They are also preventive, in that they seek to ensure that any mistakes uncovered will not be repeated.

Inquiries also serve a purpose that is less obvious, but just as important:

25 *Canada and Public Inquiries*, CBC News Online, February 11, 2004.

26 Indian Specific Claims Commission (Canada); SARS Commission (Ontario); Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar (Canada); Commission of Inquiry into the Sponsorship Program and Advertising Activities (Canada); Ipperwash Inquiry (Ontario); Lamer Commission of Inquiry (Newfoundland & Labrador); HMCS Chicoutimi Board of Inquiry (Canada, Department of National Defence); Cape Breton Ferry Worker Snowplow Accident Judicial Inquiry (Nova Scotia); Commission of Inquiry into the Wrongful Conviction of David Milgaard (Saskatchewan); Inquiry into the Events Surrounding Allegations of Abuse of Young People in Cornwall (Ontario).

27 *Westray, supra* note 3 at paras. 60, 62, Cory J., dissenting.

they are restorative. As noted by Justice Cory in *Westray*: "Both the status and high public respect for the commissioner and the open and public nature of the hearing help to restore public confidence not only in the institution or situation investigated but also in the process of government as a whole."[28] Commissions of inquiry are a unique way of addressing issues in Canadian society and are part of our democratic culture:

> [A commission] has certain things to say to government but it also has an effect on perceptions, attitudes and behaviour. Its general way of looking at things is probably more important in the long run than its specific recommendations. It is the general approach towards a social problem that determines the way in which a society responds to it. There is much more than law and governmental action involved in the social response to a problem. The attitudes and responses of individuals at the various places at which they effect the problem are of profound importance.
>
> What gives an inquiry of this kind its social function is that it becomes, whether it likes it or not, part of this ongoing social process. There is action and interaction.... Thus this instrument, supposedly merely an extension of Parliament, may have a dimension which passes beyond the political process into the social sphere. The phenomenon is changing even while the inquiry is in progress. The decision to institute an inquiry of this kind is a decision not only to release an investigative technique but a form of social influence as well.[29]

I was to discover the truth in the words "The phenomenon is changing even while the inquiry is in progress." These inquiries did indeed change as they progressed, with priorities and issues emerging or receding as the investigation developed.

[28] *Supra* note 3 at para. 62, Cory J., dissenting. Although Justice Cory dissented in the result, his *obiter* statements regarding the role and purpose of public inquiries have been cited with approval.

[29] Gerald E. Le Dain, "The Role of the Public Inquiry in Our Constitutional System" in Jacob S. Ziegel, ed., *Law and Social Change* (Osgoode Hall Law School, 1973) 79 at 85, cited in *Westray*, *supra* note 3 at para. 64, Cory J., dissenting. See also *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System in Canada—Krever Commission)*, [1997] 3 S.C.R. 440 at para. 30, Cory J. [*Blood Inquiry*].

B. Municipal Public Inquiries

Subsection 100(2) of the *Municipal Act*[30] authorized a municipality to establish a judicial inquiry to investigate "any matter connected with the good government of the municipality or the conduct of any part of its public business" and any related alleged misconduct. This provision of the *Municipal Act* predates Confederation and has remained substantially the same since 1866.[31]

A municipal public inquiry certainly has some broad powers. In the course of calling an inquiry, for example, a municipality has the power to "demand" the services of a judge of the Superior Court of Justice to conduct it. This is, in fact, a more far-reaching power than that available to the Province of Ontario[32]or the Government of Canada.[33] However, in some other critical matters, a municipal public inquiry is more limited. A municipal inquiry's powers are limited to those ascribed to it under Part II of the *Public Inquiries Act*.[34] Accordingly, it may not state a case to the Divisional Court,[35] cause a person to be apprehended who has been served with a summons and has failed to appear,[36] appoint a formal investigator,[37] or ask for a search warrant to be issued.[38] These are shortcomings that I will address later in this volume.

The purposes of a municipal public inquiry were stated succinctly by Justice Binnie in the Supreme Court of Canada decision *Consortium Developments (Clearwater) Ltd. v. Sarnia (City)*:

30 *Supra* note 4. Section 100(2) is now s. 274(1)(b) of the *Municipal Act, 2001*, S.O. 2001, c. 25.

31 *Consortium Developments (Clearwater) Ltd. v. Sarnia (City)*, [1998] 3 S.C.R. 3 at para. 26 [*Consortium*].

32 The *Public Inquiries Act*, R.S.O. 1990, c. P.41, in contrast, states that the Lieutenant Governor in Council "may, by commission, appoint one or more persons to conduct the inquiry."

33 The *Inquiries Act*, R.S.C. 1985, c. I-11, states that "the Governor in Council may, by a commission, appoint persons as commissioners by whom the inquiry shall be conducted."

34 *Public Inquiries Act*, R.S.O. 1990, c. P.41.

35 *Public Inquiries Act*, *ibid.*, s. 6.

36 *Public Inquiries Act*, *ibid.*, s. 16.

37 *Public Inquiries Act*, *ibid.*, s. 17(1).

38 *Public Inquiries Act*, *ibid.,* s. 17(2).

> [Section 100 of the *Municipal Act*] reflects a recognition through the decades that good government depends in part on the availability of good information. A municipality, like senior levels of government, needs from time to time to get to the bottom of matters and events within its bailiwick. The power to authorize a judicial inquiry is an important safeguard of the public interest. . . .[39]

I was mindful of that purpose throughout these inquiries. Through the investigations and public hearings, one of my goals was to inform and educate the public about the transactions that formed the basis of the inquiries. It is also my hope that the inquiries engaged the citizens of Toronto in a discourse about their municipal government and the kind of city in which they wish to live.

C. Not a Civil Trial and Not a Criminal Trial

Many times during the inquiries, I reiterated that a public inquiry is neither a civil nor a criminal trial. A trial is narrow and retrospective and examines specific events. Trials do not seek to explain why something occurred, except for the purpose of determining guilt or liability. While there is certainly public interest in some trials, the public is not purposely engaged. By contrast, a public inquiry is a public investigation, carried out in the public eye. It carries its own set of rules and procedures and has different aims. One of the important differences is that there are no legal consequences from the commissioner's findings. This distinction can be frustrating for members of the public who want to see perceived wrongdoers penalized. Punishment or penalty may well follow, but not as part of the public inquiry itself.

The distinction can also be frustrating for lawyers representing clients who are part of a public inquiry. Courtroom lawyers who have practised exclusively in criminal or civil trials find that they have to adjust their expectations and tactics to the much broader, open-textured, and fluid environment of a public inquiry. Otherwise, they run the risk of disserving their clients.

The distinction between a public inquiry and a criminal or civil trial has been made repeatedly by the courts, including forcefully by Justice Cory in the *Blood Inquiry* case:

[39] *Supra* note 31 at para. 26.

> A commission of inquiry is neither a criminal trial nor a civil action for the determination of liability. It cannot establish either criminal culpability or civil responsibility for damages. Rather, an inquiry is an investigation into an issue, event or series of events. The findings of a commissioner relating to that investigation are simply findings of fact and statements of opinion reached by the commissioner at the end of the inquiry. They are unconnected to normal legal criteria. They are based upon and flow from a procedure which is not bound by the evidentiary or procedural rules of a courtroom. There are no legal consequences attached to the determinations of a commissioner. They are not enforceable and do not bind courts considering the same subject matter. The nature of an inquiry and its limited consequences were correctly set out in *Beno v. Canada (Commissioner and Chairperson, Commission of Inquiry into the Deployment of Canadian Forces to Somalia)*, [1997] 2 F.C. 527, at para. 23:
>
> > A public inquiry is not equivalent to a civil or criminal trial.... In a trial, the judge sits as an adjudicator, and it is the responsibility of the parties alone to present the evidence. In an inquiry, the commissioners are endowed with wide-ranging investigative powers to fulfil their investigative mandate.... The rules of evidence and procedure are therefore considerably less strict for an inquiry than for a court. Judges determine rights as between parties; the Commission can only "inquire" and "report".... Judges may impose monetary or penal sanctions; the only potential consequence of an adverse finding...is that reputations could be tarnished.

Thus, although the findings of a commissioner may affect public opinion, they cannot have either penal or civil consequences. To put it another way, even if a commissioner's findings could possibly be seen as determinations of responsibility by members of the public, they are not and cannot be findings of civil or criminal responsibility.[40]

[40] *Blood Inquiry, supra* note 29.

IV. Guiding Principles

I REALIZED THAT NO PUBLIC INQUIRY would satisfy everyone. In settling on procedures, therefore, I was looking for mechanisms that would render the inquiry above reproach in the basic guiding principles observed throughout: fairness, thoroughness, efficiency, accessibility, and cost-effectiveness.

A. Fairness

PUBLIC INQUIRIES ARE LESS FORMAL and more flexible than criminal or civil trials, but they do carry powers that demand procedural fairness. I had to consider the possibility that in my report I might comment on the conduct of certain individuals, and that those comments might tarnish their reputations. What rights should those people have to counter allegations against them and to give their version of events? The *Public Inquiries Act*[41] and our own rules of procedure[42] gave me the power to compel witnesses to attend and give evidence and produce documents. How should I exercise those powers, so necessary to carrying out my mandate, while being fair to those witnesses? I decided on the following:

41 *Supra* note 34, s. 7(1).

42 Rule 23 in the rules of procedure for both TCLI and TECI.

1. I would keep an open mind throughout the investigation and the hearings, and listen carefully to all of the evidence. I repeated my commitment to do this numerous times during the inquiries and I took steps to ensure that the hearing was free of actual or perceived bias. Keeping an open mind proved applicable to more than weighing the evidence. The scope and direction of the hearings changed considerably as the inquiries progressed.
2. There would be no surprises for witnesses. It was not always possible to accomplish that, but every effort was made. Before they testified, witnesses would be advised of the documents that might be put to them. If any documents were added later, witnesses would be given an opportunity to review them before being questioned on them.
3. Whenever possible, witnesses called to testify would be informed, usually formally but sometimes informally, if I might make negative findings about their conduct.
4. If I thought I might make negative findings about witnesses, I would tell them and give them an opportunity to tell their side of the story.

In short, my commitment to fairness entitled anyone who was called before the inquiries to have a hearing before a fair and impartial decision-maker and an opportunity to tell his or her story. All of us who worked on the inquiries were ever mindful of that commitment.

B. Thoroughness

A PUBLIC INQUIRY IS CALLED IN RESPONSE to a matter of public concern. If it is to address that concern, it must investigate, and investigate thoroughly. There were occasions in these inquiries when investigation turned up no useful information or a line of inquiry led to information that was not relevant to my terms of reference. Nevertheless, I had to be satisfied that we had left no important stone unturned.

The principle of thoroughness in gathering evidence continued in the hearing room. Commission counsel are not advocates for particular parties, but they cannot accept statements or explanations at face value. Sometimes, no party has an interest adverse to that of the witness. It then falls to commission counsel to examine the witness with particular thor-

oughness. They must investigate, test, and verify. It is to be expected that some witnesses will not be truthful or will be less than forthcoming. Without tenacity, the public will not have the answers the inquiry has been asked to provide.

C. Efficiency

A PUBLIC INQUIRY MUST BALANCE the need for fairness and thoroughness with the need to get the job done. I said that we left no important stone unturned. The emphasis is on "important." If we had heard every available witness on every conceivable issue, the inquiries would still be going on. In the heat of a hearing, it often seems that every issue is important. It was my job to hear all relevant and helpful evidence, but not all possible evidence. Efficiency demanded that the hearings not become mired in minutiae.

The need to curtail excessive exploration of minutiae in the interest of efficiency is all the more important given that most public inquiries are likely to involve multiple parties. To achieve efficiency and minimize public expense, commission counsel must work closely with counsel for all parties to ensure that examinations of witnesses do not become repetitive.

I took steps to expedite evidence and to operate as efficiently as possible, but there were significant delays nevertheless. I dealt with the delays by being flexible. I instructed my commission counsel to use the time to prepare witnesses, continue investigations, or work on parts of the hearing unrelated to the delay—anything that might shorten our hearing time and get us back on track. I used the downtime to make notes for consideration when writing my report (recognizing the need to maintain an open mind right to the end), including my thoughts for writing a chapter about the process which eventually became this volume. I also began drafting possible recommendations.

D. Accessibility

A PUBLIC INQUIRY IS, to state the obvious, public. It must be open to the public, understood by the public, and responsive to the public.

Our hearings were open to the public, and some stalwart citizens attended with impressive regularity. The rules of procedure provided for

hearings in private,[43] but no circumstances arose where I found that necessary. If I had been faced with that situation, I would have considered the matter very carefully before allowing testimony removed from public scrutiny. The principle of public access in a public inquiry is not to be brushed aside lightly.

Accessibility is also a matter of practicality. Our hearing room was in a public building and we posted signs to let people know they were welcome to come in and watch. The location was accessible to people with disabilities and close to public transit and parking.

Public inquiry hearings are less formal than courtroom proceedings, but I have no doubt that they are somewhat intimidating to the public and to witnesses compelled to testify. I tried to demystify the process as much as possible. Our website was one way to do that. It contained exhaustive information about the inquiries, including the process, the people, and the schedule and details for each upcoming stage, updated regularly. The website also included a link the public could use to send us questions about the inquiries, all of which were answered. My commission counsel were accessible to answer questions about procedure.

Another way to demystify the process was plain language. We wrote our rules of procedure, and all other documents originating from the inquiries, in plain English.

E. Cost-Effectiveness

A PUBLIC INQUIRY IS, to state the obvious again, financed from the public purse. I never lost sight of the fact that we were spending public money and I took steps to spend it carefully. Our budgets were public documents. Periodically, I publicly disclosed whether we were on target.

Our initial operating budget was set by the City of Toronto. My chief administrative officer calculated our subsequent operating budgets, I approved them, and they were submitted to the City through the City solicitor. The City solicitor was responsible for ensuring that they were taken to City Council for approval. As the nature and extent of the inquiries developed and expanded, it was necessary to get City Council approval for additional funding from time to time.

[43] Rules 29, 30, and 31 in the rules of procedure for both TCLI and TECI.

Wherever possible, we obtained goods and services by tender in order to get what we needed at the best price. We did obtain some services without tender, but only when the service was unique, the monetary value was very low, and/or there was insufficient time to carry out a competition. Every person or company retained for the inquiries signed a letter of agreement with me. It set out the services to be provided, the rate of payment, confidentiality provisions, and other conditions.[44] As a further accountability measure (but not in a way that would affect my independence), we set out for the City the basis for retaining the services of each person or company, the recruitment process, the tendering process or the need for single-sourcing, and the basis for the rate of payment.

I have pointed out that the City of Toronto had no recent experience with public inquiries. Nevertheless, the Mayor, Council, and the taxpayers of Toronto should have been better prepared for the potential cost. The former Chief Justice of the Superior Court of Justice told me that he had advised the City, emphatically, that a public inquiry would be very, very expensive and would likely cost millions of dollars.

The City initially estimated the cost of the first inquiry at $1 million to $2 million (probably closer, they thought, to $1 million).[45] The estimate was based on the cost of a public inquiry in the City of Sarnia several years before, a public inquiry in Toronto in the 1970s, and the erroneous assumption that we would be able to take advantage of the investigative work already done for the City.[46] The budget explicitly did not take into account any funding for legal representation at the inquiry for parties, City employees, or the City itself. It considerably underestimated the number of hearing days the inquiry would need. The budget estimated 40 hearing days, but it actually took 180.[47] And the City estimated that it would take only fifty hours for me to write my report. Past commissioners will surely agree that this was unachievable. I don't know how long it took the City's lawyers to

[44] Appendix D(ii), Sample Service/Confidentiality Agreement, Service Providers; Appendix D(iii) Sample Confidentiality Agreement, Experts.

[45] Appendix C(i), City of Toronto Staff Report to Audit Committee, January 30, 2002, or http://toronto.ca/legdocs/2002/agendas/committees/au/au020208/it008.pdf.

[46] The assumption was that KPMG had done most of the investigative work. While that work was helpful, it was undertaken for a purpose different from that of the inquiry. We were able to rely on it but had to conduct considerably more investigation ourselves.

[47] TCLI had 180 days of hearings. The two inquiries had 214 hearing days in all.

prepare the City's submissions to the first inquiry, but they totalled approximately 800 pages and doubtless took considerably longer than fifty hours to write. Further, City staff had told me that the inquiry would likely involve the equivalent of one filing cabinet of documents. Instead, up to the end of the first inquiry, we had 70,000 pages of documents. By the end of the second inquiry, we had 124,000 pages.

The City's budget estimate was unrealistically low and that had unpleasant repercussions. It raised expectations in Council and the public that were impossible to meet in the actual circumstances.

Throughout the inquiries, we provided the City with our estimates and budget requirements. In February/March 2005, City Council approved a budget of $11,392,000 for both inquiries.[48] That did not include my salary or other costs that were borne by the federal government. At the time of writing this report, it appears that we will have spent less than budgeted. The City budgeted $4,750,000 for its own outside counsel and related expenses and an additional $3,000,000 for counsel for parties and City employees. These costs were outside my control or jurisdiction and I therefore have no knowledge of whether they were within budget or not. Given all of the circumstances, I am satisfied that we took all available steps to make these inquiries as cost-effective as possible.

F. Why Do the Guiding Principles Matter?

FAIRNESS, THOROUGHNESS, EFFICIENCY, accessibility, and cost-effectiveness are more than just abstract academic concepts. These principles matter, in a tangible way, to everyone involved in a public inquiry. Individuals whose reputations stand to be tarnished must have an opportunity to be heard. The government body that calls the inquiry must be assured that the report on the inquiry will be useful and will not be dismissed as one-sided or incomplete. Ultimately, though, these principles matter most to the public. Throughout these inquiries, I have been heartened by the interest shown by

[48] Appendix C(v), City of Toronto Staff Report to Policy & Finance Committee, January 12, 2005, or http://www.toronto.ca/legdocs/2005/agendas/committees/pof/pof050119/it020.pdf.

members of the public. They care deeply about this City and its governance, and they want a civic structure that governs responsibly. I owed it to them to ensure that I heard all sides, kept an open mind, and exercised the powers granted to me fairly, thoroughly, efficiently, accessibly, and cost-effectively.

V. The Mandate

A. The Toronto Computer Leasing Inquiry

Initially, the City of Toronto established only one inquiry, which came to be called the Toronto Computer Leasing Inquiry, or TCLI. The mandate as set out in the terms of reference[49] was to inquire broadly into all aspects of certain leasing contracts for computers and related software between the City of Toronto and MFP Financial Services Ltd., and between the City of Toronto and Oracle Corporation.

The first day of hearings for TCLI was set for September 30, 2002. The week before that, commission counsel obtained information that, if true, could have resulted in criminal charges being laid against one or more potential witnesses to the inquiry. We contacted the Ontario Provincial Police (OPP) on September 26, 2002, and notified them of the allegation of criminal wrongdoing. Because one of the potential witnesses was a former member of the Toronto Police Services Board, I elected to contact the OPP instead of the Toronto police.

The OPP immediately began a criminal investigation and asked me not to proceed with the inquiry during the critical initial stage of their investi-

[49] Appendix B(i), TCLI Terms of Reference, or http://www.torontoinquiry.ca/lirp/pdf/Terms_of_Reference_TCLI.pdf.

gation. When we convened in the hearing room on September 30, 2002, I announced that the inquiry would adjourn.[50]

During the following weeks, the OPP gave me periodic status reports. Meanwhile, we all continued to prepare for the hearings on the other issues. On November 1, 2002, I announced that the hearings would resume on December 2, 2002. I expected the OPP's preliminary investigation to be completed by then. On November 21, 2002, the OPP announced in a press release that the investigation was concluded and that no criminal charges would be laid.[51] We resumed the hearings on December 2, as planned.

B. The Toronto External Contracts Inquiry

A FEW DAYS AFTER WE FIRST contacted the OPP and then adjourned the hearing, Toronto City Council met (on October 1, 2, and 3, 2002) and ultimately voted to expand the scope of the inquiry. Council now wanted me to investigate and report on some other contracts entered into by the City. In order not to further delay the hearings in the existing inquiry while we investigated these additional matters, Council decided to call a separate second inquiry under section 100 of the *Municipal Act*. It would be known as the Toronto External Contracts Inquiry (TECI).[52]

I was concerned, as were commission counsel, that the terms of reference for this second inquiry were unclear. In particular, there was a section dealing with computer hardware and software. Those items were the subject of a request for quotation (RFQ) for leasing that was being investigated as part of TCLI. In a resolution passed at its meeting on October 29, 30, and 31, 2002, Council clarified that section of the terms of reference by restricting the investigation in TECI to the supply of certain specific items.[53]

50 Appendix E(ii), Commissioner's Opening Statement at TCLI Hearings, September 30, 2002, or http://www.torontoinquiry.ca/lirp/pdf/Sept_30_Opening_Speech.pdf.

51 Appendix F, OPP Press Release, November 21, 2002.

52 Appendix B(ii), TECI Terms of Reference, or http://www.torontoinquiry.ca/lirp/pdf/Terms_of_Reference_TECI.pdf.

53 Appendix C(ii), Excerpt of Toronto City Council Minutes, October 29, 30, and 31, 2002, or item 8.53, pp. 113–115, at http://www.city.toronto.on.ca/legdocs/2002/minutes/council/cc021029.pdf.

The terms of reference also specified that I was to be the commissioner of both inquiries. No doubt, Council inserted this so that efficiencies would be gained by having the same commissioner hear all the evidence, especially as a number of the issues would be similar. The point was phrased as an imperative, but the appointment of a commissioner is the responsibility of the Chief Justice of the Superior Court of Justice. On October 23, 2002, Acting Chief Justice Heather Forster Smith (later Chief Justice) appointed me commissioner of the second inquiry.[54] I decided, so as not to delay TCLI any further, that the investigation, review of documents, and witness interviews for TECI would take place while we got on with the TCLI hearings.

The effect on my workload was dramatic. Normally, a commissioner would oversee the investigation and then conduct the hearings. Now, I would be overseeing the investigation in one while conducting the hearings in the other. Moreover, both inquiries required me to do an in-depth examination of issues relating to good municipal government. The long working day had to become much longer. I saw that there would be not a single moment to spare and hired an executive assistant to help manage the steady stream of meetings before and after sittings. She also took over the role of managing the ever-increasing number of documents.

Presiding over the two inquiries at effectively the same time did create certain efficiencies. The basic administrative structure was already in place, and I needed only to retain additional commission counsel and investigators. On the other hand, two inquiries presented some logistical challenges. Several of the witnesses would appear in both inquiries, many of the issues were the same, and some of the same parties would be involved in both. To proceed with TCLI as soon as possible seemed sensible on the surface, but hearing duplicate evidence and writing two reports was neither in the public interest nor in the interests of the parties and witnesses in terms of efficiency and cost.

After consultation with the parties, we amended our rules of procedure to permit evidence from TCLI to be considered in TECI, and vice versa, and to permit parties in one inquiry to refer to evidence in the other and vice versa.[55] If they requested it, I gave parties with standing in one inquiry

[54] Appendix A(iii), Letter of Appointment to TECI, October 23, 2002.

[55] Rule 21.1 in the rules of procedure for both TCLI and TECI.

standing in the other, to the extent that their interests were substantially and directly engaged.[56] I would release one report, which would address the evidence and my findings from both inquiries.[57] With these measures in place, we were ready to proceed with both inquiries as quickly and efficiently as possible.

Shortly after TECI was called, a party with standing brought a motion for particulars. Essentially, the party wanted me to direct the City to provide more detail in the terms of reference for TECI in order to set out the City's specific concerns about that party.

I dismissed the motion.[58] The terms of reference for a public inquiry are not, in the words of the Supreme Court of Canada, "a pleading, much less is it a bill of indictment."[59] It is not realistic to expect detailed allegations to precede an investigation. That would cripple the investigation before it began.

No judicial review application was brought with respect to my ruling. Later, the individual left Canada and did not participate in the inquiry, despite having been granted standing.

C. Another Phase, a New Council, and Changing the Sequence

The City had set up the first inquiry on the assumption that it would cost less than $2 million and take only forty hearing days. By early November 2003, we had already concluded over a hundred days more than the City had initially estimated, and we still had the second inquiry to do, which was budgeted for seventy days of hearings. But there was a third element to my mandate. City Council's first resolution in my terms of reference for both inquiries required me to examine and report on "any matter connected with the good government of the municipality, or the conduct of any part of its public business" when the main evidence of the two inquiries was finished.

56 Rule 11.1 in the rules of procedure for both TCLI and TECI.

57 Rule 1.1 in the rules of procedure for both TCLI and TECI.

58 Appendix G(iv), Commissioner's Ruling on Application for Particulars by Ball Hsu & Associates Inc., March 6, 2003, or http://www.torontoinquiry.ca/lirp/pdf/TECI-ruling-Ball.Hsu.pdf.

59 *Consortium, supra* note 31.

Toronto was preparing to elect a new mayor and a new city council on November 10. All of the main mayoralty candidates had proposed changes to the way the City conducted its business. All of them were talking about integrity, conflict of interest guidelines, rules on lobbying, and the need for transparency in government. It seemed clear that whoever was elected mayor planned to address these integrity issues as an early priority. In the circumstances, the order in which I would proceed with the three elements of my mandate became important.

The commissioner of a public inquiry has to consider the relevance of the inquiry in a broader political and social context and stay flexible in considering what can be done, within the terms of reference, to serve that broader context. I considered, therefore, that if I waited until both inquiries were completed before dealing with the good government matters, it would be impossible for me to give the new mayor and council a timely report on those issues. I wanted the inquiries to be relevant to this new council and I believed that my task of exploring good government would help Toronto most if I addressed it earlier, giving the mayor and council the benefit of our information early in their mandate. Thus, instead of starting the hearings in the second inquiry, I set the "Good Government phase" to begin in early January 2004.[60]

After the election, but before the Good Government phase began, I was struck by another important question having to do with the public interest. Toronto now had a new mayor and many new councillors. The inquiries had been called by the previous council. I decided that I had a responsibility to the Toronto taxpayers to engage the new mayor and council.

The inquiries were still not over. The cost to the taxpayers for TCLI had escalated far beyond the original prediction and I could foresee the possibility of more of the same for TECI. It was public knowledge that the City was experiencing budgetary constraints. I knew also that, given the time it would take to complete all phases, it was not going to be possible to give the new council a full report that I considered timely. Importantly, having completed the investigation of TECI, I had reached the conclusion that, while evidence of misconduct might arise out of TECI, it was unlikely that

[60] Appendix E(v), Commissioner's Statement on Good Government Segment of Inquiry, November 4, 2003, or http://www.torontoinquiry.ca/lirp/pdf/TECI_Good_Government_Statement.pdf.

the evidence would materially enhance my recommendations to Council. This was so because so many of the issues were common to both inquiries. (Now that the inquiries are completed, I can confirm both of those early conclusions: there was indeed misconduct uncovered in the second inquiry and very few additional recommendations emanated from it.)

Having considered all of those factors, I decided that it was important to give the new council an opportunity to re-address the need for the second inquiry.

Judges are distanced from the parties before them in that they must remain impartial, and it would be considered extremely unusual for a judge to contact one party to a trial directly. The City was a party to the inquiries, but commissioners have a broader role than trial judges, including but extending beyond judicial functions. Without compromising or appearing to compromise independence, commissioners can initiate limited contact with the government that established the inquiry when necessary to ensure that the proceedings are always in the public's best interest.

I therefore wrote to the new mayor, David Miller, on December 30, 2003, setting out the status of TCLI and asking Council to decide whether it still wanted me to proceed with TECI. I emphasized that I was fully prepared to do so, but that it was in the hands of Council.[61]

On January 29, 2004, on a motion by the Mayor, passed 34 to 2 by Council, a decision on my request for confirmation was deferred until all evidence related to TCLI had been called. In the interim, I was not expected to begin the hearings in TECI, which had been scheduled for February 16.[62]

When I wrote to the Mayor, there were two outstanding matters in TCLI. One was the need to recall a few witnesses. The other was a judicial review of one of my rulings, and I could not proceed with TCLI until after the Divisional Court decided. Once the court ruled, the "recall phase" of the first inquiry began on April 19, 2004. A few days into the hearings, two witnesses who had been summonsed, a former councillor and his wife, brought another motion and application for judicial review and I had to adjourn the inquiry.

[61] Appendix E(vii), Commissioner's Letter to Mayor Miller, December 30, 2003, or http://www.torontoinquiry.ca/lirp/pdf/commissioner_letter_to_mayor.pdf.

[62] Appendix C(iii), Excerpt of Toronto City Council Minutes, January 27, 28, and 29, 2004, or item 3.56, pp. 65–71 and Attachment No. 2 at pp. 133–139, at http://www.city.toronto.on.ca/legdocs/2004/minutes/council/cc040127.pdf.

With TCLI adjourned again, I had my commission counsel contact the City's lawyers to try to get a decision on whether we were to proceed with TECI. Parties with standing and witnesses in TECI were understandably loath to co-operate with our investigations, let alone risk incriminating themselves in any way, given the possibility that they might not have to testify. This was hampering our ability to be fully prepared to proceed expeditiously with TECI if Council decided it wished me to do so.

Accordingly, on May 18, 2004, with TCLI still adjourned, the City solicitor conveyed to Council her advice that it should now direct either that TECI proceed or that it not go ahead. The next day, Council voted 34 to 4 in favour of a motion that TECI proceed.[63]

The hearings for TECI began on October 18, 2004, after the Good Government hearings concluded, and after all of the witnesses, including those who had been recalled, had been heard in TCLI.

D. Good Government

The terms of reference for both inquiries gave me jurisdiction to "inquire into all aspects of the [transactions set out in the terms of reference], 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 this inquiry." I consider my recommendations regarding good government to be the heart of my report. It is important for the public to understand what happened in the past, but it is even more important to understand what should be done in the future.

I knew I would hear a great deal of evidence from City employees about administrative processes and specific tasks, but I also needed information about the big picture—municipal governance generally and wider policy issues. To make the best possible recommendations for the good

[63] Appendix C(iv), Excerpt of Toronto City Council Minutes, May 18, 19, and 20, 2004, or item 8.127, pp. 178–181 and Attachment No. 10 at pp. 243–246, at http://www.city.toronto.on.ca/legdocs/2004/minutes/council/cc040518.pdf.

government of the City, I had to look broadly at the institution of government, not simply at the workings of a single department or division within the City. The broad exploration of social or governance systems is another feature that distinguishes public inquiries from trials, and it can contribute markedly to effective recommendations. I decided to devote several weeks of hearing time solely to good government, as a discrete phase of the process.

VI. Stages in the Inquiries

I HAVE ALREADY HIGHLIGHTED SOME of the important differences between a public inquiry and a criminal or civil trial. There is yet another vital distinction. In our common law system, trials follow investigations. Parties are pitted against each other, and examinations and cross-examinations are the thrust and parry to test the evidence and arrive at the truth. In a public inquiry, the investigation is part of the process; indeed, the whole purpose is to investigate and make public the results.

In the sections that follow, I describe the inquiries in stages: setting up, investigations, hearings, and the Good Government phase. I divided the stages this way to make the inquiry process clear, but the division is somewhat artificial. As I have said, the whole of an inquiry is an investigation—before the hearings start, behind the scenes while hearings are going on, and in the hearing room itself.

A. First Things First: Setting Up and Running the Inquiries

1. Meeting with City Staff

After I was appointed, and before I retained commission counsel or indeed any staff, I met with two City of Toronto staff members. These were not long meetings, but I wanted to get a general sense of the task ahead of me. How many documents were involved? Had a budget been established? Had they thought of a location where I could hold the hearings? I also asked them to give me all of the media clippings they had gathered that touched upon the issues that would likely be faced in the inquiry. Finally, I needed to know which law firms were on retainer with the City because I had to hire commission counsel, and lawyers from those firms would have an obvious conflict.

I was reluctant to have private meetings with City staff and confined them to a very few, but until I retained commission counsel it seemed the only way to proceed. Communications with City of Toronto staff moved forward much more quickly once I retained counsel, and progressed even more quickly once the City retained outside counsel. Oddly, the City had not initially intended to retain outside counsel or to be a party with standing at the inquiry. Once retained, the City's outside counsel were able to help my commission counsel navigate through the bureaucracy.

2. Commission Counsel

a. Role of Commission Counsel

Commission counsel are not adverse in interest to any witness or any party with standing. Thus, the relationship between commissioner and commission counsel is very different from that of judge and lawyer in a trial. Counsel are the commissioner's lawyers, and their role is to assist the commissioner in the conduct of the investigation and the inquiry generally.

Justice Dennis O'Connor, writing about the role of commission counsel after the Walkerton Inquiry, described it as follows:

> The role of commission counsel is quite different from that of a lawyer in most other legal proceedings. Perhaps the role of a coroner's counsel at an inquest is the closest analogy. The difference stems from the relationship between commissioner and commission counsel. That relationship is altogether different from that usual one between a judge and a lawyer. The commissioner appoints commission counsel. By investigating the subject matter of the inquiry and leading evidence at the hearings, commission counsel assist the commissioner in carrying out his or her mandate. Throughout, they act on behalf of and under the instructions of the commissioner.
>
> As a result, the role of commission counsel is not to advance any particular point of view, but rather to investigate and lead evidence in a thorough, impartial, and balanced manner. In this way, the commissioner will have the benefit of hearing all of the relevant facts or evidence unvarnished by the perspective of someone with an interest in a particular outcome.[64]

While it is not the role of commission counsel to advance any particular point of view, it does not follow that they should not be vigorous and thorough in their investigation, which includes the examination of witnesses. Commission counsel assist the commissioner in trying to discover the truth. They must be prepared to ask probing questions, especially when a witness's evidence is inconsistent or evasive. Commission counsel cannot accept each statement or explanation at face value. When there is no party adverse in interest to the witness, commission counsel have a special duty to examine the witness particularly thoroughly. They are not advocates for a party, but they are advocates for the truth. They must investigate, test, and verify.

b. Selecting Commission Counsel

Justice O'Connor described commission counsel, aptly I think, as the alter ego[65] of the commissioner. I knew I would be working closely with commission counsel, and it was important to me to find lawyers I trusted and respected. Not incidentally, since we would be spending many long hours together, I also wanted to get along well with them.

[64] Justice Dennis O'Connor, "The Role of Commission Counsel in a Public Inquiry" (Summer 2003) 22 Advocates' Soc. J. No. 1, 9–11.

[65] *Ibid.*

Commission counsel must be strong advocates in the hearing room, but it is also important that they act with tact and diplomacy. What goes on in the hearing room is only one part of the inquiry process, and commission counsel were the liaison between me and the parties with standing and witnesses. If disagreements arose (and they did), negotiations had to take place between commission counsel and counsel for the witnesses or parties with standing. Commission counsel had to steer a course that did not allow disagreements to cause delay by spilling into the hearing room. The result was numerous meetings with counsel, and voluminous correspondence with lawyers for the various parties and witnesses.

The inquiries involved thousands of documents and hundreds of witnesses. Commission counsel had to be organized, and with the current practice of electronic document organization, computer literacy was imperative.

Frequent dealings with the media were also an important part of commission counsel's role. My commission counsel ensured that the media had access to the information they needed and, where necessary, gave them the fuller explanations helpful to the media's role of communicating to the broader public.

Obviously, commission counsel must be free of any conflict of interest, given that a public inquiry plays an important role in restoring public confidence. I believe that freedom from conflict in this context entails something more than the prohibition against a lawyer's acting in opposition to a former client in the same matter or in any related matter.[66] Commission counsel not only must be free of any such conflicts but must also appear to be free of them. I decided not to retain counsel who had personally or through their firms acted for the City of Toronto, the Mayor, or any of the persons or companies referred to in the terms of reference. I also

[66] Rule 2.04 (4) of the *Rules of Professional Conduct* of the Law Society of Upper Canada states:

> A lawyer who has acted for a client in a matter shall not thereafter act against the client or against persons who were involved in or associated with the client in that matter:
>
> (a) in the same matter,
>
> (b) in any related matter, or
>
> (c) save as provided by subrule (5), in any new matter, if the lawyer has obtained from the other retainer relevant confidential information unless the client and those involved in or associated with the client consent.

eliminated from consideration lawyers who had worked for any of the likely witnesses. A public inquiry involving some of the same parties had been called in the City of Waterloo, and I also excluded lawyers or firms who were involved in that matter. Unquestionably, this is a broad approach to conflict of interest, but given the public role of commission counsel, I believe it to be the right one. The public must have confidence that commission counsel are above reproach, that they were selected in the public interest, and that they will act only in the public interest.

Once I selected commission counsel, I assumed that their fees would be paid in accordance with the City's guidelines with respect to rates for outside counsel. I was surprised to learn that, unlike the provincial or federal governments, the City had no such guidelines. As a result, I was not involved in setting commission counsel's fees. My two lead commission counsel in TCLI negotiated their fees directly with the City, and the information was publicly disclosed.

As it turned out, the public was fortunate in my choices and so was I. My commission counsel were diligent, fair, thorough, and extremely hard-working throughout. They never lost sight of their duty to the public interest, and the public interest was well served by their tireless efforts.

3. Staff

A myriad of staff are essential to the efficient running of a public inquiry. Junior lawyers, researchers, law clerks, investigators, and clerical staff—these people ensure that the massive amount of work in a public inquiry is done. I cannot overemphasize the need to have a full complement of staff. We added staff as it became apparent that the volume of work far outstripped the initial estimate. Had I known about the expanding scope in advance, I would have hired more staff at the initial investigation stage and would have reduced the complement as the investigation neared completion. I was blessed with particularly competent and dedicated staff, for which I am extremely grateful.

a. Chief Administrative Officer

I could not have operated these inquiries without a chief administrative officer (CAO). I recommend to future commissioners that they hire one before

they hire anyone else, possibly even before they hire commission counsel. The first tasks of a commissioner are administrative, not legal, and it is not a good use of taxpayers' money to have lawyers doing work that a competent CAO can do. The CAO can hire support staff, find office space and equip it with furniture, computers, and other office equipment and supplies, find a suitable hearing room, arrange parking, establish procedures for tendering service contracts, have a website set up, and get many other essential practical matters out of the way.

I was fortunate to find an extremely conscientious CAO—a seasoned, retired public servant who was winding down his role as the CAO for the Walkerton Inquiry. He was diligent in adhering to my commitment to obtaining goods and services through competition whenever possible, vigilant in scrutinizing invoices, and relentless in ensuring that the inquiry kept within its budget. I often heard good-natured murmurs that the CAO was frugal, and I was delighted. He shared my view that since we were spending the public's money, we must be financially responsible and accountable. This was especially important given the subject matter of the inquiries.

b. Communications Officer

Early on, I hired a communications officer. I was fortunate in finding someone with extensive relevant experience. As was the case with the CAO, he had most recently worked with the Walkerton Inquiry.

He had the necessary contacts with reporters and news desks at the many media outlets in the City. Having identified the potential media constituency, he facilitated their access to public information about the inquiries. He provided background information to the media but was not a spokesperson for the inquiries. He wrote our press releases, hired a webmaster, made sure our website was up to date, and arranged for advertising when necessary. The job description was broad and his strategic communications advice was a great help.

c. Administrative and Technology Support

The inquiries had to establish the normal administrative procedures, despite being a time-limited office. Wherever possible, we used the administrative

procedures and services available from the City of Toronto. These included the procurement of office supplies, stationery, mail and delivery services, printing, external shredding, and so on.

Before the inquiry office was set up, my CAO talked to City staff about our need for a secure computer server and network system. Using the City's system and network turned out to be an efficient solution. We had full technology service and help, with significant cost savings. To ensure confidentiality and independence, it was essential that we have a separate server and e-mail group, but the City was able to provide that.

The City provided computers and printers, originally just surplus desktop computers. Later, we needed extra memory for those computers and some new laptop computers for me and for commission counsel, especially for use in the hearing room. A City e-mail account was available for each computer user at the inquiry office. In addition, the JUDICOM system provided by the Office of the Commissioner for Federal Judicial Affairs proved very useful to my work.

The contract for transcription services was tendered and awarded to a very efficient company, and transcripts were available on our website within four hours of the end of each day's hearings.

4. Offices and the Hearing Room

Hearings took place at the East York Civic Centre, the administrative centre for one of the former municipalities now amalgamated into the City of Toronto. We chose this location for a number of reasons.

Our physical requirements included a hearing room as well as offices. The hearing room had to be wheelchair accessible and the location had to be reachable by car and by public transit. The Civic Centre met all of those needs, and because the City of Toronto owned the building, it presented a considerable saving to the taxpayer over leasing privately owned space. We were also fortunate in that the City staff who worked in the building were very accommodating.

To minimize costs, we made no structural changes to the existing offices and layout. City Facilities Services provided workstations and furniture from surplus inventory. We acquired further furniture and equipment as needed (such as dictation equipment and a fax machine). Those items

became City property and were to be reassigned at the conclusion of the inquiries. We changed the door-locking mechanisms to ensure the security of the premises, and some electrical work and very limited painting was required. The East York Art Foundation kindly enhanced the space by providing artwork.

The hearing room was the former East York Council Chamber. It had a dais for me and the registrar, a "witness box," and a place for the deputy and the court reporter. There was adequate floor space to accommodate counsel tables and public seating. A few changes were necessary to make the Council Chamber suitable for use as a hearing room. Those included a secure locking system for the doors, improved lighting, data lines for computers, a special digital telephone line for court reporting, and an upgraded audio system. The City made the hearing room available for our exclusive use but, to the extent possible, we accommodated requests to use it for traditional East York events.

Naturally, it was important to ensure the security of confidential documents. The building and the hearing room met our stringent security requirements. Our individual offices could be locked, and they were located in a discrete wing of the building that was locked in the evening. The hearing room, which contained the court reporter's equipment, television cameras, and sound equipment, was also securely locked whenever the room was not in use.

5. The Biggest Public Forum Possible: The Website

I have already stressed the public nature of a public inquiry. It is a public forum and the public must have access. The only question is how best to accomplish it. There are physical considerations having to do with the site for public hearings, such as transportation links, wheelchair access, and so on. However, most members of the public who have an interest in an inquiry will not be able to attend the hearings. For them, we arranged electronic access. Our website, www.torontoinquiry.ca, provided a complete and unfiltered recording of our proceedings each day. The public, potential witnesses, the press, counsel—anyone with Internet access, anywhere in the world, could learn all about the inquiries.

From its launch in May 2002 until May 1, 2005, our website attracted almost one million visits. We made every effort to keep it up to date as new information became available. It was operating very soon after I was appointed, and well before our first hearing day. In fact, one of my early tasks was to tender for and retain the services of a webmaster. We designed our site and the City added a link to our site on its own website.

In this technology-savvy age, I cannot imagine how a public inquiry would function without a website. It was so important to fulfilling my commitment to accessibility that I think it's worth looking at the architecture of the site in detail.

Home Page

- At-a-glance update of what was going on at the inquiries, with the two inquiries distinguished by different colours
- Schedule of witnesses—who was testifying at the time, and who was expected to testify that week
- Summary of important and late-breaking developments posted on the site, with appropriate links
- Links to TCLI, TECI, and the Good Government phase
- Updated daily

About the Inquiry

- History, mandate, and purpose of each inquiry, updated periodically

The Commissioner

- Biography and photograph

Commission Counsel

- Biographies and photographs

Parties with Standing

- Listing of all parties with standing and their counsel, including contact information for counsel (with their consent)
- Link to rulings on standing and funding

Legal Information
- Terms of reference for both inquiries
- Rules of procedure for both inquiries
- Commissioner's statements and letters to the Mayor
- Commissioner's rulings
- Closing submissions and reply submissions

Closing Submissions
- Closing submissions and reply submissions

Transcripts
- Each day's transcripts, usually posted by 8 p.m.
- Easily searchable by word and by date, with links to each witness
- Unfortunately, we could not provide electronic access to all exhibits, but members of the public could come to the inquiry offices and access them there.

Schedule & Witnesses
- Witnesses listed alphabetically, as well as in the order in which they appeared
- Links from witnesses to transcripts on the date(s) they testified

Media Information
- Up-to-date information of interest to the media
- A notice that I would not be giving interviews. We used the following wording: "As is the custom for members of the judiciary, Madam Justice Bellamy will not be giving interviews." Commission counsel were always available to the media to answer questions, and the website indicated this.

Media Releases
- Text of the media releases issued (twenty-three in all), announcing upcoming significant witnesses and notable developments during the inquiries

Location of Offices
- Photograph of the building and the address and telephone number

- Directions by public transportation, and by car (including information about parking)

FAQs (Frequently Asked Questions)

- Narrative answers to questions about public inquiries, the mandate of the inquiries, and the expected results (namely, my report)

Feedback

- Telephone number for leaving messages and a general e-mail address

Links

- The City of Toronto website and the Toronto Transit Commission (TTC) website

6. Rules of Procedure

Subject to the dictates of fairness, a commissioner is free to formulate the rules of procedure for a public inquiry.[67] I certainly drew upon the experience of previous commissioners in creating mine and benefited greatly from it. However, since I had already decided on using a website to increase accessibility, I wanted all of the documents available to the public to be more generally understandable. We therefore took care to write our rules of procedure in plain language. We circulated them in draft form to parties with standing for their comments. The finalized rules were the first substantive document posted to our website.[68]

[67] *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 at 657, L'Heureux-Dubé J.: Every administrative body is the master of its own procedure and need not assume the trappings of a court.

See also *Addy v. Canada (Commission of Inquiry into the Deployment of Canadian Forces to Somalia)* (1997), 149 D.L.R. (4th) 118 at 174 (F.C.T.D.), Teitelbaum J.:

Another element dictating restraint is the right and ability of the Commission to serve as "master of its own procedure" *(Knight, supra*, at 685). As long as the Commission respected the rules of fairness, it could devise as it saw fit, the hearing schedule and the relevancy criteria for the anticipated witnesses.

[68] Appendix H(i), Rules of Procedure, TCLI, or http://www.torontoinquiry.ca/lirp/pdf/Rules_of_Procedure_TCLI.pdf; Appendix H(ii), Rules of Procedure, TECI, or http://www.torontoinquiry.ca/lirp/pdf/Rules_of_Procedure_TECI.pdf.

The rules of procedure covered the guiding principles of the inquiries, practical information such as the location and time of hearings, and procedural matters such as standing, witness interviews, documentary evidence, and the hearing of evidence. They were as complete as possible, but we put in place other procedures during the course of the inquiries, such as the use of affidavits.

7. Document Management

When I first met with City staff, they told me there would be one filing cabinet of documents. This made us think we did not need a sophisticated document management system. However, as the documents trickled in, and then poured in, we realized we needed to obtain some form of electronic document management system. In the end, the inquiries generated 48,228 documents with some 124,000 pages.

a. Electronic Document Management Services

The document management field has developed rapidly over the last decade. The unstoppable trend is toward electronic document organization, management, production, and hearings. These inquiries took advantage of that trend.

In fact, the inquiries simply could not have functioned without electronic document management. It would have been virtually impossible to review, search, and put in order such a volume of documents efficiently in any other way. It does take time to learn the document management software, but I believe it was worth the effort.

After competitive tendering, we retained the services of a document management company. As documents came in from parties with standing, they were immediately shipped to the document management company, where they were electronically scanned and indexed. The inquiries and the parties with standing received compact discs containing electronic images of each document, along with indexing information. People who received notices of alleged misconduct were also given the opportunity to access all documents. This system of document disclosure, scanning, indexing, and CD distribution continued as additional documents were produced.

Each document was assigned a unique identifying number, which was a feature of Summation Blaze (proprietary software for organizing documents, transcripts, and other files related to a proceeding). During the hearings, whenever counsel referred to a document, they were required to identify it not only by its place in the document book (e.g., "the document at Volume 1, Tab 1") but also by the beginning document number, or "begdoc." In that way, the document number was registered in the transcript, in our summaries of the transcripts, and in my own notes. That made it considerably easier to later locate each document in the electronic document database when required.

It made sense to outsource the scanning and indexing. The flow of incoming documents varied dramatically, from a trickle to a flash flood, and we would otherwise have had to manage varying staff levels or find staff already trained in document management software. The document management company provided exemplary service, often working over weekends and holidays to meet our needs.

b. Paper Documents

We managed and disclosed documents electronically, but we used paper documents in the hearings. We considered having a "paperless" hearing before the first inquiry, but given the City's initial low estimate of both the number of documents and the length of the hearings, and given the significant start-up costs for an electronic hearing, we dismissed the idea. We considered it again for the second inquiry, but given the comparatively short duration of the hearings, we opted not to do it.

Before each witness testified, commission counsel made a list of the documents on which the witness intended to rely and invited parties with standing to provide a list of any other documents they thought were necessary. The listed documents were then printed and collated into a binder (or, more likely, several binders) for each witness.

Often, there were last-minute demands as new documents were added on the morning of a hearing or even during the hearing day. Most of one inquiry staff member's time was devoted to the task of document management. She was the liaison between the person providing the documents and all counsel. She was also responsible for supervising the printing,

collating, and distribution of the document binders that were used in the hearing room.

Our system of managing documents during the hearing evolved over the course of the inquiries. Initially, a separate document binder (or binders) was prepared for each witness. As the evidence unfolded, it became apparent that there was considerable duplication among witness binders, particularly when several witnesses were called to testify about the same subject matter. We switched to preparing binders by subject matter rather than by witness, thus reducing overall the number of binders that had to be produced.

During TECI, we developed statements of non-contentious facts, further reducing the number of documents to which a witness's attention had to be drawn. Even with these improvements, the inquiries still used a huge amount of paper.

Electronic hearings would have had a higher up-front cost. Moreover, not everyone is comfortable with electronic documents, and eliminating paper would have been very difficult for some people. Nonetheless, I strongly believe electronic hearings are well worth exploring and, where appropriate, using. In light of the ultimate number of documents, I believe these inquiries would have benefited from having paperless hearings.

c. Archives

My CAO arranged to transfer the official records of the inquiries to the City archives. Meetings to discuss that transfer began in 2003 and continued into 2005.

The materials transferred included original certified copies of the transcripts of the hearings, the original registrar copy of all exhibits entered into evidence during the hearings, closing submissions, a CD and digital tape of the website contents, general files, and my report in CD and hard-copy versions. All of the documents collected by the inquiries were put on CDs and likewise transferred to the City archives, but some are sealed for twenty years because of the personal nature of some of the materials.

8. Security

The inquiries collected and managed a great deal of confidential information. Our ongoing investigations were not public, and it was important to

preserve confidentiality and investigative integrity. Our security measures proved satisfactory and there was no security breach in the course of the inquiries.

Our offices were in a discrete wing of the building that could be locked. Our individual offices could be locked also. The locks were rekeyed and we had limited-access security cards for our suite of offices, main access, and parking. All documents were kept in filing cabinets, which were locked each evening. Documents saved on computers were password-protected. The City of Toronto did not have access to the server on which we saved these documents.

In the hearing room, I was accompanied by an experienced deputy seconded from the Superior Court of Justice. The hearing room was locked during lunch breaks and before and after the hearing day. All original exhibits and documents were kept in a locked room.

All staff, including commission counsel, executed confidentiality agreements.[69] When temporary or new staff members were hired, their references were checked. Counsel for parties with standing, counsel for witnesses, and witnesses themselves were also required to sign a confidentiality agreement if they were provided with any documents.[70]

From time to time, we needed security for a witness. Sometimes we did this on our own initiative and sometimes a witness would request physical security for their appearance at the hearing. In those cases, we retained plainclothes security officers to attend the hearings and discreetly accompany the witness.

9. Media

When trials attract public interest, the public generally relies on the media for information about them. Major media outlets have reporters who can distill and interpret the sometimes mysterious judicial proceedings. As a general rule, public inquiries are much more likely than trials to engage public notice. By definition, they involve widespread public interest to a much higher degree than most trials. As with trials, though, many members

[69] Appendix D(i), Sample Confidentiality Agreement, Commission Counsel and Staff.

[70] Appendix D(iv), Sample Confidentiality Agreement, Counsel; Appendix D(v), Sample Confidentiality Agreement, Parties and Witnesses.

of the public rely on the media for information. In a public inquiry, facilitating media access is part of facilitating public access.

a. Contact and Interviews

Recognizing the importance of the media to the principle of public accessibility, I had hired a communications officer to liaise with reporters and the news desks of media outlets and to perform all of the related communications functions. The communications officer was not a spokesperson for the inquiries.

I did not consider it appropriate for me to have contact with the media. A simple declaration on our website made that clear. I did make several statements, including at the beginning and end of each inquiry, before and after the Good Government phase, upon resuming the hearings if we had been adjourned for some time, and so on. The text of my statements was posted on our website.[71] I spoke about the nature of the inquiry and the need to keep an open mind. I note that Justice Sidney B. Linden, commissioner of the Ipperwash Inquiry (which is ongoing as I write this report), has been providing the public with periodic statements on the progress of his inquiry. This is another example of how all inquiries are different. I did it by way of statements to mark specific events in the proceedings, but doing it his way is also a good idea.

The Supreme Court of Canada has directed commissioners to make every effort to ensure that public inquiries are accessible to the public. Since I had decided not to give interviews, responsible contact with the media by commission counsel was one of the ways to achieve this necessary goal. I considered it perfectly appropriate for commission counsel to give interviews and answer questions from the media, and they made every effort to be available to do so. They also provided background information to reporters and facilitated their access to documents and transcripts. Given that sometimes legal information was to be communicated to the public, it was important that my commission counsel communicate effectively, through the media, to those with no legal training. They were able to do so in a very productive and prudent way.

[71] Appendix E, Commissioner's Statements, or http://www.torontoinquiry.ca/lirp/index.html.

The extent to which commission counsel kept the media informed differs, perhaps, from what might be considered appropriate during a trial, and that illustrates yet another important difference between trials and public inquiries. However, commission counsel were certainly not given free rein in their dealings with the media. I reminded them that they were really speaking on my behalf. Thus, and as essentially the alter egos of the commissioner, who was also a judge of the Superior Court of Justice, they had a high level of responsibility and obligation to be evenhanded and fair in their comments to the media.

b. Press Releases

We issued press releases to draw attention to motions and rulings, significant events, and important dates such as hearing start and end dates and adjournments. We found that Canada NewsWire, a commercial wire service that broadcasts to every newsroom in Canada, was the most effective channel for media releases. My communications officer would follow up on the releases by contacting the reporters and media outlets that regularly covered the inquiries.

c. Lockups

A public inquiry can generate a huge number of documents and sometimes media representatives have very little time to read and synthesize the information. The second inquiry had three segments. Before the start of each segment, we released the detailed statement of non-contentious facts, along with the affidavits of all the witnesses who were going to testify in that segment. On these occasions, because of the volume of material to be entered into evidence, we arranged a media lockup. Several hours before the start of the hearing day, media representatives would be allowed to read the documents to be entered into evidence that day, on their written undertaking not to report on them until they had been made public.[72] From my perspective, this lockup procedure worked well. The media honoured their commitments, and from the informal feedback we received, it seems the lockups helped them do their important work.

[72] Appendix D(vi), Sample Confidentiality Agreement, Media Lockup.

d. Media Room

These inquiries were covered by print and electronic media, and we had to be sensitive to the demands of their respective deadlines.

The communications officer arranged for a media room. This space was equipped with electrical outlets, Internet access, telephone lines, desks, and sound plug-ins for radio reporters.

Reporters could watch the hearing on a television monitor. They could also sit in the hearing room if they chose, but monitoring the hearings from the media room seemed to make it easier for them to work and file their stories on deadline. We also placed in the media room copies of every exhibit used in the hearings so that the media could review them and follow along as witnesses looked at and commented upon them.

e. Photographs

Still cameras were permitted in the hearing room when hearings were not taking place. Occasionally, because of the number of photographers interested in a particular witness, I permitted one minute of hearing time for taking photographs in the hearing room. Witnesses could also be photographed entering and leaving the hearing room, but, luckily, our hearing room had glass doors. Beyond the one minute I allowed for photography in the hearing room, still photographs could be taken through the glass doors at any time without disturbing the hearings. That made a significant difference in the degree to which photographers could do their jobs effectively, and it had the additional bonus of ensuring that witnesses did not need to feel beleaguered by photographers before or after testifying.

f. Television

Television cameras require sound and video feed. The CBC provided the basic cabling and a TV monitor. Local television stations took turns providing a single camera for use during the hearings, hooked up to the live monitor in the media room. Some television stations brought their own recording devices and these were positioned in the media room. This cooperative arrangement was complicated, but it worked very well.

The public was also able to follow the inquiries through a video and audio feed to City Hall and Metro Hall. The City's audio-visual department organized the video and audio lines at that end. Video was supplied by the media television pool when it was operating. On days when television stations chose not to cover the proceedings, the inquiries' audio technician provided a camera. While not of broadcast quality, it managed to capture the proceedings well enough.

B. The Investigation

A public inquiry is generally called in response to a matter of urgent and immediate public concern. The hearings should start as quickly as possible; otherwise, the inquiry is at risk of becoming irrelevant. But the drive to get on with the hearings must be balanced against the need for preparation. Lawyers, staff, and investigators have to be hired, documents have to be gathered, along with other evidence, and witnesses have to be interviewed and later prepared for their appearance at the inquiry. All of this takes time, perhaps many months. We were not set to call our first witness until six months after I was appointed commissioner, but it was time well spent. The bulk of the investigation takes place before the hearings and it must be thorough. Without our strong foundation of investigation, anything that followed would have been shaky, and hearing days would have been wasted.

The investigation phase is the least public part of a public inquiry. In these inquiries, it started the moment I was appointed to the first inquiry and continued unabated until the inquiries ended, although it was most intense in the months leading up to the beginning of the hearings.

Based on my experience in these inquiries, I think it essential that commission counsel be very much involved in all phases of the investigation. My commission counsel were closely involved in all stages of the investigation, and they brought to the investigative task the crucial perspective of my guiding principles for the inquiries: fairness, thoroughness, efficiency, accessibility, and cost-effectiveness.

1. Documents

a. Collecting Documents

Parties with standing and all witnesses were required, either by our rules of procedure[73] or by summons, to produce all relevant and helpful documents. Most made their best efforts to comply, but I was astounded and disturbed by the volume of documents that continued to be produced very late, when we were well into the inquiries.

For example, one party failed to produce thousands of electronic documents, and the party's legal counsel had not known of their existence. Upon this belated discovery, TCLI had to adjourn to find, classify, and distribute these documents. Another party also discovered a substantial number of additional documents during TCLI and, at the very close of hearings in the inquiry, located yet more previously undisclosed documents.

Witnesses also disclosed new documents during the hearings. One witness, despite being asked repeatedly by her own counsel, counsel for other parties with standing, and commission counsel, did not disclose the existence of several notebooks in which she had kept handwritten notes about the very matters being investigated. When recalled to testify about these documents once they were produced, she could not provide a reasonable explanation for not disclosing them earlier.

This was frustrating, and it wasted our time, but the problems with document production were not unique to these inquiries. In *Consortium Developments (Clearwater) Ltd. v. Sarnia (City)*, Justice Binnie commented on the challenge of "rolling disclosure" in the public inquiry context:

> Unlike an ordinary lawsuit or prosecution where there has been preliminary disclosure and the trial proceeds at a measured pace in accordance with well-established procedures, a judicial inquiry often resembles a giant multi-party examination for discovery where there are no pleadings, minimal pre-hearing disclosure (because commission counsel, at least at the outset, may have little to disclose) and relaxed rules of evidence.[74]

[73] Rule 13 in the rules of procedure for both TCLI and TECI.

[74] *Supra* note 31, at para. 41.

"Rolling disclosure" is not uncommon, but the late disclosure of documents presents problems. It is unfair to witnesses, because they may not be able to answer questions fully without the assistance of all of the relevant documents. It is unfair to counsel who are working to understand the matters at issue in the inquiry. Late disclosure also leads to delay, either because parties have to be given time to review the additional documents or because witnesses must be recalled to testify about the newly discovered documents.

I think parties with standing should be required to provide a plan for the production of documents, specifically including a review of electronic documents. Given that the storage and retrieval of electronic documents is a specialized field, it is a good idea to hire someone with expertise in this area as part of the investigation team. Deadlines should be set for the production of documents, and parties should have to account for any delays. Parties and witnesses should also be told explicitly that the definition of "documents" includes their own written notes, leaving no room whatsoever for ambiguity.

b. Solicitor-Client Privilege

No public inquiry is entitled to production of documents that are subject to solicitor-client privilege.[75] In these inquiries, and no doubt many others, that principle was complicated by co-existent civil litigation between some of the parties with standing.

I decided that claims of solicitor-client privilege would be resolved informally whenever possible, and virtually all such claims were successfully dealt with that way. If a party claimed privilege with respect to a document, it was agreed that the document would be shown to commission counsel without waiver of the privilege claim. If commission counsel agreed the document was privileged, that would end the matter and the document would be excluded. If commission counsel did not agree the document was privileged, they would then determine whether the document was relevant or helpful. Only if there was a disputed claim of privilege *and* commission counsel determined the document to be relevant or helpful would there be further adjudication. In such cases, the matter was to be heard by the Regional Senior Justice of the Superior Court of

[75] *Public Inquiries Act*, *supra* note 34, s.11.

Justice or his designate. I did not have jurisdiction to specifically order disputed claims to be dealt with in this way. The parties with standing agreed to it, and the Regional Senior Justice for Toronto kindly agreed to hear such matters himself or delegate them to another judge. We were thus prepared for the eventuality, but we never did require the services of a judge for any such hearings.

As noted, this procedure required the agreement of the parties with standing and the co-operation of the Regional Senior Justice at the time of these inquiries. I recommend that the Province amend the *Public Inquiries Act* to permit any interlocutory matters, not limited to claims of solicitor-client privilege, to be resolved in this or some similarly efficient way.

Solicitor-client privilege with respect to documents arose, in a somewhat different form, in an application for judicial review brought by one of the parties with standing, as related later in this chapter at C.7.a.

c. Summonsing Personal Documents

The *Public Inquiries Act*[76] gives an inquiry the right to "require any person, by summons, to give evidence on oath or affirmation at an inquiry, or to produce in evidence at an inquiry such documents and things as the commission may specify." The act clearly granted me the power to issue summonses,[77] but naturally I considered each one carefully. Where documents were concerned, I was especially careful when they could have been considered private or personal. In fact, most of the documents covered in summonses were neither private nor personal. They either were available publicly or could not be considered confidential in any way.

The use of a summons is an important investigative tool, and one that the legislature clearly intended the commissioner of a municipal public inquiry to use. If the documents or evidence included in the summons are relevant or helpful to fulfilling the terms of reference, a summons should certainly be issued, and I did not hesitate to do so when necessary, whether the material was private and personal or not. Where it was private, however, I took particular care to frame the summons in a way that would infringe on the individual's privacy as little as possible. For bank records, for exam-

[76] *Ibid.*, s. 7.

[77] Appendix I(i), Sample Summons.

ple, I made sure the summons was restricted to documents covering only the scope and time necessary to discharge my mandate.

The Supreme Court of Canada has repeatedly emphasized a commissioner's broad discretion in fulfilling his or her investigative mandate. Nevertheless, in many circumstances, there was no easy answer to the question of how much personal information I should include in the summons and it was sometimes impossible to specify in advance the precise information needed to investigate fully. Furthermore, in the interest of efficiency, I did not want to return to the same source repeatedly for more information. In these circumstances, a reasonable estimate was necessary. I was always careful to ensure that the estimate was made in a principled way, taking into account the extent of the intrusion on an individual's core privacy interests, but with the paramount concern of possible relevance or helpfulness to the inquiries.

d. Summons Where a Witness Did Not Testify

Summonsing documents did not necessarily mean the associated witness had to testify. For example, if I issued a summons to a cellular telephone company to produce call records, the company, as custodian of those records, would have to locate them and prepare them for transfer to the inquiry, all as set out in the summons. However, the inquiry would receive those records without requiring a witness from the cellular telephone company to testify. This was simply practical. An individual from the company would have nothing to add to the inquiry, and would have appeared only to hand over the documents. It would be sensible to formalize the power to summons the production of documents in such cases without the need for attendance by a witness in the *Public Inquiries Act*.

2. Witnesses

a. Interviews

The cornerstone of our investigation was interviews with potential witnesses. Commission counsel interviewed every person believed to be able to provide relevant or helpful information, with the exception of witnesses who lived outside Ontario and one party who left the jurisdiction after being granted standing and did not return to testify. Where possible,

commission counsel gave witnesses copies of documents, before the interview, that could be helpful to them or might refresh their memories. Information from one witness often led to other interviews with further witnesses. If the information to be gleaned from witnesses appeared to be relevant or helpful and within the inquiries' terms of reference, commission counsel diligently pursued every lead.

These interviews, and preparing the statements and/or affidavits afterward (discussed in more detail in the following section), took several months. Commission counsel worked tirelessly at them before the first inquiry's original start date of September 30, 2002, and continued to do so throughout the inquiries as new issues arose.

Witnesses invited to an interview and witnesses called to testify are often nervous. Both the *Public Inquiries Act* and our rules of procedure explicitly prohibited any adverse employment consequences for co-operating with the inquiries,[78] but some witnesses remained apprehensive. Commission counsel did their utmost to reassure these witnesses and to explain the inquiries' process to them. Most witnesses came forward, told their stories, and respected the role of the inquiries, often in the glare of intense media scrutiny.

Most interviews with witnesses were confidential, as were commission counsel's interview notes. It makes sense that witnesses might be more forthcoming under that condition, and that reasoning bore fruit. Witnesses did disclose information they might not have revealed otherwise, such as secondhand knowledge or details about which they were uncertain. Commission counsel would then investigate the veracity of the information. Some of it led nowhere. Often, however, even rumours turned out to have more than a grain of truth in them.

Some interviews, with the consent and knowledge of the witness (and counsel if the individual had one), were not confidential. In those cases, it was clearly understood that statements made in the interviews could be used to impeach the witnesses if, during the hearing, they derogated from those statements. Such interviews were sometimes transcribed, and the transcripts were a substitute for the requirement to testify or were used to augment testimony at the hearing.

[78] *Public Inquiries Act*, *supra* note 34, s. 9.1. See also Rules 6 and 18 in the rules of procedure for both TCLI and TECI.

The ability to determine whether interviews would be confidential or "on the record" allowed commission counsel to adapt to the circumstances faced with each witness, which in turn advanced the investigation as effectively as possible.

b. Witness Statements and Affidavits

If a person who had been interviewed was to be called as a witness, commission counsel prepared a statement of the witness's expected evidence.[79] After the witness reviewed and approved it, the statement was distributed to parties with standing.[80]

This procedure evolved as the inquiries progressed. At first, commission counsel prepared brief statements of the expected evidence and appended a list of the documents on which commission counsel intended to rely, reasoning that examinations and cross-examinations would be shorter if they focused on only the most relevant details. It soon became clear that these short statements were insufficient, and we found that the parties were delving into issues not covered in the statements.

As the inquiries progressed, commission counsel drafted longer and more detailed statements of the expected evidence. Eventually, that evolved into drafting affidavits for the witnesses, and sometimes counsel for the witness would write the first draft. Counsel for parties with standing were thus better able to focus their cross-examinations. In fact, we found that the affidavits significantly shortened the time for examinations and cross-examinations, and sometimes precluded the need for the witness to testify in person.[81] No one was forced to sign an affidavit and some witnesses chose not to. For those witnesses, commission counsel, and on one occasion a witness's lawyer, prepared a statement of the expected evidence.

Another advantage of the interview-affidavit-testimony sequence was that it gave commission counsel an opportunity to evaluate each witness's evidence comprehensively: first during the interview, again when the affidavit was drafted, revised, and eventually sworn, and finally when the witness testified. This process was much like peeling the layers of an onion. With each

[79] Rule 19 in the rules of procedure for both TCLI and TECI.

[80] Rule 20 in the rules of procedure for both TCLI and TECI.

[81] In TCLI, 15 per cent of the witnesses testified by affidavit only. In TECI, 37 per cent did.

iteration of the evidence, important perspective was added and the story was fleshed out. That is not to say that all witnesses were necessarily withholding information in the initial interview. Some were, of course, but even the most forthright witness would inevitably provide a bit more detail that was helpful or a more thoughtful perspective in the course of refining the evidence through the interview-affidavit-testimony progression.

Each witness's affidavit was entered into evidence at the beginning of his or her testimony and it would thus become the first part of the transcript. Commission counsel would then examine the witness orally. The oral examinations were thorough, and with the help of the affidavits, homed in on the issues we considered most important.

Preparing detailed affidavits certainly shortened the time spent in the hearing room, but it lengthened prehearing preparation time. These were sworn documents, of course, so the witnesses understandably wanted to ensure that they were accurate in every particular. On balance, however, it turned out to be very efficient—so efficient that if I had known how the inquiries would expand, I would have hired more junior lawyers and/or law clerks to assist with this time-consuming work at the outset. That would have increased the cost of the inquiries only minimally, and likely not at all given the time saved in the hearing room. The extra staff would have been needed most at the beginning of the inquiries, and the number could have been reduced as time went on.

c. Witness Photographs

Prior to testifying, witnesses were asked if they would object to having their photographs taken. We made it clear that these photographs would not be published, would be used only to assist me or other witnesses in refreshing our memories, and would be destroyed after the inquiries were over. Those commitments were set out in a consent form,[82] and whether or not the photographer had the opportunity to ask a witness to sign one, I honoured the principle. It was not compulsory, of course, but no one objected to being photographed.

The photographs proved useful a few times in the inquiries, such as instances where a witness couldn't remember which of two people had done

[82] Appendix J, Sample Consent to Be Photographed.

or said something or other. They were also useful to me when I was writing my report and sorting through the words of the 156 witnesses who appeared before me over a period of 214 days of hearings. It was very helpful to be able to readily put a face to the evidence, and I'm grateful to the witnesses for allowing themselves to be photographed in this manner.

3. Investigators

Before the City established the inquiries, it had retained KPMG, a professional services firm that provides audit, tax, and advisory services, including forensic audit services, to conduct an investigation. Based on KPMG's report, the City concluded that further investigation in the form of a public inquiry was warranted.

KPMG's report and supporting documents, including interview notes, were made available to the inquiries. Those documents were a good starting point, but it soon became apparent that the inquiries would have to delve much more deeply. I do not criticize KPMG for this at all. The firm had a specific and time-limited mandate and it had fewer investigative powers than a public inquiry has at its disposal.

We hired investigators to track down witnesses and documents, and they often conducted preliminary interviews for commission counsel. I was impressed with their tenacity, dogged determination, and insight. Their contribution was invaluable.

4. Experts

In litigation, experts give opinion evidence on matters outside the scope of general knowledge on behalf of a party. In the context of these inquiries, experts testified when I believed it would be in the public interest to hear from someone with professional knowledge in particular subject areas, and when experts could assist me in understanding what happened so that I could make effective recommendations designed to prevent a recurrence.

a. Leasing

We heard from two leasing experts. The first gave a "Leasing 101" primer, which was very helpful given the subject matter of the first inquiry. The second provided two extremely thorough, detailed reports about the financial

implications of the specific lease transactions that were the subject of the inquiries. I found this evidence very useful, and so did the City. Sometime after the witness testified, and when it was clear that the inquiries would no longer need his services, the City hired the expert, with my consent, to assist with an analysis of its end-of-lease options.

b. Forensic Analysis of Records

We commissioned an analysis of telephone and bank records, and the data was summarized in clear, concise charts.

Accountants provided further detailed analysis of bank records. This work constituted investigation as well as expert testimony. It was time-consuming and very detailed, but yielded much helpful evidence.

c. Good Government

Professionals in the subject (former senior civil servants and government advisers) provided background papers for the Good Government phase of the hearings. At my direction, they prepared a series of papers that surveyed the literature and practices in conflict of interest policy, municipal governance, lobbyist registration, and procurement. They did extensive work before the hearings began, which helped the participants in this phase focus on the issues.

C. The TCLI and TECI Hearings

1. Laying the Groundwork for the Report

The tangible outcome of a public inquiry is its report, and I began preparations for writing my report on the first day of hearings.

First, I took my own notes on my computer during the hearings. These notes were by no means transcripts; they were more like an aide-mémoire for what the witness said and for my assessment of that witness and the evidence.

Second, while I naturally intended to keep an open mind until I had heard all of the evidence and had read all of the submissions, I knew I would need some way to marshal the hundreds of days of evidence, the thousands

of pages of exhibits, and the thousands of pages of transcripts when it came time to write my report. In short, I would need summaries, and I hired a senior policy analyst who had performed that function for the Walkerton Inquiry. Two research assistants helped her. Each day, they summarized the transcripts of the hearings and pulled together the evidence of different witnesses on the same issues. When it came time for me to write the report, I had my own detailed notes and summaries of the evidence to work with, instead of having to review thousands of pages of transcripts. Of course, I still had electronic access to the actual transcripts and documents. The electronic transcript, with its sophisticated search capability, proved invaluable in quickly finding specific references to the evidence as I wrote my report.

2. Standing

I have already pointed out several differences between trials and public inquiries. The question of standing brings me to another. In a civil action, the roles of the parties, the plaintiff and the defendant, are clearly delineated, just as they are in a criminal matter where the parties are the prosecutor and the accused. In a public inquiry, there is no adversarial relationship between two parties. Rather, anyone who has a direct and substantial interest in the subject matter of the inquiry is invited to apply to be granted the status of a party with standing.[83] I expanded that to include anyone whose participation could be helpful in fulfilling my mandate.[84] Parties with standing enjoy certain privileges designed to protect their rights and interests, but they also have concomitant responsibilities.

a. Applications for Standing

Many potential parties with standing, such as the City of Toronto, were obviously well aware of the inquiries. To reach those who were not, we invited applications for standing by placing advertisements in Canadian newspapers.[85] As well, we issued press releases over Canada NewsWire. For TECI, we also advertised in two cities in the United States because some of the potential parties lived there.

[83] *Public Inquiries Act*, *supra* note 34, s. 5(1).

[84] Rule 8 in the rules of procedure for both TCLI and TECI.

[85] Appendix K, Advertisement re Application for Standing.

It was not mandatory, but parties could appear before me to explain the reasons for their request for standing.[86] Some applied in writing only. In applying for standing, the parties stated their reasons and explained how their participation was relevant to the terms of reference of the inquiries or how their involvement could be helpful to me. Applications for standing were solicited and adjudicated well before the hearings. Nevertheless, as the hearings drew closer, and even after they were under way, I received further applications for standing. Some parties who had thought their involvement minimal came to realize otherwise and sought to protect their rights through obtaining standing. The existing parties with standing were notified of each new application and had an opportunity to comment. I heard each application for standing, in writing or in person. If I granted standing, commission counsel endeavoured to ensure that the party received all relevant documents as soon as possible and was otherwise brought up to date.

Applications for standing were made public, as were my decisions, and the parties with standing were listed on our website.

b. Categories of Standing

The inquiries involved the interests of some parties more than others. I therefore decided on two categories of standing: full and special.[87]

Parties with full standing had the full spectrum of available rights at the hearing, including access to documents collected by the commission, notice of documents proposed to be introduced into evidence, statements of expected evidence and/or affidavits in advance, a seat at the counsel table, the opportunity to cross-examine witnesses on relevant matters, and the opportunity to make closing submissions.

Along with these rights came responsibilities. A party granted standing was deemed to have undertaken to follow the rules of procedure[88] and to produce all relevant documents.[89]

86 Rules 10 and 11 in the rules of procedure for both TCLI and TECI.

87 Rule 8 in the rules of procedure for both TCLI and TECI permitted the commissioner to "determine on what terms standing may be granted."

88 Rule 9 in the rules of procedure for both TCLI and TECI.

89 Rule 13 in the rules of procedure for both TCLI and TECI.

By comparison, the rights of parties with special standing were circumscribed. Notably, they did not have the right to cross-examine witnesses and did not have a seat at the counsel table. Their interest was recognized, and they contributed to the work of the inquiries, but their participation was less direct, commensurate with their less significant interest in the proceedings.[90] Nevertheless, the responsibilities that went with special standing were the same as those for full standing.

In one instance, I granted full standing to a party for a specific portion of the hearings only. A City employee made allegations of reprisals resulting from her co-operation with the inquiries. For the "hearing within a hearing" where I dealt with those serious allegations, I granted the party full standing with all of the attendant rights.

We amended our rules of procedure when the second inquiry was called so that the evidence received in one inquiry could be received and referenced in the other, and so that parties with standing in one inquiry could refer to evidence in the other.[91] The rules also provided that, to the extent that their interests were engaged, parties with standing in one inquiry would have standing in the other.[92]

In the very early stages of the first inquiry, City Council decided not to have legal representation at the inquiry. Later, Council reversed that position and decided to seek standing and to retain outside counsel. I am glad it reconsidered its position. Indeed, it is difficult to imagine how we would have proceeded without the City's active participation. The City of Toronto was well represented at the hearings, and its full participation helped me enormously.

In the end, eleven parties were granted full standing in TCLI and ten were granted full standing in TECI. One party was granted special standing at both inquiries. As mentioned, one party had full standing for a portion of the first inquiry only.[93]

90 The only party with special standing from the outset was the Canadian Union of Public Employees (CUPE), which represents approximately 25,000 workers at the City of Toronto (18,000 in Local 79 and 7,000 in Local 416).

91 Rule 21.1 in the rules of procedure for both TCLI and TECI.

92 Rule 11.1 in the rules of procedure for both TCLI and TECI.

93 Appendix G(i), (ii), (iii), and (v), Commissioner's Rulings on Standing, or http://www.torontoinquiry.com/lirp/pdf/ruling_july03_02.pdf, http://www.torontoinquiry.ca/lirp/pdf/Ruling_on_Standing_TECI.pdf, http://www.torontoinquiry.ca/lirp/pdf/Adding_Parties_with_Standing.pdf, and http://www.torontoinquiry.ca/lirp/pdf/Ruling_on_Standing_TCLI_June_12_03.pdf.

c. Standing and the Role of Legal Counsel

When lawyers accept the responsibility of representing parties with standing (or witnesses) in a public inquiry, they need to be aware of the ways in which their role is different from that of lawyers representing parties in a trial. The rules of evidence and the rules of procedure may be more relaxed, but counsel have an elevated obligation to co-operate with a public inquiry and to bring forward all relevant and helpful evidence. Comparatively few lawyers have experience of participating in public inquiries, and some approach them the way they do trials, at least at first. They might not fully appreciate that commission counsel are not prosecutors, and that can affect their degree of co-operation with the inquiry.

Over sixty lawyers appeared for witnesses or parties with standing at these inquiries. Most counsel eventually recognized the difference in their role. They provided their clients with excellent representation and co-operated with the inquiries. Nevertheless, I believe it would have been helpful for many of them, and for us, if they had appreciated the nuances of their task sooner. Perhaps we should have prepared something as simple as a short document outlining the distinctions between a trial and a public inquiry and including the leading cases on public inquiries.

d. Funding for Legal Counsel

The City solicitor wrote to me on June 21, 2002, inviting me "to direct that funding, limited to $50,000.00 per person on receipt of invoices, be provided by the City of Toronto to individuals" with standing at the inquiry. The $50,000 figure was based on the City's original assumption that there would be only forty days of hearings, in one inquiry, and also on the assumption that counsel for the parties with standing would attend for only half of those hearing days. The letter further suggested that if I concluded that more than $50,000 ought to be provided to any party with standing, I should make a recommendation to the City to increase the sum. Meanwhile, some parties applying for standing asked me directly to grant them funding to retain legal counsel.

Neither section 100 of the *Municipal Act* nor the *Public Inquiries Act* expressly confers authority on the commissioner of a public inquiry to order funding for counsel. The terms of reference for both inquiries were silent on

the issue. I concluded that while I had no jurisdiction to order the City of Toronto to provide funding for legal counsel, I did have the jurisdiction to make recommendations, and I did so. A public inquiry does not impose either criminal or civil liability, but it would be naive to believe that there is no possibility of repercussions for the witnesses and parties called to testify. Moreover, inquiries operate under relaxed rules of evidence and the proceedings are less formal than at a trial, but they are hearings and observe many courtlike formalities. A witness or party with standing without counsel might well be at a disadvantage in presenting evidence, cross-examining witnesses, and otherwise exercising the right to be heard.

The Royal Commission on the Donald Marshall, Jr., Prosecution put it this way:

> 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 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.[94]

In my ruling, as the City solicitor had requested, I directed the City to fund legal counsel for some parties with standing, up to $50,000, upon the production of invoices.[95] I also set out the factors that should be considered upon granting funding:

- It is not in the public interest to have open-ended funding.
- 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.

[94] *Royal Commission on the Donald Marshall, Jr., Prosecution*, Volume 1: *Findings and Recommendations*, Appendix 10, Selected Rulings of the Commissioners, May 14, 1987, at 335.

[95] Appendix G(i), Commissioner's Ruling on Standing and Funding for Legal Counsel, July 3, 2002, or http://www.torontoinquiry.ca/lirp/pdf/ruling_july03_02.pdf.

- The City should establish reasonable hourly rates for senior and junior counsel for purposes of this inquiry.
- Whatever hourly rate or scale of compensation the City selected, it should include reasonable time for preparation by counsel as well as for attendance at the hearings.
- The City should either limit the number of counsel or specify the use that would be made of junior counsel.
- Counsel should be entitled to compensation for their reasonable and necessary disbursements.
- Where appropriate, disbursement rates should be set.
- Limits should be set on preparation time.
- Time spent at the hearings should be limited to a reasonable number of hours.
- Attendance of counsel at the hearings should be limited to attending when the party's interests were engaged.
- No fees incurred before the date of Council's decision to hold a public inquiry should be paid.
- No fees related to any other matters (e.g., civil litigation) should be paid.
- Accounts should be subject to assessment.

Apart from the request from the City solicitor and the recommendations in my ruling, there were no further formal applications for funding brought to my attention. All requests for funding and the payment of legal fees were handled by the City, independent of the inquiries.

The City's budget shows that it spent much more than $50,000 per witness on legal fees. This is hardly surprising since the hearings ran for much longer than the estimated forty days.

3. Conduct of the Hearings

a. Opening Statements

In keeping with the non-adversarial nature of a public inquiry, I did not allow the parties to make opening statements. Another reason why I did not permit opening statements is that a public inquiry does not follow an investigation; it is an investigation in itself. Opening statements are not as

helpful as they can be in a trial because at the beginning of hearings in an inquiry, the investigation is far from complete.

b. Examinations

Keeping the hearings moving was one of my top priorities. We had to be thorough, we had to be fair, but we also had to be efficient and cost-effective. There is a natural tension among these goals, and it was my job to ensure that all of them were met and kept in balance.

Typically, a witness would swear to tell the truth or make affirmation to that effect, and commission counsel would then lead the evidence from the witness. They were entitled to ask both leading and non-leading questions.[96] Counsel for a witness could apply to me if they wished to lead the witness's evidence, but only one did.[97] This procedure requires evenhandedness on the part of commission counsel. The parties must be confident that commission counsel will conduct the lead examinations of their clients fairly. Next, counsel for parties with standing had an opportunity to cross-examine the witness. As to the order, one of our rules of procedure[98] provided that they would decide among themselves. If they were unable to reach agreement, I would decide. Counsel were very co-operative and I was called upon to set the order for cross-examination only a few times. Counsel for the witness examined the witness last (or re-examined, if he or she had led the evidence). Finally, commission counsel would re-examine the witness.

I was reluctant to limit the time for examination and cross-examinations. A public inquiry, unlike a trial, does not include pretrial discovery or disclosure, but where possible, the witness's expected evidence and the documents on which commission counsel and the witness would rely were disclosed to all counsel in advance. I wanted to give all counsel a chance to explore any avenue that was relevant or helpful to me in fulfilling my terms of reference, especially considering the investigative nature of a public inquiry. I also recognized that counsel sometimes needed more time to explore particular areas. Nevertheless, before each lawyer began cross-examining a witness, I asked for an estimate of the length of the

[96] Rule 27 in the rules of procedure for both TCLI and TECI.

[97] Rule 26 in the rules of procedure for both TCLI and TECI.

[98] Rule 27 in the rules of procedure for both TCLI and TECI.

cross-examination. I tried to keep them to it although, for a host of reasons, this was not always possible.

I was vigilant, however, in ensuring that cross-examinations did not become repetitive. Given the many parties with standing, some with similar interests, there was great potential for overlapping. I continually reminded counsel of the need to confine themselves to questions that had not already been sufficiently explored, and counsel were generally co-operative in avoiding unnecessary repetition.

As already noted, we used statements of non-contentious facts in TECI. These statements took a great deal of work and required counsel for the parties to co-operate with commission counsel. In the hearing room, they were filed as evidence and seldom mentioned thereafter, which might give the impression that they were unhelpful. On the contrary, these statements conveyed much background detail essential to understanding the crucial issues before me. Having the statements in evidence at the outset allowed everyone to operate according to a shared understanding of that background. Questions asked of witnesses could then go directly to the matters in issue, and much time was saved in the hearing room as a result.

In the end, the inquiries heard evidence for 214 days, and 156 witnesses testified, some of them more than once.

While I did not permit opening statements, at the conclusion of each witness's evidence, I asked the witness whether he or she would like to add anything that would assist me in making my recommendations to City Council. Many witnesses had valuable insights, and I am grateful to them for sharing them with me.

4. Notices of Alleged Misconduct

Subsection 5(2) of the *Public Inquiries Act*[99] states, "No finding of misconduct on the part of any person shall be made against the person in any report of a commission after an inquiry unless that person had reasonable notice of the substance of the alleged misconduct and was allowed full opportunity during the inquiry to be heard in person or by counsel." In what I assume is an oversight, which I recommend that the Province address, this section, found in Part I of the act, is not applicable to a public

[99] *Supra* note 34.

inquiry called by a municipality. That is because the *Municipal Act*[100] states that such inquiries have powers only under Part II of the *Public Inquiries Act*.

The Supreme Court of Canada makes it clear that, although section 100 of the *Municipal Act* is silent with respect to the requirement to give formal notices of misconduct, the principle behind giving such notices is grounded in the principles of natural justice. For that reason, commissioners appointed pursuant to section 100 of the *Municipal Act* should govern themselves by that underlying principle even though their powers derive from only Part II of the *Public Inquiries Act*.[101]

So, even though the statute did not require me to give notices of alleged misconduct, the Supreme Court of Canada certainly did. We incorporated the wording of subsection 5(2) of the *Public Inquiries Act* into our rules of procedure. Our rules of procedure provided that "the Commissioner will not make a finding of misconduct on the part of any person unless that person has had reasonable notice of the substance of the alleged misconduct and was allowed full opportunity during the Inquiry to be heard in person or by counsel."[102]

a. Threshold

The purpose of giving notice that I might make a finding of misconduct was to allow the recipients an opportunity to prepare to properly address the issues referred to in the notice of alleged misconduct when they testified or cross-examined other witnesses. The threshold for giving notices is low. I did not issue a notice on a remote possibility, but if there was any reasonable prospect that I would make a negative finding, I gave the individual a notice. I included in my definition of "misconduct" possible damage to the person's reputation. However, I did not include a possible finding based solely on credibility, unconnected to a particular event (such as "the commissioner might find that you are not credible"). Every witness's credibility is at issue, and it would have diluted the purpose to issue a notice for this type of possible finding to all of them.

[100] *Supra* note 4, s. 100(1) (now s. 274(2) of the *Municipal Act, 2001*, S.O. 2001, c. 25).

[101] *Consortium, supra* note 31 at para. 31.

[102] Rule 35 in the rules of procedure for both TCLI and TECI.

Each notice was accompanied by a covering letter explaining this low threshold and setting out why we were required to provide the notice.[103] The difficulty was that we had to notify the recipients if I *might* make a finding of misconduct. The notice did not necessarily mean that I *would* make such a finding. Nonetheless, many individuals expressed shock and betrayal upon receipt of a notice, particularly in cases where the recipient had co-operated fully with commission counsel to that point. The notice changed the relationship between them, and sometimes the recipient's degree of co-operation. Little can be done to avoid that outcome. The law requires that the notices be given and specifies the low threshold. I issued the notices as early as reasonably possible, without yet knowing what all the evidence might be. As it turned out, some people who received notices were not the subject of findings of misconduct in my report.

b. Rights of Recipients

For the purposes of these inquiries, the contrast between the rights of a party with standing and the rights of other individuals or corporations if they were given notices of alleged misconduct was a distinction without much difference. Any person or corporation given a notice of alleged misconduct could exercise the right to be heard in the same manner as a party with standing, including the right to cross-examine witnesses, make closing submissions, and submit documents to the inquiries. If summonsed to attend before the inquiries, they were subject to the same conditions as anyone else who received a summons, including the requirement to produce any cited documents. In practice, therefore, the rights and requirements were the same as those applicable to parties with standing.

There was one important and substantial difference, however. The identities of the parties with standing were public knowledge, but the identity of any person served with a notice of alleged misconduct was confidential, as was the content of the notice.[104] We sent the notice only to the recipient and to the recipient's counsel if the individual had one. However, when a witness testified on behalf of a corporate body, we sent the notice to the witness, not to counsel for the corporation.

[103] Appendix L, Sample Covering Letter for Notice of Alleged Misconduct.

[104] Rule 36 in the rules of procedure for both TCLI and TECI. See also *Blood Inquiry, supra* note 29 at para. 56.

Confidentiality presented a dilemma. How could the inquiries keep confidential the identity of a person who received a notice of alleged misconduct but did not have standing, if that person chose to exercise the right to be heard? There was no procedural measure that could have prevented any possible inferences being drawn from an individual's appearance before the inquiries. I therefore decided that when recipients of notices chose to exercise their procedural rights, such as the right to cross-examine, we would simply accommodate them in the hearing without fanfare, and of course without referring to or acknowledging the existence of the notice. Some counsel referred to the notice in the course of examining their witnesses. There was nothing I could do to prevent that. The individuals, through their counsel, made their own choices about going public with their own notices of alleged misconduct.

c. Content

The Supreme Court of Canada has directed that a notice of alleged misconduct be set out in as much detail as possible, but so long as the notices are issued in confidence, they are not subject to the strict degree of specificity applicable to formal findings.[105]

I adopted an incremental approach to the detail to be included in the notices. At the beginning of the hearings, or before a witness had testified, the content would be quite general. The level of detail increased as the investigations and hearings progressed and knowledge of the issues increased. Notices were sometimes revised over the course of the hearings, and the new version, noting the current date, was sent to the recipient each time.

While it is important to update notices when significant new possible misconduct comes to light, it is also important to remember that these notices are neither pleadings nor indictments, and a high standard of specificity in issuing them would require an inordinate amount of rewriting time as the hearings progress. As long as they cover in principle the misconduct alleged in such a way that the party affected receives fair notice, they serve their purpose. Thus, they need only be amended when new allegations surface, and the evolution of details in matters already covered does not necessarily precipitate revised notices of alleged misconduct.

[105] *Blood Inquiry, supra* note 29 at para. 56.

Drafting the notices of alleged misconduct was not a function I could delegate entirely to commission counsel. They had to reflect my own views, since I would ultimately be making findings and writing this report.

d. Timing

With respect to the timing for issuing notices of alleged misconduct, the Supreme Court of Canada stated the following:

> There is no statutory requirement that the commissioner give notice as soon as he or she foresees the possibility of an allegation of misconduct. While I appreciate that it might be helpful for parties to know in advance the findings of misconduct which may be made against them, the nature of an inquiry will often make this impossible. Broad inquiries are not focused on individuals or whether they committed a crime; rather they are concerned with institutions and systems and how to improve them. It follows that in such inquiries there is no need to present individuals taking part in the inquiry with the particulars of a "case to meet" or notice of the charges against them, as there would be in criminal proceedings. Although the notices should be given as soon as it is feasible, it is unreasonable to insist that the notice of misconduct must always be given early. There will be some inquiries, such as this one, where the Commissioner cannot know what the findings may be until the end or very late in the process. So long as adequate time is given to the recipients of the notices to allow them to call the evidence and make the submissions they deem necessary, the late delivery of notices will not constitute unfair procedure. . . .
>
> The timing of notices will always depend upon the circumstances. Where the evidence is extensive and complex, it may be impossible to give the notices before the end of the hearings. In other situations, where the issue is more straightforward, it may be possible to give notice of potential findings of misconduct early in the process.[106]

Accordingly, we made every effort to issue notices of alleged misconduct as early as possible. As mentioned, however, these early notices were usually more general than those issued later.

[106] *Blood Inquiry, supra* note 29 at paras. 69, 70.

5. Compelling the Attendance of Witnesses

Our rules of procedure provided that it is "the practice of Commission counsel to issue and serve a subpoena (summons to witness) upon every witness before he or she testifies." In other words, we summonsed witnesses whether or not they would have appeared voluntarily.[107]

However, my power to compel the attendance of witnesses did not extend beyond the Ontario border.[108] There was simply no legal means by which I could require a witness who was outside of Ontario to testify before the inquiries.

One person and his company were both named in the terms of reference for TECI. Since he and his company had both been granted standing, I assumed he wished to participate fully in the inquiry. First, he changed lawyers. Then, in the course of our investigations, we learned that he had possibly left Ontario. That turned out to be the case. His new lawyer asked to be removed from the record because she was not able to get in touch with her client. He was in China, she told us, and she did not know his intentions with respect to TECI. Other witnesses also told us that he had left the country and some had received phone calls from him from China. Through informal channels, commission counsel tried to let him know we wished to speak with him and asked him to consider returning to Ontario. He did not, and I could not compel him to appear before the inquiry unless he returned to Ontario voluntarily. Again through informal channels, commission counsel made every effort to inform him that a negative inference might be drawn from his failure to participate in the inquiry.

Two American residents were intrinsic to some of the issues under examination in the second inquiry and their evidence would have been relevant

[107] Appendix I(i), Sample Summons.

[108] A similar issue arose during the Westray public inquiry in Nova Scotia. Several recalcitrant witnesses who were out of the legal jurisdiction of the inquiry (i.e., outside the province of Nova Scotia) were sent subpoenas, each with a letter explaining that the subpoena was not enforceable but that the individual's attendance at the hearing would be valuable. They did not attend. The commissioner wrote to the minister of justice for Canada to request a federal mandate *solely* for the purpose of ensuring the attendance of witnesses who were outside provincial jurisdiction. The minister declined to grant that request. See *Report of the Westray Mine Public Inquiry: The Westray Story—A Predictable Path to Disaster*, Justice K. Peter Richard, Commissioner, November 1997, Province of Nova Scotia, Volume 2, Chapter 16 at page 595, 596.

and helpful in understanding what happened. Both declined to attend the hearings or assist the inquiry in any way. Again, I had no jurisdiction to compel them to participate, but we went to extraordinary lengths to encourage them to do so. Advertisements for the standing hearings were placed in their local newspapers. Neither individual sought standing. We wrote to both of them and commission counsel spoke to one of them. We retained investigators in their home states and the investigators sought to question them, but neither provided anything more than cursory information. The investigators also tried to serve both of them with a summons to witness. Each summons was accompanied by a covering letter[109] acknowledging that the summons had no extraterritorial effect and only requested their voluntary attendance. They would not accept service. Before the hearings began, we contacted both individuals again to advise them that I might draw a negative inference if they were not present to give evidence. Despite these efforts, the hearings proceeded without their participation.

6. Allegations of Adverse Employment Consequences: The "Hearing within a Hearing"

A City employee was scheduled to testify in the spring of 2003. A few days before she was scheduled to begin her testimony, she advised commission counsel of two allegations. First, she stated that during the prehearing investigation her supervisor told her that if she did not tell commission counsel what the supervisor wanted her to say, she would be in serious trouble. Second, she alleged that she had since been fired because she did co-operate with commission counsel's investigation and with the previous forensic investigation conducted by KPMG.

Naturally, I took these allegations very seriously. In 2000, the *Public Inquiries Act* had been amended to include the following provision:

> No adverse employment action shall be taken against any employee of any person because the employee, acting in good faith, has made representations as a party or has disclosed information either in evidence or otherwise to a commission under this Act or to the staff of a commission.[110]

[109] Appendix I(ii), Sample Covering Letter for Extraterritorial Summons.

[110] *Supra* note 34, s. 9.1(1), as am. by *Public Inquiries Amendment Act, 2000*, S.O. 2000, c. 14.

If the allegations were true, they constituted an offence under the act. Moreover, I had to take action to safeguard the integrity of the inquiries and not permit anyone to interfere with a witness's co-operation. I therefore devoted a week of hearing time to addressing the allegations, essentially conducting a hearing within a hearing.

First, I heard evidence immediately after the witness made the allegations. Then, after a further investigation, I heard the evidence of other witnesses. After considering the investigation evidence, the evidence of the witnesses, and the documentation related to the allegations, I concluded that the supervisor had not threatened the witness and that the witness had not lost her position at the City because she co-operated with TCLI or with KPMG.[111] I was satisfied that the hearing within a hearing had dealt with the matter effectively.

7. Applications for Judicial Review

Parties who perceive, in good faith, that they have been treated unfairly in an inquiry must have access to a court to seek a remedy, and applications to a court with reviewing powers are not uncommon in public inquiries.

If a commissioner and commission counsel are attentive to conditions that might lead to applications for judicial review, it is sometimes possible to foresee possible hot spots and avoid them, minimize them, or plan for delay in the inquiry proceedings if they are unavoidable. However, it is often impossible to estimate how much time the court will require to hear and decide an application. Resolving a case could take days, or possibly years if it makes its way to the Supreme Court of Canada. This element contributes to the unpredictability of the length of public inquiries, as well as to the consequent unpredictability of the cost of conducting them, and should be taken into account by government bodies considering setting up an inquiry. Commissioners should likewise prepare for the prospect that applications for judicial review will interrupt inquiry proceedings and plan to carry on with unrelated work, if possible.

Commissioners might also wish to retain a firm to handle any judicial review applications, or other legal matters that come up from time to time,

[111] Appendix G(vi), Commissioner's Ruling regarding Allegations Made by Paula Leggieri, September 26, 2003, or http://www.torontoinquiry.ca/lirp/pdf/Ruling_Leggieri_Matter.pdf.

which cannot be dealt with by commission counsel for one reason or another. It would be practical to do this early on. Once an inquiry is under way, it is likely that more and more lawyers will become involved in it, and it could become difficult to find a firm without a conflict.

In these inquiries, there were two applications for judicial review of my rulings.

a. First Application: Solicitor-Client Privilege

A party with standing, a lawyer, had been served with a summons to produce all relevant documents in TCLI. Commission counsel wrote to the party several months before his scheduled testimony and reminded him of his obligation to contact his former law firm regarding relevant documents. When we did not receive a response, we contacted his former law firm directly and issued a summons to it to produce all relevant documents.

Initially, the law firm advised us that it did not have any physical files pertaining to any of the matters specified in the summons. The firm continued its search efforts, however, and, shortly before the party was scheduled to testify, discovered a large number of potentially helpful materials, most of which were located in an off-site storage facility. Unfortunately, commission counsel did not become aware of the existence of these additional materials until after the party had completed his testimony.

After the party finished testifying, his former law firm delivered eighteen boxes of files to the inquiry. As agreed between that firm and commission counsel, the boxes arrived sealed. The party was advised that we had received the boxes and that we intended to review the entire contents on a without-prejudice basis. He was invited to be present when we did so. He was further advised that he could assert solicitor-client privilege over the documents, and that, in accordance with our procedure, we would attempt to resolve disputed claims of privilege and relevance or helpfulness through discussion. Failing that, I would hear disputed claims of relevance or helpfulness, and the Regional Senior Justice or his designate would hear disputed claims of privilege.

Without taking the opportunity to review any of the documents, the party responded by asserting a blanket claim of privilege over all of the

sealed materials. On October 10, 2003, commission counsel (supported by the City of Toronto) brought a motion before me to unseal the boxes and permit review of the contents. This motion was opposed by the party, and by another party with standing who had been one of his clients. In my ruling,[112] I ordered that commission counsel could unseal the boxes and review the entire contents for relevance, helpfulness, and possible privilege. The party and/or his counsel could be present during the review. In the event of a dispute about relevance or helpfulness, the matter would be brought before me. In the event of a dispute about solicitor-client privilege, the matter would be brought before the Regional Senior Justice for Toronto or his designate for a ruling.

The party (but not his client) sought judicial review of my ruling.[113] In a decision released on February 19, 2004, the Divisional Court dismissed the application.[114] The party agreed to pay costs to the commission in the amount of $35,000 and costs to the City of Toronto in the amount of $15,000.

The Divisional Court found that, based on the party's earlier testimony to the effect that he had been acting as a lobbyist, it was unlikely that the material in the boxes would be the subject of solicitor-client privilege and, in any event, the screening mechanism set out in my ruling ensured that any solicitor-client privilege would be minimally impaired.

Accordingly, commission counsel, with the party's counsel present, reviewed the contents of the boxes. After discussion and negotiation, commission counsel and counsel for the party identified 244 documents that might be helpful or relevant. No issues of relevance or solicitor-client privilege were argued either before me or before the Regional Senior Justice for Toronto or his designate.

[112] Appendix G(vii), Commissioner's Ruling regarding an Application by Commission Counsel to Unseal & Inspect Boxes Containing Documents Belonging to Jeffrey Lyons, or http://www.torontoinquiry.ca/lirp/pdf/Ruling_Lyons.pdf.

[113] This party bought two applications for judicial review, which were heard together. The first application sought review of my ruling of October 15, 2003. Subsequent to the launch of the first application for judicial review, the party brought a motion to vary. I declined jurisdiction to hear this motion, and he brought a second application to review that decision. The Divisional Court dismissed both applications for judicial review.

[114] Appendix M(i), Divisional Court Ruling in *Lyons v. Toronto Computer Leasing Inquiry*, [2004] O.J. No. 648 (Div. Ct.) (QL), or http://www.canlii.org/on/cas/onscdc/2004/2004onscdc10163.html.

b. Second Application: Quashing Summonses

A former City councillor and his wife brought separate motions before me arguing that it was constitutionally impermissible for me to hear certain new evidence, which they said should instead be turned over to the police. When I ruled against them,[115] they brought applications to the Divisional Court to review my decisions. They argued that the summonses issued to them should be quashed, and they should not be required to testify, because the recall phase of TCLI had essentially become an inquiry into allegations of criminal misconduct, which was unconstitutional. The details of their roles in these inquiries are in Volume 1 of this report.

The Divisional Court dismissed both applications. The court decided that the evidence related to the applicants should be considered in context, not in isolation. The possibility that I would hear evidence that might also be grounds for criminal prosecution did not prohibit me from proceeding. I was acting within my terms of reference, and the evidence sought from the former councillor and his wife was incidental, relevant, and necessary to the broader investigative and policy development purposes of the inquiry.[116]

The applicants were ordered to pay costs to the inquiry, fixed at $25,000. They were also ordered to pay costs to the City of Toronto, fixed at $10,000.[117]

8. Closing Submissions

I invited closing submissions from all parties with standing, as well as from recipients of notices of alleged misconduct.[118] No one was obliged to make closing submissions, however, and some did not. I did receive a consider-

[115] Appendix G(viii), Commissioner's Ruling regarding a Motion by Tom Jakobek and Deborah Morrish, April 30, 2004, or http://www.torontoinquiry.ca/lirp/pdf/COMMISSIONER_BELLAMY_RULING_April_30_2004.pdf.

[116] Appendix M(ii), Divisional Court Ruling in *Jakobek v. Toronto (City) Computer Leasing Inquiry*, [2004] O.J. No. 2889 (Div. Ct.) (QL), or http://www.canlii.org/on/cas/onscdc/2004/2004onscdc10413.html.

[117] Appendix M(iii) Divisional Court Ruling in *Jakobek v. Toronto (Computer Leasing Inquiry, Commissioner)*, [2005] O.J. No. 797 (Div. Ct.) (QL), or http://www.canlii.org/on/cas/onscdc/2005/2005onscdc10055.html.

[118] Appendix N, Letter to Counsel for Parties and Witnesses re Closing Submissions.

able number, and many were extremely useful. I elected to receive closing submissions only in writing, but to permit the parties to reply to them orally if they wished to do so. None did.

The sequence of the inquiries meant that I received closing submissions in two stages. Most of the evidence in TCLI, but not all of it, was completed in November 2003. In January and February 2004, I proceeded with the Good Government phase. In April 2004, the remaining evidence in TCLI was slated for completion, which involved recalling several witnesses. The "recall phase" began but was soon adjourned pending the judicial review already described. After the Divisional Court rendered its decision, the recall phase continued in September 2004. That marked the completion of the evidence in TCLI.

Hearings in TECI began in October 2004 and ended in late January 2005. I had already announced that I would be writing only one report covering both inquiries. The parties would have preferred to produce one set of closing submissions for both inquiries. I would have preferred that, too, but that would have delayed the closing submissions on matters touching the first inquiry until several months after the completion of the second. I opted to receive closing submissions in TCLI in December 2004 and closing submissions in TECI in March 2005.

I allowed parties with standing and recipients of notices of alleged misconduct to prepare reply submissions, whether or not they had made closing submissions. Reply submissions were limited to points raised in the closing submissions of other parties. They were to be made in writing or orally, but not both. If made orally, they would be time-limited. As it turned out, no one elected to make them orally. I received several reply submissions from people who had not made closing submissions but chose to reply to allegations made about themselves in the closing submissions of others.

All closing and reply submissions were posted on our website shortly after they were received.

Given the complex array of issues intertwining through these two inquiries, the written submissions proved very helpful to me, as a ready reference to the evidence set out by the witnesses, while I wrote my report.

9. Delays

I keenly felt my responsibility to move these inquiries forward so that I could provide answers to the Mayor, Council, and the citizens of Toronto as soon as possible. Despite my commitment to efficiency, unforeseen circumstances resulted in delays:

- The discovery of a huge number of additional documents stored electronically at the City of Toronto resulted in an adjournment to scan and index the new documents and permit City lawyers and commission counsel time to review them.
- A witness's serious allegations of adverse employment consequences stemming from her co-operation with the inquiries required investigation and a "hearing within a hearing."
- Several times during the inquiries, new evidence surfaced that required us to recall witnesses who had already testified. There were also days when a critical witness or a lawyer was unavailable for good reason.
- In August 2003, the city of Toronto, along with most of eastern Canada and the eastern United States, experienced a massive power blackout. Our building was closed to the public for a week.
- There had been delay while we waited for City Council's decision with respect to whether it still wished us to proceed with the second inquiry.
- The applications for judicial review of my rulings put the proceedings on hold pending decisions from the Divisional Court.

These delays were enervating, but we used the time to continue investigations and prepare for resuming the hearings. We used the time as well as we could, but a certain degree of energy and purpose flows from the hearings themselves. There is nothing like the deadline of a hearing day to galvanize everyone to work.

Extended delays, especially when there was no known end, made it more difficult to allocate our staff resources and to plan efficiently in general. Delays that effectively shut down the hearings (such as the applications for judicial review) also made it difficult to let the various lawyers know exactly when they would need to return. Mindful that they had other clients and commitments, I tried to accommodate most counsel, but sometimes that

simply was not possible and we just had to start. I made up for some delays by holding hearings on days not originally scheduled for them, but that became increasingly difficult for counsel who were planning their work around the original schedule.

D. The Good Government Phase

The Good Government phase was markedly different from the other inquiry hearings. It was much less like a courtroom proceeding and much more like a forum for open discussion and debate. We altered our procedure in this phase to encourage the vigorous exchange of ideas that would provide me with the best possible foundation for practical recommendations.[119]

1. Discussion Papers

I knew that the City had already made some changes in key policy areas since the start of the inquiries. To assist me in evaluating those changes, I retained a firm to prepare an analysis of the City's current policies and to give me an independent perspective on their effectiveness.

My terms of reference, as well as the investigations and the evidence already heard, had highlighted four important policy areas: conflict and ethics, lobbying, procurement, and municipal governance. I therefore asked the firm to prepare background papers on each of these areas. In doing the research, it canvassed broadly the academic literature and the legal research with respect to existing laws. The firm also interviewed academics, politicians, former politicians, senior government officials, and private sector experts. The interviews were off the record in order to encourage interviewees to be frank.

The research provided a comprehensive picture of good government policies and measures and their effectiveness in other jurisdictions. In late 2003 and early 2004, the firm delivered four volumes of well-thought-out papers covering the four policy areas identified. In January 2004, shortly before the Good Government hearings, the papers were posted on our

[119] Appendix E(viii), Commissioner's Opening Statement at the Beginning of the Good Government Phase of the Inquiry, January 19, 2004, or http://www.torontoinquiry.ca/lirp/pdf/speech_jan19.04.pdf; Appendix E(ix), Commissioner's Speech at the End of "Good Government," February 5, 2004, or http://www.torontoinquiry.ca/lirp/pdf/Commissioner_speech_GG.pdf.

website. Although I had retained these experts and directed the focus of their work, these background papers were never intended to reflect my views. Rather, they were a handy compilation of research and insight that was a springboard for further discussion by experts.

2. Hearings

The background papers were important, but I also wanted to hear from witnesses who were knowledgeable in each of the policy areas. Even more, I wanted a vigorous public debate to inform me and help me to develop the best possible recommendations for reform.

We invited members of the media, politicians (including past and present mayors, City councillors, and Ontario MPPs), former provincial deputy ministers and other current and former senior civil servants, academics, private sector procurement experts, lobbyists, citizen advocacy groups, authors, lawyers and accountants, the former provincial auditor, the integrity commissioner and the lobbyist registrar for Ontario, and the federal ethics counsellor. In all, I heard from forty-one individuals. Many of them participated as members of panels, co-ordinated by topic. The participants had not been summonsed and they were not under oath. They were asked questions, but we didn't follow our usual sequence of examination and cross-examination.

All the parties with standing were permitted to participate in the Good Government phase. However, as the City of Toronto was the party directly affected by this phase, it was the only party present. The City had counsel at the hearings who participated in the discussions and clarified matters by pointing out current or proposed policies.

The first witness in the Good Government phase was the chief administrative officer of the City, who described the initiatives the City had already undertaken and the further steps contemplated. In 2005, at the conclusion of the inquiries, I asked for and received a written update on changes the City had implemented in the months following the Good Government phase.

The setup of the hearing room was changed for the panel discussions. The panellists were on the dais where I usually sat, while I sat off to the side. One of my commission counsel, acting as moderator, sat in what was usu-

ally the witness chair. The members of each panel had a conference call beforehand, with commission counsel participating, to ensure that they were all aware of the issues to be covered and the format of the discussion. The panel format worked very well. The sessions were both spirited and informative.

3. Follow-up

In January 2004, while the Good Government hearings were still under way but as part of considering whether the second inquiry should proceed, City Council passed a motion that seemed to be premised on the erroneous assumption that I would be making recommendations right after the completion of the Good Government phase. Our rules of procedure provided that I would make my recommendations in one report, and only after hearing all of the evidence (from both inquiries, if Council decided that the second was to proceed).

Nevertheless, I was certainly interested in ensuring that Council had the information we had gathered; indeed, I had changed the order of the Good Government phase for that very reason. Accordingly, we compiled the research, documents, and evidence gathered in the Good Government hearings on a compact disc and sent a copy to each of the councillors and the Mayor, together with one hard copy for the City. I made it clear that this was not an interim report and that it did not contain my recommendations or observations. The CD[120] was released to Council in July 2004[121] and was available on our website.[122]

[120] http://www.torontoinquiry.ca/cd/index1.html.

[121] Appendix E(xi), Commissioner's Letter to Mayor David Miller, July 13, 2004, or http://www.torontoinquiry.ca/cd/pdf1/Commissioner_Letter.pdf.

[122] http://www.torontoinquiry.ca/gg/index.html.

VII. Writing the Report

After hearing from 156 witnesses over 214 hearing days, the public portion of the inquiries concluded on January 27, 2005. My work was far from over. I still had to write this report.

This report comprises four volumes: the volume on facts and findings, the volume on good government, this volume on the inquiry process, and the executive summary. In keeping with my commitment to accessibility, the entire report is also available as an interactive CD-ROM with the most up-to-date, user-friendly technology available, such as advanced search capability and live links.

Writing one report on the two inquiries was practical, but it did present a challenge. Many of the events examined in the second inquiry predated the events examined in the first inquiry, yet the vast majority of my recommendations flowed from events I heard about in the first inquiry. I therefore elected to set out the story chronologically in Volume 1 and group all of my recommendations in one place in Volume 2 rather than having them follow from the narrative.

I have made every effort to be thorough and to be fair, and to make concrete, timely recommendations designed to ensure that the events leading to these inquiries are not repeated. Indeed, that was my mandate, and the Mayor, Council, and the citizens of Toronto deserved no less than my best effort to carry it out.

VIII. Recommendations

The recommendations in this volume are fundamentally different from those in the Good Government volume of my report. Those recommendations flowed from the evidence I heard. The recommendations that follow are based on my observations about improving the process for public inquiries in general.

Recommendation 1: A municipal public inquiry should have all of the powers granted to an inquiry under both Part I and Part II of the *Public Inquiries Act*.

A municipal public inquiry currently has only those powers contained in Part II of the *Public Inquiries Act*. Thus, it does not specifically have the power to state a case to the Divisional Court, cause a person who has been served with a summons and has failed to appear to be apprehended, appoint a formal investigator, or have a search warrant issued. It is also not statutorily required to issue a formal notice if it intends to make a finding of misconduct. A municipal public inquiry conducted pursuant to the *Municipal Act*, which is always chaired by a Superior Court judge, would be strengthened if it had these powers.

Recommendation 2: The *Public Inquiries Act* should be amended to include a mechanism whereby interlocutory matters, including issues related to solicitor-client privilege, could be resolved expeditiously.

The parties before these inquiries agreed that issues of solicitor-client privilege would be resolved by reference to the Regional Senior Justice of the Superior Court of Justice, or a judge designated by him, and the Regional Senior Justice agreed to accept jurisdiction under these conditions. Without agreement among the parties and the generous acquiescence of the court, it would have been much more difficult and expensive to deal with such a matter had one arisen. I recommend that the Province amend the *Public Inquiries Act* to permit any interlocutory matters, not limited to claims of solicitor-client privilege, to be resolved in this or some similarly efficient way.

Recommendation 3: The *Public Inquiries Act* should be amended to formalize the power to summons the production of documents without the need for attendance by a witness.

There were occasions in these inquiries when documents were summonsed without the need for a witness to testify. For example, certain business records (such as cellular telephone records) were turned over without the need for a witness to attend. An individual from the company would have had nothing to add to the inquiries, and would have appeared only to hand over the documents.

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Appendices

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Reply To: Jim Anderson
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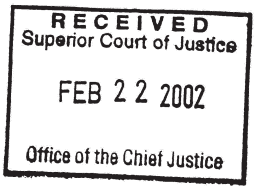
File No.



February 22, 2002

Chief Justice of the Superior Court of Justice
The Honourable Patrick J. LeSage
Osgoode Hall
130 Queen Street West
Toronto, ON
M2H 2N3

Dear Chief Justice LeSage:

Re: Resolution of the City of Toronto Requesting a Public Inquiry under Section 100 of the Ontario Municipal Act

At its meeting of February 13, 14 and 15, 2002, the Council of the City of Toronto passed a resolution under section 100 of the *Municipal Act* requesting a judge of the Superior Court of Justice to investigate the matter of certain computer equipment and software leases entered into by the City with MFP Financial Services Ltd. Enclosed for your reference is a copy of section 100 of the *Municipal Act* which mandates an inquiry upon the Council resolution being passed.

Also enclosed is a certified copy of the Council resolution referred to above. The resolution respectfully requests your Lordship to appoint the inquiry judge and, in addition, sets out the factual framework underlying the request. The resolution refers to three attached reports, dated November 29, 2001, January 28, 2002 and February 6, 2002 which background reports are also enclosed. My office will be contacting your office in the next few days in the hope that an appointment can be arranged to meet with you to amplify on the facts contained the resolution as well as to discuss the necessary appointment.

Thanking you in advance for your consideration.

Yours truly,

Margaret A. Fischer
Acting City Solicitor

Cc: Shirley Hoy, Chief Administrative Officer
Joan Anderton, Commissioner of Corporate Services
Mayor Mel Lastman

Appendix A(i): Letter to the Chief Justice of the Superior Court of Justice Requesting Appointment of an Inquiry Judge, February 22, 2002

THE HONOURABLE PATRICK J. LeSAGE
CHIEF JUSTICE OF THE SUPERIOR COURT OF JUSTICE

L'HONORABLE PATRICK J. LeSAGE
JUGE EN CHEF DE LA COUR SUPERIEURE DE JUSTICE

OSGOODE HALL
TORONTO, ONTARIO M5H 2N5

(416) 327-5000

March 7, 2002

Ms Margaret A. Fischer
Acting City Solicitor
Legal Services
26th Floor, Metro Hall
55 John Street
Toronto ON M5V 3C6

Dear Ms Fischer:

Re: Toronto Public Inquiry under s. 100 of the Ontario *Municipal Act*

I am pleased to advise you that I have designated Madam Justice Denise Bellamy to conduct the inquiry mandated pursuant to the resolution of the City of Toronto under s. 100 of the *Municipal Act*.

Until Justice Bellamy has counsel and staff in place, I would appreciate if any communication with the Commissioner be through Michael Brown, Executive Legal Officer to the Chief Justice, Superior Court of Justice, Osgoode Hall, 130 Queen Street West, Toronto, Ontario M5H 2N5, 416-327-5015 (Mr. Brown will be away until Monday, March 11th).

Yours sincerely,

Patrick LeSage

:ic

cc: Regional Senior Justice Blair
✓Justice Bellamy
Michael Brown

HAND DELIVERED

Appendix A(ii): Letter of Appointment to TCLI, March 7, 2002

THE HONOURABLE HEATHER FORSTER SMITH
ASSOCIATE CHIEF JUSTICE OF THE SUPERIOR COURT OF JUSTICE

L'HONORABLE HEATHER FORSTER SMITH
JUGE EN CHEF ADJOINTE DE LA COUR SUPERIEURE DE JUSTICE

OSGOODE HALL
TORONTO, ONTARIO M5H 2N5

(416) 327-5000
FAX (416) 327-5358

October 23, 2002

Ms Anna Kinastowski
City Solicitor, Legal Services
55 John Street
Stn. 1260, 26th Flr., Metro Hall
Toronto, ON M5V 3C6

Dear Ms Kinastowski:

I write to you in your capacity as City Solicitor for the City of Toronto and in response to your letters of October 15, 2002 and October 17, 2002. Pursuant to s. 100 of the *Municipal Act*, I appoint the Honourable Madam Justice Denise Bellamy as the Commissioner to conduct the inquiry mandated pursuant to the Terms of Reference approved by the Council of the City of Toronto at its meeting held on October 1, 2, and 3, 2002, and contained in Clause No. 7 of Report No. 8 of the Audit Committee.

Yours truly,

Heather J. Smith,
Associate Chief Justice.

c: Ron Manes, Commission Counsel, Toronto Computer Leasing Inquiry

Appendix A(iii): Letter of Appointment to TECI, October 23, 2002

Terms of Reference for Toronto Computer Leasing Inquiry

Being a Resolution to Request a Judicial Inquiry Pursuant to Section 100 of the Municipal Act and to Provide the Terms of Reference Therefor

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 Court (General Division), now the 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 ch. P. 41;

AND WHEREAS on approximately January 1, 1998, computer equipment acquired for the newly elected City Councillors' offices was leased from MFP Financial Services Ltd. ("MFP") for a three year term pursuant to a Master Equipment Lease Agreement numbered "784" and subsequently by equipment schedules under the Master Agreement for assets totaling approximately $1,093,731;

AND WHEREAS there is no written documentation that the procurement of the equipment was lawfully approved or that a competitive process was followed in awarding the leasing contract to MFP;

AND WHEREAS in early 1999 staff were exploring financing options for the large-scale software and computer acquisitions anticipated as necessary to deal with what is commonly referred to as the "Y2K problem" and a Request for Quotations ("RFQ") was issued in May 1999 to solicit bids for computer leasing;

AND WHEREAS pursuant to a report from the City's then Chief Financial Officer and the City's then Executive Director, Information Technology, Council approval was obtained to lease $43 million of computer and related equipment by the adoption of Clause No. 11 of Report No. 4 of the Policy and Finance Committee at Council's meeting of July 27, 28, 29 and 30, 1999;

AND WHEREAS the report indicated to Council that the bid by MFP was the preferred bid and Council authorized the City of Toronto to enter into a leasing contract with MFP for three years;

AND WHEREAS the report to Council failed to mention that the rates quoted in the responses to the RFQ were only in effect for 90 days and staff entered into a Master Equipment Lease Agreement and a Program Agreement after the 90 day period expired, which agreements contemplated various Equipment Schedules to the Master Equipment Lease Agreement that would identify the equipment to be leased and lease terms and rates in respect of the equipment;

AND WHEREAS in the fall of 1999, staff initiated a sale and lease back transaction with MFP of the City's computer equipment which had been bought prior to the Council authority of July 1999 and there was no mention of a sale and lease back to be bid on in the RFQ and no authorization of a sale and lease back was sought in the report to Council;

AND WHEREAS, through the execution by staff of Equipment Schedules, the City has leased up to $85 million of computer equipment although the Council approval indicated an estimated cost of acquisition of $43 million of equipment;

AND WHEREAS with two exceptions, the initial Equipment Schedules were not for three years as approved by Council, but were for longer terms, most commonly five years and in the summer of 2000 a number of the equipment leases were restructured to extend the term of some of the Equipment Schedules beyond even the five year period;

AND WHEREAS the report to Council indicated that the preferred bid by MFP contained an implicit interest rate of 4.6% and the Equipment Schedules executed by City staff contained lease rates with implicit interest rates significantly in excess of the 4.6% interest rate;

AND WHEREAS in or about December 1999, the City's Director of the Y2K Project recommended the acquisition by the City of 10,000 Oracle Database enterprise software licences, the acquisition was approved by the City's then Y2K Steering Committee, with subsequent approval by the City's then Chief Administrative Officer, and the 10,000 licences were then acquired by lease through MFP by the addition of an Equipment Schedule to MFP's Master Equipment Lease Agreement;

AND WHEREAS the acquisition of the 10,000 Oracle licences was a serious miscalculation and it is unclear as to whether such acquisition was co-ordinated with the City's agencies boards and commissions, why leasing was undertaken as opposed to the continued purchase of the licences directly from Oracle and how MFP was selected for leasing of the Oracle software;

AND WHEREAS the concerns of the City in respect of the MFP and Oracle transactions are more fully detailed in the attached reports from the Chief Administrative Officer and City Auditor, dated respectively in respect of the MFP transactions and the Oracle transaction, November 29, 2001 and February 6, 2002 and in respect of the 1998 computer lease numbered "784", the report from the City Auditor, dated January 28, 2002;

AND WHEREAS the public inquiry would permit (i) the Commissioner to investigate the existence of any malfeasance, breach of trust or misconduct, (ii) the Commissioner to make recommendations that would be a benefit for the future conduct of the public business of the City, and (iii) the public to understand and evaluate fully the above noted transactions;

- 3 -

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 inquire into, or concerning, any matter related to a supposed malfeasance, breach of trust or other misconduct on the part of a member of 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, or other person to the corporation or to any matter connected with the good government of the municipality, or the conduct of any part of its public business, and

2. the Honourable Chief Justice Lesage, Chief Justice of the Superior Court of Ontario, be requested to designate a judge of the Superior Court of Ontario as Commissioner for the inquiry and the judge so designated is hereby authorized to conduct the inquiry.

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.

Terms of Reference – Toronto External Contracts Inquiry

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.)

TORONTO STAFF REPORT

January 30, 2002

To: Audit Committee

From: City Solicitor

Subject: Review of Computer Leasing Contract with MFP Financial Services
Public Inquiry under Section 100 of the *Municipal Act*

Purpose:

The purpose of this report is to report through the Audit Committee to Council in order to provide information on the option of a public inquiry under section 100 of the *Municipal Act* as background for Council's decision-making at its meeting on February 13, 2002.

Financial Implications and Impact Statement:

There are no financial implications by the receipt of this report.

Recommendations:

It is recommended that this report be received for information.

Background:

At its meeting of December 4,5, and 6, 2001, in considering the matter of the computer leasing contract with MFP Financial Services ("MFP"), Council requested the City Solicitor to submit a report to the Audit Committee no later than April 2002 on whether a public inquiry should be instituted pursuant to section 100 of the *Municipal Act* ("section 100 public inquiry") with respect to the review of the contract and any related matters identified by the Chief Administrative Officer, the City Auditor and the Commissioner of Corporate Services. As it is apparent that the issue of a public inquiry will be before the February 13, 2002 Council meeting, the Chief Administrative Officer requested the City Solicitor to report through the Audit Committee in time for the meeting of February 13th and to canvass for the information of councillors the various options that could be available for further investigation or inquiry. The Chief Administrative Officer has also requested that the report address the potential costs of a section 100 public inquiry.

Comments:

The issue of whether a section 100 public inquiry should be instituted or not is a matter which Council itself needs to determine. That determination can take into account the information provided to date by the City Auditor and external counsel as a result of the reviews undertaken by both the City Auditor and KPMG as well as any recommendations by the City Auditor and external counsel. This report discusses, as requested for the information of Council, the various options that were looked at as possible avenues for further investigation or inquiry by the City into the matters surrounding the MFP computer leasing contract and then focuses on the particular issues associated with a section 100 public inquiry.

The various statutory provisions that are referred to in the body of this report are set out in the attached Appendix A.

(i) Investigation or Inquiry Options

The options available to Council are as follows:

(1) Continue with the City's Current Internal Audit and Forensic Investigation

The internal investigation is currently ongoing by the City Auditor in conjunction with that of KPMG, which is under retainer to the City's external counsel, Alan Lenczner of Lenczner Slaght. Council, at its meeting of December 4, 5 and 6, 2001, adopted a recommendation that the Chief Administrative Officer and City Auditor continue the investigation of the matter and report to the Audit Committee in April, 2002. In addition, Council requested the City Auditor as follows:

"(3) the City Auditor be requested to:

(a) undertake the further investigations, as instructed by City Council at the in-camera portion of its meeting; and

(b) continue to investigate and report to the Audit Committee on:

(i) purchase or lease of Council original equipment (IT) and the whereabouts of this equipment;

(ii) whether the City had been reimbursed for this equipment;

(iii) whether proper approvals for the actions were received; and

(iv) details surrounding the acquisition of this equipment by the Toronto Transition Team, such as the minutes of meetings, the bid process, bid proposals, the authorization of the Purchase Orders, the signatures on the contract and the interest rates on this contract or contracts;"

The City Auditor advises that, at present, his investigation is focusing on the acquisition of the Council original equipment in 1997,i.e., in accordance with the direction contained in Recommendation 3(b) above.

As one of its options, Council could determine to await the conclusion of the current internal investigation and assess then whether no action should be taken, a public inquiry is warranted or the police should be requested to investigate with a view to whether a criminal offence, in particular breach of trust or municipal corruption, has occurred.

(2) Follow up with the Request for a Provincial Municipal Audit

Under subsection 9(1) of the *Municipal Affairs Act*, Council can by resolution request the Ministry of Municipal Affairs and Housing to conduct a municipal audit of the financial affairs of the municipality. If the Province chose to do so, it would then appoint an officer of the Ministry or other person to undertake the audit.

Unlike the City's internal investigation, the auditor would have the power to require the production of all or any books, records and documents that might relate in any way to the affairs of the municipality that are the subject of the audit and to require any person to appear before him or her to give evidence under oath touching any of the inquiry matters. The auditor would have all the powers of a commission under Part II of the *Public Inquiries Act*.

Part II of the *Public Inquiries Act* provides for such matters, among others, as the issuance of a summons to any person to give evidence or produce any document, the power to compel such attendance or production, the rights of witnesses, the ability of an auditor to appoint an investigator and the ability to apply for search warrants.

Such municipal audits are rare, would likely be restricted to a financial review and are not public or typically publicized. The costs would be fixed and charged back to Toronto.

At its meeting of December 4, 5 and 6, 2002, by the adoption of Clause No. 11 of Report No. 10 of the Audit Committee, Council requested the Province of Ontario and the Minister of Municipal Affairs to conduct a Provincial municipal audit of the computer leasing contract with MFP. In accordance with that direction, a formal request has been submitted to the Premier's Office and the Minister of Municipal Affairs and Housing. At the date of writing, while there has been an acknowledgement of receipt, the Province has not replied to the request.

It is unlikely that the request will be granted unless the Province believes there is a provincial interest involved. A ratepayers group in the City of Waterloo had requested such a municipal audit in respect of Waterloo's contract with MFP relating to Waterloo's RIM Park, but that request has been denied on the basis of ongoing litigation. It is likely that the same reasoning would apply in Toronto's case. In addition, given the issue of possible misconduct raised by some council members, there are matters of procedural fairness that would warrant a hearing and attendant judicial expertise to safeguard the rights of parties.

(3) Request an Investigation or Inquiry by the Ontario Municipal Board

Under section 54 of the *Ontario Municipal Board Act* ("OMB Act"), the Ontario Municipal Board has the jurisdiction and power to inquire at any time into any or all of the affairs, financial and otherwise of a municipality. It may hold hearings and make such investigations as may appear necessary or expedient to be made in the interest of the municipality, its rate-payers, inhabitants and creditors and "particularly to make and hold such inquiries, hearings and investigations for the purpose of avoiding any default or recurrence of a default of any municipality in meeting its obligations".

There are no recent cases indicating the use of this power by the Board. The origin of the section likely arises from the financial supervisory role of the Board at a time historically when municipalities were in financial difficulty. That role is outdated as evidenced by it being superseded by the financial limit regulations under the OMB Act. Given:

(a) the contractual nature of the issues involved specifically with MFP, i.e., the matter of contract management, coupled with the issue of possible wrongdoing, all of which lends itself to the need for judicial expertise and protections,

(b) the expertise of the Board being essentially focussed on planning and assessment matters,

(c) that the Board, if it was so inclined to consider an inquiry, would, in any event, likely hold a hearing on the necessity of an inquiry, with attendant delay, and

(d) the Board, rather than Council, would likely determine the extent of any inquiry or investigation,

any Council directive to proceed with an inquiry by public hearing should be by way of either a provincial or municipal public inquiry.

(4) Request a Provincial Inquiry

Under the *Public Inquiries Act*, the Lieutenant Governor in Council may appoint by commission one or more persons to conduct a public inquiry. The Lieutenant Governor in Council may do so where the Lieutenant Governor in Council considers it expedient concerning any matter connected with or affecting the good government of Ontario or the conduct of any part of the public business of the government or that the Lieutenant Governor in Council declares to be a matter of public concern and the inquiry is not regulated by any special law.

Accordingly, the Province could establish a provincial public inquiry if it felt that the contractual matters affecting Waterloo, Windsor and Toronto affected provincial government and interests. It is unlikely that the Province would be able to declare the matters involved solely in Toronto's MFP computer leasing contract as a matter of provincial or public concern and subject to a provincial inquiry as, arguably, the specific matter is governed by special law, i.e., the provisions of section 100 of the *Municipal Act* relating to municipal public inquiries.

Even if a provincial public inquiry were possible involving more than one municipality's contract with MFP, there are concerns that, while on the one hand, Toronto could thereby share the inquiry costs, Toronto could be caught up in costs and delays as a result of the legal issues and challenges specific to other municipalities.

(5) Request a Section 100 Municipal Inquiry

Subsection 100(1) of the *Municipal Act* states as follows:

> "100(1) Where the council of a municipality passes a resolution requesting a judge of the Ontario Court (General Division) 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 corporation, 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 corporation, or 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, the judge shall make the inquiry and for that purpose has all the powers of a commission under Part II of the *Public Inquiries Act*, which Part applies to such investigation as if it were an inquiry under that Act, and the judge shall, with all convenient speed, report to the council the result of the inquiry and the evidence taken."

Under this section, Council may pass a resolution mandating a public inquiry, i.e., upon receipt of the request a judge must conduct a public inquiry. The resolution would set out the scope of the inquiry. The potential scope of the inquiry is wide-ranging, given that it may be very specific to a matter of misconduct or may concern "any matter connected with the good government of the municipality or the conduct of any part of its public business".

As indicated above in respect of a provincial municipal audit, Part II of the *Public Inquiries Act* provides for such matters, among others, as the issuance of a summons to any person to give evidence or produce any document, the power to compel such attendance or production, the rights of witnesses, the ability to appoint an investigator and the ability to apply for search warrants. A public hearing would take place and the rules of procedural fairness would apply.

A number of points need to be made about the municipal inquiry:

(a) Council has the ability, by its requesting resolution, to control the scope of the inquiry; at the same time, the resolution must be carefully crafted as it constitutes the terms of reference or mandate binding the inquiry judge in the conduct of the inquiry as well as notification of the subject matter to potential parties. The resolution must have sufficient particularity as there have been a number of cases where the requesting resolution has been quashed by the courts because the resolution was too vague;

(b) The conduct and the procedure to be followed on an inquiry is under the control and direction of the inquiry judge. The inquiry judge may appoint his or her own inquiry

counsel and any investigators felt necessary. A time limit cannot be established for the inquiry given that section 100 of the *Municipal Act* addresses the time element by stating that the inquiry judge shall report "with all convenient speed" on the result of the inquiry and the evidence taken; and

(c) Any person who has a substantial and direct interest in the subject matter of the inquiry is entitled to standing at the inquiry with the ability to call and examine witnesses relevant to the person's interest. The City could appoint its own counsel to represent it as commission counsel would not be taking instructions from the City.

(ii) Costs and Timing of a Section 100 Public Inquiry

Subsection 100(3) of the Municipal Act is explicit that the municipality pays the inquiry judge's expenses of the inquiry, i.e., the engagement of inquiry counsel, assistants, investigators, or other expenses that the inquiry judge considers advisable for the proper conduct of the inquiry.

One of the issues that Council will need to address is whether the City will pay the costs of employee representation at the inquiry or by its terms of reference give discretion for the payment of costs or provision of funding to parties by the inquiry judge.

It is difficult to estimate the potential costs of an inquiry hearing. Two recent inquiries were the Sarnia inquiry, an inquiry under section 100 of the *Municipal Act* and the Walkerton inquiry, being a provincial inquiry under the *Public Inquiries Act*. The first inquiry was held in 1998 and concerned a series of land transactions in the former Town of Clearwater before its amalgamation into Sarnia. The inquiry involved 33 hearing days. The total cost of the inquiry was approximately $600,000. There were additional costs of approximately $400,000 in connection with various court challenges all the way to the Supreme Court of Canada.

The well-known Walkerton inquiry, which just issued its Part 1 report, had a broad mandate concerning the contamination of water in the Town of Walkerton. The provincial inquiry involved 95 hearing days and a combined total of 145 hearing days and public meetings. The total cost, as reported, was $9.5 million.

It is difficult to estimate the costs of any inquiry in advance but a range of $1 million to $2 million (and more likely closer to $1 million) can be expected for the inquiry itself relating only to the MFP transactions that are currently the subject of the settlement discussions before Council. The basis and assumptions for this dollar range are set out in Appendix B to this report.

On the issue of the time-line of any inquiry, it is estimated that the time from the passage of the requesting resolution to the submission of a report would be approximately 9 to 12 months. This estimate is based on the fact that the Sarnia inquiry, which was concerned with more of a transactional subject matter similar to that involved here, had a time-line of approximately 9 months with 33 hearing days. There were 38 witnesses and 106 exhibits.

In the late 1970's, a public inquiry, the Risdon inquiry, was conducted pursuant to the request of the former City of Toronto. That inquiry related to allegations of misconduct by the then Chief

Plumbing Inspector for the City. Again, the time-line from requesting resolution to submission of report was approximately 9 months. The inquiry involved 29 hearing days, 69 witnesses and 326 exhibits.

Overall, it is estimated that the hearing itself would take place over a period of 1½ to 2 months. For the purpose of estimating costs, an estimate of 40 hearing days has been used.

(iii) Steps to be taken if Council wishes a Section 100 Public Inquiry

Should Council decide that it wishes to proceed with a section 100 public inquiry, instructions should be provided to staff to draft the requesting resolution to form the terms of reference for the inquiry. The terms of reference will need to be sufficiently particular to guide the inquiry and notify potential parties of the subject matter of the inquiry. Council will therefore have to give direction on the scope of any inquiry. Upon receipt of instructions, staff will also contact the Chief Justice of the Superior Court to determine the availability of an inquiry judge. A draft requesting resolution would then be brought back for passage by Council.

Conclusions:

(1) Based on the examination of options for investigation and inquiry as detailed in this report, Council realistically has the option of either awaiting the completion of the City's internal investigations to determine any future action or proceeding with an inquiry under section 100 of the *Municipal Act*;

(2) If Council wishes to proceed with a section 100 public inquiry, the requesting resolution to an inquiry judge must be carefully crafted as it constitutes the terms of reference or mandate binding the inquiry judge as well as notification of the subject matter to potential parties;

(3) It is difficult to estimate the costs of any inquiry in advance but a range of $1 million to $2 million (and more likely closer to $1 million) can be expected for an inquiry relating only to the MFP transactions that are currently the subject of the settlement discussions before Council. The basis for this estimate is set out in Appendix B to this report; and

(4) On the issue of the time-line of any inquiry, it is estimated that the time from the passage of the requesting resolution to the submission of a report would be approximately 9 to 12 months.

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H.W.O. Doyle
City Solicitor

Attachments

Appendix A: Various Statutory Provisions relating to Municipal or Provincial Investigations or Inquiries

Appendix B: Detailed Estimates of the Costs of a Section 100 Public Inquiry

APPENDIX A

Various Statutory Provisions relating to Municipal or Provincial Investigations or Inquiries

MUNICIPAL AFFAIRS ACT- PROVINCIAL MUNICIPAL AUDITS

Provincial municipal audit -- s. 9(1)

9. (1) The Ministry, upon its own initiative or whenever requested by any municipality expressed by resolution of its council, or on a petition in writing signed by not less than fifty ratepayers assessed as owners and resident in a municipality, may direct a provincial municipal audit of the financial affairs of the municipality.

Extent of audit -- s. 9(2)

(2) Any direction given by the Ministry may extend to an audit of all the financial affairs of a municipality or may be limited to the financial affairs of any local board thereof, or to any specified phase of such financial affairs or to any specified books, accounts, registers, records, vouchers, receipts, funds, money or financial transactions, kept by or under the charge of any officer of the municipality designated by the Ministry. R.S.O. 1980, c. 303, s. 9.

General inquiry -- s. 10
History

10. The Ministry upon its own initiative may make an inquiry into any of the affairs of a municipality. R.S.O. 1980, c. 303, s. 10; 1993, c. 27, Sch.

Appointment of auditor -- s. 11

11. An audit directed to be made under this Part may be made by any officer of the Ministry, or by a competent auditor appointed by the Minister, and the officer and person so appointed for the purposes of such audit have all the powers mentioned in section 12. R.S.O. 1980, c. 303, s. 11.

Powers of auditor -- s. 12

12. For the purposes of any audit, the officer of the Ministry or other person appointed to make the audit may require the production of all or any books, records and documents that may in any way relate to the affairs of the municipality that are the subject of the audit, and inspect, examine and audit and copy them, and may require any officer of the municipality and any other person to appear before him or her and give evidence on oath touching any of such affairs, and for such purpose has all the powers of a commission under Part II of

the Public Inquiries Act, which Part applies to such audit as if it were an inquiry under that Act. R.S.O. 1980, c. 303, s. 12.

Report on audit -- s. 13

13. Upon completion of an audit under this Part, the auditor shall report thereon in writing to the Deputy Minister, who shall forthwith transmit a copy of the report to the municipality. R.S.O. 1980, c. 303, s. 13.

Powers of Ministry as a result of an audit or inquiry -- s. 14

14. The Ministry, as a result of an audit of the affairs of a municipality made under this Part, or as a result of an investigation or inquiry made under any general or special Act, may make such orders as it sees fit requiring the municipality to carry out, put into effect, observe, perform or enforce such matters or things as the audit, investigation or inquiry has disclosed as being necessary or desirable in the interests of the municipality or with respect to the due accounting for, collection or payment of any of its assets, liabilities, revenues, expenditures, funds or money or otherwise in any respect as the order of the Ministry may provide. R.S.O. 1980, c. 303, s. 14.

Fees for audit -- s. 15

15. The Ministry may fix the fees and allowances for expenses payable with respect to any audit of the affairs of a municipality under this Part, and the amount so fixed shall forthwith be paid by the municipality. R.S.O. 1980, c. 303, s. 15.

ONTARIO MUNICIPAL BOARD ACT

General municipal jurisdiction of the Board: -- s. 54(1)

54. (1) The Board has jurisdiction and power in relation to municipal affairs,

(i) to inquire at any time into any or all of the affairs, financial and otherwise, of a municipality and hold such hearings and make such investigations in respect thereof as may appear necessary or expedient to be made in the interest of the municipality, its rate-payers, inhabitants and creditors and particularly to make and hold such inquiries, hearings and investigations for the purpose of avoiding any default or recurrence of a default by any municipality in meeting its obligations;

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PUBLIC INQUIRIES ACT

Appointment of commission -- s. 2

2. Whenever the Lieutenant Governor in Council considers it expedient to cause inquiry to be made concerning any matter connected with or affecting the good government of Ontario or the conduct of any part of the public business thereof or of the administration of justice therein or that the Lieutenant Governor in Council declares to be a matter of public concern and the inquiry is not regulated by any special law, the Lieutenant Governor in Council may, by commission, appoint one or more persons to conduct the inquiry. R.S.O. 1980, c. 411, s. 2.

APPENDIX B

Detailed Estimates of the Costs of a Section 100 Public Inquiry

The City's Obligation to Pay

The City pays the inquiry judge's expenses of the inquiry, i.e., the engagement of inquiry counsel, assistants, investigators, or other expenses that the inquiry judge considers advisable for the proper conduct of the inquiry.

Assumptions

The estimate of cost is based on the assumption that the Sarnia Inquiry forms a reasonable costing and timing model for the section 100 public inquiry. First, the transactional nature of the subject matter of the Sarnia inquiry is more similar to the subject matter here (i.e., the MFP leases) than the broader public interest inquiry of the Walkerton inquiry. The Risdon Inquiry in the 1970's (dealing as it did with allegations of misconduct by the chief plumbing inspector) interestingly had approximately the same time line and number of hearing days as the Sarnia inquiry. Sarnia's hearing stage was relatively recent (1998) and therefore the costing of the inquiry can be reasonably applied.

The cost of the City's own legal representation has not been included. The estimate does not take into account any funding to be provided to parties or employees for the costs of representation at the inquiry.

Commission Counsel

The total legal fees incurred by the City of Sarnia (for the reimbursement of commission counsel) in the Sarnia Public Inquiry (and aside from the legal fees for the various court challenges) were approximately $455,000. Some of this amount comprised duplication as a result of the need to restart the inquiry given the court challenges.

There are typically two parts to any inquiry: an investigative stage and a hearing stage. The hearing stage of the Sarnia Inquiry was fairly recent, the hearing taking place in 1998 after a delay of approximately 5 years as a result of the court challenges. The legal fees for the work in 1998 comprised approximately $290,000, which would have involved the actual hearing (33 hearing days) as well as the hearing preparation and legal review of the inquiry report.

One approach on an estimate of costs for the role of commission counsel is to determine a per hearing day cost which would include preparation and follow-up. In the Sarnia case, the per hearing day cost (using 1998 amounts only) was approximately $8,800. Assuming a 20% increase in costs and applying therefore a per hearing day cost of approximately $10,500, an MFP hearing estimated at 40 hearing days (approximately 2 months) would cost approximately $425,000 in fees for commission counsel.

The legal fees for commission counsel's involvement in the investigative stage for any MFP inquiry has been estimated at $250,000. This is an amount more than the prior years' counsel fees involved in the Sarnia inquiry and, arguably, is generous as commission counsel in this case would be able to take advantage of the investigative work by the City to date.

The total estimate for commission counsel by this approach is therefore $675,000.

This estimate compares favourably to an hourly approach based on the following hours at a combined hourly rate of $800.00/hr for senior and junior commission counsel:

- 10 hours a day for each of 40 hearing days,
- 50 hours for preparation of the inquiry report,
- 200 hours involved in preparation, and
- 200 hours for investigation,

for a total of $665,000.

Investigator

Sarnia spent approximately $60,000 for an investigator. In this case, KPMG has done most of the investigative work and document production and that work could be relied on for some savings. It is therefore estimated that any follow-up investigative work should not exceed $75,000.

Advertising & Process

In Sarnia, the cost was approximately $5,000. We have simply estimated based on multiplying the cost, namely to $30,000 given the cost of advertising in Toronto.

Clerking Services

The Inquiry Judge will need a clerk for the hearing. We have simply ascribed an amount of $15,000.

Court Reporter

Transcripts of the hearing will be required, typically daily. In the Sarnia case, that amount was approximately $42,000. In this case, the estimate is based simply on a little more than doubling, i.e., approximately $100,000.

Inquiry Judge Incidental Expenses

We have simply ascribed an amount of $5,000 for incidental expenses.

Inquiry Hearing Room

We assume a City facility can be used. If not, an amount of $20,000 has been used.

The total for all of the above is approximately $920,000. Applying a contingency of 15%, the cost would just exceed $1,000,000 subject, as set out above, to additional costs based on determinations to be made on the City's own legal representation and funding of parties.

8.53 **Toronto Computer Leasing Inquiry and Toronto External Contracts Inquiry - Clarification**

Councillor Miller moved that the necessary provisions of Chapter 27 of the City of Toronto Municipal Code be waived to permit introduction of the following Notice of Motion J(6), which carried, more than two-thirds of Members present having voted in the affirmative:

Moved by: **Councillor Miller**

Seconded by: **Councillor Johnston**

"**WHEREAS** at its meeting of October 1, 2 and 3, 2002, City Council approved the terms of reference for an Inquiry (subsequent or concurrent to the Toronto Computer Leasing Inquiry) concerning the Beacon and Remarkable Contracts and the external contracts being Ball HSU-Associates Inc. and the contracts for the purchase of the computer hardware and software that subsequently formed the basis for the computer leasing Request For Quotations (RFQ) that is the subject of the Toronto Computer Leasing Inquiry; and

WHEREAS Madame Justice Bellamy has been designated as the Commissioner for the Inquiry, known as the Toronto External Contracts Inquiry or 'TECI'; and

WHEREAS Standing Hearings will be held on November 5, 2002, in respect of the TECI; and

WHEREAS Commission Counsel have written to our outside solicitors clarifying one aspect of the terms of reference of the TECI. They have identified that it is the Commission's intention to investigate and inquire into the supply of Dell desktops and servers which were referred to in the leasing RFQ, but not the other hardware and software listed in the RFQ; and

WHEREAS Commission Counsel seek the clarification so that all parties are clear as to the scope of the terms of reference for the TECI;

NOW THEREFORE BE IT RESOLVED THAT Council give consideration to the attached report dated October 28, 2002, from the City Solicitor, and that such report be adopted."

Advice by Deputy Mayor:

Deputy Mayor Ootes advised the Council that the provisions of Chapter 27 of the City of Toronto Municipal Code requiring the referral of Motion J(6) to the Audit Committee would have to be waived in order to now consider such Motion.

Procedural Vote:

The vote to waive referral of Motion J(6) to the Audit Committee carried, more than two-thirds of Members present having voted in the affirmative.

City Council also had before it, during consideration of Motion J(6), a report dated October 28, 2002, from the City Solicitor, entitled "Toronto Computer Leasing Inquiry and Toronto External Contracts Inquiry". (See Attachment No. 2, Page 173).

Motion:

Councillor Miller moved that Motion J(6) be adopted, subject to adding thereto the following new Operative Paragraph:

"**AND BE IT FURTHER RESOLVED THAT** the City Solicitor be authorized to apply for standing at the Toronto External Contracts Inquiry on behalf of the City of Toronto."

Votes:

Adoption of motion by Councillor Miller:

Yes - 24 Councillors:	Altobello, Augimeri, Balkissoon, Bussin, Cho, Chow, Di Giorgio, Duguid, Filion, Hall, Holyday, Johnston, Jones, Layton, Li Preti, McConnell, Miller, Moeser, Moscoe, Nunziata, Ootes, Shiner, Tziretas, Walker
No - 0	

Carried, without dissent.

Motion J(6), as amended, carried.

City Council, by its adoption of Motion J(6), as amended, adopted, without amendment, the report dated October 28, 2002, from the City Solicitor, embodying the following recommendation:

> "It is recommended that City Council approve the clarification sought by Commission Counsel with respect to the scope of the Toronto External Contracts Inquiry, namely, that they will investigate and inquire into the supply of Dell desktops and servers which were referred to in the leasing RFQ, but not the other hardware and software listed in the RFQ."

3.56 **Toronto Computer Leasing Inquiry ("TCLI") and Toronto External Contracts Inquiry ("TECI") – Letter from Commissioner Bellamy to Mayor Miller**

Mayor Miller moved that the necessary provisions of Chapter 27 of the City of Toronto Municipal Code be waived to permit introduction of the following Notice of Motion J(3), which carried, more than two-thirds of Members present having voted in the affirmative:

Moved by: **Mayor Miller**

Seconded by: **Deputy Mayor Pantalone**

"**WHEREAS** Commissioner Bellamy has written to Mayor Miller requesting City Council to consider the future of the Toronto External Contracts Inquiry ('TECI'); and

WHEREAS the City Solicitor has prepared a report dated January 26, 2004, providing a status of the TCLI and the TECI to assist City Council in its deliberations;

NOW THEREFORE BE IT RESOLVED THAT Council consider the report from the City Solicitor dated January 26, 2004."

Advice by Mayor:

Mayor Miller advised the Council that the provisions of Chapter 27 of the City of Toronto Municipal Code requiring the referral of Motion J(3) to the Policy and Finance Committee would have to be waived in order to now consider such Motion.

Fiscal Impact Statement:

City Council had before it, during consideration of Motion J(3), a Fiscal Impact Statement from the Chief Financial Officer and Treasurer advising that there was a financial impact resulting from the adoption of this Motion. (See Fiscal Impact Statement Summary, Page 134)

Procedural Vote:

The vote to waive referral of Motion J(3) to the Policy and Finance Committee carried, more than

two-thirds of Members present having voted in the affirmative.

Council also had before it, during consideration of Motion J(3), a report January 26, 2004, from the City Solicitor, entitled "Toronto Computer Leasing Inquiry and Toronto External Consultants Inquiry Letter from Commissioner to Mayor Miller and Status Update". (See Attachment No. 2, Page 121)

Councillor Bussin in the Chair.

Motions:

(a) Mayor Miller moved that Motion J(3) be amended by adding the following new Operative Paragraph:

"**AND BE IT FURTHER RESOLVED THAT** Council adopt the following motion:

'**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/or "TCLI"); and

WHEREAS Madame Justice Denise Bellamy was designated as Commissioner for a second inquiry established by the Council of the City of Toronto under s. 100 of the Municipal Act by Resolution dated October 3, 2003 ("Toronto External Contracts Inquiry" and/or "TECI"); and

WHEREAS Commissioner Bellamy has appointed Commission Counsel who have been conducting investigations including the interview of witnesses and the review of documents involving the terms of reference for both Inquiries since that time; and

WHEREAS City Council has reviewed Commissioner Bellamy's letter dated December 30, 2003, to Mayor Miller, and the City Solicitor's report to Council dated January 26, 2004;

NOW THEREFORE BE IT RESOLVED THAT:

(1) the Commission be urged to investigate fully all information relevant to the TCLI terms of reference and to complete that investigation as soon as possible;

(2) the Commission be encouraged to call all evidence that may shed light on the issues raised in the TCLI terms of reference;

(3) City Council defer further consideration of the letter dated December 30, 2003, to Mayor Miller, from Commissioner Bellamy, until Commissioner Bellamy or her Counsel advise the City that all evidence related to TCLI has been called. In the interim, Council does not expect the Commissioner to begin hearings in the TECI;

(4) the City's outside Counsel be permitted to criticize current employees in closing submissions, only if justified by the evidence; and

(5) the budget amount estimated for the cost of the City's outside counsel be increased to $3,440,000.00 from $3,250,000.00 to complete TCLI.'."

(b) Councillor Pitfield moved that Motion J(3) be amended by adding the following new Operative Paragraphs:

"**AND BE IT FURTHER RESOLVED THAT** if Council decides not to proceed with the TECI, the collected evidence and all other information gathered to date through existing expenses be requested of the Commissioner by City Council to be made public;

AND BE IT FURTHER RESOLVED THAT after Commissioner Bellamy has submitted her report on good governance, City Council have the opportunity to decide whether to proceed with the TECI."

(c) Councillor Walker moved that Motion J(3) be amended by adding the following new Operative Paragraph:

"**AND BE IT FURTHER RESOLVED THAT** Toronto City Council request Commissioner Bellamy to release the good government phase of her Inquiry at such time as she has completed that phase, in order for City Council to consider and implement her recommendations as soon as possible."

Mayor Miller in the Chair.

(d) Councillor Mammoliti moved that motion (a) by Mayor Miller be amended to provide that the increase to the budget amount be limited to $3,000,000.00.

(e) Councillor Pantalone moved that motion (d) by Councillor Mammoliti be referred to the City Solicitor for a report to City Council when this matter is again before Council.

Withdrawal of Motion:

Councillor Pitfield, with the permission of Council, withdrew the second new Operative Paragraph contained in her motion (b).

Votes:

Adoption of motion (e) by Councillor Pantalone:

Yes - 33	
Mayor:	Miller
Councillors:	Altobello, Ashton, Balkissoon, Bussin, Carroll, Cho, Chow, Cowbourne, Davis, De Baeremaeker, Di Giorgio, Feldman, Filion, Ford, Giambrone, Hall, Holyday, Jenkins, Kelly, Lindsay Luby, Mihevc, Milczyn, Nunziata, Ootes, Palacio, Pantalone, Pitfield, Rae, Saundercook, Stintz, Thompson, Walker
No - 2	
Councillors:	Del Grande, Mammoliti

Carried by a majority of 31.

Adoption of motion (a) by Mayor Miller, without amendment:

Yes - 34	
Mayor:	Miller

Councillors:	Altobello, Ashton, Balkissoon, Bussin, Carroll, Cho, Chow, Cowbourne, Davis, De Baeremaeker, Di Giorgio, Feldman, Filion, Ford, Giambrone, Hall, Holyday, Jenkins, Kelly, Lindsay Luby, McConnell, Mihevc, Milczyn, Nunziata, Ootes, Palacio, Pantalone, Pitfield, Rae, Saundercook, Stintz, Thompson, Walker
No - 2	
Councillors:	Del Grande, Mammoliti

Carried by a majority of 32.

Motion (c) by Councillor Walker carried.

Adoption of motion (b) by Councillor Pitfield:

Yes - 36	
Mayor:	Miller
Councillors:	Altobello, Ashton, Balkissoon, Bussin, Carroll, Cho, Chow, Cowbourne, Davis, De Baeremaeker, Del Grande, Di Giorgio, Feldman, Filion, Fletcher, Ford, Giambrone, Hall, Holyday, Jenkins, Kelly, Lindsay Luby, McConnell, Mihevc, Milczyn, Nunziata, Ootes, Palacio, Pantalone, Pitfield, Rae, Saundercook, Stintz, Thompson, Walker
No - 1	
Councillor:	Mammoliti

Carried by a majority of 35.

Adoption of Motion J(3) as amended:

Yes - 35	
Mayor:	Miller
Councillors:	Altobello, Ashton, Balkissoon, Bussin, Carroll, Cho, Chow, Cowbourne, Davis, De Baeremaeker, Di Giorgio, Feldman, Filion, Fletcher, Ford, Giambrone, Hall, Holyday, Jenkins, Kelly, Lindsay Luby, McConnell, Mihevc, Milczyn, Nunziata, Ootes, Palacio, Pantalone, Pitfield, Rae, Saundercook, Stintz, Thompson, Walker
No - 2	

Councillors:	Del Grande, Mammoliti

Carried by a majority of 33.

Summary:

In summary, Council adopted Motion J(3), subject to adding the following new Operative Paragraphs:

"**AND BE IT FURTHER RESOLVED THAT** Council adopt the following motion:

'**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/or "TCLI"); and

WHEREAS Madame Justice Denise Bellamy was designated as Commissioner for a second inquiry established by the Council of the City of Toronto under s. 100 of the Municipal Act by Resolution dated October 3, 2003 ("Toronto External Contracts Inquiry" and/or "TECI"); and

WHEREAS Commissioner Bellamy has appointed Commission Counsel who have been conducting investigations including the interview of witnesses and the review of documents involving the terms of reference for both Inquiries since that time; and

WHEREAS City Council has reviewed Commissioner Bellamy's letter dated December 30, 2003, to Mayor Miller, and the City Solicitor's report to Council dated January 26, 2004;

NOW THEREFORE BE IT RESOLVED THAT:

(1) the Commission be urged to investigate fully all information relevant to the TCLI terms of reference and to complete that investigation as soon as possible;

(2) the Commission be encouraged to call all evidence that may shed light on the issues raised in the TCLI terms of reference;

(3) City Council defer further consideration of the letter dated December 30, 2003, to Mayor Miller, from Commissioner Bellamy, until Commissioner Bellamy or her Counsel advise the City that all evidence related to TCLI has been called. In the interim, Council does not expect the Commissioner to begin hearings in the TECI;

(4) the City's outside Counsel be permitted to criticize current employees in closing submissions, only if justified by the evidence; and

(5) the budget amount estimated for the cost of the City's outside counsel be increased to $3,440,000.00 from $3,250,000.00 to complete TCLI.';

AND BE IT FURTHER RESOLVED THAT Toronto City Council request Commissioner Bellamy to release the good government phase of her Inquiry at such time as she has completed that phase, in order for City Council to consider and implement her recommendations as soon as possible;

AND BE IT FURTHER RESOLVED THAT if Council decides not to proceed with the TECI, the collected evidence and all other information gathered to date through existing expenses be requested of the Commissioner by City Council to be made public;

AND BE IT FURTHER RESOLVED THAT the following motion be referred to the City Solicitor for a report to City Council when this matter is again before Council:

Moved by Councillor Mammoliti:

'That Part (5) of the motion by Mayor Miller, be amended to provide that the increase to the budget amount be limited to $3,000,000.00.' "

Appendix C(iii): Excerpt of Toronto City Council Minutes, January 27, 28, and 29, 2004

ATTACHMENT NO. 2 [Notice of Motion J(3)]

Report dated January 26, 2004, from the Chief Financial Officer and Treasurer, entitled "Subject: Toronto Computer Leasing Inquiry and Toronto External Consultants Inquiry Letter from Commissioner to Mayor Miller and Status Update" (See Minute No. 3.56, Page 57):

Purpose:

To provide City Council with a status update on the Toronto Computer Leasing Inquiry ("TCLI") and the Toronto External Contracts Inquiry ("TECI") and to comment on the implications of Commissioner Bellamy's letter to Mayor Miller.

Financial Implications and Impact Statement:

City Council has approved a preliminary estimate of $15,470,300 for the Inquiries. In the event that City Council decides not to proceed with TECI, costs estimated to be in the range of $3,070,000 will not be expended. If City Council decides to proceed with TECI, potential revisions to the approved budget will be the subject of a further report. Costs of the City's outside counsel for TCLI will exceed the approved estimate but are anticipated to be within the overall approved budget estimate for the Inquiries.

Recommendations:

It is recommended that:

(1) City Council consider Commissioner Bellamy's December 30, 2003 letter to Mayor Miller and determine whether or not it should cancel TECI;

(2) the City's outside counsel be permitted to criticize current employees in closing submissions, only if justified by the evidence;

(3) if City Council confirms that Commissioner Bellamy proceed with TECI, the City Solicitor be requested to report to Policy and Finance Committee with a revised budget estimate; and

(4) the budget amount estimated for the cost of the City's outside counsel be increased to $3,440,000 from $3,250,000 to complete TCLI.

Background:

City Council established a public inquiry pursuant to Section 100 of the *Municipal Act* (now section 274 of the *Municipal Act, 2001*), at its meeting held on February 13, 14 and 15, 2002. There have been several reports to City Council on the status of this Inquiry, which is now known as the Toronto

Computer Leasing Inquiry ("TCLI").
City Council established a second public inquiry, now known as the Toronto External Contracts Inquiry ("TECI"), at its meeting held on October 1, 2 and 3, 2002.

City Council approved an estimated budget of $15,470,000 for all costs relating to both Inquiries at its meeting held on September 22, 23, 24 and 25, 2003.

Commissioner Bellamy wrote a letter dated December 30, 2003, to Mayor Miller, attached as Appendix "A". The Commissioner has requested that City Council consider whether it wishes TECI to proceed to a hearing or not.

Comments:

Status of TCLI

On November 25, 2003, Commissioner Bellamy adjourned TCLI. As of that date, 65 witnesses had given evidence over approximately 152 hearing days. The City's outside counsel has requested that the Inquiry recall four witnesses to respond to evidence that has been led at TCLI since they testified: Dash Domi, Jeff Lyons, Tom Jakobek and Peter Wolfraim. The Commissioner has not yet decided whether or not to recall these witnesses because her counsel are continuing to investigate certain significant matters within the TCLI terms of reference. The Commission is sensitive to the need to move quickly and is giving it urgent attention. Until these investigations are completed, a decision will not be made about whether to call additional evidence and/or recall witnesses.

There is also the outstanding matter of a legal challenge of the Commissioner's Ruling dated October 15, 2003 with respect to sealed boxes belonging to Mr. Jeffrey Lyons. On May 14, 2003, Mr. Lyons completed his testimony at TCLI. Subsequently, Commission Counsel learned that Mr. Lyons' former law firm had 18 bankers' boxes of his material, which the firm sealed and delivered to Commission Counsel. Neither Mr. Lyons nor Commission Counsel have reviewed the contents of the boxes.

Mr. Lyons has claimed solicitor client privilege over the contents of the boxes. Commission Counsel brought a motion before the Commissioner seeking a ruling that the boxes be unsealed and reviewed by Commission Counsel, in the presence of Mr. Lyons and his counsel, to review the material for privilege and relevancy to the Inquiries. The City supported Commission Counsel's position. Mr. Lyons opposed the motion and proposed that he and his lawyers review the documents privately, without the participation of Commission Counsel, to determine whether there is material in the boxes that might be helpful to the Commissioner.

The Commissioner ruled that Commission Counsel could unseal the boxes and review their entire contents for relevance, helpfulness and possible privilege, taking into account all issues in both TCLI and TECI. Mr. Lyons has applied to the Divisional Court for judicial review of the Commissioner's order. The Commissioner has retained outside counsel to oppose the application. The City's outside counsel is also appearing to oppose the application. It is scheduled to be heard on January

28 and 29, 2004. The Divisional Court's decision may be appealed to a higher court.

City Submissions on TCLI

City Council has previously instructed the City's outside counsel that they can make specific submissions on allegations of misconduct, if appropriate, against various persons based on the evidence presented at the hearing (Report of the Chief Administrative Officer and City Solicitor dated November 26, 2002 attached to Notice of Motion J34 approved by City Council at its meeting held on November 26, 27 and 28, 2002). However, City Council's current instructions prevent outside counsel from criticizing current City employees unless the evidence shows fraud, criminal misconduct or bad faith on the part of the current employee.

Commission Counsel will not be making final submissions to the Commissioner. In the absence of such submissions, and in order for the City's submissions to be truly helpful to the Commissioner, it may be necessary for the City's submissions to contain some criticism of current City employees. Accordingly, it is recommended that our outside counsel be instructed that the City's submissions may criticize current employees only where such criticisms are justified on the evidence.

Good Governance Portion of the Inquiry

The good governance phase is expected to last three weeks and will focus on four main themes: conflict of interest, lobbying, procurement and municipal governance. As Commissioner Bellamy pointed out at the opening of the good government phase on January 19, 2004:

> My Terms of Reference require that I also make recommendations for change that will improve City government and hopefully prevent, in the future, the kinds of mistakes or misconduct that may have occurred in the past…
>
> Before making such recommendations, I intend to benefit from the knowledge and experience of experts on municipal government. The good government phase of this Inquiry is designed to provide me with their insight and expertise, which I can then consider in formulating my recommendations on the various issues that will form part of my report.

On November 4, 2003, Commissioner Bellamy announced that the good government phase would immediately follow TCLI so that the City could consider the work of the Inquiry as it moved to deal with the issues related to the four themes to be explored.

The Commission retained experts who have produced reports on the four themes. These reports have been posted publicly on the Inquiry web site and the experts will appear as witnesses, but will not give evidence under oath. The Chief Administrative Officer was the first witness at the good government phase and will be followed by panels of witnesses selected by the Commission.

Appendix C(iii): Excerpt of Toronto City Council Minutes, January 27, 28, and 29, 2004

Status of TECI and Commissioner Bellamy's Letter

Commissioner Bellamy wrote a letter dated December 30, 2003, attached as Appendix "A", to Mayor Miller. Commissioner Bellamy has asked City Council to consider whether the value to the public of holding public TECI hearings may be outweighed by its potential cost and the attendant delay in the delivery of her report. The Commissioner has advised that it is not likely that the anticipated TECI evidence would materially enhance her recommendations. The Commissioner has made it very clear that she is prepared to carry out her mandate if City Council decides that TECI should proceed.

On September 30, 2002, at the opening session of TCLI, the Commissioner adjourned the Inquiry to permit the Ontario Provincial Police to investigate certain information that Commission Counsel had discovered during their investigation. On October 1, 2002, City Council considered a status report dated September 20, 2002 from the City Solicitor and passed a motion recommending that the Inquiry's terms of reference be amended to include the IT consulting contracts involving Beacon and Remarkable software. City Council also requested that the City Solicitor commence discussions with Commission Counsel regarding how to accomplish this goal.

On October 3, 2002, the City Solicitor reported back to City Council on the discussions with Commission Counsel regarding amended terms of reference. Commission Counsel advised that there were two areas that Commission Counsel wanted to investigate and explore further that may not have been expressly included in the TCLI terms of reference: consulting contracts between Ball Hsu Associates and the City and the City's acquisition of the computer hardware and software that subsequently formed the basis of the computer leasing RFQ that is the subject of TCLI.

On October 3, 2003, City Council approved terms of reference for an inquiry, subsequent or concurrent, concerning:

1. The Beacon and Remarkable contracts (as requested by City Council);

2. The external contracts being Ball Hsu Associates Inc. (as requested by Commission Counsel); and

3. The contracts for the purchase of the computer hardware and software that subsequently formed the basis of the computer leasing RFQ that it the subject of TCLI (as requested by Commission Counsel).

The Commissioner advised in her letter that she has three concerns with respect to proceeding with TECI:

1. The cost of TECI in view of the City's budgetary pressures (the financial status of the Inquiry is discussed below);

2. The timeliness of her report. TECI is currently scheduled for 70 hearing days. If TECI does not proceed, the Commissioner expects to release her report to City Council by the end of the summer 2004. If City Council chooses to proceed with TECI, the Commissioner's report will not be available until early to mid 2005.

3. The value of TECI to City Council. The Commissioner has advised that while TECI will examine different transactions than TCLI, and while there may be merit in such an examination, there is some overlap with many of the same participants and it is not likely that the evidence to be presented will materially enhance her recommendations to City Council.

Council should consider the Commissioner's concerns and determine whether the value to the public of continuing with TECI may be outweighed by its potential cost and the resulting delay in the delivery of her report.

Inquiry Budget Status and Financial Implications

At its meeting held on September 22, 23, 24 and 25, 2003, Council approved a revised estimated budget of $15,470,000 for costs relating to or associated with the public inquiries. At that time, the preliminary budget estimates for the inquiry components were as follows:

Inquiries (TCLI & TECI) including contingency	$9,940,300
Additional KPMG retainer	$ 30,000
City's Outside Counsel	$3,250,000
Funding for Individuals with standing and Current and former City employees	$2,250,000
Total	$15,470,300

As of January 15, 2004, actual costs expended by the City are as follows:

Inquiries cost for 2002	$1,921,016
Inquiries cost for 2003	$4,565,200
Additional KPMG retainer	$ 22,447
City's Outside Counsel	$2,809,938
Funding for Individuals with standing and Current and former City employees	$1,427,357
Miscellaneous Expenses (printing, software etc)	$ 13,349
Total	$10,759,307

In the event that TECI does not proceed, the Commissioner estimates that $1.5 million will not be expended by the Inquiry. In addition, additional expenditures for funding for individuals with standing and current and former City employees will not be required. The City has currently expended $1,427,357 to fund current and former employees. Whether or not TECI proceeds, these persons will incur further costs to prepare their final submissions. While it is difficult to estimate the final total, it is currently anticipated to be within the $2,250,000 amount approved by Council. If TECI proceeds and takes 70 hearing days, the total costs for funding current and former employees will exceed the original budgeted amount.

The City has paid its outside counsel $2,809,938. This number is higher than anticipated due to the length of TCLI, significant issues of witness credibility, the number of parties with standing and unexpected matters such as the Paula Leggieri allegations and the judicial review application concerning the Jeff Lyons boxes. In some cases, our outside counsel has been able to assist City staff with Inquiry matters thereby reducing those employees' legal bills. Staff feel that the firm of Paliare Roland has ably represented the City's interest and that their cost is justified.

If TECI does not proceed, it is estimated that the City will expend $190,000 beyond the original budgeted amount for its outside counsel bringing the total estimated cost to $3,440,000 from $3,250,000. The major component of the increased cost is expected to be the preparation of final submissions. If TECI proceeds, it is estimated that the City will expend $760,000 beyond the original budgeted amount bringing the total budgeted amount to 4,010,000.

The revised preliminary budget estimate comparing costs with and without TECI proceeding would be:

	Without TECI	With TECI
Inquiry	$8,440,300	$9,940,300
Additional KPMG retainer	$ 30,000	$ 30,000
City's Outside Counsel	$3,440,000	$4,010,000
Funding for Individuals with Standing and current and former City employees	$2,250,000	$3,250,000*
Total	$14,160,300	$17,230,300

*Includes TCLI and estimate only for TECI

By not proceeding with TECI, the City would not expend at least $3,070,000. As Council has been previously advised, the City has little, if any, control over the length of hearing time required and the nature of issues raised. It is possible that the costs of TECI may exceed this estimate depending on the actual length of the hearing and if new issues arise which are not currently foreseen or if more individuals seek and are granted standing and participate in TECI.

Appendix C(iii): Excerpt of Toronto City Council Minutes, January 27, 28, and 29, 2004

Conclusions:

Commissioner Bellamy has asked City Council to consider whether the value to the public of holding public TECI hearings might be outweighed by its potential cost and the attendant delay in the delivery of her report. The Commissioner also advises that it is not likely that the anticipated TECI evidence would materially alter her recommendations. The Commissioner has made it very clear that if City Council decides that TECI should proceed, she is prepared to carry out her mandate.

In the event that City Council decides to request Commissioner Bellamy to continue to proceed with TECI, the City Solicitor should be requested to report back to City Council through the Policy and Finance Committee with a revised budget estimate.

Contact:

Anna Kinastowski
City Solicitor
Telephone: (416) 392-0080
Facsimile: (416) 397-5624
E-mail: akinasto@toronto.ca

(A copy of Commissioner Bellamy's letter to Mayor Miller dated December 30, 2003, referred to in the report is on file in the City Clerk's Office.)

Appendix C(iii): Excerpt of Toronto City Council Minutes, January 27, 28, and 29, 2004

8.127 **Toronto Computer Leasing Inquiry ("TCLI") and Toronto External Contracts Inquiry ("TECI")**

Mayor Miller moved that the necessary provisions of Chapter 27 of the City of Toronto Municipal Code be waived to permit introduction of the following Notice of Motion J(40), which carried, more than two-thirds of Members present having voted in the affirmative:

Moved by: **Mayor Miller**

Seconded by: **Councillor Walker**

"**WHEREAS** the City Solicitor has prepared a report providing City Council with an update on the Toronto Computer Leasing Inquiry ('TCLI'); and

WHEREAS this report seeks Council's instruction with respect to the resumption of the Toronto External Consultants Inquiry ('TECI');

NOW THEREFORE BE IT RESOLVED THAT Council consider the report of the City Solicitor dated May 18, 2004, entitled 'Toronto Computer Leasing Inquiry and

Toronto External Consultants Inquiry' and provide instructions to staff."

Advice by Mayor Miller:

Mayor Miller advised the Council that the provisions of Chapter 27 of the City of Toronto Municipal Code requiring the referral of Motion J(40) to the Policy and Finance Committee would have to be waived, in order to now consider this Motion.

Fiscal Impact Statement:

City Council had before it, during consideration of Motion J(40), a Fiscal Impact Statement from the Chief Financial Officer and Treasurer advising that there was a financial impact resulting from the adoption of this Motion. (See Fiscal Impact Statement No. 7, Page 250)

Procedural Vote:

The vote to waive referral of Motion J(40) to the Policy and Finance Committee carried, more than two-thirds of Members present having voted in the affirmative.

Council also had before it, during consideration of Motion J(40), a report dated May 18, 2004, from the City Solicitor, entitled "Toronto Computer Leasing Inquiry and Toronto External Consultants Inquiry". (See Attachment No. 10, Page 233)

Motions:

(a) Mayor Miller moved that Motion J(40) be amended by adding the following new Operative Paragraph:

> "**AND BE IT FURTHER RESOLVED THAT** the following Recommendation No. (1) contained in the report dated May 18, 2004, from the City Solicitor be adopted:
>
> '(1) City Council direct the City Solicitor to advise Commission Counsel that it wishes TECI to proceed.'"

(b) Councillor Nunziata moved that Motion J(40) be amended by adding the following new Operative Paragraph:

> "**AND BE IT FURTHER RESOLVED THAT** Council request the Toronto Police Service to conduct a criminal investigation into this matter."

Ruling by the Mayor:

Mayor Miller, due to the nature of motion (b) by Councillor Nunziata, ruled the motion out of order.

Councillor Walker challenged the ruling of the Mayor.

Vote to Uphold Ruling of Mayor:

Yes - 33	
Mayor:	Miller
Councillors:	Altobello, Augimeri, Balkissoon, Bussin, Carroll, Cho, Chow, Cowbourne, Davis, De Baeremaeker, Del Grande, Di Giorgio, Filion, Fletcher, Giambrone, Hall, Jenkins, Li Preti, Lindsay Luby, McConnell, Milczyn, Moscoe, Ootes, Palacio, Pantalone, Pitfield, Saundercook, Shiner, Stintz, Thompson, Walker, Watson
No - 4	
Councillors:	Ford, Holyday, Mammoliti, Nunziata

Carried by a majority of 29.

Ruling by the Mayor:

Mayor Miller, due to the nature of Motion J(40), ruled that the Motion was in order.

Councillor Ootes challenged the ruling of the Mayor.

Vote to Uphold Ruling of Mayor:

Yes - 27	
Mayor:	Miller
Councillors:	Altobello, Balkissoon, Carroll, Cowbourne, Davis, Di Giorgio, Feldman, Fletcher, Giambrone, Grimes, Jenkins, Kelly, Lindsay Luby, McConnell, Mihevc, Milczyn, Moscoe, Pantalone, Pitfield, Rae, Saundercook, Shiner, Stintz, Thompson, Walker, Watson
No - 6	
Councillors:	Del Grande, Hall, Holyday, Mammoliti, Nunziata, Ootes

Carried by a majority of 21.

Votes:

Adoption of motion (a) by Mayor Miller:

Yes – 34	
Mayor:	Miller
Councillors:	Altobello, Augimeri, Balkissoon, Bussin, Carroll, Cowbourne, Davis, De Baeremaeker, Feldman, Filion, Fletcher, Giambrone, Grimes, Hall, Holyday, Jenkins, Lindsay Luby, McConnell, Mihevc, Milczyn, Moscoe, Ootes, Palacio, Pantalone, Pitfield, Rae, Saundercook, Shiner, Soknacki, Stintz, Thompson, Walker, Watson
No – 4	
Councillors:	Del Grande, Di Giorgio, Kelly, Nunziata

Carried by a majority of 30.

Motion J(40) as amended, carried.

ATTACHMENT NO. 10 [Notice of Motion J(40)]

Report dated May 18, 2004, from the City Solicitor, entitled "Toronto Computer Leasing Inquiry and Toronto External Consultants Inquiry." (See Minute 8.127, Page 170):

Purpose:

To provide City Council with an update on the Toronto Computer Leasing Inquiry ("TCLI") and to seek Council's instructions with respect to the resumption of the Toronto External Consultants Inquiry ("TECI").

Financial Implications and Impact Statement:

City Council has approved a preliminary estimate of $15,470,300 for the Inquiries. In January 2004, it was estimated that if TECI did not proceed, the estimated cost would be $14,160,300 and if TECI proceeded, the estimated cost of both Inquiries would be in the range of $17,230,000. These estimates do not take into account the costs of the current proceedings in Divisional Court. If City Council wishes to proceed with TECI, the Chief Financial Officer and Treasurer should be directed to report back on a source of funding for the amount in excess of $15,470,300. At this time, our estimate of the total cost for TECI is $3,070,000.

The Chief Financial Officer and Treasurer has reviewed this report and concurs with the financial impact statement.

Recommendations:

It is recommended that:

(1) City Council direct the City Solicitor to advise Commission Counsel that it wishes TECI to proceed;

OR

(2) City Council direct the City Solicitor to advise Commission Counsel that it does not wish TECI to proceed at this time.

Background:

City Council established a public inquiry pursuant to Section 100 of the *Municipal Act* (now section 274 of the Municipal Act, 2001), at its meeting held on February 13, 14 and 15, 2002. There have been several reports to City Council on the status of this Inquiry, which is now known as the Toronto Computer Leasing Inquiry ("TCLI").

City Council established a second public inquiry, now known as the Toronto External Contracts Inquiry ("TECI"), at its meeting held on September 22, 23, 24 and 25, 2003.

At its meeting held on January 27, 28 and 29, 2004, City Council considered the report of the City Solicitor and the letter dated December 30, 2003 from Commissioner Bellamy to Mayor Miller. With respect to the deferral of TECI, City Council resolved among other matters, as follows:

1. The Commission be urged to investigate fully all information relevant to the TCLI terms of reference and to complete that investigation as soon as possible;

2. The Commission be encouraged to call all evidence that may shed light on the issues raised in the TCLI terms of reference;

3. City Council defer further consideration of the letter dated December 30, 2003, to Mayor Miller, from Commissioner Bellamy, until Commissioner Bellamy or her Counsel advise the City that all evidence related to TCLI has been called. In the interim, Council does not expect the Commissioner to begin hearings in the TECI.

Comments:

Since Council's consideration of this matter in January, the Divisional Court released its decision with respect to the judicial review application dealing with the opening of sealed boxes belonging to Mr. Jeffrey Lyons. The Divisional Court upheld the Commissioner's ruling that Commission Counsel could unseal the boxes and review their contents for relevance, helpfulness and possible privilege, taking into account all issues in both TCLI and TECI. The Divisional Court decision was not appealed and Commission Counsel has now completed its review of the boxes.

Commissioner Bellamy resumed TCLI on April 19, 2004. The Inquiry heard from two witnesses. The Inquiry was scheduled to hear from at least five further witnesses including Mr. Peter Wolfraim, Mr. Jeffrey Lyons, Mr. Tom Jakobek and Ms. Deborah Morrish. Prior to testifying, Mr. Tom Jakobek and his wife, Ms. Deborah Morrish brought motions before Commissioner Bellamy. Mr. Jakobek refused to respond to the summons to answer questions with respect to new evidence which was before the Commissioner. He argued that the Commissioner should give the information to the police because it is constitutionally impermissible for the Commissioner to examine this new evidence at a public inquiry. In the alternative he requested that the Commissioner adjourn TCLI so that he can bring an application before the Divisional Court to quash the summons to appear. Ms. Morrish accepted service of the summons to testify at the Inquiry but requested an adjournment to bring an application before the Divisional Court to quash the summons. On April 30, 2004, Commissioner Bellamy issued her decision rejecting the arguments made on the motions. She concluded that she would not limit the recall evidence as requested by Mr. Jakobek.

However, in light of the applications for judicial review, the Commissioner adjourned TCLI to allow Mr. Jakobek and Ms. Morrish to proceed with their applications before the Divisional Court. This matter has now been scheduled to be heard on June 16 and 17, 2004. The Commissioner has retained outside counsel to oppose the applications. The City's outside counsel is also appearing to oppose the applications. There may be further delay if any of the parties seek to appeal the Divisional Court's decision to a higher court.

In response to inquiries, Commission Counsel has provided the attached letter dated May 18, 2004 which provides information on the nature of the issues which form the basis of TECI. If Council now wishes to proceed with TECI, the Commissioner must be advised so that further investigative work can be undertaken. Depending on the length of time for the Divisional Court decision to issue and whether there are appeals of the decision, there may be adequate time to complete the investigation and to commence hearings into TECI. The Commissioner has retained legal, investigative and support staff to assist her during the course of the inquiries. It would be efficient to use these resources to continue with TECI during the adjournment period.

Inquiry Budget Status and Financial Implications

At its meeting held on September 22, 23, 24 and 25, 2003, Council approved a revised estimated budget of $15,470,000 for costs relating to or associated with the public inquiries. At that time, the preliminary budget estimates for the inquiry components were as follows:

Inquiries (TCLI & TECI) including contingency	$9,940,300
Additional KPMG retainer	$ 30,000
City's Outside Counsel	$3,250,000
Funding for Individuals with standing and Current and former City employees	$2,250,000
Total	$15,470,300

As of May 6, 2004, actual costs expended by the City are as follows:

Inquiries cost for 2002	$1,921,016
Inquiries cost for 2003	$4,565,200
Inquiries cost for 2004	$ 584,334
Additional KPMG retainer	$ 22,447
City's Outside Counsel	$2,987,021
Funding for Individuals with standing and Current and former City employees	$1,445,755
Miscellaneous Expenses (printing, software etc)	$ 13,349

Total $11,539,122

As set out in the attached letter from Commission Counsel, the Commission's budget estimate for TECI is $1.5 million, based on an estimated 70 hearing days. This figure does not include costs for the City's outside counsel nor funding for certain individuals at the Inquiry. At this time we estimate these costs to be $570,000 (for the City's outside counsel) and $1 million (for funding certain individuals). Accordingly, our estimate of costs for TECI at this time are a total of $3,070,000.

Conclusions:

If Council wishes TECI to move forward, it would be appropriate to advise Commissioner Bellamy accordingly and to direct the City Solicitor and the Chief Financial Officer and Treasurer to report to Policy and Finance Committee with a revised budget and a source of funding.

Contact:

Anna Kinastowski
City Solicitor
Telephone: (416) 392-0080
Facsimile: (416) 397-5624
E-mail: akinasto@totonto.ca

(The communication dated May 18, 2004, from Commissioner Bellamy, attached to this report, is on file in the City Clerk's Office.)

TORONTO STAFF REPORT

January 12, 2005

To: Policy and Finance Committee

From: City Solicitor
Chief Financial Officer and Treasurer

Subject: Toronto Computer Leasing Inquiry and Toronto External Contracts Inquiry
Revised Budget Estimate

Purpose:

To provide an updated budget estimate for the Toronto Computer Leasing Inquiry ("TCLI") and the Toronto External Contracts Inquiry ("TECI").

Financial Implications and Impact Statement:

Council has previously approved a 2002/2003 preliminary budget estimate of $15.0 million for the Inquiries and funds have been set aside in the non-program expenditures budget (Computer Leasing and External Contracts Inquiry) to finance the Inquiries. In May 2004, the City Solicitor updated the estimated costs to be in the range of $17.2 million over 2004/2005. As at December 31, 2004, actual costs expended on the Inquiries total about $15.3 million.

This report advises that the revised budget estimate for the Inquiries is $19.2 million based on a projected completion in 2005. As a result, additional funding in the amount of $4.2 million must be budgeted for in 2005. Based on the anticipated approval of the 2005 budget by late February 2005, it is projected that existing approvals (inclusive of the interim levy by-law for 2005) will be sufficient to fund the forecasted costs over the next two months. The City Solicitor and the Chief Financial Officer and Treasurer will monitor expenses and will report to Council with any substantial changes to the estimated budget.

Recommendations:

It is recommended that:

(1) Council approve the revised budget estimate of $19,179,447 and additional funding of $4.2 million for costs related to TCLI and TECI by an increase to the 2005 non-program, Computer Leasing and External Contracts Inquiry budget;

(2) staff monitor the revised budget estimates set out in this report and report back with any substantial changes to the estimated budget set out herein; and

(3) the appropriate City officials be authorized and directed to take the necessary action to give effect thereto.

Background:

City Council established a public inquiry pursuant to Section 100 of the *Municipal Act* (now section 274 of the *Municipal Act, 2001)*, at its meeting held on February 13, 14 and 15, 2002, which is now known as the Toronto Computer Leasing Inquiry ("TCLI"). City Council established a second public inquiry, now know as the Toronto External Contracts Inquiry ("TECI"), at its meeting held on October 1, 2 and 3, 2002.

At its meeting held on September 22, 23, 24 and 25, 2003, by adopting Clause 73 or Report No. 9 of the Policy and Finance Committee, City Council approved an estimate of $15,470,300 for costs relating to or associated with TCLI and TECI.

At its meeting held on January 27, 28 and 29, 2004, Council considered Notice of Motion J(3) and authorized an increase in the estimated cost of the City's outside counsel from $3,250,000 to $3,440,000.

At its meeting held on May 18, 19 and 20, 2004, City Council considered Notice of Motion J(40) together with my May 18, 2004 report and directed that the City Solicitor advise Commission Counsel that it wishes TECI to proceed. At that time, it was estimated that the cost of TCLI without TECI would be $14,160,000 and that if TECI proceeded, the estimated cost of both Inquiries would be in the range of $17,230,000. We have now received a revised budget from Commissioner Bellamy and considered other costs related to TECI which require Council's consideration.

Commissioner Bellamy has now concluded hearings on TCLI and the City's outside counsel assisted by City lawyers are preparing final submissions. The public hearing on TECI commenced on October 18, 2004, and the hearing is expected to continue for approximately 70 days.

Comments:

The Commission's Revised Budget is attached as Schedule A and assumes 70 hearing days for TECI, 8 days of oral submissions for TCLI and 4 days for oral submissions for TECI for a total of 82 days. The budget assumes that the Commissioner's report will be issued by September 2005. The Commission advises that the increase in total costs from the original budget of $9.9 million is primarily due to a delay resulting from references of matters by parties to Divisional Court and awaiting Council's decision of May 18, 19 and 20, 2004 with respect to the continuation of TECI. In addition, it was necessary for the Commission to retain outside counsel for the Divisional Court matters. Ongoing operational costs continued during the delays and more than anticipated accounting and forensic work was required related to the materials and evidence produced at the Inquiry hearings. The Commission now estimates a total budget of $11,392,000 for both Inquiries.

Inquiry Budget Status and Financial Implications

The September 2003 estimated budget approved by Council consisted of the following components:

Inquiries (TCLI & TECI) including contingency	$ 9,940,300
Additional KPMG retainer	$ 30,000
City's Outside Counsel	$ 3,250,000
Funding for Individuals with standing and Current and former employees	$ 2,250,000
Total	$15,470,300

City Council at its meeting held on January 27, 28 and 29, 2004 approved an increase in the estimated budget amount for the City's outside counsel to $3,440,000 from $3,250,000 approved in September 2003. This increase in the amount of $190,000, increased the total Council approved budget to $15,660,300.

As of December 31, 2004, actual costs expended by the City are as follows:

Inquiries cost for 2002	$ 1,921,016
Inquiries cost for 2003	$ 4,565,200
Inquiries cost for 2004	$ 2,983,719
Additional KPMG retainer	$ 22,447
City's Outside Counsel	$ 4,116,351
Funding for Certain Individuals with Standing and Current and Former City Employees	$ 1,688,730
Miscellaneous Expenses (printing, software etc.)	$ 13,362
Total	$15,310,825

The current revised budget is as follows:

Inquiries Cost	$11,392,000
Additional KPMG retainer	$ 22,447
City Outside Counsel	$ 4,750,000
Funding for Certain Individuals with Standing and Current and Former City Employees	$ 3,000.000
Miscellaneous Expenses	$ 15,000
Total	$19,179,447

There are many reasons for the increase in the budget estimate. There have been significant issues of witness credibility, significant resources were required to investigate and document events such as then Councillor Jakobek's trip to a hockey game in Philadelphia and the cash transactions of Dash Domi and the Jakobek family. There have been delays due to Judicial Review Applications made by Jeff Lyons, Tom Jakobek and Deborah Morrish which required the Commission to retain outside counsel. As Council has been previously advised on numerous occasions, the City has little, if any, control over the length of the hearing time required and the nature of the issues raised. It is still possible that our current estimate may be exceeded depending on the actual length of the hearing and if new issues arise which are not currently foreseen. It does appear that TECI is on schedule and we are not aware of any reasons at this time for it taking any longer than projected.

Conclusions:

The Commission has now provided us with its revised budget for TCLI and TECI which is attached for Council's consideration. The City's outside counsel has also provided us with her best estimate of her costs to the end of the Inquiries. The costs of funding for individuals with standing and current and former employees has been estimated. The total costs are estimated at $19.2 million.

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The Chief Financial Officer and Treasurer advises that the necessary funding should continue through a further adjustment to the 2005 non-program budget for Council consideration as part of the 2005 budget process.

Contact:

Anna Kinastowski, City Solicitor
Tel: 416-392-0080
Fax 416-397-5624
e-mail akinasto@toronto.ca

City Solicitor

Chief Financial Officer and Treasurer

List of Attachments:

Commission Budget dated October 18, 2004

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BUDGET WORKSHEET

TORONTO COMPUTER LEASING INQUIRY / TORONTO EXTERNAL CONTRACTS INQUIRY

2002	$1,760,000
2003	$4,600,000
2004 (Jan to Sept)	$2,600,000
2004 (Oct to Dec) & 2005	$2,432,000 (see attached details)
TOTAL	**$11,392,000**

Notes:

- budget for last quarter of 2004 and calendar year 2005 is based on assumption of 70 hearing days for TECI, 8 days of oral submissions for TCLI and 4 days for oral submissions for TECI
- budget assumes Report will be issued by September 2005
- increase in total cost from March 2003 estimate of $9.9 million is primarily due to a delay to the schedule of hearing days resulting from references of matters by parties to Divisional Court and awaiting City Council's response of May 18, 2004 to the Commissioner's letter of December 30, 2003 concerning whether TECI should proceed. It was necessary for the Commission to retain outside Counsel for those Divisional Court matters. Ongoing operational costs continued during those delays. More than anticipated accounting and forensic work was also required related to the materials and evidence produced at the Inquiry hearings.

Confidentiality Agreement

TORONTO COMPUTER LEASING INQUIRY

I, [NAME], undertake to the Toronto Computer Leasing Inquiry ("the Inquiry") that any and all documents or information disclosed to me, either inadvertently by email or otherwise, in connection with the Inquiry have not been disclosed to anyone, and that I will not disclose these documents or information about their content to anyone. I undertake to hold and treat all documents and information as confidential.

I also confirm that any and all documents (including copies or duplicates) that have been disclosed to me, either inadvertently or otherwise, in connection with the Inquiry have been deleted electronically and have been destroyed, and I confirm that I have no copies of any documents and I have not provided any copies to anyone.

_____	_____
Signature	Witness
_____	_____
Date	Date

[DATE]

[OUTSIDE ADDRESS]

Dear [NAME]:

This is to confirm the offer of the Toronto Computer Leasing Inquiry to retain you to provide [TYPE OF SERVICES] related to [SPECIFIC SERVICES] to the Inquiry.

You will be engaged on a fee-for-service basis at a rate of [$] per hour, as agreed [DATE OF COMMUNICATION]. This contract takes effect today and will continue through the term of the Inquiry.

Fee payments will be made on the basis of your submitting an invoice to the Chief Administrative Officer of the Inquiry, indicating the hours worked during that period.

During the term of your engagement, you will report and take direction from Commission Counsel, unless otherwise directed.

On acceptance of this agreement, you will treat as confidential and will not disclose or give to any person, during or after this assignment any information or document that is of a character confidential to the business of the Inquiry to which you may become privy as a result of the performance of the above-mentioned services. The confidentiality document which you previously signed for Commission Counsel continues in effect [IF APPLICABLE: and you will ensure that any other employees at [COMPANY NAME] who are working on this project will likewise honour those confidentiality terms].

All rights to any reports or other material prepared by or for you in the performance of your services pursuant to this agreement shall be the property of the Inquiry. All documents provided to you by Commission Counsel during the course of this project are to be returned upon completion of your services.

This agreement may be cancelled by either party upon giving seven (7) days written notice of such intention.

Appendix D(ii): Sample Service/Confidentiality Agreement, Service Providers

If you are in agreement with these terms, please signify by signing below and return the original to me.

Yours very truly,

The Honourable Denise Bellamy
Commissioner

The undersigned hereby agrees to the matters documented above.

Signature: _____ Date: _____

TORONTO COMPUTER LEASING INQUIRY

CONFIDENTIALITY AGREEMENT FOR EXPERTS THE TORONTO COMPUTER LEASING INQUIRY

I, , undertake to the Toronto Computer Leasing Inquiry that any and all documents or information which are produced to me in connection with the Commission's proceedings will not be used by me for any purpose other than those proceedings. I further undertake that I will not disclose any such documentation or information to anyone.

I understand that this undertaking will have no force or effect with respect to any document or information which becomes part of the public proceedings of the Commission, or to the extent that the Commissioner may release me from the undertaking with respect to any document or information. For greater certainty, a document is only part of the public proceedings once the document is made an exhibit at the Inquiry.

With respect to those documents or information which remain subject to this undertaking at the end of the Inquiry, I further understand that such documents or information will be collected from me by the person acting as counsel who disclosed them to me.

_____	_____
Signature	Witness
Please Print Name:	Please Print Name:
_____	_____
Date	Date

TORONTO COMPUTER LEASING INQUIRY

CONFIDENTIALITY AGREEMENT
COUNSEL TO
THE TORONTO COMPUTER LEASING INQUIRY

I undertake to the Toronto Computer Leasing Inquiry that any and all documents or information which are produced to me in connection with the Commission's proceedings will not be used by me for any purpose other than those proceedings. I further undertake that I will not disclose any such documents or information to anyone for whom I do not act or who has not been retained as an expert for the purposes of the Inquiry. In respect of anyone for whom I act, or any witness, or any expert retained for the purposes of the Inquiry, I further undertake that I will only disclose such documents or information upon the individual in question giving the written undertaking annexed hereto.

I understand that this undertaking has no force or effect once any such document or information has become part of the public proceedings of the Commission, or to the extent that the Commissioner may release me from the undertaking with respect to any document or information. For greater certainty, a document is only part of the public proceedings once the document is made an exhibit at the Inquiry.

With respect to those documents or information which remain subject to this undertaking at the end of the Inquiry, I undertake to either destroy those documents or information, and provide a certificate of destruction to the Commission, or to return those documents to the Commission for destruction. I further undertake to collect for destruction such documents or information from anyone to whom I have disclosed any documents or information which were produced to me in connection with the Commission's proceedings.

_____	_____
Signature	Witness
Please Print Name:	Please Print Name:
_____	_____
Date	Date

TORONTO COMPUTER LEASING INQUIRY

CONFIDENTIALITY AGREEMENT
PARTIES AND WITNESSES
THETORONTO COMPUTER LEASING INQUIRY

I, ————————————-**,** undertake to the Toronto Computer Leasing Inquiry and the Toronto External Contracts Inquiry that any and all documents or information which are produced to me in connection with the Commission's proceedings will not be used by me for any purpose other than those proceedings. I further undertake that I will not disclose any such documentation or information to anyone

I understand that this undertaking will have no force or effect with respect to any document or information which becomes part of the public proceedings of the Commission, or to the extent that the Commissioner may release me from the undertaking with respect to any document or information. For greater certainty, a document is only part of the public proceedings once the document is made an exhibit at the Inquiry.

With respect to those documents or information which remain subject to this undertaking at the end of the Inquiry, I further understand that such documents or information will be collected from me by the person acting as my counsel who disclosed them to me.

_____	_____
Signature	Witness
Please Print Name:	Please Print Name:
_____	_____
Date	Date

[DATE]

I_____ representing _____ agree not to disclose, report, or broadcast in any medium the contents of the Inquiry [MATERIALS] being made available to me until [DATE AND TIME].

Signature

SPEECH BY THE HONOURABLE MADAM JUSTICE DENISE BELLAMY, COMMISSIONER, AT THE STANDING HEARINGS OF THE TORONTO COMPUTER LEASING INQUIRY ON MONDAY, JUNE 24, 2002

Good morning. Welcome to the first public session of the Toronto Computer Leasing Inquiry. My name is Denise Bellamy. I am a judge of the Superior Court of Justice in Ontario. I've been appointed by the Chief Justice of that Court to be the Commissioner of this independent Inquiry. Before we begin with the applications for standing, I am going to make a few preliminary remarks.

Toronto City Council voted unanimously to hold this Inquiry. I see that unanimity as a demonstration of their concern. It's not at all common for a municipal government to call for a public inquiry. To the contrary, it is quite rare. Clearly, Council and the Mayor wanted an impartial outside look at something that they feel went wrong. There have been suggestions of significant cost over-runs, conflicts of interest and poor decision-making. My job is to look into this and get answers to those questions.

Council has provided me with broad terms of reference. Briefly, they want me to examine what happened with respect to certain computer and software leasing contracts between the City of Toronto and MFP Financial Services, and between the City and Oracle Database. In looking into this, they have given me the power to ask ANY questions I consider necessary. They want me to scrutinize the evidence and determine what the impact of these leasing contracts has been on the taxpayers of Toronto.

I am going to do this by way of public hearings, and after I'm finished, I will write a report. I have been given the explicit authority to make ANY recommendations that I think are appropriate and in the public interest. In the final analysis, my report should shine a bright light on the issues of concern to City Council and to the taxpayers of this city.

To help me do that, I encourage anyone who has ANY information that they think might be helpful to the Inquiry, whether it involves documents or names of potential witnesses, to provide us with this information as soon as possible. The law offers protection to witnesses to encourage them to come forward in public inquiries.

Let me speak for a minute about what a public inquiry is and what a public inquiry is not. A public inquiry investigates and reports on matters of substantial public interest to a community. A public inquiry is not a trial. No one is charged with any criminal offence, nor is anyone being sued. A public inquiry must be conducted with scrupulous fairness and impartiality.

A public inquiry also needs to be both public and available to the public. I am committed to having open and public hearings. I encourage members of the public to come to the hearings and listen to the evidence. The TTC stops nearby.

Having said that, I recognize that in our busy worlds, not everyone who is interested in the inquiry will be able to physically come and attend. I'm pleased, therefore, to see members of the media present. It is through you that those who are unable to attend can find out what is happening on a day-to-day basis. To ensure that the media can accurately report what is happening at the Inquiry in a timely manner, I have directed Inquiry staff to make materials as accessible as possible to the media.

In another attempt to make information available to the public, we have created a website to provide an open window into the activities of the Inquiry. For example, anyone will be able to access the website at any time and read what a witness has said, word for word, generally by the end of the same day the witness testifies. Our website can be found at torontoinquiry.ca. – that's torontoinquiry (one word).ca.

Today, we begin the process of identifying those persons or organizations who may have a direct and substantial interest in the proceedings of the Inquiry, or whose participation in the Inquiry may be helpful. I'm going to hear submissions from

applicants who have expressed an interest in getting what is known as "standing". People who are granted standing can take an active part in the proceedings of the Inquiry.

Before I hear the applications for standing, though, I want to BRIEFLY update you with respect to what has been happening since I was appointed to be the Commissioner.

The first thing I did was to choose Commission counsel. Commission counsel are lawyers. They play a critical role in a public inquiry. They are the legal arm of the Commission. Essentially, I am their client, and their only client. The main responsibility I have given to them is to represent the public interest at the Inquiry. They do not represent any particular point of view. They are not prosecutors. Their role is not adversarial nor do they take one side over another. They have a duty, in fact, to make sure that all issues bearing on the public interest are brought to my attention. Their job is to use their skill and experience to present all the available relevant evidence in as fair and thorough a fashion as possible.

I'm fortunate in having been able to put together an outstanding team. This team is headed up by Ron Manes. He is being assisted by Pat Moore and by Daina Groskaufmanis. I would encourage you to check our website for more information about the background of each of these lawyers.

Each public inquiry establishes its own rules. We have drafted our Rules of Procedure in a way that makes sure that the process we follow is open and fair to everyone. We've tried to write the rules in plain language and to keep the legal jargon to a minimum. Our rules explain the process that I intend to follow. They too are posted on our website.

At the moment, these Rules are in draft form. After I've made my decision about who will have standing, I will invite the lawyers representing parties with standing to let

me know if there is anything in the rules that they think should be changed. If there are any changes to the rules, they will be posted on our site.

Commission counsel have also started to pull together and organize many, many thousands of pages of documents. They are beginning to interview people who have knowledge of the issues that I will be examining.

The City has provided us with these premises and we have been here since the beginning of May. I want to take this opportunity to thank the staff in this building for all their cheerful help in getting us up and running.

Our offices and this hearing room are both in the same building at 850 Coxwell Avenue, which is the East York Civic Centre. Before amalgamation, it was the home of City Council for the Borough of East York. We will be holding the Inquiry hearings in this very room.

I'm not yet in a position to announce the date for the hearings. Before we can start public hearings, we have to be sure that we have gathered all the information, that we have interviewed all those who may be helpful, and that we have organized everything for the hearings, so that this information can be presented in an understandable and efficient way.

All this takes time. However, my hope is that we will be in a position to start the hearings in the fall. I encourage you to check our website regularly for updates.

I am now ready to hear the oral presentations for standing. I will hear from the City first and I understand that you have agreed on the order for the remainder of the applicants.

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Before I hear you, I want to let you know that after you have all made your applications for standing, I will give each of you the opportunity to comment on whether you think an applicant should or should not have standing.

I understand that some of you want to address the issue of whether there will be funding. As we indicated in our Rules, the terms of reference, which were given to me, do not give me the jurisdiction to order funding. Having said that, last Friday we received a letter from Ms. Anna Kinastowski, the City Solicitor, in which she mentioned that City Council has now invited me to direct that funding up to $50,000 be provided by the City to individuals who receive standing, in certain circumstances. I would be grateful if the City's lawyer could address that issue in as much detail as possible, and I would ask counsel for the parties seeking funding to take those comments into consideration when making your submissions to me.

Lastly, after hearing all the submissions on standing, I just want to tell you that I will be reserving my decision and will release a written decision on standing and funding shortly thereafter. I will release it to those who have applied for standing, and will ensure that the media and the public are made aware of the decision on the day it is released.

NOTES FOR A SPEECH
BY THE HONOURABLE MADAM JUSTICE DENISE BELLAMY
COMMISSIONER

AT THE OPENING SESSION OF THE
TORONTO COMPUTER LEASING INQUIRY
ON MONDAY, SEPTEMBER 30, 2002

Good morning, ladies and gentlemen. Welcome to the opening session of the Toronto Computer Leasing Inquiry. My name is Denise Bellamy and I am a judge of the Superior Court of Justice in Ontario. I have been appointed by the Chief Justice of that Court to be the Commissioner of this independent Inquiry.

Toronto City Council voted unanimously to hold this Inquiry. The terms of reference they gave me can be found on the city's website or on ours at www.torontoinquiry.ca. Briefly, the terms of reference call for a judge to examine what happened with respect to certain computer and software leasing contracts between the City of Toronto and MFP Financial Services, and between the City and Oracle Corporation. By calling for a judicial inquiry, City Council purposely took the matter out of their own hands and asked that an outsider conduct an independent and impartial inquiry and do so in public. I interpret that to mean that Council and the Mayor were concerned enough to want to uncover the truth and to receive useful recommendations with respect to the terms of reference.

Public inquiries are an important component of Canadian society. Traditionally, they play a key role in fact-finding and in educating and informing concerned members of the public. They also play a role in restoring public confidence in governmental institutions. In the end, they make recommendations that are designed to ensure that the problem that gave rise to the inquiry will not happen again.

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Having said that, it is important to understand what a public inquiry is and what it is not. A public inquiry is an investigation into a matter of substantial public interest to a community. An inquiry has the power to summons witnesses, to compel the production of documents and to accept evidence. However, it is not a trial. No one is charged with any criminal offence. No one is being sued. As a Commissioner, I have no right to find anyone guilty of a criminal offence nor can I establish civil responsibility for damages. The distinction between a public inquiry and a trial will be important to keep in mind, for reasons I will give shortly.

Throughout the summer, Commission counsel have worked diligently preparing for this day, so that we would be in a position to start this hearing on schedule. They collected thousands of documents. They consulted experts and interviewed about 100 witnesses, many of them more than once. Many of the other people in this room have also been working extremely hard to prepare for today.

Despite this, for the following reasons, I have concluded that I must adjourn this Inquiry.

Last week, Commission counsel uncovered new information that, if true, could result in criminal charges being laid against one or more potential witnesses to this Inquiry. We contacted the police and brought the existence of these allegations to their attention. In my view, the public interest required that this be done.

The Ontario Provincial Police has now begun a criminal investigation into the alleged wrongdoings.

Late Friday, I received a request from the Commissioner of the OPP asking that the Inquiry not proceed during this critical initial stage of the police investigation. After carefully considering this over the week-end, I have decided that the request is reasonable and I will agree to it.

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I am well aware that the very existence of this Inquiry has created a great deal of stress for many people, that their lives have been – and will now continue to be - in limbo. However, as Commissioner, it is my obligation to ensure that the hearings are as public as possible while maintaining the essential rights of individual witnesses whose activities may be scrutinized in the course of the police investigation.

For the following two important reasons, I have decided it would not be in the public interest to proceed with the Inquiry at this time: First, I want to ensure that the interests of those individuals whose right to a fair trial, should it come to that, are not detrimentally affected by the Inquiry's process. Second, at this juncture, I do not believe the Inquiry should impede or otherwise interfere with the early stages of the criminal investigation.

The OPP has agreed to provide me with a status report of their investigation within two weeks. At that time, I will re-assess the situation and will decide whether this Inquiry should continue to be delayed any further.

After I leave, Commission counsel, Ron Manes, will be available to answer questions from the media. I know you will understand that, given the police investigation, he must necessarily be circumspect in his responses to you.

The other Commission counsel, Pat Moore & Daina Groskaufmanis, are available to meet immediately with counsel for the parties with standing. Commission counsel will keep them apprised of any new developments that we are in a position to share with them.

As well, I have directed our media contact, Peter Rehak, to update our website regularly and to continue to cooperate with the media to ensure that the public is kept informed. Our website, as I mentioned earlier, can be found at www.torontoinquiry.ca.

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In the meantime, I assure you that I am committed to continuing the Inquiry as soon as it is feasible to do so.

The Inquiry is adjourned until further notice. Thank you.

NOTES FOR A SPEECH
BY THE HONOURABLE MADAM JUSTICE DENISE BELLAMY
COMMISSIONER

AT THE STANDING HEARINGS OF THE
TORONTO EXTERNAL CONTRACTS INQUIRY
ON TUESDAY, NOVEMBER 5, 2002

Good morning. Welcome to the first public session of the Toronto External Contracts Inquiry. My name is Denise Bellamy. I am a judge of the Superior Court of Justice in Ontario. At the request of Toronto City Council, I have been appointed by Acting Chief Justice Heather Smith to be the Commissioner of this independent Inquiry. Today I am going to be dealing with applications for standing, but first I would like to make a few preliminary remarks.

Toronto now has two separate public Inquiries: The Toronto Computer Leasing Inquiry and this Inquiry, the Toronto External Contracts Inquiry. The first came into being by way of a resolution in February of this year, the second only last month, when it became apparent to City Council that the original terms of reference of the first Inquiry were not sufficiently broad to permit me to examine other areas over which City Council was concerned. That is why we now have two public Inquiries proceeding at the same time.

While these Inquiries have separate terms of reference, they are inter-related in many respects. A number of the witnesses for each Inquiry will be the same and some of the issues are the same. The Rules for both Inquiries are essentially the same. Some of the parties with standing will be the same. I am the Commissioner for both judicial Inquiries. It would be a waste of the taxpayers' money for me to write two separate reports simply because the additions to the terms of reference came in the form of a separate inquiry. Therefore, I will be writing one report and will refer to the evidence heard in both Inquires in this one report.

Now, let me talk specifically about the Toronto External Contracts Inquiry. City Council has provided me with broad terms of reference which you can find either on the city's website or on our Inquiry website. Briefly, Council has asked me to examine five separate matters:

1. the circumstances relating to the retention of certain consultants to assist in the creation and implementation of the tax system of the former City of North York (TMACS)
2. the circumstances relating to the amalgamated city of Toronto's selection of TMACS,
3. the circumstances relating to the selection of consultants to develop and/or implement TMACS at the amalgamated City of Toronto

4. the circumstances surrounding the selection of Ball Hsu & Associates Inc. to provide consulting services to the City of Toronto; and
5. all aspects of the purchase of computer hardware and software that subsequently formed the basis for the computer leasing Request for Quotations that is currently the subject of the Toronto Computer Leasing Inquiry, the other Inquiry over which I am Commissioner.

In so far as #5 is concerned, through a resolution passed at the meeting of City Council on October 29, 30, and 31, City Council has clarified that this section is to refer only to the supply of Dell desktops and servers which were referred to in the leasing RFQ, but not the other hardware and software listed in the RFQ.

The majority of City Council voted to hold this Inquiry. I take that to mean that City Council and the Mayor want an impartial look at these matters and want answers regarding what happened. City Council has given me the authority to ask any questions I consider necessary and to scrutinize the evidence to determine what the impact of these contracts has been on the taxpayers of Toronto.

I am going to do this by way of public hearings, and after I am finished, I will be preparing a report. In that report, I have been given the explicit authority to make any recommendations that I think are appropriate and in the public interest.

To help me do that, I encourage anyone who has information that they think might be helpful to the Inquiry, whether it involves documents or names of potential witnesses, to provide this information to us as soon as possible. The law offers protection to witnesses to encourage them to come forward in public inquiries.

I want to emphasize what a public inquiry is and what it is not. I have said this at least twice at the Toronto Computer Leasing Inquiry, but I am going to repeat it again because of its importance. A public inquiry investigates and reports on matters of substantial public interest to a community. A public inquiry is not a trial. No one is charged with any criminal offence; no one is being sued. As a Commissioner, I have no right to find anyone guilty of a criminal offence nor can I establish civil responsibility for damages. Inquiries tend to be broader than either criminal or civil trials and, as a rule, while they investigate past events, they tend also to be concerned with providing an explanation of what happened, so as to assist in preventing similar events in the future.

A public inquiry also needs to be both public and available to the public. I am committed to having open and public hearings. I encourage members of the public to come to the hearings and listen to the evidence.

Having said that, I recognize that in our busy worlds not everyone who is interested in the Inquiry will be able to physically attend the hearings. I am pleased, therefore, to see that the media has been active in reporting news about the Inquiry. It is through the media that those who are unable to attend can find out what is happening on a day-to-day basis. To ensure that the media can accurately report what is

happening at the Inquiry in a timely manner, I have directed Inquiry staff to make materials as accessible as possible to them.

In another attempt to make information available to the public, we have created a website to provide an open window into the activities of the Inquiry. For example, any member of the public will be able to access the website at any time and read what a witness has said, word for word, generally by the end of the same day the witness testifies. Our website can be found at www.torontoinquiry.ca.

We recognize that the public might get confused about the two separate Inquiries that I am conducting at the same time. We are trying to simplify this by having only one website so that people do not have to figure out which Inquiry is doing what at what time. Bear with us, please, as we update our website to include both Inquiries and as we try to make it as user-friendly as possible.

Commission counsel play a critical role in a public inquiry. They are the legal arm of the Commission. Essentially, I am their client, and their only client. The main responsibility I have given to them is to represent the public interest at the Inquiry. They do not represent any particular point of view. They are not prosecutors. Their role is not adversarial nor do they take one side over another. They have a duty to make sure that all issues bearing on the public interest are brought to my attention. Their job is to use their skill and experience to present all the available relevant evidence in as fair and thorough a fashion as possible.

I would like at this point to introduce you to Commission counsel. Ron Manes is lead Commission counsel on both Inquiries. However, he cannot be everywhere at the same time, so while he is proceeding with the Toronto Computer Leasing Inquiry, David Butt will lead the investigation into the Toronto External Contracts Inquiry. Mr. Butt will also be the lawyer who will be handling media inquiries relating to the Toronto External Contracts Inquiry. Julie Dabrusin will be assisting Mr. Butt. Our website contains information about the background of each of these lawyers, and I encourage you to visit it.

Each public inquiry establishes its own rules. We have drafted our Rules of Procedure in a way that makes sure that the process we follow is open and fair to everyone. We have tried to write the rules in plain language and to keep the legal jargon to a minimum. Our rules explain the process that I intend to follow. They too are posted on our website.

Today, we begin the process of identifying those persons or organizations who may have a direct and substantial interest in the proceedings of the Inquiry, or whose participation in the Inquiry may be helpful. I have received applications from seven applicants who have expressed an interest in getting what is known as "standing". People who are granted standing can take an active part in the proceedings of the Inquiry. I should point out that, because of the special circumstances of these two Inquiries with overlapping issues proceeding at the same time, we have created a rule

for each Inquiry that permits those with standing in one Inquiry to obtain standing in the other Inquiry. Three of the seven applicants are ones who already have standing in the Toronto Computer Leasing Inquiry.

I am not yet in a position to announce the date for the hearings for the Toronto External Contracts Inquiry. Before we can start public hearings, we have to be sure that we have gathered all the information, that we have interviewed all those who may be helpful, and that we have organized everything for the hearings so that this information can be presented in an understandable and efficient way. In any event, as the Toronto Computer Leasing Inquiry is scheduled to resume on December 2, 2002, clearly that Inquiry will be in a position to start before this one. I encourage you to check our website regularly for updates.

Thank you for your attention.

I am now ready to hear the oral presentations for standing.

NOTES FOR A SPEECH
BY THE HONOURABLE JUSTICE DENISE BELLAMY
COMMISSIONER

AT THE
TORONTO COMPUTER LEASING INQUIRY
ON MONDAY, DECEMBER 2, 2002

Good morning, ladies and gentlemen. After our abbreviated start on September 30th, I again welcome you to the opening session of the Toronto Computer Leasing Inquiry.

I am going to take a few minutes now to let you know what has happened with respect to this Public Inquiry since the September 30th adjournment.

But first, let me briefly remind you how this Inquiry came about. Toronto City Council voted unanimously in February of this year to hold this Public Inquiry and provided me with broad terms of reference. These are quite long so I will not repeat them here; you can find them on either the city's website or on ours at www.torontoinquiry.ca. In a nutshell, I am to examine what happened with respect to certain computer hardware and software leasing contracts between the City of Toronto and MFP Financial Services Ltd., and also to examine the city's acquisition of Enterprise Licences from Oracle Corporation.

On September 30th, the Inquiry was all set to start. However, shortly before that date, Commission counsel uncovered evidence that we felt needed to be brought to the attention of the police. The Ontario Provincial Police began an investigation and asked that we not proceed with the Inquiry during the critical initial stage of their investigation. I agreed to that request. After that, the OPP provided Commission counsel with regular status reports and about two weeks

ago, they completed their investigation. The OPP decided that no charges would be laid.

As we begin the hearings phase of this Inquiry, I want to say a few general words about public inquiries. Public inquiries are an important component of Canadian society. As the Supreme Court of Canada has said, "In times of public questioning, stress and concern, they [public inquiries] provide the means for Canadians to be apprised of the conditions pertaining to a worrisome community problem and to be part of the recommendations that are aimed at resolving the problem.... They are an excellent means of informing and educating concerned members of the public" [*Phillips* v. *Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97].

While it has become relatively common in Canada to have federal or provincial inquiries, municipal inquiries in Ontario are still rather rare. When Toronto City Council voted to hold this Inquiry, it used a section of the Municipal Act that was enacted in 1866, a year before Confederation. Over 130 years later, our Supreme Court had occasion to comment on the enduring nature of that section as reflecting "a recognition through the decades that good government depends in part on the availability of good information. A municipality, like senior levels of government, needs from time to time to get to the bottom of matters and events within its bailiwick" [*Consortium Developments (Clearwater) Ltd.* v. *Sarnia (City)*, [1998] 3 S.C.R. 3].

Getting "to the bottom of matters" takes time. It is not possible to present the evidence all at once. Some evidence will come out of order. It will only be after all the evidence is heard that the complete picture will become clear. This will take a number of months. If this were a jury trial, I would be cautioning the jurors not to make up their minds until they have heard all the evidence. This is not a jury trial, but I do believe it would be helpful for all who are following the

details of this Inquiry to place themselves in the same position as jurors and not to jump to any conclusions until all the evidence has been presented.

This is especially important for three reasons. First, it is essential to keep in mind that a police investigation is very different from the task of a public inquiry. This is so despite the fact that public inquiries may call witnesses and hear evidence that covers the same subject matter as a police investigation.

On several occasions I have commented publicly about what a public inquiry is and what it is not, but I am going to repeat it now because it is so important. A public inquiry is not a trial. The strict rules of evidence that govern trials in our courts do not apply to public inquiries. Each public inquiry can establish its own rules and we posted our Rules of Procedure on our website on May 27th. Another distinction between a public inquiry and a trial is that in a public inquiry, no one is charged with a criminal offence and no one is being sued civilly. The Supreme Court of Canada has made it clear that commissioners of public inquiries are not to find anyone guilty of a criminal offence nor are they to establish civil responsibility for damages.

As well, public inquiries tend to be broader than either criminal or civil trials. They investigate and report on matters of substantial public interest to a community. Indeed, 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. As a rule, while public inquiries investigate past events, they are also concerned with providing an explanation of what happened to help prevent the occurrence of similar events in the future.

Second, there now exists another public inquiry that involves many of the same people. Within days of my adjourning the Inquiry for the police investigation, Toronto City Council decided the original terms of reference of the

Toronto Computer Leasing Inquiry were not sufficiently broad to permit me to examine other areas about which it was concerned. As a result, at its meeting in early October, City Council voted to extend the mandate of the Inquiry. Not wanting to further delay the start of the hearings of the first Inquiry, City Council voted to establish a second Inquiry called the Toronto External Contracts Inquiry. I am the Commissioner of both Inquiries.

This second Inquiry is at a very early stage. During the time that the first Inquiry was adjourned, I hired two Commission counsel for the second Inquiry: David Butt and Julie Dabrusin. I held standing hearings. After consultation with the parties with standing, we finalized the Rules of Procedure. Mr. Butt and Ms. Dabrusin are now beginning their investigations and will continue to do so during the time that I am conducting the hearings in the first Inquiry with Commission counsel Ron Manes, Pat Moore and Daina Groskaufmanis.

The existence of two inquiries presented the Commission with a complex procedural dilemma. Several of the witnesses will be the same, many of the issues are the same, and some of the same parties will be involved in both Inquiries. In an ideal world, it might have made sense to complete the investigation of the second Inquiry before embarking on hearing the evidence of the first. However, that would have resulted in a delay of a minimum of four months. Such a delay is in no one's best interests. Indeed, it would have been contrary to the express wishes of City Council. It is sensible then to proceed immediately with the first Inquiry instead of waiting for the investigation of the second one to be completed.

After reflection, the Commission decided to amend some of the Rules of Procedure to make certain that the principles of efficiency, expedition and cost saving govern both Inquiries. These rules, amended after consultation with all parties with standing, ensure that I can consider all the evidence in one report, and that the parties with standing in each Inquiry have a full opportunity to

explore this evidence. Even with these changes, there will be some witnesses who will be required to testify at both Inquiries.

I said there were three reasons not to jump to conclusions before the end of the second Inquiry. The third reason is this. An important aspect of my terms of reference in both Inquiries will not be addressed until the end of the second Inquiry. This is the part that requires me to examine the impact of the transactions on the ratepayers of the City of Toronto as it relates to the good government of the municipality or the conduct of its public business. This part cannot be addressed until I have heard all the evidence in both Inquiries.

As a result, the Inquiries will be organized as follows. In Phase 1, I will hear evidence of the transactions involving the City and MFP Financial Services Ltd. and Oracle Corporation. After this is completed, there will be an adjournment. I will then begin Phase 2, the second Inquiry, where I will hear evidence concerning the City's transactions involving Beacon, Remarkable, Ball Hsu & Associates Inc., and Dell Computer Corporation. I will then merge the two Inquiries to hear evidence relating to good government. We are calling this Phase 3.

As a rule, counsel will not be asking questions of the witnesses in the first Inquiry that should be more fully explored in the second one. Given that the investigation in the second Inquiry is at a very early stage, it would be premature to permit too much questioning on issues that should more properly be dealt with there. As well, as a general rule, counsel will not be probing the good government issues until the evidence has been heard regarding all the specific transactions.

For these reasons, I would ask everyone to reserve judgment and not to prematurely arrive at conclusions until they have heard all the evidence.

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I want to repeat my commitment to open and public hearings and to the accessibility of information of the proceedings. On several occasions, I have encouraged members of the public to attend the hearings. I have also encouraged the media to publish written material and to televise reports of the hearings to inform those who cannot attend in person.

We have created a website for the Inquiry at www.torontoinquiry.ca to ensure that the public has easy access to all relevant information. We have tried to make it as user friendly as possible. Information on both Inquiries can be found on the same website. Our Rules of Procedure are written in plain language with a minimum of legal jargon and are designed to ensure that the process we follow is open, accessible and fair. Transcripts of each day's evidence will be on our website within a few hours after we finish for the day. Members of the public will be able to access the website at any time and read what every witness has said, word for word.

We are ready to begin. I will now call on Commission counsel, Ron Manes.

NOTES FOR A SPEECH
BY THE HONOURABLE MADAM JUSTICE DENISE BELLAMY
COMMISSIONER

CHANGE IN DIRECTION
PROCEEDING WITH GOOD GOVERNMENT PHASE

TUESDAY, NOVEMBER 4, 2003

The Toronto Computer Leasing Inquiry (TCLI) is in its final stages. Barring further developments, we have only a few remaining witnesses. As we begin to hear the evidence of the last few witnesses, I would like to inform the public of the direction we are heading.

After this Inquiry was established, City Council asked me to examine some additional issues. In doing so, it created a second inquiry – the Toronto External Contracts Inquiry (TECI). That second Inquiry was scheduled to start next month. It was to be followed by an in-depth examination of issues relating to good municipal government that are an essential part of my Terms of Reference.

I have decided to change that order. I will now move from the Toronto Computer Leasing Inquiry directly into the examination of good government. I want to explain why I am making that change.

Next week, Toronto will elect a new mayor and a new City Council. All the main candidates for mayor have proposed changes to the way the City conducts business. All of them discuss integrity, conflict of interest guidelines, rules on lobbying, and the need for transparency in government. It seems clear that whoever is elected mayor plans to address these integrity issues as an early priority.

I believe my task of exploring good government issues will help Toronto most if I address them in an earlier time frame. This will give the new mayor and new Council the

opportunity to include this Inquiry's work in their deliberations on how to better serve the people of Toronto.

The Supreme Court of Canada, in its discussion of the value of public inquiries, has stated that "good government depends in part on the availability of good information." I would like the new mayor and new Council to have our research on good government early in their term.

Under my direction, Commission Counsel David Butt has managed the preparations for the good government phase to ensure that it is comprehensive and responds to issues of concern that the Inquiry has uncovered. Indeed, much of the work we have done deals directly with integrity, lobbying, conflicts of interest, codes of conduct, tendering practices, transparency, and accountability. This list makes it evident why I believe the Inquiry can better serve the City's interests by making our information available earlier.

I will begin the good government phase in early January 2004 after appropriate consultation with the parties with standing. I do not expect this change in direction to affect the budget approved by Council.

As I have stated previously, after I have completed both Inquiries and the good government phase, I will write one report that will include recommendations on good government. I hope my recommendations will improve the way the City conducts business. And I hope my recommendations will help the City avoid problems before they arise.

NOTES FOR A SPEECH
BY THE HONOURABLE MADAM JUSTICE DENISE BELLAMY
COMMISSIONER

REMARKS ON ADJOURNING THE
TORONTO COMPUTER LEASING INQUIRY

TUESDAY, NOVEMBER 25, 2003

Having heard the testimony of this last witness we have reached the end – or nearly the end - of this phase of the Toronto Computer Leasing Inquiry. I say "nearly the end" because there are still two outstanding issues.

First, we are trying to resolve the matter of the eighteen sealed banker's boxes that belong to Mr. Jeffery Lyons. Because we do not know the content of the documents in those boxes, we cannot determine whether they contain material that is relevant to this Inquiry. Mr. Lyons has brought an application to the Divisional Court seeking judicial review of my ruling that the boxes should be opened. This issue, therefore, remains unresolved.

Second, throughout this Inquiry, Commission Counsel has continuously assessed who would be called as witnesses, whether we still needed to hear from witnesses who had already been summonsed to testify, and whether some witnesses must be recalled. Recently, the City has specifically requested that Commission Counsel recall Jeffery Lyons, Tom Jakobek, Dash Domi and Peter Wolfraim. Such decisions cannot be made piece-meal or in isolation. As I have stated a number of times during the Inquiry, I have no interest in calling a witness repeatedly. I especially have no interest in doing so if it could lead to the proceedings becoming confusing, cumbersome, unnecessarily expensive or if it would be unfair to bring back a witness for an unimportant or unhelpful issue. I will make a decision about whether to recall any of these witnesses at the appropriate time and after careful consideration.

Although the Toronto Computer Leasing Inquiry has not formally concluded, I plan to adjourn this phase of the Inquiry and proceed to the next phase -- the examination of good government at

the City of Toronto. This phase will begin in January 2004, on a date to be arranged with the parties with standing. All parties will be notified as soon as that date is fixed and it will be posted on our website at www.torontoinquiry.ca. I expect this phase of the Inquiry will address policy issues such as lobbyist policies and practices, conflicts of interest, procurement/purchasing matters, and effective municipal government. We have commissioned research papers on these topics. These papers will be posted on our website. After completing the good government phase, hearings of the Toronto External Contracts Inquiry will begin.

We have come a long way since Council established this Public Inquiry in February 2002. At that time, the City thought this Inquiry would involve just over one filing cabinet of documents and approximately forty hearing days. The City initially thought it would not need a lawyer at these hearings. The City based its budget on those assumptions. In fact, however, this Inquiry has involved more than 64,000 pages of documents, twelve parties, forty lawyers, twice as many witnesses as originally projected, and has taken over 150 days of hearings.

As I said at the opening of this Inquiry, "getting to the bottom of matters takes time". But the time has been necessary, because throughout I have tried to make fairness and thoroughness the overriding principles of this Inquiry. Early in our investigation, we recognized the likely magnitude of this Inquiry. After carefully analyzing timelines and budgetary needs, we tabled our schedule and budget for Council's approval. We continue to be both on time and on budget.

The evidence at the Inquiry has had extensive media coverage. I think it's fair to say that the entire process has helped raise public awareness of issues such as integrity, good government, conflicts of interest, accountability and lobbying, matters which were seriously addressed by all the major mayoralty candidates in the recent municipal campaign. As I previously mentioned, these issues will be explored further in the next phase of this process.

Before we begin the good government phase, I want to take this opportunity to thank my Commission Counsel and Commission staff who have worked so hard to ensure that this Inquiry operates smoothly, efficiently and cost-effectively. I could not have accomplished what I have without their hard work, devotion and commitment.

Appendix E(vi): Commissioner's Statement on Adjournment of TCLI, November 25, 2003

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I would also like at this time to acknowledge the staff who have been in this room and who have made things work so smoothly for us: our Registrars, in reverse order of appearance, Dorothy Button, Janet Smith and Joyce Ihamaki. You will recall that Joyce suffered a stroke earlier in the year. I'm happy to report that last week Joyce celebrated her 70th birthday and is now back with her family. Thanks also to the gentlemen who make sure that we can all be heard: Bernie Sandor and his assistants, Derek Best and Ken Wheeler; to our court reporting facility: Carol Geehan and Wendy Warnock, and all the individuals supporting them whom we never see; and lastly our Hearing Services Operators, Bob Gray, Voltaire Veneracion and Andy Pandoff.

Thanks to all of you for your assistance. I wish you a happy holiday and a good rest.

DELIVERED BY HAND

Personal & Confidential

December 30, 2003

His Worship Mayor David Miller
Office of the Mayor
Toronto City Hall
100 Queen Street West, 2nd Floor
Toronto, Ontario M5H 2N2

Dear Mr. Mayor:

May I take this opportunity to extend the best of the holiday season to you, your staff, and members of City Council.

I would also like to inform you and Council about what has transpired to date in the Toronto Computer Leasing Inquiry (TCLI) and to receive your urgent consideration regarding the future of the Toronto External Contracts Inquiry (TECI).

As you know, City Council voted unanimously in February 2002 to hold an independent judicial inquiry, now known as the Toronto Computer Leasing Inquiry. Since my appointment as Commissioner in early March of that year, I have been involved in investigating and hearing evidence relating to this Inquiry.

In early discussions with City staff before I retained Commission Counsel, I was advised that the Inquiry would involve just one filing cabinet of documents and, based partly on that assumption, that City staff had budgeted for approximately forty days of hearings. At first, the City thought it would not need a lawyer at these hearings. In the final analysis, the City hired four lawyers, and the Inquiry involved more than 64,000 pages of documents, twelve parties with standing, forty lawyers, twice as many witnesses as originally projected, and heard testimony over the course of 150 days. As you can see, the Inquiry process involved much more time and cost than the former Council had initially anticipated. This is understandable, and we all now have the benefit of hindsight.

Even with that, the Toronto Computer Leasing Inquiry is not yet over. There remain a couple outstanding issues. One of these involves the possible recall, at the City's request, of four

witnesses: Messrs. Dash Domi, Tom Jakobek, Jeffery Lyons and Peter Wolfraim; the other, the unresolved issue of the contents of eighteen sealed banker's boxes belonging to Mr. Lyons. This latter matter is currently before the courts.

In October 2002, by a majority vote of 26 to 7, Toronto City Council voted to extend the mandate of the first Inquiry by establishing a second Inquiry, the Toronto External Contracts Inquiry. As part of their Terms of Reference, both Inquiries require that I examine issues relating to good municipal government. The second Inquiry was set to start on December 1, 2003. It was to be followed by an examination of issues relating to good government.

However, on November 4, 2003, recognizing that it was impossible for me to have a timely report to the Mayor and the new Council, I reversed the order of the good government phase and the Toronto External Contracts Inquiry. During the municipal election campaign, I saw that all the main candidates for Mayor were proposing changes to the way in which the City conducts its business. Each of you discussed integrity, conflict of interest guidelines, rules on lobbying and the need for transparency in government. It seemed clear that whoever was elected Mayor intended to address these integrity issues as an early priority. I wanted the new Mayor and City Council to have the benefit of the information we had gathered and researched over the past year, early in the electoral term.

The good government phase is now set to begin on January 19, 2004. It will be followed by the Toronto External Contracts Inquiry on February 16, 2004**.**

Upon reflection and because of the impending February date, I feel it is my responsibility to bring three concerns to your attention. I would be grateful if you would discuss these with members of City Council and respond to me before the February start date, as preparations with respect to TECI are proceeding without interruption and we continue to diligently pursue all viable investigative leads.

I preface the following remarks by assuring you that I am fully prepared to discharge my mandate under the second Inquiry. As well, without prejudging evidence before it is tested in the hearing room, I can inform you and Councillors that my investigations to date have uncovered conduct, the propriety of which may be in question and would be appropriate to expose by way of a judicial inquiry.

First Concern: Cost

I am aware that this Council is faced with considerable budgetary pressures and that the existence of the Inquiries contributes to those pressures. In examining all relevant questions with care and fairness to all concerned, public inquiries are expected to be thorough. They are also expensive. At the end of the day, they are prohibited by law from finding criminal or civil liability. Throughout the Inquiry, I have been live to budgetary concerns and have continually addressed this publicly at the hearings.

Between March 2002 and December 2003, the Inquiries will have spent approximately $6.5 million ($1.760M for 2002; $4.700M for 2003). That amount is within the budget that we gave

to the City in March, 2003. It does not, of course, include the cost of the City's own lawyers nor those legal costs of TCLI participants which the City may be paying.

I expect the Toronto External Contracts Inquiry to result in the spending of at least another $1.5 million. Again, that does not include the cost of the City's own lawyers nor the legal costs of TECI participants which the City may pay. I am not privy to those costs, but I know your staff would be in a position to provide you with this information. In any event, it would not be unreasonable to expect that the combined costs for proceeding with the second Inquiry could be more than $3 million.

Court applications to review my decisions also increase the cost. Each application can result in additional unexpected pressure on my budget, and presumably also on the City's own budget.

Second concern: Timeliness

The *Municipal Act,* referred to in my Terms of Reference, requires that I report to Council "with all convenient speed". If TECI does not proceed, I would expect to be in a position to have a report with my recommendations to you and Council by the end of the summer, 2004. If TECI does proceed, for the reasons discussed below, I would not be able to have a report to you and Council until early to mid 2005.

The reasons for this are as follows: the second Inquiry has been scheduled for 70 hearing days. Commission Counsel is making every effort to streamline and minimize the issues and evidence in TECI (to date, over 54,000 pages of documents). It may be that TECI can be completed in less than the budgeted 70 days. On the other hand, the parties to TECI may exercise rights which can affect the length and costs of the Inquiry.

Ultimately, as we learned in TCLI, the length of an inquiry cannot be determined in advance with certainty. Providing the participating lawyers the time they need to conduct the good government phase, to make their submissions with respect to TCLI, to conduct TECI with reasonable sitting times and breaks, means that it is unlikely that the second Inquiry would finish before August, 2004. After this, I must provide the parties with a reasonable opportunity to make submissions before I write the report. It would not be possible to have a complete report on both TCLI and TECI until early to mid 2005.

Third Concern –Value

I believe that the first Inquiry served to highlight issues which resulted in them being seriously addressed during the election. I think it is fair to say that evidence heard during the Inquiry has already helped raise the profile and public awareness in the City of issues such as integrity, conflicts of interest, accountability, lobbying, and good government.

Both TCLI and TECI are mandated to examine good municipal government in the context of information technology procurement. Thus, while the specific transactions to be examined differ between TCLI and TECI, and while there may be merit in examining those different transactions,

it is also true that there is considerable overlap in subject matter and that many of the same participants in TECI were also involved in TCLI.

With that in mind, I believe I have a responsibility to inform you and Council that whether or not any misconduct, serious or otherwise, is brought out publicly in the second Inquiry, it is not likely that the receipt of this evidence will materially enhance my recommendations to you and Council.

In conclusion, I repeat that my staff and I are ready to complete my mandate within the Terms of Reference of both Inquiries. I also expect that my decision to explore good government issues sooner rather than later will assist Council to address integrity issues in a timely fashion.

Having said that, I am sensitive to the budgetary constraints facing the City of Toronto at this point. I believe, therefore, that I have a responsibility to you, to Council, and to the ratepayers of Toronto to bring the above-mentioned concerns to your attention so that you and the new Council can weigh the cost of proceeding with the second Inquiry against the results you hope to achieve, mindful that potential findings of misconduct are unlikely to materially change my recommendations.

I look forward to your early response.

Yours very truly,

Denise E. Bellamy
Commissioner

NOTES FOR A SPEECH
BY THE HONOURABLE MADAM JUSTICE DENISE BELLAMY
COMMISSIONER

AT THE OPENING OF THE GOOD GOVERNMENT PHASE OF THE TORONTO COMPUTER LEASING INQUIRY
MONDAY, JANUARY 19, 2004

Good morning and welcome back. Today we begin a different and very important phase of this Inquiry: the Good Government Phase. I would like to explain briefly why it is so different and why it is so important.

The Good Government Phase was originally scheduled to take place at a later stage in the Inquiry's proceedings. However, last fall, prior to the municipal election results, I announced that I would change the order of the hearings and hold the Good Government Phase now. My purpose in doing so was to provide the City, the new Mayor, and the new Council, with the benefit of these Good Government hearings as early as possible in their mandate.

Public Inquiries must always investigate very carefully the events that caused them to be established. It is essential that they probe deeply to discover any wrongdoing that may have occurred. For the past year, this has been the focus of our Inquiry. We have been examining the computer leasing transactions between the City of Toronto and MFP Financial Services Ltd., and the City's acquisition of Enterprise Licences from Oracle Corporation. Our focus has been on exploring possible wrongdoing – mistakes, carelessness, or deliberate wrongful acts.

It is important to understand that my task does not end after I have fully investigated all possible wrongdoing. My Terms of Reference require that I also make recommendations for change that will improve City Government, and hopefully prevent, in the future, the kinds of mistakes or misconduct that may have occurred in the past. In my opening

address on December 2, 2002, I indicated that I would be hearing evidence relating to good government and this is what will be taking place over the next three weeks.

Before making such recommendations, I intend to benefit from the knowledge and experience of experts on municipal government. The Good Government Phase of this Inquiry is designed to provide me with their insight and expertise which I can then consider in formulating my recommendations on the various issues that will form part of my final report.

Many months of planning this Phase have occurred. Commission Counsel David Butt has taken the lead in developing and carrying out our approach. We have commissioned research and discussion papers on subjects which arose as matters of concern both during the course of our investigations and at the public hearings. Broadly speaking, these topics fall into four general categories: conflict of interest, lobbying, procurement, and municipal governance. Within those four broad topics, there are many issues that we intend to explore. The research and discussion papers were prepared by Ms. Valerie Gibbons and Mr. Sam Goodwin, of the Executive Resource Group. These detailed and thorough papers are posted on our website, at www.torontoinquiry.ca. I am grateful to Ms. Gibbons and Mr. Goodwin for their comprehensive research and for the suggestions they make in their reports. They will attend the hearings on Tuesday afternoon to explain the process undertaken in their work.

Although the discussion papers contain recommendations for reform, I want to emphasize that those recommendations are meant as suggestions only, as a springboard for discussion in the Good Government hearings that begin today. The papers provide important background on the topics I must address, but the suggestions contained there may or may not find their way into the recommendations that I ultimately make in my report. I anticipate they will focus discussion on realistic responses to the practical issues confronted by the City of Toronto. I welcome debate on the points made in the papers in the forthcoming weeks.

Appendix E(viii): Commissioner's Opening Statement at the Beginning of the Good Government Phase of the Inquiry, January 19, 2004

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I will devote the next three weeks to the Good Government hearings. During that time, I will hear from a broad range of experts: academics, former and current politicians, civil servants, and many individuals from the private sector. We have deliberately sought to present different views, so that we can benefit from the interchange of conflicting ideas. The presenters we invited have expertise to share with me on topics that are central to my ultimate recommendations.

The Good Government Phase is different from the hearings we have conducted over the past several months. Many of you will have already observed that the room is now configured differently from the way it was when testimony was heard at the Toronto Computer Leasing Inquiry. The hearings in the Good Government Phase will be much less like a courtroom proceeding, and much more like a forum for discussion and debate. I will continue to preside, and Commission Counsel, Mr. Butt, will present the evidence. Proceedings will be much more informal. Presenters will not be under oath, and will not be cross-examined. Sometimes we will hear from one individual, and often we will have a panel discussion consisting of several people. We will be addressing important current policy questions for the City, rather than past conduct, and panelists will be encouraged to engage in open discussion of the issues. We have deliberately altered our procedure in this Phase to encourage a vigorous exchange of ideas that will provide me with the best possible foundation for practical recommendations in my final report.

During our planning of the Good Government Phase, we invited many people to participate in this exchange of ideas. The response has been overwhelming. Dozens of experts have generously offered to share their time and insights. Without exception, they have agreed to do so without charging a fee. I am deeply grateful to all these very accomplished individuals for donating their time to me and the City in the examination of these important issues. The dates and order in which these experts will present their views, as well as a description of their respective bibliographies, are on our Inquiry website.

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The Good Government Phase is an important opportunity to turn the page on past events. I welcome this Phase as an occasion to focus on improvements for the future.

I would like to now call on Mr. David Butt to introduce our first presenter, Ms. Shirley Hoy.

NOTES FOR A SPEECH
BY THE HONOURABLE MADAM JUSTICE DENISE BELLAMY
COMMISSIONER

AT THE CLOSING OF THE GOOD GOVERNMENT PHASE OF THE TORONTO COMPUTER LEASING INQUIRY
THURSDAY, FEBRUARY 5, 2004

For the past three weeks, we have heard presentations in the Good Government Phase of the Inquiry. This Phase was designed to provide me with the insight of experts in municipal government, and with the assistance of those who have given careful consideration to issues that have arisen during the Toronto Computer Leasing Inquiry. People from various disciplines with different perspectives were invited to make presentations. Indeed, conflicting views on the same subject were encouraged so as to provide me with the best possible foundation for practical recommendations in my report to the Mayor and Council.

In the last three weeks, I have heard from forty-one individuals, many of whom made presentations as part of a panel. They included the City's Chief Administrative Officer; elected officials, including people who are or were Mayors, City Councillors, or M.P.P.s in Ontario; former provincial deputy ministers; persons who are or were senior employees in governments; academics and procurement specialists; representatives of the media; lobbyists; lawyers and accountants; citizen advocacy groups; the former Provincial Auditor; the Integrity Commissioner, and the Lobbyist Registrar for Ontario; and the federal Ethics Counsellor.

Each of these individuals participated without charging a fee. I would like again to extend my thanks and appreciation to all of them for having donated so generously of their time.

The topics we dealt with fell into the four general categories of conflict of interest, lobbying, procurement, and municipal governance. Within those four broad topics, we

explored the relationships between lobbyists and public office holders; the power and influence of the Mayor; the role of Councillors, City Council and Community Councils; the role of the Chief Administrative Officer and senior staff in municipal government; effective procurement practices; and ethics and conflict of interest policies. We heard about initiatives the City has already undertaken with respect to procurement, ethics and lobbying.

The presentations by these forty-one individuals, together with the excellent research and discussion papers prepared by the Executive Resource Group, materials provided by the City and the other exhibits filed, as well as books and articles that were referenced, have provided me with a wealth of valuable information. I cannot stress enough how significant this Phase has been in assisting me to formulate my thoughts and to prepare my recommendations that will ultimately be made to the Mayor and Council.

As the Good Government Phase comes to an end, I particularly wish to thank my Commission Counsel, David Butt, for his extraordinary skill in moderating every single one of the twenty separate sessions held in the last three weeks. Assisting him in the preparation of the Good Government Phase were Zachary Abella, Heather Hogan and Clita Saldanha, and I want to thank them publicly for all the work they did to ensure that these sessions ran so smoothly. I am also grateful to Andrew Lewis, counsel for the City, for his helpful contributions over the past weeks.

We will now adjourn this Phase. Shortly, I will be making an announcement with respect to whether and when witnesses will be called or recalled to testify at the Toronto Computer Leasing Inquiry. In the meantime, I again thank everyone for their participation and their assistance in making this Phase so successful.

NOTES FOR A SPEECH
BY THE HONOURABLE JUSTICE DENISE BELLAMY
COMMISSIONER

AT THE
TORONTO COMPUTER LEASING INQUIRY
ON MONDAY, APRIL 19, 2004

Good morning. I want to welcome everyone back to what we all expect will be the final evidence phase of the Toronto Computer Leasing Inquiry. When I adjourned the Inquiry in late November, I mentioned that there were two outstanding issues. Both those issues have now been resolved. One of them involved the matter of some banker's boxes belonging to Mr. Jeffery Lyons; the other, was a request to recall four witnesses.

Before we begin hearing evidence today, I want to explain briefly what has transpired since we were here in late November. In January and February 2004, I heard valuable testimony in the Good Government phase from forty-one witnesses. The matter of the banker's boxes was resolved by the Divisional Court in mid-February. Commission Counsel and counsel for Mr. Lyons co-operatively examined the contents of the eighteen boxes. Late last week they were able to resolve which documents are helpful to the Inquiry as well as material that is subject to privilege.

As far as the calling of more evidence is concerned, I want to emphasize that the investigations of Commission Counsel have continued without interruption since the inception of the Inquiry. Whether we were sitting in the hearings, were on a recess from the hearings, or were proceeding with the Good Government phase, the investigations never abated.

New information has come to light which may help me to better understand the evidence and fulfill my Terms of Reference. Because of this, as well as some outstanding issues, Commission Counsel have decided to call a few new witnesses and to recall some who have already testified. For those who have already testified, this opportunity will allow them to explain important contradictions or inconsistencies in the evidence.

I would have preferred to have spared the witnesses from having to return to testify. Testifying at a public inquiry may not always be a pleasant experience. Unfortunately, though, by the time the last witness testifies, it is sometimes helpful to return to earlier witnesses and revisit what they said in light of what has been learned, either because of evidence that was heard from a subsequent witness or because new information has been uncovered. This is not unusual. Indeed when the Inquiry began, I emphasized

that it was not possible to present the evidence all at once and that some of it would come out of order. That is what is happening now.

The testimony that we will hear in the next few weeks is occurring after a break in the Inquiry's proceedings. I remind everyone to please listen to the evidence with an open mind and not to draw any conclusions based on this evidence alone, as the testimony we are about to hear is only a small component of the entire body of evidence that has been presented in this Inquiry. The transcripts of the earlier evidence are available on our website at www.torontoinquiry.ca.

Having decided to call additional evidence in the Toronto Computer Leasing Inquiry, I wish to emphasize that this is not an opportunity for the parties with standing to tie up every loose end in the Inquiry, nor to introduce a lot of new evidence. If I were to allow that, we would never finish, and I remain mindful of the cost to the taxpayer. There needs to be some finality to this.

Accordingly, I have permitted Commission Counsel to call or recall witnesses to address subjects we have already examined only where there is a compelling need to do so. In deciding whether there is such a compelling need, I have considered three key points: what will be helpful to me, what is fundamentally fair to those affected, and what is most efficient and economical.

I know that some of the witnesses, and some of the lawyers representing witnesses or parties with standing, have time conflicts. I do want to complete the evidence in a timely fashion; however, to the extent feasible, I will try to accommodate time constraints of counsel and witnesses. Because of that, there may be days when we will not be able to hold the hearings. I am prepared to begin proceedings earlier, sit later, and shorten the mid-day break. I also expect all counsel to focus their questions tightly, and address only topics that there is a compelling need to address.

We will now hear the evidence. Commission Counsel, David Butt, will take us through the evidence of the first witness and Commission Counsel, Ron Manes, will follow with the next witness.

TORONTO COMPUTER LEASING INQUIRY

The Honourable Madam Justice Denise Bellamy
Commissioner

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850 Coxwell Avenue
Toronto, Ontario
M4C 5R1

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July 13, 2004

His Worship Mayor David Miller
Office of the Mayor
Toronto City Hall
100 Queen Street West, 2nd Floor
Toronto, Ontario
M5H 2N2

Dear Mayor Miller:

In January 2004, City Council passed the following motion: "AND BE IT FURTHER RESOLVED THAT Toronto City Council request Commissioner Bellamy to release the good government phase of her Inquiry at such time as she has completed that phase in order for City Council to consider and implement her recommendations as soon as possible."

It would appear that Council's motion was premised on the assumption that I would be making recommendations immediately following the Good Government Phase. The Inquiries' Rules of Procedure provide that my findings and recommendations (which include the Good Government Phase) will be contained in one report that will be released only after the conclusion of both the Toronto Computer Leasing Inquiry and the Toronto External Contracts Inquiry. Because both Inquiries are ongoing, I cannot make recommendations on improving municipal government until they are concluded.

Having said that, it has always been my interest to provide timely information to you and Council. You may recall that it was for this reason that I changed the sequence of the Good Government Phase in order that a newly elected Mayor and Council would have the benefit of the results of this Phase early in the electoral term. Therefore, even though I cannot yet offer my recommendations, I believe I can assist you and City Council by providing materials in response to your motion.

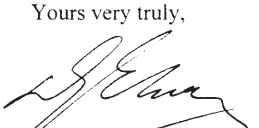
My Terms of Reference for both Inquiries require me to examine issues relating to good municipal government. To that end, in January and February 2004, I heard from over forty presenters who have broad experience in issues affecting municipal governments. Some of these individuals were the City's Chief Administrative Officer; elected officials, including people who are or were Mayors, City Councillors or MPPs; former provincial deputy ministers; persons who are or were senior employees in governments; academics and procurement specialists; representatives of the media; lobbyists; lawyers and accountants; citizen advocacy groups; a former Provincial Auditor; the Integrity Commissioner for Ontario, the Lobbyist Registrar for Ontario; and the former federal Ethics Counsellor.

I also commissioned research papers. Broadly speaking, the research papers and the topics discussed during the Good Government Phase covered important current policy issues in the four general categories of ethics, lobbying, procurement, and municipal government. Within those four broad topics, we explored the relationships between lobbyists and public office holders; the power and influence of the Mayor; the role of Councillors, City Council and Community Councils; the role of the Chief Administrative Officer and senior staff in municipal government; effective procurement practices; and ethics and conflict of interest policies.

The hearings and research material during the Good Government Phase are part of the foundation upon which I will build my recommendations. In response to City Council's motion, we have assembled all the testimony, exhibits and research papers. I offer them to you in a readily accessible format on the enclosed Compact Disc, which I am pleased to provide for each City Councillor. I am also forwarding one hard copy of the voluminous materials.

As you embark upon discussions regarding structural change to City government, this should permit you, members of City Council, City officials and interested individuals, to have easy access to this comprehensive set of materials. I hope this material will help you in your important work, as it will help me in mine.

Yours very truly,



Denise E. Bellamy
Commissioner

NOTES FOR A SPEECH
BY THE HONOURABLE JUSTICE DENISE BELLAMY
COMMISSIONER

AT THE
TORONTO COMPUTER LEASING INQUIRY
ON MONDAY, AUGUST 30, 2004

Good Morning. Welcome back to the Toronto Computer Leasing Inquiry. It has been four months since we last met in this hearing room. Today, we are again resuming the final evidence phase of this Inquiry.

In April, Mr. Tom Jakobek and Ms. Deborah Morrish brought an application to the Divisional Court. The purpose of that application was to review my decision to hear evidence of possible financial dealings involving Mr. Jakobek and Mr. Dash Domi. The Divisional Court has now resolved that matter. They have ruled that the evidence in question is relevant and necessary for me to complete my mandate.

That evidence is part of what we will be hearing during the next few weeks. There are also other important outstanding issues to be addressed. As well, we will hear from witnesses we interviewed at Mr. Jakobek's request. Altogether, this evidence is expected to take about three weeks.

Before we hear from the first witness, I want to repeat a few of the comments I made on April 19. First, I want to remind everyone to listen to the evidence with an open mind and not to draw any conclusions based on this evidence alone. Some of the witnesses have testified previously; their evidence should be considered in its entirety. Transcripts of earlier evidence are readily available on the Inquiry's website at www.torontoinquiry.ca.

Second, Commission Counsel have continued their investigations without interruption since this Inquiry was established. During the adjournment necessitated by this most recent court challenge, new information has emerged, and existing information has been further developed. This information may assist me to better understand the evidence and to fulfill my Terms of Reference.

Third, I recognize that some lawyers and a few of the witnesses have time conflicts. Where practicable, I am prepared to accommodate reasonable time constraints within these next three weeks, recognizing that I do have a second Inquiry that is ready to begin. I am prepared to start proceedings earlier, sit later, and shorten the mid-day break. I expect counsel to focus their questions tightly and to address only topics that there is a compelling need to address.

I wish also to remind everyone about the Good Government hearings that we held in January and February, together with the new developments that have transpired since I last reported on this in April. The Good Government hearings dealt with policy matters in the four general categories of ethics, lobbying, procurement and municipal government. On July 13, 2004, I wrote to Mayor David Miller and City Council. I sent them, by means of hard copy and compact disk, the presentations and background papers from the Good Government phase. This was not an interim report, nor did it contain recommendations. I will be making recommendations in my report at the end of the two Inquiries. The compilation of my letter to the Mayor and the contents of the compact disk are available to the general public on our website. They can be found in the Good Government section under "Good Government Hearings 2004: Ideas & Best Practices".

Just to refresh everyone's memory, the Toronto External Contracts Inquiry is the second Inquiry that was established when Toronto City Council broadened the issues that it wanted me to examine. TECI will begin within days of the completion of this final portion of the TCLI evidence.

We will now hear the evidence. Commission Counsel, David Butt, will take us through the evidence of the first witness, and Commission Counsel Ron Manes and Daina Groskaufmanis will follow with the subsequent witnesses.

NOTES FOR A SPEECH
BY THE HONOURABLE MADAM JUSTICE DENISE BELLAMY
COMMISSIONER

AT THE
CLOSING OF THE TORONTO COMPUTER LEASING INQUIRY
WEDNESDAY, SEPTEMBER 29, 2004

This brings us to the conclusion of the Toronto Computer Leasing Inquiry. I would like to take this opportunity to make a few remarks.

When I was appointed Commissioner of this Inquiry, I consulted with a number of my colleagues who had direct involvement with other public inquiries, and I reviewed the proceedings of several other public inquiries in Canada. A consistent theme was that public inquiries almost always take longer than anyone thinks they will.

I think it is fair to say that the City of Toronto did not anticipate that the Inquiry would last this long. It initially budgeted for only 40 days of hearings, partly on the assumption that this Inquiry would involve just one file cabinet of documents. At this early stage, City staff did not even think the City required legal representation for the Inquiry.

The reality bears no resemblance to these early assumptions: 70,000 pages from 20,000 documents, 12 parties with standing, 46 lawyers, and almost 130 witnesses who testified during the course of approximately 180 days. Indeed, today is one day short of the second anniversary of the start of our public hearings.

Throughout the entire process, I have always been mindful of the cost of the Inquiry to the Toronto ratepayer. My commitment to controlling costs has placed great pressure upon all those involved, and especially on my Commission Counsel and staff. To date, our cost is approximately $8 million, less than the $9.9 million designated by City Council in September 2003. However, unexpected interruptions to the Inquiry, coupled with City Council's decision to proceed with a second Inquiry will likely result in further costs, so I will continue to give very careful attention to our budget in the next phase of the public hearings.

Inevitably, the question arises whether public inquiries have been worth it, whether they have had an impact. Ultimately, it will be for others to assess the value of this Inquiry when I present my report. However, I think it can be stated without reservation that the proceedings in the past two years have focused valuable public attention on how municipal government works.

Throughout all stages of the Inquiry, I have been committed to the following overriding principles: openness and public accessibility, fairness, comprehensiveness and efficiency. My Commission Counsel and I designed the Rules of Procedure that

governed the Inquiry to reflect these principles. We wrote the Rules in plain language and throughout our public hearings tried to keep legal jargon to a minimum.

We created a website at www.torontoinquiry.ca. This gave the public access to the Terms of Reference, the Rules of Procedure, the list of anticipated witnesses, transcripts of the evidence of the witnesses who had already testified, my rulings, speeches, and other important information. The transcripts were on our site within hours of a witness testifying and have a word search feature that makes it easy to find each topic.

I felt it was critical for this Inquiry to be conducted completely in public. The final report of an Inquiry is important, but equally important is the ability of citizens to follow what is occurring in the hearing room as it happens, and to make their own decisions. In this regard, the media serves an important public function. While media scrutiny has sometimes made it difficult on a personal level for some individual witnesses and their families, the Supreme Court of Canada has recognized that media coverage is an important part of the public inquiry process itself. It proves the adage, which I quoted in one of my earlier rulings, that sunlight is a powerful disinfectant.

At various periods of the hearing process, the Commission was faced with matters beyond its control that extended the length of the Inquiry. These include allegations by a witness of possible criminal wrong-doing which resulted in an OPP investigation, allegations by a City employee of reprisals for co-operating with the Inquiry, a blackout which resulted in the closing of this building to the public, and two court challenges. Court challenges are not unusual in public inquiries and, indeed, are often part of the reason for the length of public inquiries.

None of these interruptions, however, stopped our investigations. Throughout this time, Commission Counsel continued to investigate; new documents emerged, and new issues and questions continued to arise.

My Terms of Reference required me not only to investigate but also to make recommendations to improve the government of the City of Toronto. One can debate which is more important to the public: the hearings themselves or the recommendations. Either way, we all recognize that these hearings have given us a rare chance to see deep inside our City to see how it operates, and to suggest improvements. As a professor recently said, the Inquiry put local government "on the operating table".

Prompted perhaps in part by our public hearings in this Inquiry, a very active public discussion of good government issues occurred during the municipal election campaign. As a result, I decided to accelerate the good government phase of the Inquiry so that the new mayor and Council would have the benefit of our information early in their mandate. I have since provided the Mayor and each member of City Council with a compact disk that assembled all the good government materials, research, and testimony that the Commission had compiled.

NOTES FOR A SPEECH
BY THE HONOURABLE MADAM JUSTICE DENISE BELLAMY
COMMISSIONER

AT THE OPENING OF
THE TORONTO EXTERNAL CONTRACTS INQUIRY
ON MONDAY, OCTOBER 18, 2004

Good Morning. Welcome to the Toronto External Contracts Inquiry. This is the second of two Judicial Inquiries that Toronto City Council has asked me to conduct. Let me briefly review how these Inquiries came about.

The first, the Toronto Computer Leasing Inquiry, was established in February 2002 by a unanimous vote of City Council. Then eight months later, in October, City Council voted to expand that Inquiry's mandate. It had become apparent that the Terms of Reference of the first Inquiry were not sufficiently broad to allow me to examine other areas over which City Council had concerns. As a result, City Council then established this second Inquiry, the Toronto External Contracts Inquiry.

Both Inquiries had been set up before the last municipal election in November, 2003. Partly as a result of this, after the election, I wrote to the new Mayor and City Council. I indicated that I was fully prepared to discharge my mandate under the second Inquiry, but before doing so I invited them to revisit whether they still wished me to proceed with it. My letter to the Mayor is available on our website at www.torontoinquiry.ca. City Council considered the matter on two occasions and ultimately voted 34 to 4 for me to proceed with the Toronto External Contracts Inquiry, and this is what we are doing today.

Both Inquiries have separate terms of reference and deal with separate transactions. The mandate of the first was 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 Corporation. The hearings of that Inquiry were completed two weeks ago.

While the issues I am to address in the Inquiries are inter-related and many of the witnesses are the same, the mandate of the Toronto External Contracts Inquiry is broader. The first Inquiry focused mainly on leasing contracts; the second will look at three different transactions and will provide an added perspective on the transactions dealt with in the first. Indeed, all the activities we will examine in this second Inquiry arose before the events that lead to the first Inquiry. The combination of both Inquiries constitutes perhaps an unprecedented look at municipal governance.

The Terms of Reference for the Toronto External Contracts Inquiry are posted on our website. Briefly summarized, I am to examine how consultants were hired,

how they were paid, how their contracts were managed and how existing rules were followed. I will explore why and how the tax system of the former City of North York came to be adopted by the City of Toronto following amalgamation. I will look into how Dell Computer Corporation came to win the Request for Proposal regarding desktops and servers which immediately preceded the MFP leasing Request for Quotations, about which we heard so much in the first Inquiry. I will hear evidence concerning the City's transactions with consultants from Saunders & Associates, Beacon Software Inc., Beacon Software Revenue Systems LLC, Remarkable Software, Inc., and Ball Hsu & Associates Inc.

As I have mentioned on other occasions, I will be writing only one report. That report will contain recommendations based on the evidence I heard in both Inquiries.

I have frequently referred to what a public inquiry is and what it is not. As we start a new public inquiry, it bears repeating. A public inquiry is not a trial. No one is charged with a criminal offence and no one is being sued civilly. A public inquiry investigates and reports on matters of substantial public interest. Its role is to educate, to make recommendations on preventing similar problems in the future and to restore confidence in public institutions.

Another important point that bears repeating is that not all the evidence can be presented at once. I would ask everyone to reserve judgment and not to arrive at conclusions until they have heard all the evidence. This caution is particularly important in this Inquiry which is, in a sense, three unrelated inquiries in one, but some witnesses have important evidence to give in more than one segment. Where possible, I prefer to call witnesses only once. They will testify where they have the most evidence to give, and at that time, they will tell us about all the transactions they were involved in.

As in the first Inquiry, I remain committed to open and public hearings and to the accessibility of information about the proceedings. The public can follow the hearings through the media, through our web page where transcripts are available each evening and by attending here. The media have thoroughly covered the first Inquiry. We have seen issues examined here become part of the discussion during last year's municipal election, and some have already contributed to changes at city hall.

Public Inquiries cost money. They are expensive. It takes time to get to the bottom of things. However, as I have mentioned before, I am always mindful of the cost of these Inquiries to the Toronto taxpayer. Sometimes my commitment to controlling costs has placed a lot of pressure on all those involved, and especially on my Commission Counsel and staff.

We have taken several new major steps tailored to this Inquiry that will save time and money. These should enable us to proceed expeditiously without compromising the integrity or thoroughness of the Inquiry.

In a commendable demonstration of co-operation between Commission Counsel and counsel for the parties with standing, we were able to prepare a Statement of Non-Contentious Facts, consisting of 235 paragraphs in over 70 pages. This Statement provides a factual outline of many events and transactions. It will save a considerable amount of time at the Hearings. As well, there are a number of uncontested affidavits. Additionally, in a further display of co-operation, we are able to introduce today one exhibit containing affidavits from most of the witnesses who will be testifying during the first segment of the Inquiry. We hope to be able to do the same for the other segments. Also, I have asked Commission Counsel David Butt to present an Opening Statement to assist us all to follow the evidence by outlining a framework of key events and by identifying issues that the evidence will address. These initiatives combined will help put the evidence into context, will speed up the presentation of evidence, and will result in reduced cost to the Toronto taxpayers.

Finally, I want now to deal with three applications for standing which we have received since I granted standing to six parties on November 6, 2002. On October 6, 2004, we received two more applications for standing: one from Ms. Lana Viinamae and one from Ms. Margo Brunning; on October 14, 2004 we received an application from Mr. Jeffrey Lyons.

Both Ms. Viinamae and Mr. Lyons had standing at the Toronto Computer Leasing Inquiry. Further to Rule 11.1 of our Rules of Procedure, people with standing at the Toronto Computer Leasing Inquiry shall, upon request, be granted standing in the Toronto External Contracts Inquiry to the extent that I determine that evidence at this Inquiry may engage their substantial and direct interest. I am satisfied that both Ms. Viinamae and Mr. Lyons have such an interest in the matters that are before this Inquiry. Accordingly, I grant them full standing at this Inquiry.

Margo Brunning is the former Director of Taxation for the former City of North York, and was later employed as the Manager, Collections/Receivable, Payments and Regional Customer Service in the amalgamated City of Toronto. She was involved in the creation, development and implementation of TMACS, and was actively involved in the evaluation of the tax systems, TMACS and TXM 2000. Based on these roles, Ms. Brunning asserts that she has a direct and substantial interest in the subject matter of the Toronto External Contracts Inquiry. Ms. Brunning's interests may well be directly and substantially engaged. Accordingly, I grant her full standing at the Toronto External Contracts Inquiry. The letters from counsel for these three individuals should be the next exhibits.

I will now call on Commission Counsel, David Butt to give a brief opening statement.

Commissioner's Statement on Final Submissions and Media Access (Dec 7, 2004)

The deadline for final submissions in the Toronto Computer Leasing Inquiry was yesterday, Monday, December 6, at 4 p. m. The Inquiry has received many submissions, comprising many hundreds, indeed thousands, of pages.

I want to take a few minutes to make a direction concerning media access to these submissions.

When I granted the city's request for an adjournment regarding the delivery of the submissions, I announced that our intention was to make the submissions received available to the public on our website shortly after we received them, and in any event we would try to have them up by the morning of Friday, December 10. We will do that. All submissions received will be posted on our website as early as possible Friday morning, but in any event no later than 9 a.m. All submissions will be made available to the public at the same time.

In the interim, I am directing that no one make their submissions available to the media before they appear on the Inquiry website.

I am making this direction for an important reason. One party to this Inquiry has encountered serious technical difficulties in the production of its submissions that has delayed the party's ability to provide them to me. In these circumstances, I believe it would be unfair if any submissions appeared in the media before the submissions of all parties have been filed. I am reluctant to interfere with the ability of parties to the Inquiry to conduct responsible media relations as they see fit. However in these unique circumstances it is necessary to do so to protect against any possible unfairness or appearance of unfairness. The media will have full access to all submissions on Friday.

Commission counsel will be notifying all parties by e-mail of this direction. To further protect against any appearance of unfairness, Commission Counsel will not be circulating the submissions among the parties until all have been received.

NOTES FOR A SPEECH
BY THE HONOURABLE MADAM JUSTICE DENISE BELLAMY
COMMISSIONER

AT THE CLOSING OF
THE TORONTO EXTERNAL CONTRACTS INQUIRY
AND THE COMPLETION OF THE TORONTO COMPUTER LEASING INQUIRY
AND THE TORONTO EXTERNAL CONTRACTS INQUIRY
ON THURSDAY, JANUARY 27, 2005

Today we come to the end of a long process. It is almost exactly three years ago that Toronto City Council by a unanimous vote created the Toronto Computer Leasing Inquiry, and over two years ago that they created the Toronto External Contracts Inquiry. Hearings for the first Inquiry ended on September 29, 2004 and today marks the end of the second one.

This is the only instance of which I am aware that has seen a judge conduct two separate inquiries at exactly the same time. Managing the two Inquiries has presented many challenges to me and my staff. It has significantly affected the budget, and it will influence the way in which I write the Report.

Completing the investigation and hearings for the two Inquiries has been a lengthy process. The City initially expected the first Inquiry hearings to take only 40 days, partly on the assumption that it would involve just one file cabinet of documents. And, of course, the City could not have known then that it would be establishing a second Inquiry, which necessarily led to an increase in time and budget.

Part of my Terms of Reference called for recommendations to improve the government of the City of Toronto and I convened a special phase to deal with that. We covered four general categories: conflict of interest, lobbying, procurement and municipal governance. I heard presentations from 41 individuals with expertise in municipal government. By the way, each of them generously participated without charging a fee. I gave the Mayor and each member of City Council the material and testimony from this phase of the Inquiries. This is also available on our website at www.torontoinquiries.ca.

Now, here we are, almost three years later, after thousands of hours of investigation, 214 days of hearings, 124,000 pages of documents, 156 witnesses, some of whom testified in both Inquiries, 22 parties with standing and over 60 lawyers.

The machinery of an inquiry – the investigations, the lawyers, the staff and office space – is an expensive proposition. I have been mindful of the cost to the Toronto ratepayer. In fact, in December 2003, I wrote to Mayor David Miller asking whether the new Council still wished me to proceed with the Toronto External Contracts Inquiry. City Council decided that I should continue and I did so.

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My commitment to controlling costs placed great pressure on all those involved, especially on Commission Counsel and staff. This was particularly evident in the second Inquiry, which we completed in less than half the time allotted. Instead of 70 days of hearings, we had 34. Commission Counsel tightened the presentation of evidence by carefully focusing on essential points, culling the witness list and making extensive use of affidavits – a technique we found highly successful in the first Inquiry. Counsel for the witnesses and parties with standing helped the process greatly by their co-operation. Many thousands of pages – almost 54,000 – were gathered for the second Inquiry, but we were able to reduce the number introduced into evidence to just under 6,500.

This provides you with some insight into the enormous effort behind the scenes that resulted in this second Inquiry coming in under the estimated time and budget. I am satisfied that the efficiencies gained did not at all compromise our ability to scrutinize the evidence or to get at the truth.

To date, our cost for both Inquiries is approximately $9.5 million.

The hearings for both Inquiries have ended, but the work is not over. Written closing submissions for the Toronto External Contracts Inquiry are due on February 28th. Parties wishing to reply to them orally will do so beginning the week of March 14th. Alternatively, parties may reply in writing. Written reply submissions are due by March 21st. The City's materials on Good Government are due by March 29th.

Even after that, my own work will be far from over. I have to write my Report, a Report that is to shed light, to the fullest extent possible, on what happened and to make useful recommendations.

As you can imagine, this will be a mammoth task. I have to consider and pass judgment on each person's evidence. I have to weigh each fact and each statement, using the insight that the more than two years of testimony have given me. I obviously have to decide the credibility of some of the testimony. In short, I have to put a mountain of evidence under a judicial microscope, and carefully dissect it all.

Judges do this all the time, but they usually do it at trials. As I have said many times before, though, a public inquiry is not a trial. Public inquiries assess what went wrong and make recommendations for improvements. They aim to maintain, improve or restore confidence in public institutions. Lawyers who work for an inquiry are different from lawyers at a criminal or civil trial. The role of Commission Counsel is not adversarial. They are not prosecutors. They represent the public interest in a very different way.

As the Commissioner, I am not to find anyone guilty of a criminal offence, nor am I to establish any civil responsibility for damages. Having said that, I fully intend to share my views about what happened. The public rightly expects me to do so. Where I find defects, I will make realistic and practical recommendations to prevent a recurrence.

I have said that these Inquiries required an enormous amount of effort. Ultimately, it will be for others to assess the value of that effort, but I think it can be stated without reservation that our proceedings have raised public awareness of the workings of municipal government.

3

I know that City officials have been paying close attention to the proceedings. During the good government phase, I heard evidence from the Chief Administrative Officer of Toronto, Ms. Shirley Hoy, about changes the City has made to address the issues examined during the first Inquiry. More recently, the City has embarked on a process of administrative review, guided in part by our proceedings. I am pleased that the City has already implemented some changes and I continue to encourage their efforts. I have asked the City for a complete update on the changes they have made since I heard from Ms. Hoy during the good government phase, and I look forward to reviewing that update. I hope that my findings and recommendations will provide the impetus for positive change to continue.

During both Inquiries, I have been committed to fairness, efficiency, openness and public accessibility. Our Rules of Procedure were written in plain language. We created a website. This gave the public access to rulings, witness lists, transcripts each day and other important information. The Toronto media gave both Inquiries extensive coverage, which helped to focus public attention on the issues. That coverage also served to accentuate in my mind the importance of the media's role in public inquiries. In keeping with our practice, Commission Counsel will continue to be available to provide information and to answer questions, now and in the months to come when I am writing my Report.

In closing, I want to thank a number of people. First, I would like to thank the people of East York who generously made available the community's Civic Centre. Also, a number of citizens have been present for many, many days of the hearings. I want to thank you all for your interest.

Next, I want to thank the many people who have made it possible for me to conduct these Inquiries. In alphabetical order, they are: Zachary Abella, Barrie Attzs, Ronda Bessner, Bill Blake, David Butt, Brian Clarke, Julie Dabrusin, Anne Dancy, Jodie Graham, Daina Groskaufmanis, David Henderson, Heather Hogan, Beverley Kozak, Ron Manes, Julia Milosh, Patrick Moore, Leanne Notenboom, Peter Rehak, Clita Saldanha, Djordje Sredojevic, Christopher Thiesenhausen, and Ljiljana Vuletic; and in the hearing room: Kevin Best, Carol Geehan, Robert Gray, Joyce Ihamaki, Bernie Sandor, Janet Smith and Cam Wheeler.

I also want to acknowledge the important contribution of the many lawyers for the witnesses and the parties with standing. And lastly, I want to thank our spouses, families and friends for their encouragement and sustenance throughout these past three years.

Let me conclude by observing that we in Toronto have good reason to care deeply about our municipal government. In many respects, this level of government has the most immediate impact on our day-to-day lives. Many fine people work for the City. I know their morale has been shaken by the Inquiries' roving searchlight on some of the inner workings of the City. People working hard at their jobs every day have felt the sting of the public's critical gaze. When I deliver my Report, I hope that my recommendations will go some way to improving the public's confidence in municipal government and to improving the functions of our City. I hope, too, that it will provoke vigorous discussion about how best to continue to improve a level of government that matters to us all. I expect to deliver my Report after Labour Day.

ONTARIO PROVINCIAL POLICE ----------

General News, Thursday, November 21, 2002

No Charges in OPP Investigation of MFP Allegations

Canada NewsWire

TORONTO - The Ontario Provincial Police, Criminal Investigation Branch, has concluded its investigation into an allegation of a possible criminal wrongdoing concerning the leasing of computers to the City of Toronto.

On Sept. 26, 2002, Madam Justice Denise Bellamy, Commissioner of the Toronto Computer Leasing Inquiry, requested the OPP conduct a criminal investigation into one specific allegation that a sum of money may have been requested or offered to secure a computer leasing agreement in the City of Toronto.

Four OPP investigators worked full time on this matter and have interviewed and taken statements from all concerned parties.

The OPP has now forwarded its report to the commission counsel indicating there is no basis for criminal charges in relation to this matter. The Inquiry, scheduled to begin Sept. 30, was delayed pending the outcome of the OPP investigation. It is scheduled to resume Dec. 2, 2002.

"We are sensitive to the fact that there has been a great deal of public anxiety and rumour concerning this recent matter, however, the OPP criminal investigation has concluded that based on the information received no criminal act occurred in the allegation we were asked to investigate," D/Supt. Ross Bingley said.

The investigation into this specific allegation as requested by Madam Justice Bellamy is separate from one being conducted by the OPP Anti-Rackets Section into campaign contributions. That investigation is still ongoing.

Note(s): For further information: Contact: D/Supt. Ross Bingley, OPP Criminal Investigation Branch, (705) 329-6331

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 Viinamae 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. Viinamae 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 pubic 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

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

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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.

Toronto Computer Leasing Inquiry

The Honourable Denise Bellamy, Commissioner

Ruling on Standing

BACKGROUND

Today, I released a decision regarding who would be granted Standing at the Toronto External Contracts Inquiry. That ruling made reference to certain parties with standing at the Toronto External Contracts Inquiry also making application to have standing at the Toronto Computer Leasing Inquiry. My decision can be found on our website at www.torontoinquiry.ca under Legal Information.

For ease of reference in the Toronto Computer Leasing Inquiry, I duplicate what I said in the ruling at the Standing Hearings into the Toronto External Contracts 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."

Written applications for Standing received on:	November 1, 2002
Oral applications for Standing heard on:	November 5, 2002
Decision Released on:	November 6, 2002

TORONTO EXTERNAL CONTRACTS INQUIRY

The Honourable Denise E. Bellamy, Commissioner

Ruling on Application for Particulars by Ball Hsu & Associates Inc.

BACKGROUND

In early 2002, Toronto City Council voted to use the power granted by s. 100 of Ontario's *Municipal Act,* R.S.O. 1990, c. M. 45 (now s. 274, S.O. 2001, c. 25) to hold a judicial inquiry into its computer related dealings with MFP Financial Services Ltd., and the City's acquisition of Enterprise Licences from Oracle Corporation. That inquiry is the Toronto Computer Leasing Inquiry, or TCLI. In the fall of 2002, City Council voted to hold a second but closely related inquiry into other City dealings with external suppliers of computers and related services. The second inquiry is the Toronto External Contracts Inquiry, or TECI. Part of the Terms of Reference of TECI require me to examine the City's dealings with Ball Hsu and Associates Inc., a company that has, in recent years, provided information technology consultants and expertise to the City of Toronto.

On February 14, 2003, I heard an application for particulars by Ball Hsu and Associates Inc. and Mr. Ball Hsu personally. An "application for particulars" is a procedure generally used in civil or criminal proceedings where parties or accused persons, as the case may be, contend that there is not sufficient detail in the allegations against them to allow them to respond properly. They usually seek either a dismissal of the proceedings or a decision from the Court ordering the other side to provide them with information that is more detailed so that they can respond properly.

The Applicants assert that the Toronto City Council TECI Resolution does not contain the level of detail that the law requires. Arguments by all counsel are on our website, www.torontoinquiry.ca under Transcripts/Inquiry Transcripts/TECI/Toronto External Contracts Inquiry, February 14, 2003.

CONCLUSION

The Application is dismissed for the reasons that follow.

JURISDICTION

The Applicants stated their position in different ways in their written material, and in oral argument.

In the Notice of Application, the Applicants sought "an order directing particulars":

- "Setting out what circumstances surrounding the selection of Ball Hsu and Associates to provide consulting services to the City of Toronto were relied upon by the Council of the City of Toronto to suppose a malfeasance, breach of trust or other misconduct"; and
- "Setting out what it is about the circumstances surrounding the selection of Ball Hsu and Associates to provide consulting services to the City of Toronto that affects the good government of Toronto or the conduct of its public business".

In oral argument, the Applicants further developed their position. They asked:

- that Commission counsel inform Ball Hsu and Associates Inc. why they recommended that Ball Hsu and Associates Inc. be included in TECI (*Transcript of Oral Argument, p. 54*);
- that the City inform Ball Hsu and Associates Inc. why they were included in TECI (*Transcript of Oral Argument, p. 55*); and

- that I direct Commission counsel to ask or direct the City to insert a preamble in the Terms of Reference which particularizes the City's concerns in a format similar to that which appeared in the TCLI Resolution (*Transcript of Oral Argument, pp. 19, 20, 37, 44, 78*).

If the Applicants assert that the TECI Resolution lacks sufficient detail so as to fall outside the power granted to the City by s.100 of the *Municipal Act,* they raise an issue I have no jurisdiction to decide. In *MacPump Developments Ltd.* v. *Sarnia* (1994), 20 O.R. (3d) 755 (C.A.) 761, the Court of Appeal held that "any exercise of a municipality's statutory powers is judicially reviewable, at least to the extent of determining whether that exercise is *intra vires* the municipality". Judicial review in these circumstances is to the Superior Court of Justice: ss.1 and 2 of the *Judicial Review Procedure Act,* R.S.O. 1990, c.J.1.

If the Applicants seek a mandatory order that the City provide further detail in the TECI Resolution, then again they seek more than I have jurisdiction to grant. As a Commissioner, I do not have the jurisdiction to order the City to do what the Applicants seek.

On the other hand, assuming as I must, that the TECI Resolution is legally valid, I have jurisdiction to request, not order, that the City provide additional information to assist the Inquiry. This jurisdiction flows from the duty and broad discretion of commissioners to ensure that persons affected by commissions of inquiry be treated fairly according to the principles of natural justice. On the duty and broad discretion to ensure fairness, see, for example, the decision by the Supreme Court of Canada in *Consortium Developments Developments (Clearwater) Ltd.* v. *Sarnia (City),* [1998] 3 S.C.R. 3.

THE DIVISION OF RESPONSIBILITY BETWEEN MUNICIPALITIES AND COMMISSIONERS

In my view, the position of the Applicants overlooks the key distinction made by the Supreme Court of Canada in *Consortium Developments*. At paragraph 28 of

the judgment, the Court emphasized the "distinction between the requirements for a valid exercise of the s.100 power to establish an inquiry, on the one hand, and the procedural protections to which ... [parties to an inquiry] are entitled in the course of an inquiry once validly established on the other hand". This distinction is important and is instructive on the issue of particulars. It divides responsibilities between the municipalities that establish commissions of inquiry and the commissioners who conduct them.

THE RESPONSIBILITIES OF MUNICIPALITIES

To understand the division of responsibility between a municipality establishing a s.100 inquiry, and a commissioner conducting it, one must keep in mind that s.100 inquiries are at their core judicial investigations. They seek understanding of events not fully understood. As a result, one cannot expect a municipality establishing a judicial inquiry to set out with particularity or detail the problems that led to the creation of the inquiry in the first place. As the Supreme Court of Canada said in *Consortium Developments* 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".

On the other hand, commissions of inquiry respond to issues of public concern. They are expensive. They can generate intense media interest. They can affect reputations. Indeed, the Supreme Court has recognized the possible effect of inquiries on reputations: *Canada (Attorney General)* v. *Canada (Commission of Inquiry on the Blood System in Canada - Krever Commission)*, [1997] 3 S.C.R. 440, paragraph 39. The Court accepted the observations of Décary, J.A. in the Federal Court of Appeal [1997] FCJ No. 17 (QL) paragraph 35:

> It is almost inevitable that somewhere along the way, or in a final report, such an inquiry will tarnish reputations and raise questions in the public's mind concerning the responsibility borne by certain individuals. 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 for this reason that the Supreme Court has ruled that a municipality cannot "trample on the rights of … persons with whom it has done business": *Consortium Developments,* paragraph 30.

A municipality that establishes an inquiry must set some limits to prevent trampling on the rights of those who might be affected. How has the Supreme Court defined those limits? In *Consortium Developments* (paragraph 28), the Court mandates that a resolution that establishes a s.100 judicial inquiry set out the subject matter of the inquiry in an "intelligible" way, and must connect that subject matter to one or more of the following three areas in s.100 of the *Municipal Act*:

- malfeasance, breach of trust, or other misconduct by anyone connected to the municipality;
- the good government of the municipality;
- the conduct of its public affairs.

Specifically, this means that the TECI Resolution must convey intelligibly the subject matter of the Inquiry. (The full Terms of Reference of TECI are attached at Schedule "A".) Paragraph 4 of the Resolution, and the final paragraphs numbered 2 and 3, do just that. Paragraph 4 says the Inquiry must look into "all of the circumstances surrounding the selection of Ball Hsu & Associates Inc. consultants to provide consulting services to the City of Toronto". This clearly states a subject matter with specific limits. The Resolution then lists eight intelligible and limited areas of particular concern. They are:

1. whether "expenditures relating to consultants were accurately reported" 4(a);

2. whether "the need for consulting services was appropriately determined, justified and documented" 4(b);

3. whether "consulting services were awarded based on sound business practices and in accordance with established procurement by-laws, policies and procedures" 4(c);

4. whether "adequate justification existed for waivers from required procedures" 4(d);

5. whether "consulting contracts were effectively managed to ensure the contract deliverables were achieved, expenses incurred were reasonable and justifiable, and "value for money" was obtained" 4(e);

6. whether "payments were made in accordance with the terms of the contract" 4(f);

7. "the relationships, if any, between the existing and former elected and administrative representatives of the City of Toronto" and the Applicants: paragraph 2; and

8. "any professional advice obtained by the City of Toronto in connection with" Ball Hsu and Associates Inc.: paragraph 3.

The TECI Resolution must also connect its subject matter with one of the areas in s.100 of the *Municipal Act*. This connection has been made. To take but one example, item six, above, from the TECI Resolution is whether "payments were made in accordance with the terms of the contract". If either a consultant, or the City of Toronto with whom the consultant conducts business, does not pay in accordance with a contract it has entered into, then the conduct of the City's public affairs, and possibly the good government of the City, is compromised. Further, depending on how and why payments were not made, there may also be malfeasance, breach of trust, or other misconduct by someone connected to or dealing with the City.

7

The Supreme Court in *Consortium Developments* at paragraph 40 said the following about the municipal Resolution that was the subject of consideration:

> The s.100 Resolution in this case is perfectly intelligible. It identifies not only what is to be inquired into but the limits of the municipality's interest. The subject matter of the inquiry as set out in the … Resolution is a matter of legitimate concern within the ambit of the matters referred to in s.100.

In my view, the same can be said about the TECI Resolution. Indeed, a comparison of the two leads to the conclusion that the TECI Resolution was closely modelled on the *Consortium Developments* Resolution. A further detailed comparison of this Application with the appellants' contention in *Consortium Developments* shows a striking similarity in the legal arguments in both hearings. The Supreme Court interpreted the appellants' complaint (which is in essence the same as that before me) as an attempt "to limit the inquiry to particulars the municipality already knows about, if indeed there are any such particulars" (paragraph 35). The Court concluded that section 100 "does not compel a municipality to advance more extravagant allegations than it is ready, willing and able to make" (paragraph 35). In any case, when read in its entirety, the TECI Resolution makes it abundantly clear that the City requires me to inquire into the public business between the Applicants and the City of Toronto.

In oral argument, the Applicants directed much of their concern at the absence in the TECI Resolution of allegations of wrongdoing by them. In the Applicants' submission, if the City cannot particularize alleged malfeasance by them, the City should not draw them into the Inquiry.

One naturally empathizes with those who find participating in a public inquiry to be difficult. It is rarely enjoyable to have one's conduct closely scrutinized in a public forum. I accept without question that those in the Applicants' position face discomfort.

However, empathy for the difficulties faced by inquiry participants cannot limit the scope of these inquiries by leading to a rule that a municipality must allege specific misconduct before including anyone in an inquiry mandate. Indeed, the authorities say the contrary. Allegations of misconduct are not required. The Supreme Court in *Consortium Developments* held at paragraph 29 that a s.100 Resolution "is not a pleading, much less is it a bill of indictment". The Court of Appeal in the same case put the point even more plainly (1996), 30 O.R. (3d) 1 (C.A.) at 22:

> The resolution does not need to spell out specific allegations for the commissioner to understand the potential problem areas that might be related to the public interest.

The logic of these authorities is as compelling as their language is clear. One should not expect detailed allegations to precede a proper investigation. To do so would cripple an investigation before it begins. As the Supreme Court noted in *Consortium Developments* at paragraph 30:

> Aspects of procedural fairness, *such as the need for particulars*, should not defeat an inquiry at the outset *unless it is concluded that in the particular circumstances of the case a fair inquiry simply cannot be had based upon the wording of the particular resolution under consideration.* Otherwise the inquiry should be allowed to proceed, and procedural objections dealt with at a later stage when the Commissioner has had an opportunity to consider the fairness issues and deal with them. [Emphasis added]

Further, s.100 of the *Municipal Act* is very broad, and has application to any matter related to good government of the municipality or its public business. To insist that misconduct allegations define all legitimate inquiries from the outset is to prune away vital branches of s.100. As stated by the Supreme Court in *Consortium Developments* at paragraph 36:

> It is evident that an inquiry under the second branch of s.100 into an item of public business may disclose misconduct. Equally, an

> inquiry under the first branch may look into "supposed malfeasance", and discover the conduct was entirely innocent, but ought nevertheless to result in recommendations for the good government of the municipality. While it may therefore be useful for some purpose to think of s.100 as having two branches, it is but a single power, and the preconditions for its valid exercise to establish a judicial inquiry do not vary with the subject matter. A more compartmentalized interpretation would undermine the utility of the power and contradict the broad legislative intent evident on the face of s.100.

Practical considerations likewise show it is inappropriate to ask the City for specific allegations of misconduct against the Applicants. Any allegations the City might provide would simply express the City's position based on the incomplete information before it. When a municipality establishes an inquiry, it is not required to allege misconduct. Indeed, it might be unwise to do so, as the allegations clearly could not compromise the Inquiry's independence by specifying in advance conclusions the Inquiry must reach. The City is quite properly sensitive to this point, as the Terms of Reference specifically state that particular enumerated subjects of interest to the City are not to be taken as "infringing on the Commissioner's discretion in conducting the inquiry in accordance with the terms of reference stated herein". Thus, whether or not the City provides allegations, the Inquiry must still conduct the same careful and impartial investigation of all the matters in the TECI Resolution. Section 100 states that the judge "shall" conduct the inquiry as requested by a municipal council.

In short, asking the City for specific allegations of misconduct cannot alter the focus of this Inquiry. On the other hand, misconduct allegations that support only some parts of the TECI Resolution might be seen to imply that those parts not supported by allegations are of no concern. Therefore, requesting details from the City might improperly limit the Inquiry contrary to the public interest as expressed in s.100. of the *Municipal Act*.

The Applicants filed an affidavit describing the material Toronto City Council had before it when it passed the TECI Resolution. The affidavit is offered to try to shed some light on what was or was not Council's underlying reason for including the Applicants in the TECI Resolution.

The Applicants' affidavit material addresses an issue that the Supreme Court in *Consortium Developments* has rejected as unhelpful. The Appellants in that case submitted that evidence of the intent of individual members of the Sarnia City Council was admissible to show the true purpose of the Resolution at issue. The Court at paragraph 45 rejected this submission:

> The motives of a legislative body composed of numerous persons are "unknowable" except by what it enacts. Here the municipal Council possessed the s.100 power and exercised it in the form of a resolution which speaks for itself. While some members of the present or previous Sarnia Council may have made statements which suggest a desire to unmask alleged misconduct, the inquiry will not be run by city councillors, but by Commissioner Killeen, a Superior Court Judge, who will take his direction from the s.100 Resolution, not from press reports or comments of some of the city politicians.

In this Inquiry, I too must be guided by the wording of the TECI Resolution rather than secondary material.

THE RESPONSIBILITIES OF A COMMISSIONER

As described above, the Supreme Court in *Consortium Developments* defined a crucial division of responsibility between municipalities that establish inquiries, and commissioners who conduct them. The Applicants appear to have intermingled the conceptual distinctions emphasized by the Supreme Court of Canada in *Consortium Developments:* the distinction between "legislative validity and the fair inquiry interests of the participants" (paragraph 30).

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I have already commented on the responsibilities that fall within the purview of the City of Toronto. I will now examine the other side of the division of responsibility, that of a commissioner of an inquiry.

In the course of conducting a s.100 judicial inquiry such as this one, a commissioner must be guided by the principles of procedural fairness and natural justice.

On several occasions so far, I have publicly stressed that inquiries are not civil or criminal trials, and that a commissioner is not to find anyone guilty of a criminal offence nor to establish civil responsibility for damages. I have repeatedly asked the public to keep an open mind when they hear the evidence because these inquiries will take time to fully unfold and the strict rules of evidence governing trials in our courts do not apply. The Supreme Court recognized the inherent difficulty of the public inquiry process when it said the following:

> Unlike an ordinary lawsuit or prosecution where there has been preliminary disclosure and the trial proceeds at a measured pace in accordance with well-established procedures, a judicial inquiry often resembles a giant multi-party examination for discovery where there are no pleadings, minimal pre-hearing disclosure (because commission counsel, at least at the outset, may have little to disclose) and relaxed rules of evidence. The hearings will frequently unfold in the glare of publicity. Often, of course, at least some of the participants will know far in advance of commission counsel what the documents will show, what the key witnesses will say, and where "misunderstandings" may occur. The inquiry necessarily moves in a convoy carrying participants of widely different interests, motives, information, involvement, and exposure. It is a tall order to ask any Commissioner to orchestrate this process to further the public interest in getting at the truth without risking unnecessary, avoidable or wrongful collateral damage on the participants. *Consortium Developments*, paragraph 41.

Inquiries are given the responsibility of establishing their own rules. We did just that. We invited those who obtained standing to comment on the draft Rules of

Procedure before we implemented them. As s.5(2) of the Ontario *Public Inquiries Act*, R.S.O. 1990 c. P.41 (the misconduct section) does not apply to a section 100 inquiry, we specifically incorporated that section into Rule 35 so that there would be no confusion about this Inquiry's clear intention to be bound by principles of natural justice.

No specific misconduct is alleged against the Applicants in the Terms of Reference. It may happen that in the course of the inquiry, misconduct is disclosed. Equally, as noted in *Consortium Developments*, an inquiry looking into supposed malfeasance may "discover the conduct was entirely innocent, but ought nevertheless to result in recommendations for the good governance of the municipality" (paragraph 36).

In the event that misconduct is alleged against the Applicants during the course of the Inquiry, the Applicants are clearly entitled to particulars. How and when the Commission must provide details of any alleged misconduct has been fully canvassed by the Supreme Court in the *Blood Inquiry* decision.

There is no requirement that the Commission provide the Applicants with particulars at this early stage of the Inquiry. Our procedural obligations are found in the *Municipal Act,* Part II of the Ontario *Public Inquiries Act,* our Rules of Procedure, and the common law requirements of procedural fairness and natural justice.

At the Blood Inquiry, the Commissioner issued confidential notices of alleged misconduct on the final day of scheduled hearings. The Supreme Court upheld the notices, stating the following at paragraph 69:

> There is no statutory requirement that the commissioner give notice as soon as he or she foresees the possibility of an allegation of misconduct. While I appreciate that it might be helpful for parties to know in advance of the findings of misconduct which may be made

> against them, the nature of an inquiry will often make this impossible. *Broad inquiries are not focussed on individuals or whether they committed a crime; rather they are concerned with institutions and systems and how to improve them.* It follows that in such inquiries there is no need to present individuals taking part in the inquiry with the particulars of a "case to meet" or notice of the charges against them, as there would be in criminal proceedings. Although the notices should be given as soon as it is feasible, it is unreasonable to insist that the notice of misconduct must always be given early. There will be some inquiries, such as this one, where the Commissioner cannot know what the findings may be until the end or very late in the process. So long as adequate time is given to the recipients of the notices to allow them to call the evidence and make the submissions they deem necessary, the late delivery of notices will not constitute unfair procedure. [Emphasis added].

Rule 35 of this Inquiry encapsulates the essential principles in the foregoing passage of the Supreme Court decision. Therefore, the Applicants' procedural rights to fair notice of any alleged misconduct and a fair opportunity to respond flow from both the Supreme Court's decision and this Inquiry's Rules of Procedure.

Like the Krever Commission, TECI is a broad inquiry. It is centrally concerned with institutions and systems – those of municipal governance and municipal dealings with external contractors. Accordingly, as was the case at the Krever Commission, it may be well into the TECI hearings before I know whether any misconduct may have taken place. Further, there is nothing to suggest at this stage that any misconduct I might find would necessarily be by the Applicants. The TECI hearings are months away from beginning. In the interim, as I stated above, it is essential that this Inquiry, and for that matter, members of the public, not jump to hasty and ill-considered conclusions. I stated at the outset of the TCLI hearings in December, 2002:

> 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.

CONCLUSION

I conclude that the TECI Resolution conforms to the standard set by the Supreme Court of Canada and that Ball Hsu and Associates Inc. and Mr. Ball Hsu have sufficient details in the Terms of Reference. I have no jurisdiction to explain, revise, expand or limit the Terms of Reference established by the TECI Resolution. Equally, I have no jurisdiction to order the City to further develop the Terms of Reference. I do have jurisdiction to ask the City to further develop the Terms of Reference, but I see no shortcomings in the Resolution that might prompt me to send such a non-binding request to the City. There is nothing inadequate or unfair about the level of detail that the Applicants already have. A fair Inquiry can be conducted based entirely on the existing wording of this Resolution. Asking the City for particularized allegations of misconduct against the Applicants is contrary to the authorities, would serve no useful purpose and may have the unintended effect of undermining and limiting the operation of s.100 of the *Municipal Act* in the context of this Inquiry. Likewise, there is no need for me to direct Commission counsel to provide more details to the Applicants at this stage of the Inquiry.

As a matter of procedural fairness to the Applicants, allegations of misconduct relating to them are not warranted at this early stage in the TECI Inquiry.

The application is dismissed.

Application Heard on: February 14, 2003
Release of Decision: March 6, 2003

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SCHEDULE "A"

Terms of Reference – Toronto External Contracts Inquiry

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.)

TORONTO COMPUTER LEASING INQUIRY

The Honourable Denise Bellamy, Commissioner

Ruling on Standing

I have received an application for standing from Ms. Paula Leggieri. On behalf of Ms. Leggieri, Mr. Jim Orr is asking for limited standing to conduct cross-examinations during the segment of the hearing which is being held specifically to deal with the issues raised by Ms. Leggieri. Mr. Orr has indicated that he does not believe that his cross-examinations of the current City employees, including Kathryn Bulko, will substantially add to the length of the Inquiry. Indeed, his letter says that, if given limited standing, he will be getting directly to the issues.

Rule 8 of our Rules of Procedure provide that the Commissioner may grant standing to people who satisfy me 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 also determines on what terms standing may be granted.

This application for standing arises as a result of the investigation into allegations made by Ms. Leggieri. She alleges that she suffered adverse employment consequences because she cooperated with this Inquiry. As I indicated in my Ruling on April 8th this year, I take such allegations very seriously, because they impugn the validity and process of the Inquiry. The Rules of this Inquiry and the provisions of the *Public Inquiries Act* are specifically intended to encourage potential witnesses to come forward and assist in every way. In particular, employee witnesses are protected from any adverse employment action for co-operating with an Inquiry.

I do not agree with Mr. Orr that his client has a substantial and direct interest in the subject matter of the Inquiry. Ms. Leggieri's concern is the harm she alleges occurred as a result of her co-operation with the Inquiry. Ms. Leggieri's allegations relate to the procedural protections provided by our Rules and by the *Public Inquiries Act.* In essence, her allegations touch on the Inquiry's process, not the Inquiry's subject matter, which is specified in our Terms of Reference. See *Commissioner's Ruling on Standing and Funding*, July 3, 2002, TCLI.

Having said that, the absence of a direct and substantial interest does not by itself decide the matter of standing. The real question is whether Ms. Leggieri's participation as a party through counsel with limited standing will be helpful to me in fulfilling my mandate. I have concluded that her participation in a limited way will assist.

Our Rules do not give standing to everyone who is simply a witness. One can readily understand why. Witnesses do not need standing simply to give evidence. Practically speaking, it is not feasible to give every witness standing, nor would many of them

qualify for it under the applicable rules. Indeed, if every witness at an Inquiry received standing, inquiries would be unmanageable, and prohibitively expensive. Inquiries would cease to play their very important role in ensuring public accountability and good government.

Ms. Leggieri's circumstances, however, are unique. She is more than simply a witness. She is a witness who alleges her cooperation with the Inquiry caused her adverse employment consequences. This allegation strikes at the heart of the Inquiry process. To preserve the integrity of our process, we must explore her allegations. In these exceptional circumstances it may be helpful for me to have Ms. Leggieri's perspective as advanced by her counsel. For example, I expect that her lawyer's cross-examination will likely be informed by a perspective different from any other counsel who is going to cross-examine. I am comforted also by her counsel's undertaking to focus directly on the issues.

I am concerned, though, about extending the length of this Inquiry. The issue raised by Ms. Leggieri, while very important, takes us away from the subject matter contained in my Terms of Reference. I remain committed to fulfilling my mandate in a timely and cost-efficient manner. This approach applies equally to process issues and those issues directly within our Terms of Reference.

Therefore, I must set reasonable limits on the time and resources of this Inquiry that will be committed to the issue raised by Ms. Leggieri. These limits will apply to all counsel who intend to cross-examine. In setting these limits I have carefully considered Ms. Leggieri's allegations in her evidence before me, and the material and information in response which were made available to me through Commission Counsel.

Based on all the information available to me, I conclude that one week of Inquiry hearing time will be ample to address Ms. Leggieri's allegations in their entirety. During that week counsel are not to delve into issues related to the City of Toronto's Contract Management Office, the administration of the leases, or conduct or events surrounding changes to the leases. Witnesses, including Ms. Bulko and Ms. Leggieri, will be recalled at a later date to address those issues.

Ms. Leggieri will be granted limited standing to enable her counsel to cross-examine witnesses during the week devoted to Ms. Leggieri's allegations. I understand from Commission Counsel that Ms. Leggieri has already received documentary disclosure, after having executed our standard confidentiality agreement. As a condition of being granted this limited standing, I expect Ms. Leggieri and her counsel to cooperate fully with Commission Counsel, to ensure that nothing important is overlooked with respect to Ms. Leggieri's allegations.

I expect all counsel to cooperatively manage the presentation of relevant witnesses to fit within the one week allocated to this issue. Counsel are reminded that the purpose of direct and cross-examination is to help me make recommendations. I do not want to lose sight of that. There comes a point at which this purpose is not served by protracted or

repetitive cross-examination. The examination and cross-examination in this segment must be kept within reasonable bounds. If counsel are unable to agree I will assign time limits for each witness.

The one week of hearing time devoted to Ms. Leggieri's allegations will begin on Monday, June 16, and end on Thursday, June 19, 2003.

Written application for Standing received on: June 11, 2003
Decision Released on: June 12, 2003

Toronto Computer Leasing Inquiry

The Honourable Denise Bellamy, Commissioner

Ruling

Regarding Allegations made by Paula Leggieri

Introduction

Paula Leggieri was the Leasing Supervisor in the City of Toronto's Contract Management Office (CMO). The CMO was created in early 2000 to centrally manage the City's information technology needs. Ms. Leggieri worked full time administering the computer leases between the City and MFP Financial Services Limited (MFP). Performance appraisals show she did a good job. Her CMO manager was Kathryn Bulko.

As part of its mandate, this Inquiry must examine the CMO's work on the MFP leases. To that end, Commission Counsel interviewed numerous witnesses, including Ms. Leggieri who was interviewed on July 24, 2002. On April 9, 2003, Ms. Leggieri began her testimony at the Inquiry and made the following two serious allegations. First, Ms. Leggieri said Ms. Bulko threatened her. Ms. Leggieri alleges that before her interview with Commission Counsel, Ms. Bulko told her that if she did not tell Commission Counsel what Ms. Bulko wanted her to say, Ms. Leggieri would be in serious trouble. Second, Ms. Leggieri alleges she lost her position with the City because she co-operated with Commission Counsel, and with an investigation conducted prior to the establishment of the Inquiry by the forensic accounting firm KPMG.

If Ms. Leggieri's allegations are true, a staff member at the City has attempted to prevent a witness from fully disclosing to the Inquiry all relevant information. This would constitute very serious wrong-doing that would subvert the interests of justice and jeopardize the integrity of this Judicial Inquiry.

CONCLUSION

Because these allegations are so serious, I dedicated a week of Inquiry time to this issue. I am releasing this Ruling so that my decision will be known now, rather than await the release of the final report. A timeline of important dates is included in Appendix A. In these reasons, I will not discuss the CMO's role in the MFP transactions as all the evidence on this issue has not yet been tendered, nor have the lawyers submitted their final submissions to the Inquiry. I will deal with that in my final report.

I have concluded that Ms. Bulko did not threaten Ms. Leggieri, and that Ms. Leggieri did not lose her position at the City for co-operating with this Inquiry or with KPMG.

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Ms. Leggieri's Evidence in April 2003 and the Inquiry's Response

The allegations made by Ms. Leggieri in her April testimony are summarized by her lawyer as follows:

> Ms. Leggieri believed she had done a good job in the position of Supervisor of Computer Leasing.
>
> In the fall of 2002, Ms. Leggieri became very concerned she would lose her job as a result of discussions with her superior, Kathryn Bulko. Ms. Leggieri complained that she was unable to obtain a clear answer about the status of her employment for a number of months, despite written requests.
>
> Ms. Leggieri came to the conclusion that the problems with her employment and her inability to obtain a clear explanation from the City were connected both to her co-operation with Commission Counsel and her prior co-operation with KPMG.
>
> This belief stemmed, in part, from the fact that after interviews both with KPMG and Commission Counsel, she was aggressively "debriefed" by Ms. Bulko. Also, prior to the interviews, she had been threatened by Ms. Bulko with negative consequences if she told the interviewers about Ms. Bulko's involvement in the leasing program prior to 2000.
>
> Ms. Leggieri also testified she encountered difficulty in her dealings with MFP and that Kathryn Bulko was not helpful in resolving these issues, such as the discrepancies Ms. Leggieri discovered in the sale-and-lease-back schedules.
>
> Ms. Leggieri believed that Ms. Bulko's close relationship with Dash Domi of MFP was an obstacle to the resolution of these issues in an appropriate and professional manner.

Commission Counsel was not informed of the details of these allegations until a few days before Ms. Leggieri was scheduled to testify. After her testimony in April, Inquiry hearings were adjourned for a week. Hearings resumed on other matters while a comprehensive investigation took place. This process inevitably occasioned some disruption and delay, but I am satisfied it was necessary, as it enabled everyone to fully present their views on these serious allegations. Many witnesses were interviewed, and hundreds of additional documents were obtained and disclosed. Commission Counsel solicited Ms. Leggieri's input during the investigation. Her counsel conveyed information to Commission Counsel and identified a potential witness. That person testified.

Ms. Leggieri's testimony regarding these allegations resumed on June 16, 2003. The documents presented by Commission Counsel in June and Ms. Leggieri's response to them, contrasted starkly with her earlier evidence in April in which she stated that she lost her position at the City for co-operating with the Inquiry and KPMG. Documents filed in June, many of which were e-mails sent by Ms. Leggieri, show she was fully aware her position was disappearing as a direct result of the City's decision to end the computer leasing program. Ms. Leggieri's e-mails show she knew she needed to find another job. In all these communications, there is no suggestion of a threat by Ms. Bulko, or of retaliation by the City for Ms. Leggieri's co-operation with either this Inquiry or KPMG. Not once is the Inquiry mentioned. When confronted with these

revealing documents, Ms. Leggieri was intransigent, unresponsive and unpersuasive. I was troubled by her testimony on this critical issue. This caused me to approach her allegations with caution.

Having said that, I also approached Ms. Leggieri's evidence aware of her difficult personal circumstances. She is a young single mother who performed well for the City. In 2002-2003, she suffered the understandable stress and anxiety of having her position declared redundant. She has been on sick leave since November 26, 2002. The City has not communicated with her as promptly as she would have liked. Her physical detachment from her workplace and the City's inadequate communication with her regarding her job have undoubtedly deepened her suspicions and distrust of the City.

Whether Ms. Bulko Threatened Ms. Leggieri

The City's concerns about the contract with MFP together with Council's decision to hold a public inquiry were widely reported in the media. In that context, it does not surprise me that employees interviewed by Commission Counsel would discuss their interviews with co-workers and supervisors both before and after they occurred. I accept the evidence of Ms. Bulko and Ms. Leggieri that they spoke about Ms. Leggieri's interview. The only question is whether Ms. Bulko threatened Ms. Leggieri. There are five equally important reasons why I am satisfied she did not.

1) The Context of the Alleged Threat

In the context of Ms. Leggieri's workplace at the time, her allegation that Ms. Bulko threatened her does not make sense. Line Marks also worked with Ms. Bulko on the MFP leases from their inception in 1999, even before Ms. Leggieri became involved. Ms. Marks testified she was not threatened by Ms. Bulko, and I believe her. Threatening Ms. Leggieri would accomplish nothing for Ms. Bulko, because Ms. Marks remained free to tell Commission Counsel about Ms. Bulko's involvement with MFP. Ms. Bulko's threat to Ms. Leggieri, if it existed, was at best an isolated one, in circumstances in which such a threat was futile. It was especially futile given that Jim Andrew and Lana Viinamae, who were senior to Ms. Bulko, were also well positioned to know of Ms. Bulko's involvement. I do not believe Ms. Bulko did something so obviously self-destructive and futile.

2) Ms. Leggieri's Silence

The investigation of Ms. Leggieri's allegations revealed that she was a prolific e-mailer. Importantly, her e-mails before and after her July 24 interview with Commission Counsel contain no reference to Ms. Bulko's alleged threat. I conclude that there is no such reference because there was no threat.

I do not simply assume that Ms. Leggieri should have raised an immediate hue and cry if she was truly mistreated by Ms. Bulko. Such an assumption may overlook a power imbalance in the employment relationship that prevents prompt complaint (although I note parenthetically that the relationship of co-workers and superiors in the CMO was exceptionally collegial). Perhaps a wiser initial assumption is the opposite: if she had been threatened, Ms. Leggieri would have no

option but to await a safe time to complain. Is there anything in the evidence to counter this initial assumption? In my view, there is: the e-mails sent by Ms. Leggieri to confidantes.

The exhibits show Ms. Leggieri used e-mail to send her private thoughts to people she trusted: her mother, her boyfriend, friends, co-workers, a City Councillor, even one of her staff. Interestingly, she also sent e-mails to her Hotmail account about office issues she considered important. She did not hesitate to use e-mail to write unflattering comments about her boss, Ms. Bulko, nor about Ms. Bulko's superior, James Ridge. In the presumed confidentiality of electronic correspondence to trusted confidantes, she spoke her mind. She revealed what was troubling her when it was fresh. Based on Ms. Leggieri's demonstrated pattern of regular and frequent communication, at a time when she had no reason to assume anyone would be reviewing her e-mail, I would have expected some reasonably contemporaneous reference to a serious threat calculated to obstruct a judicial inquiry, especially as it was one that would also significantly affect her livelihood and her ability to support her child. It is that very absence that contributes to my belief there was no threat.

Apart from her e-mail correspondence, Ms. Leggieri had an unusually close business relationship with Felix Di Brina, a member of her staff who reported directly to her. They spent work breaks and lunch together. They spoke by phone every night. Their communications were relaxed and frank. Despite their close working relationship, she never once told him she was threatened by Ms. Bulko. Mr. Di Brina was a very forthright witness, whose obvious friendship with Ms. Leggieri did not diminish his candour. He had a persuasively detailed recollection of events and I accept his evidence without reservation.

3) How and When the Threat Allegation Surfaced

The City first learned of Ms. Leggieri's allegation of a threat in a letter written by Ms. Leggieri's lawyer to the City on February 12, 2003. This was more than six months after her interview with Commission Counsel and sixteen months after her interview with KPMG. At the time the City received this letter, Ms. Leggieri had been on sick leave and away from work for months.

Mr. Orr, counsel for Ms. Leggieri, asserts that the City's communication with Ms. Leggieri was inadequate. I agree. By mid-January 2003, it would appear both sides sensed that litigation loomed, and that they needed to speak carefully. No doubt Ms. Leggieri's sick leave complicated the resolution of her employment situation; however, the City should have been more diligent in its communications with her in January 2003. While the City did respond to her frequent and anxious requests more quickly than she suggested in the witness box, it appears City personnel were not sufficiently organized or informed to communicate promptly with Ms. Leggieri, which she deserved. Even in the witness box in June, Ms. Bulko, as her manager, demonstrated irresponsible ignorance of Ms. Leggieri's termination entitlements.

Because of the inadequate communication from her employer and her concerns for her health and livelihood, one can understand how Ms. Leggieri could recast past events in a more sinister light. In my view, that is what happened. In early 2003, when Ms. Leggieri made the threat allegation, she was distorting past events by reviewing them through the prism of her difficult personal circumstances and her deteriorating relationship with the City. Furthermore, it seems she thought there was a connection between the City's firing of Ms. Viinamae and her own situation. I saw no such connection.

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Finally, on the subject of timing, while Ms. Leggieri's allegations were made known to the City in February, her lawyer inexplicably did not provide any details to Commission Counsel until April, almost two months later. It is troubling that Ms. Leggieri, with the assistance of legal counsel, would allege that she lost her position for co-operating with the Inquiry, and then refrain from immediately advising the Inquiry. This failure could lead to the perception that the allegations are "bargaining chips" in her negotiations with the City.

4) Internally Inconsistent Evidence

Ms. Leggieri's evidence is internally inconsistent and detracts from her allegations against Ms. Bulko in two important respects.

First, Ms. Leggieri testified that Ms. Bulko treated everyone the same way she was treated. I took this evidence to be an acknowledgement that Ms. Bulko did not single out Ms. Leggieri for any particular mistreatment. None of Ms. Leggieri's co-workers who testified alleged similar threats. Ms. Leggieri's acknowledgement of equal treatment by Ms. Bulko is therefore plainly inconsistent with her allegation of a threat by Ms. Bulko.

Second, Ms. Leggieri testified that during her interview with Commission Counsel she was truthful about Ms. Bulko and her relationship with Dash Domi. In other words, she was not deterred by the alleged threat from Ms. Bulko. Ms. Leggieri also testified that after the interview, she informed Ms. Bulko that she had told the truth. She effectively told Ms. Bulko that she had not been deterred. On receiving the message that her alleged threat attempt had failed, Ms. Bulko said and did nothing. If Ms. Bulko had truly threatened Ms. Leggieri in an attempt to have her lie about Ms. Bulko's relationship to MFP, I would have expected Ms. Bulko to react very differently to the information that her threat attempts had failed.

5) The Relationship between the Two Allegations

Ms. Leggieri made two allegations. She alleges a threat by Ms. Bulko at the time of her interview with Commission Counsel, and she alleges she lost her position for co-operating with this Inquiry. Each must be considered individually because it is possible for the threat to have occurred without the loss of position, and vice-versa. However, on the evidence before me, the two allegations do interrelate. My reasons for concluding that Ms. Leggieri did not lose her position for co-operating with this Inquiry, discussed below, are similar to my reasons for finding Ms. Leggieri was not threatened. The similarities reinforce the conclusions I have reached on both of Ms. Leggieri's allegations.

Mr. Orr submits Ms. Bulko had a motive to threaten Ms. Leggieri because Ms. Bulko wanted to suppress her own role in placing on the MFP leasing schedules items that might be viewed as inappropriate, such as toner, cables, and software upgrades. Addressing this alleged motive would require me to discuss in detail Contract Management Office issues, which must await further evidence and final submissions.

Even if I were to find that Ms. Bulko did misuse the leasing schedules and does have a motive to protect herself, there remains the separate question of whether Ms. Bulko acted on that motive by threatening Ms. Leggieri. Given the futility of the threat, Ms. Leggieri's contemporaneous

silence, and the timing problems, all outlined above, I remain satisfied that even if Ms. Bulko had a motive to threaten Ms. Leggieri, she did not do so.

Did Ms. Leggieri's Employment Suffer for Co-operating with the Inquiry?

Ms. Leggieri testified at the hearings that she believes she has no position with the City because she co-operated with the Inquiry. She believes this because she could not think of any other reason for losing her position:

> **Q:** Do you think the fact that you have, in your mind, that you have no job position, is connected with your co-operation with this Commission?
> **A:** Yes, I do.
> **Q:** Why do you believe that?
> **A:** I believe that, because I can't think of any other reason that I would not still have a job at the City. I've had excellent performance reviews. I've transitioned before and, you know, the IT Division in the City, doesn't normally operate in the way that this was done. HR would --- I can't see them operating in this way and treating me this way as a City employee. I've been there for a very long period of time and I don't think anybody else has been treated this way. Everybody else went and they're still working there and I don't have a job.

Ms. Leggieri arrived at this conclusion after she had been home for months on sick leave. Her conclusion was reached shortly before her lawyer sent the February 2003 letter to the City.

Ms. Leggieri did not begin her sick leave in a positive frame of mind towards the City. In an e-mail to her boyfriend the day before she went on sick leave, she was hostile toward Mr. Ridge. She ends her e-mail with the ominous phrase, "let the games begin".

Ms. Leggieri's conclusion that she lost her position for co-operating with this Inquiry and KPMG was a result of hindsight and reflection. It was an inference she drew, not something told to her. It came without contemporaneous supporting evidence. It came only after a period of illness and employment uncertainty, fed by her hostility as she perceived her relationship with the City disintegrating further. In the isolated, stressful and uncertain circumstances of late January 2003, it appears Ms. Leggieri re-appraised her employment situation by connecting a partial and highly selective sequence of events.

I find Ms. Leggieri's conclusion that she lost her position for co-operating with this Inquiry to be unreasonable and inaccurate. It flies in the face of thirteen significant facts, many of which she herself knew. Those facts are as follows:

1. City Council froze the leasing program in August 2001. In November 2001, itcontinued the freeze indefinitely. Ms. Leggieri, as Leasing Supervisor, would know this freeze jeopardized her position regardless of her performance. I accept the statement of James Ridge, Executive Director of the Information and Technology Division that "by late 2001, and certainly by early 2002, it was abundantly clear within the Division, and to all of the employees in the Division, that the City would not be doing any future large-scale leasing of computer hardware and software".

2. Ms. Leggieri's e-mail to James Ridge on January 18, 2002 asking about new opportunities for leasing staff, and the possibility of reapplying for other jobs within the City, shows she knew her position was in peril.

3. On March 8, 2002 City Council finalized its budget and rejected Mr. Ridge's request for ten new CMO positions which Mr. Ridge believed were urgently needed. Confronted with this financial dilemma, an appropriate reaction for a manager would be to eradicate redundant positions, such as those in the discontinued leasing program, to free up much needed salary dollars. I accept Mr. Ridge's evidence that this is what he did. This is corroborated by Mr. Ridge's confidential space-planning chart that eliminated Ms. Leggieri's position. In sum, Ms. Leggieri's position was disappearing independently of her co-operation with this Inquiry, well before her July 2002 interview with Commission Counsel. Significantly, the ultimate decision to eliminate this position was made by Mr. Ridge, not Ms. Bulko.

4. Ms. Leggieri's e-mail on September 19, 2002 shows that following a meeting with Ms. Bulko, she was aware that the survival of her position would depend on a City re-organization document, the Finance Model Report, expected the next month.

5. On October 25, 2002, Ms. Leggieri asked for and received the Finance Model Report. The Report recommended purchasing, not leasing, computers. Ms. Leggieri testified she did not read the Report immediately nor did she understand it when she ultimately did read it. I reject this as implausible. Ms. Leggieri knew the Report would affect her future. She asked for it, and, because of its crucial importance to her and her staff, would have read it immediately. Having observed Ms. Leggieri testify, I am certain she could easily understand the implications of that Report.

6. In cross-examination, Ms. Leggieri acknowledged that during a meeting with Ms. Bulko in late autumn 2002, she knew her position was disappearing.

7. Ms. Leggieri e-mailed Human Resources worker Janice David on November 12, 2002, seeking transition planning assistance. In the e-mail she said, "I have been 'reminded' on a weekly basis for over the past year that my position will be ending …" One year would extend back to November 2001, which was when City Council froze the leasing program indefinitely. Two days later, Ms. Leggieri again e-mailed Ms. David, "I would like to make an appointment with you to discuss my options … when my position becomes redundant". And the next day, "I had applied for a couple of positions but to date have not received notification". Her explanation that the e-mails are "just very flowery in the way I speak" makes no sense. In these e-mails Ms. Leggieri means exactly what she says – she knows her job is ending and she has known it for at least a year.

8. Ms. Leggieri's e-mails in late 2002 show she knew her position was ending and that it had nothing to do with this Inquiry. When asked about these e-mails she said she was "sarcastic", "venting", in a "very confused state", "scared and confused", "in a very distressed state", or "just being very paranoid". I reject all these explanations. Ms. Leggieri is far too poised and articulate to have misspoken as she claims. In the e-mail excerpts below, Ms. Leggieri plainly said what she knew to be true:

Appendix G(vi): Commissioner's Ruling regarding Allegations Made by Paula Leggieri, September 26, 2003

- November 14, to her boyfriend: "Kathryn [Bulko] has … already submitted my position realigning to [James Ridge] for approval"
- November 20, to her mother: "I have been told I no longer have a job … anyway trying to find another … look in [G]uelph for me".
- November 22, to a friend: "I've just recently been told my job is no longer needed so I am on the job hunt".
- November 22, to co-worker Grant Coffey: "my job has now been deemed "redundant" (no more leasing … leasing Supervisor) so I have a short period of time to find something or off I go".
- November 25, to Councillor Maria Augimieri: "my job is ending and I am looking for work".
- November 25, to another friend: "I have just learned that I am losing my job! (horrible). Was wondering if you could have a looksee at your job postings and see if anything is available (in Hamilton or Toronto)."

9. When she testified in April 2003, Ms. Leggieri left the clear impression that she was the only person in the Leasing Unit who was not transferred to another position when the City decided it would no longer lease. By the time she testified in June, it became apparent that the Leasing Unit consisted of only three people: the Supervisor, Paula Leggieri, and her two staff, Felix Di Brina and Annie Leung, both of whose jobs are protected by a collective agreement. Accordingly, she was the only person in the Leasing Unit who could, in fact, be affected by the City's decision not to lease. The inference in April was quite misleading.

10. In August and November 2002, Ms Leggieri re-worked her résumé. Initially, she said it was unrelated to her position ending. She quickly retracted this statement, and admitted she prepared her résumé to apply for other positions at the City because of the restructuring that was affecting her employment.

11. While all these changes were unfolding in fall 2002, and with Ms. Leggieri concerned about her prospective employment, even her most private e-mails make no suggestion her situation is related to either her co-operation with this Inquiry or KPMG.

12. Despite the close business friendship between Mr. Di Brina and Ms. Leggieri, she never once told him she was losing her position for co-operating with the Inquiry.

13. Mr. Di Brina testified he sent Ms. Leggieri job postings, at her request, while she was on sick leave. I accept his evidence. It is consistent with previous situations in which they exchanged job postings. I reject Ms. Leggieri's evidence that she was "surprised" and "paranoid" to receive job postings from Mr. Di Brina.

These thirteen points taken together show clearly that in the fall of 2002, Ms. Leggieri knew her position disappeared because the City had decided to discontinue leasing, not because she co-operated with this Inquiry or KPMG. Ms. Leggieri's erroneous conclusion that she was let go because she co-operated with this Inquiry or KPMG, reached as it was from a distance during her difficult early months of 2003, may be understandable. Her firm adherence to that conclusion when confronted with all the objective evidence to the contrary, is not.

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I have addressed above my concerns about the City's communication with Ms. Leggieri after she went on sick leave with her position ending. However, these concerns do not lead me to think Ms. Leggieri's position was ending because she co-operated with this Inquiry. The reasons for a position disappearing and the employer's subsequent treatment of the affected employee, are separate issues with no necessary relationship. In this instance, the evidence of valid reasons for terminating Ms. Leggieri's position is tightly interwoven from different sources, and is strongly corroborated by independent documentation, all of which predates Ms. Leggieri's sick leave. No events after her departure undermine the ample pre-existing evidence that her job was, to her knowledge, phased out for administrative policy reasons.

Mr. Orr emphasizes that Mr. Ridge's decision not to allow Ms. Leggieri to compete for a job is evidence of ill-will toward her. He submits, "Mr. Ridge testified that he did not inquire into Ms. Leggieri's qualifications for the position and that at no point did he even consider allowing her to compete for this position that replaced her old job".

I cannot agree with Mr. Orr; the evidence is to the contrary. Mr. Ridge did not seriously consider Ms. Leggieri for the position because he considered the skills of another City employee to be superior to those of Ms. Leggieri. He stated in his evidence:

> They had both worked for me, Commissioner, for --- at that point for two years. I had seen the performance evaluations, I'd had regular discussions with --- with Ms. Bulko about Ms. Leggieri, how she was progressing, her --- her, sort of, abilities. She was, again, quite a new supervisor. She had only been supervising other adults for the first time in her life for about the previous year so I had a reasonably good understanding of their strengths and weaknesses and quite frankly, in my judgment, Ms. Leggieri did not have the breadth and depth of experience that met the minimum threshold for the new position.

I accept Mr. Ridge's evidence. He did not freeze Ms. Leggieri out of a job. He filled the position with a qualified person. While, in hindsight, it may have been preferable to have informed her of the job opening and to have held a competition, this is a different shortcoming altogether from freezing someone out of a position in retaliation for co-operating with a public inquiry. It is possible, though, to understand how Ms. Leggieri would not, at the time, appreciate the difference.

Ms. Bulko's Relationship with Dash Domi

Mr. Kramer, Ms. Bulko's lawyer, submits that his client is entitled to an express finding that no credible evidence exists to support the allegations made by Ms. Leggieri concerning Ms. Bulko's relationship with Dash Domi. Mr. Orr, by contrast, says the relationship evidence demonstrates that Ms. Bulko should not be believed, and instead it advances his client's allegations against Ms. Bulko and the City.

At this stage of the Inquiry, I do not have enough evidence or submissions to pronounce upon the relationship between Ms. Bulko and Mr. Domi. The relationship between these two individuals is inextricably related to how the CMO managed the MFP leases, a subject that must await my final report. At present, however, the evidence of a sexual relationship is no more than an implication from Ms. Bulko's use of the term "boyfriend". That is an implication Ms Bulko strongly denies.

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Ms. Leggieri described the Bulko-Domi relationship as "buddy-buddy" and "friendly-friendly", but in cross-examination denied any knowledge of an intimate relationship.

CONCLUSION

Ms. Leggieri made two very serious allegations against Ms. Bulko and the City of Toronto. I reject those allegations for two essential reasons. First, they are refuted by independent evidence. Second, the allegations were the product of hindsight apparently distorted by Ms. Leggieri's difficult personal circumstances and strained relationship with the City. In the result, I am satisfied the investigative processes of this Inquiry have not been compromised.

Having concluded my decision on Ms. Leggieri's allegations, I feel it necessary to address the written submissions which her lawyer presented to me and counsel. Lawyers are entitled to advance their client's position vigorously. However, they have a duty to remain civil, and a duty to adhere to the evidence. These duties are an integral part of the ethical obligations of every lawyer. Mr. Orr's submissions contain some ill-advised or over-heated comments and allegations with no evidence to support them. Had these submissions been made in the hearing room, I would have stopped them. The prospect of gaining a wide audience during a public inquiry imposes on lawyers a more onerous obligation to speak responsibly.

Commission Counsel:	Ms. Daina I. Groskaufmanis
Counsel for the City of Toronto:	Mr. Robert A. Centa
Counsel for Ms. Paula Leggieri:	Mr. James C. Orr
Counsel for Ms. Kathryn Bulko:	Mr. Jeffrey W. Kramer

Evidence heard on April 9, 10, June 16, 17, 18, 19, 2003
Submissions received by August 1, 2003
Reply submissions received by August 20, 2003
Decision released on September 26, 2003

APPENDIX 'A'

TIMELINE

DATE	OCCURRENCE
2001	
August	City Council freezes the leasing program
11 October	Paula Leggieri is interviewed by KPMG
November	City Council freezes the leasing program indefinitely
2002	
18 January	Paula Leggieri asks James Ridge about new opportunities for leasing staff
8 March	City Council rejects James Ridge's request for ten new CMO positions
24 July	Paula Leggieri is interviewed by Commission Counsel
19 September	Paula Leggieri understands the survival of her position will depend on the Finance Model Report
25 October	Paula Leggieri receives the Finance Model Report
12 November	Paula Leggieri seeks transition planning assistance from Human Resources
14 November	Paula Leggieri tells her boyfriend that her position is being realigned
20 November	Paula Leggieri tells her mother that she no longer has a job
22 November	Paula Leggieri tells a co-worker that her job has been deemed redundant
22 November	Paula Leggieri tells a friend that her job is no longer needed

25 November	Paula Leggieri tells a Councillor that she is looking for work
25 November	Paula Leggieri tells another friend that she is losing her job
25 November	Paula Leggieri e-mails her boyfriend: "Let the games begin"
26 November	Paula Leggieri goes on sick leave
24 December	Kathryn Bulko informs Paula Leggieri that two months of work remain

2003

12 February	Paula Leggieri's lawyer informs the City about her allegations
Early April	Paula Leggieri's lawyer discloses to Commission Counsel the details of Ms. Leggieri's allegations
9, 10 April	Paula Leggieri testifies at the Inquiry
16 June	Paula Leggieri resumes her testimony

Toronto Computer Leasing Inquiry

and

Toronto External Contracts Inquiry

The Honourable Denise Bellamy, Commissioner

Ruling

Regarding a Motion by Commission Counsel to Unseal & Inspect Boxes Containing Documents Belonging to Jeffrey Lyons

Introduction & Conclusion

There are eighteen sealed banker's boxes that are currently stored safely in the Inquiry offices. They contain documents belonging to Jeffrey Lyons. They were discovered by the former law firm of Mr. Lyons in its storage facilities and the boxes arrived at the Inquiry pursuant to a valid summons signed by me. Mr. Lyons asserts that all the material in the boxes are irrelevant and protected by solicitor-client privilege. Should Commission Counsel be permitted to review the documents in confidence with Mr. Lyons or his lawyer to determine if there is anything in them that may be helpful to the Inquiries? That is the question for this ruling. I have decided the answer is yes.

As Commissioner of two Inquiries under section 274 of the *Municipal Act 2001,* S.O. 2001, c. 25, I have a duty toward everyone affected to be thoroughly fair. I must investigate and report in accordance with my Terms of Reference, but the investigation and public hearings must not only be fair but must also be perceived to be fair. Considerations of fairness have guided all my decisions to date. I have concluded that my lawyers, Commission Counsel, can confidentially review the material properly summoned because the review, as I will describe it below, is entirely fair to Mr. Lyons and anyone else affected by it.

How the Documents Were Summoned

The process by which Mr. Lyons' documents were summoned has an important bearing on the fairness of the confidential review of those documents.

Mr. Lyons is a lawyer. However, in recent years he has worked predominately as a lobbyist. He assists clients with their government relations, including relations with the City of Toronto. From December 1995 until June 2001 he conducted his lobbying work from the law firm of Morrison Brown Sosnovitch, where he was counsel. Mr. Lyons testified that he worked primarily as a lobbyist at this firm and when his lobbying clients required legal work, it was handled by other members of the law firm, not by him. His lobbying files were opened as Morrison Brown

Sosnovitch files when he worked there. Mr. Lyons' staff used the computers of Morrison Brown Sosnovitch which remained at the law firm after Mr. Lyons' departure.

MFP Financial Services Limited (MFP), Dell Financial Services Limited (DFS), and Dell Computer Corporation (Dell) were among Mr. Lyons' many clients. Both MFP and DFS bid on the City of Toronto 1999 computer leasing RFQ, which MFP won. When Mr. Lyons testified before this Inquiry in May 2003, he was insistent that he provided no legal services to MFP, DFS, or Dell. He claimed that he acted for them solely as a lobbyist. His lobbying work for these clients included work in connection with the City of Toronto. The activities of MFP, DFS and Dell during 1998-2001, as they relate to the City of Toronto, are part of the subject matter of these Inquiries.

Mr. Lyons was first served with a summons to the Toronto Computer Leasing Inquiry when he was interviewed by Commission Counsel in August 2002. Subsequently, he provided the Inquiry with some documents relating to MFP, but none for DFS. That was approximately fifteen months ago. He was served with a second summons in December 2002. Those summonses placed an obligation on him to make every reasonable effort to locate and provide in complete confidence (Rule 14 of the Rules of Procedure of the Inquiries), all documents within his custody, control or power "touching on the matters in question". His obligation in responding to the summonses included an obligation to obtain all potentially helpful material from Morrison Brown Sosnovitch, and provide it to Commission Counsel.

Mr. Lyons applied for and was granted standing at the Toronto Computer Leasing Inquiry (TCLI) on December 2, 2002. Under our Rules, people who are granted standing are deemed to undertake to follow the Rules of Procedure (Rule 9), which includes an obligation to produce to the Commission all documents having any bearing on the subject matter of the Inquiry (Rule 13).

Mr. Lyons' counsel corresponded and spoke extensively with Commission Counsel for months following the August 2002 interview and summons. On February 14, 2003, in one of many letters to Mr. Lyons' counsel, Commission Counsel said the following:

> Since my December 6 letter, several witnesses have given evidence, some of which involves your client; e.g. the evidence of Irene Payne … In light of that evidence, we would expect that you have enquired of Mr. Lyons' business entity (under which he practiced as a Lobbyist) and/or his former law firm (Morrison Brown Sosnovitch) seeking relevant documents.

By early March 2003, approximately six and a half months after Mr. Lyons was first summoned and three months after he obtained standing, Commission Counsel had received no assurance that either Mr. Lyons or his counsel had searched for material at Morrison Brown Sosnovitch that could be helpful to the judicial inquiry. The Toronto taxpayers who fund these Inquiries have a right to expect that the investigations and hearings will proceed not only fairly but also efficiently. When a summons is not responded to with appropriate dispatch, it is necessary that alternative investigative means be employed to prevent matters from slowing down unnecessarily. Accordingly, on March 7, 2003, Commission Counsel summoned directly from Morrison Brown Sosnovitch all "material relating to the matters in issue before this Inquiry". The summons was issued for both the Toronto Computer Leasing Inquiry and the Toronto External Contracts Inquiry and thus covered material helpful and relevant to both. At the hearing

of this motion, counsel for Mr. Lyons appropriately conceded that the summons to Morrison Brown Sosnovitch was properly issued.

Morrison Brown Sosnovitch co-operated fully and professionally with the March 2003 summons. Commission Counsel and the firm agreed that the summoned materials would be sealed. However, the firm's ability to respond to the summons was complicated by its discovery, after Mr. Lyons departed from the firm in June 2001, that some matters he worked on while at the firm, were not billed in accordance with the law firm's usual billing arrangements. Because the firm was not aware of this work, and because the work was not identified in accordance with the firm's usual administrative procedures, the firm had more difficulty locating records of this work. The firm's first search revealed nothing relevant.

The firm did continue its efforts and eventually, Morrison Brown Sosnovitch discovered a large amount of potentially helpful material in both electronic and paper form. Much of it was located in the firm's off-site storage facility. Unfortunately, due to the complication in the search arising from Mr. Lyons' billing practices, and because a letter from the firm dealing with electronic material went astray, Commission Counsel did not become aware that material had been located at Morrison Brown Sosnovitch until after Mr. Lyons completed his testimony at this Inquiry on May 14, 2003. Indeed, the search for Mr. Lyons' documents continued well after he testified at the hearings. Commission Counsel assisted Morrison Brown Sosnovitch in its search by giving the firm information that emerged during the evidence of both Mr. Lyons, and his assistant at the relevant time, Ms. Susan Cross.

With the benefit of hindsight, the contrast between Mr. Lyons' testimony and the later results of the search for material by Morrison Brown Sosnovitch is striking and troubling. Mr. Lyons testified that the DFS file was probably destroyed on his instructions. It was not. Morrison Brown Sosnovitch discovered the file, and sent it to Commission Counsel. Further, the firm has no record of any instruction by Mr. Lyons to destroy a file.

The DFS file was found in hard copy only after Mr. Lyons had given his evidence at the hearings. Commission Counsel examined that file and found two memoranda that have since figured prominently in the testimony of Mr. Jim Andrew, the former Executive Director of the Information and Technology Division at the City of Toronto. These memoranda were apparently prepared by Mr. Lyons, and relate to the 1999 City of Toronto leasing RFQ which is central to our Terms of Reference. The memoranda summarize conversations between Mr. Lyons and a confidential source apparently within the upper echelons of the Information and Technology Division at the City. Mr. Andrew has testified that the information contained in these memoranda should not have been communicated to Mr. Lyons. Some of it was confidential and the conversation summarized in one of the memoranda inappropriately took place during the RFQ "blackout" period of communication between bidders and the City. The source of this information has not yet been determined and, because the DFS file was not made available to Commission Counsel before Mr. Lyons' testimony, Mr. Lyons could not be asked under oath about the source of this material.

Mr. Lyons' statement that the DFS file was destroyed is unusual in a law firm environment where record retention is a matter of professional responsibility. The assertion is also contrary to the policy of Morrison Brown Sosnovitch, which the law firm described in a letter to Commission Counsel on July 21, 2003:

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> The firm's policy on retention and storage of documents is the same today as was the policy during the time that Mr. Lyons was associated with our firm as counsel. The policy is that upon completion of the matter as determined by the lawyer in charge of the file the file is closed out, documents are returned to the client as appropriate and the file is then assigned a file away number and ultimately deposited in the firm's storage facility.

Mr. Lyons testified that he did not use long-term storage facilities because they are too expensive. However, when he left Morrison Brown Sosnovitch in 2001, he put twenty-one bankers boxes of files into the firm's long-term storage facilities. His DFS file was found in that location.

Mr. Lyons testified repeatedly that he searched for the DFS file, and that he asked his assistant Mr. Mangat to verify with Morrison Brown Sosnovitch whether there was electronic data. Morrison Brown Sosnovitch, however, wrote on July 21, 2003 that: "Mr. Lyons has not at any time to our knowledge requested from this firm any materials relevant to the Inquiries".

Mr. Lyons testified that his assistant, Mr. Mangat, learned from Morrison Brown Sosnovitch that electronic data had been "wiped clean" when he left the firm, "because they had too much data storage". This explanation is also quite unusual in a law firm environment, and contrary to Morrison Brown Sosnovitch's record retention policy. Most importantly, however, is that the firm's search did indeed reveal the existence of relevant electronic data.

Finally, in July 2003 Morrison Brown Sosnovitch advised Commission Counsel in a letter that "we did send two boxes of Mr. Lyons' personal files to Mr. Lyons at his request some time in the calendar year 2002". Mr. Lyons was therefore aware he had boxes in storage at Morrison Brown Sosnovitch. The Toronto Computer Leasing Inquiry was publicly announced in February 2002. Commission Counsel do not know what was in the boxes, nor do they know when in 2002 they were retrieved. Mr. Lyons has not volunteered this information.

The eighteen boxes of files in issue on this motion arrived at the Inquiry offices from Morrison Brown Sosnovitch on July 22, 2003. The law firm was appropriately attentive to possible issues of relevance and solicitor-client privilege. Sensitive to the firm's concerns, Commission Counsel suggested that in accordance with well-established legal procedure, they would receive the sealed boxes, and would not unseal them without either Mr. Lyons' consent, or an appropriate ruling from the Commissioner.

Beginning on August 6, 2003, Commission Counsel engaged in a lengthy exchange of correspondence with Mr. Lyons' counsel. No agreement on unsealing and reviewing the documents has been reached. The boxes remain sealed and this motion to unseal them was heard orally by me on Friday, October 10, 2003.

The Positions of Counsel on this Motion

Commission Counsel

Commission Counsel seeks a ruling that the eighteen boxes be unsealed confidentially by Commission Counsel and, if desired, in the presence of Mr. Lyons and/or his counsel, that the

contents of the boxes be reviewed for material relevant or helpful to these Inquiries, and that only potentially helpful material be examined for potential privilege issues.

Section 11 of the Ontario *Public Inquiries Act*, R.S.O. 1990 c. P.41 (as amended) makes clear that privileged materials are inadmissible at a judicial inquiry. There are three known outstanding lawsuits amongst the parties with standing. Clearly issues of solicitor-client privilege lurk in the background of these Inquiries. Accordingly, Commission Counsel has suggested the same process for the opening of these boxes as it has for summoned witnesses and for all the other parties with standing.

From the outset of their dealings with Morrison Brown Sosnovitch, Commission Counsel proposed that the documents received would be reviewed confidentially by them, in their capacity as *alter ego* for the Commissioner, in the presence of Mr. Lyons and/or his counsel. Unhelpful materials would be returned, and materials helpful to TCLI and TECI would be assessed for privilege. Unresolved privilege issues would be determined by the Regional Senior Justice or his designate.

This was the practice employed in the Walkerton Inquiry to address potential cabinet privilege in government documents. It has also been the practice to date in TCLI and TECI for all other documents that have raised potential privilege issues. In Walkerton and in these Inquiries, the process has worked efficiently and fairly: all privilege issues at the Walkerton Inquiry as well as TCLI and TECI have been resolved through Commission Counsel's confidential discussions with the affected parties. The issues are readily amenable to prompt and mutually satisfactory confidential resolution because both parties can address themselves to concrete issues that emerge from the particular contents of each document in issue.

Jeffrey Lyons

Mr. Lyons takes a very different position. Mr. Lyons asserts in a blanket way that all material received by Commission Counsel from Morrison Brown Sosnovitch is irrelevant and is protected by solicitor-client privilege. He further argues that relevance and privilege are, in essence, inextricably linked, and therefore cannot be separated by Commission Counsel in their review of the documents in question.

Mr. Lyons' position is that a summons under section 7 of the *Public Inquiries Act* mandates that the recipient of the summons (i.e. Morrison Brown Sosnovitch) produce relevant and admissible, but not privileged, documents. Mr. Lyons proposes that Morrison Brown Sosnovitch review the contents of the eighteen boxes for relevance and privilege. Morrison Brown Sosnovitch has declined. Alternatively, Mr. Lyons proposes that his lawyers review the documents privately, without the participation of Commission Counsel, to determine whether there is material in the boxes that may be helpful to me.

Mr. Lyons contends that Commission Counsel cannot view the documents. It is his view that Commission Counsel is a third party with a role not unlike that of a Crown attorney and, therefore, is not in any position to view potentially privileged material.

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Dell Computer Corporation

Ms. Dyer on behalf of Dell Computer Corporation emphasized the importance of solicitor-client privilege, and the great care the law takes to protect it. She asserted that privileged documents are beyond the reach of the state, and that the state cannot view such documents without the prior informed consent of the affected client. The only people with a right of access to privileged documents are the client and its solicitor. No third parties have such access. She contends that commissioners and commission counsel are third parties, agents of the state exercising investigative powers granted by the Ontario *Municipal Act* and the *Public Inquiries Act*. Therefore, it is Ms. Dyer's position that neither I as Commissioner nor my Commission Counsel, are permitted to examine the documents over which privilege is claimed.

Both Mr. Lyons and Dell submit that the practical result of their positions is that counsel for the party claiming privilege should review the affected material alone.

City of Toronto

The City of Toronto supports the position taken by Commission Counsel, including the statement that Commission Counsel is the *alter ego* of the Commissioner. The City's position is informed by its direct experience in these Inquiries in resolving relevance and privilege issues confidentially with Commission Counsel in the manner described above. The City of Toronto stated it is satisfied that our process is fair, and expressed full confidence in Commission Counsel to review the material in an appropriate manner.

Mr. Roland for the City of Toronto opposes Mr. Lyons' claim that he alone should review the documents. Mr. Roland submits that Mr. Lyons, by his own failure to discharge his obligations pursuant to the summonses served in August and December 2002, has forfeited his opportunity to review the documents in advance. Mr. Roland submits that Mr. Lyons has not been candid in the production of documents, and argues that it would be difficult for Mr. Lyons, given such an unco-operative approach to date, to recast his thinking sufficiently to determine what is and is not helpful to this Inquiry. In short, difficult decisions about what is helpful should not reside with Mr. Lyons alone.

Analysis

Our Rules provide that the Commissioner may receive any evidence that she considers to be helpful in fulfilling the mandate of the Inquiry (Rule 21). Section 7 of the *Public Inquiries Act* grants a commission the power to summons a person to give evidence or produce documents relevant to the subject matter of the inquiry that are not inadmissible at the inquiry under section 11 (the privilege section).

The submissions of Mr. Lyons and Dell Computer that a commissioner and commission counsel cannot confidentially review privileged material are based on the criminal case of *Lavallee, Rackel & Heintz* v. *Canada* (2002), 167 C.C.C. (3d) 1 (S.C.C.). In this decision, the Supreme Court of Canada struck down the *Criminal Code* provisions governing law office searches, in part, because the sections gave the prosecution access to materials over which privilege was

claimed before there was a judicial determination that they were not privileged documents. Mr. Lyons and Dell argue by analogy from this criminal case that a commissioner and commission counsel are indistinguishable from prosecutors regarding access to privileged materials.

Our highest courts have repeatedly emphasized the central importance of solicitor-client privilege as a fundamental legal right. As the Supreme Court states in *Lavallee* (at paragraph 24):

> It is critical to emphasize here that all information protected by the solicitor-client privilege is out of reach for the state. It cannot be forcibly discovered or disclosed and it is inadmissible in court. It is the privilege of the client and the lawyer acts as gatekeeper, ethically bound to protect the privileged information that belongs to his or her client. Therefore, any privileged information acquired by the state without the consent of the privilege holder is information that the state is not entitled to as a rule of fundamental justice.

The simple fact remains, however, that regardless of how deeply valued any legal right may be, debates about its scope in particular factual circumstances will inevitably arise. That is why the Supreme Court in *Lavallee* held that in criminal investigations, a judge has the authority to review material over which a claim of privilege is made (paragraph 49). The rule is precisely the same in civil cases. Rule 30.10(3) of the Ontario Rules of Civil Procedure provides for a judge to review documents subject to a privilege claim to decide if they are in fact are privileged. A similar rule or practice exists in every civil jurisdiction in Canada. In short, the prohibition of involuntary third party access to solicitor-client materials has never been interpreted, nor should it be interpreted, to exclude review by a neutral arbiter of privilege disputes.

This brings us back to the judicial inquiry context. Does the assertion of a claim of solicitor-client privilege have the effect of preventing a commissioner and commission counsel access to the disputed documentation for any purpose? In my view, the answer to this question is no.

The Judicial Approach in a Public Inquiry

A commissioner and his or her commission counsel perform completely different functions from a prosecutor. There is no prosecutorial function in a judicial inquiry. I have mentioned this repeatedly throughout the course of these Inquiries. Our process is investigatory, not adversarial. It is a mandatory feature of the two Inquiries over which I preside, pursuant to section 274(1) of the *Municipal Act, 2001,* that the Commissioner be a Superior Court Judge. It is the commissioner and commission counsel who are therefore best placed to perform in an inquiry context the first instance neutral dispute resolution tasks that are undeniably central to the protection of solicitor-client privilege. Accordingly, the severance of a commissioner's powers as suggested by Mr. Lyons and Dell is unworkable for two basic reasons. First, it is not necessary to uphold solicitor-client privilege. Second, it would prevent judicial inquiries from discharging their important public functions.

The Supreme Court of Canada has explained that much of the value of judicial inquiries in Canadian society flows from the judicial approach they bring to pressing social problems. For example in *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy*),

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[1995] 2 S.C.R. 97, Mr. Justice Cory made the following observations that highlight the value of a judicial approach:

- "As *ad hoc* bodies, commissions of inquiry are free of many of the institutional impediments which at times constrain the operation of the various branches of government." (paragraph 60)

- "One of the primary functions of public inquiries is fact-finding. They are often convened, in the wake of public shock, horror, disillusionment, or scepticism, in order to uncover "the truth". Inquiries are, like the judiciary, independent; unlike the judiciary, they are often endowed with wide-ranging investigative powers." (paragraph 62)

- "Both the status and high public respect for the commissioner and the open and public nature of the hearing help to restore public confidence …" (paragraph 62)

The benefits of a judicial approach to important issues in the municipal sphere has likewise been noted by the Supreme Court in *Consortium Developments (Clearwater) Ltd. v. Sarnia (City)*, [1998] 3 S.C.R. 3 (paragraph 26):

> A municipality, like senior levels of government, needs from time to time to get to the bottom of matters and events within its bailiwick. The power to authorize a judicial inquiry is an important safeguard of the public interest, and should not be diminished. …

If there is any lingering doubt from the foregoing quotations that a judicial approach to the task at hand is at the heart of a commissioner's responsibilities, the following statement from the Supreme Court, again in the *Consortium* case, dispels that doubt (paragraph 27):

> The fact a s.100 inquiry [now s.274 of the Ontario *Municipal Act, 2001*] is a judicial inquiry clearly seeks to balance the municipality's desire to have accurate information and useful recommendations from an independent commissioner against the right of private citizens and others to have their legitimate interests recognized and protected. A good deal of confidence is inevitably and properly placed in the ability of the Commissioner to ensure the fairness of the inquiry.

Commissioners in recent judicial inquiries have made clear that the success of their inquiries depends upon judicial attributes being brought to bear in a job where they are not formally sitting as judges. The Honourable Justice Dennis O'Connor wrote in his Report on the Walkerton tragedy that it was essential that an inquiry be perceived by the public as "independent and impartial" (*Report of the Walkerton Inquiry,* Part One, 2001 at p. 472).

The primary lesson in the Supreme Court authorities on the role of the commissioner, and in the perspectives of experienced Commissioners, is that a commissioner has investigative powers necessary to "get to the bottom of matters", but must exercise those powers, and conduct all other inquiry business, always in conformity with the role of judge. One can see that in a judicial inquiry, a commissioner has the responsibilities of a judge, transplanted into an inquiry context.

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In civil or criminal litigation, it is accepted that permitting a judge to confidentially review material subject to a privilege dispute will not destroy or weaken the privilege. The Supreme Court has made it clear that judicial review of disputed material is an essential part of protecting the privilege in an orderly way. In a judicial inquiry, it is the commissioner who must always diligently discharge the judicial function. The Supreme Court directed in *Consortium*, in the passage from paragraph 27 cited above, that the commissioner must protect the rights of "private citizens and others to have their legitimate interests recognized and protected". Therefore, when a privilege dispute arises in a judicial inquiry, confidential review of the material by the commissioner is likewise an essential part of protecting the privilege in an orderly way.

Mr. Roland for the City of Toronto made the same point differently. The law is clear that third parties cannot see privileged materials. However in civil or criminal courts, no one objects to the examination by the judge of privileged material because the judge is not a third party in the relevant sense. The judge is the appropriate person to review privileged material because he or she must ensure that the case proceeds with due respect for everyone's rights. Likewise, in a judicial inquiry, the commissioner is not a third party. Like a judge, the commissioner must also ensure that the inquiry proceeds with due respect for everyone's rights. Accordingly, the commissioner in a judicial inquiry is precisely the appropriate person to review privileged material.

Counsel for Dell argues that a judicial inquiry exercises investigative powers granted by the *Public Inquiries Act*, and is therefore indistinguishable from the police and prosecution in a criminal case, at least with respect to access to privileged materials. While it is true that investigation is often a central component of a judicial inquiry's mandate, this argument overlooks a very basic and crucially important difference between criminal investigations and those undertaken by a judicial inquiry. It is the difference in focus.

Criminal investigations are focused exclusively on identifying a perpetrator for prosecution and punishment. Judicial inquiries are prohibited from focusing on prosecution and punishment. The law is clear that judicial inquiries have no power to impose criminal or civil liability, or even to pronounce upon it. Courts will readily shut down inquiries that look too much like criminal investigations (*Starr* v. *Houlden*, [1990] 1 S.C.R. 1366).

But what is it that makes criminal investigations and judicial inquiry investigations so very different? Police officers who identify perpetrators and build a case for successful prosecution and punishment face one inevitable reality: from the outset of the investigation, and every step of the way, they are in an adversarial relationship with the perpetrator.

In stark contrast, judicial inquiries have no adversarial relationship with anyone. As Mr. Justice Cory stated in the *Westray* decision quoted above, a judicial inquiry is free of the "institutional impediment", that is, an adversarial approach that "constrains" a police investigation. The value of a judicial inquiry lies precisely in a broad, distanced investigative approach, free of the adversarial or competitive pressures that people closer to the events might experience. For example, it is no accident that judicial inquiries often follow high profile miscarriages of criminal justice. The completely different investigative approach of a judicial inquiry is rightly perceived as a necessary antidote to a criminal investigation that went wrong.

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Contrary to the position advocated by Dell, there is no necessary contradiction between being both an investigative body and a judicial body. There is a distinct advantage to judicially conducted investigations. The fact-finding investigation in a judicial inquiry is valued by the public precisely because it is conducted in a judicial way. This point was made by Mr. Justice Cory in the *Westray* case (paragraph 175):

> It is crucial that an inquiry both be and appear to be independent and impartial in order to satisfy the public desire to learn the truth. It is the commissioner who must be responsible for ensuring that the hearings are as public as possible, yet still maintain the essential rights of the individual witnesses.

In sum, the absence of an adversarial approach in a judicial inquiry ensures that an inquiry's investigative aspects differ markedly from criminal investigations. This absence of an adversarial approach, combined with the commissioner's judicial obligations as overseer, ensure that a commissioner and a judge are equally well placed to resolve privilege disputes that arise in their respective forums.

The Role of Commission Counsel

The role of commission counsel is not widely discussed in judicial decisions. However, there is a respectable body of legal literature on commission counsel's role. Experienced commissioners and commission counsel have over the years expressed an evolving but coherent conception of the role. The core principle is that commission counsel is the commissioner's *alter ego*; the agent of the commissioner.

Over time, inquiry mandates have become increasingly complex, involving intricate and wide ranging relationships among issues of fact, law, policy, institutional culture, and social practices. This increased complexity has generally increased the reliance of commissioners on counsel for the simple reason that where there is more to be done, and more help is needed to do it.

The increased complexity of inquiries, though, has not reduced the need for judicial comportment in everything an inquiry does. Therefore, as the role of commission counsel has expanded, the need for impartiality and judicial comportment by commission counsel has also expanded. The increased need for impartiality by commission counsel has edged the role along the spectrum from the helpful but independent barrister toward full-fledged membership in a judicial management team. For example, in the past decade, the prevailing view of the propriety of commission counsel participating in the writing of the final report has changed significantly. Compare for example, Mr. Justice John Sopinka, "The Role of Commission Counsel" *Commission of Inquiry*, Carswell: 1990, Ch. 5, edited by A. Paul Pross, Innis Christie & John A. Yogis at pp.84-85, disapproving of the practice, and Mr. Justice Dennis O'Connor, "The Role of Commission Counsel in a Public Inquiry" (2003), 22 *The Advocates Society Journal*, No. 1, p. 11 treating the opposite view as beyond dispute. See also Federal Court of Appeal decision, *Canada (Attorney General) v. Canada (Commissioner of the Inquiry on the Blood System)* [1997] 2 F.C. 36 at para.102.

Impartiality on the part of commission counsel is not to be confused with a lack of rigour and vigilance in seeking the truth. Commission counsel must still act forcefully wherever necessary

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to overcome resistance that could obscure truth. This persistence is particularly important wherever the transparency of public inquiries motivates resistance on the part of those with something to hide. What makes commission counsel's role unique is that they must take into consideration the public interest, the interests of all parties, and furthermore, must explore conscientiously all plausible explanations and outcomes regardless of whose interests are advanced.

We have now reached a point in the evolution of commission counsel's role where it can be confidently asserted that every task they undertake must be infused with an impartiality inseparable in degree from that of the commissioner. Accordingly, there is no basis to distinguish in principle between a commissioner and commission counsel for purposes of confidentially reviewing potentially helpful or privileged material. I am supported in this conclusion by the approach taken in the Walkerton Inquiry. In Walkerton, confidential review of potentially privileged materials by commission counsel took place to the satisfaction of everyone who participated regardless of their interest in the materials (See the *Report of the Walkerton Inquiry*, Part One, pp.486-87 and Appendix H(III) pp.131-137).

Turning from principle to the facts before me, no one has alleged that Commission Counsel's conduct in these Inquiries has disentitled them from assisting me with a confidential review of potentially privileged materials. Indeed, the only comments on the conduct of Commission Counsel was from the City of Toronto. The City of Toronto assured me that Commission Counsel to date have conducted themselves in a completely satisfactorily manner during the confidential privilege reviews affecting the City in these Inquiries. The City said it has full confidence in Commission Counsel to conduct similar reviews in the forthcoming months of the Inquiries. Accordingly, I see no basis in either principle or fact to distinguish between myself as Commissioner and my Commission Counsel for purposes of confidentially reviewing potentially privileged material.

In a judicial inquiry such as this, a commissioner is bound to discharge his or her functions judicially. It stands to reason that so too do the commissioner's counsel who act as the commissioner's *alter ego,* in fulfilling their responsibilities to the commissioner.

Practical Considerations: Making Inquiries Work

For the reasons set out below, the practice of having commission counsel confidentially review potentially helpful and/or privileged documents is the most practical way of resolving relevance and privilege disputes fairly, while at the same time ensuring that inquiries are on track and on budget. While the practical considerations that follow are significant, they are secondary in nature and would have to give way, if it were not otherwise completely fair and in keeping with the importance of solicitor-client privilege for a commissioner and commission counsel to review relevant and/or privileged material in confidence.

The first and most important practical consideration is the close relationship between relevance, or helpfulness, and privilege. It makes no sense to address privilege issues on irrelevant or unhelpful materials. If a particular document received in response to a summons is not something Commission Counsel wishes to place before the Inquiry, no effort need be expended discussing and resolving questions of privilege. Thus, relevance or helpfulness assessments precede

privilege issues. Examining the documents first for relevance or helpfulness increases efficiency by eliminating unnecessary discussions about privilege. But this does mean that anyone reviewing the documents for relevance or helpfulness may see documents that might, if they are helpful to the commission, spawn a privilege claim. Practically speaking, if commission counsel cannot see privileged material, they cannot do a central part of their job: they cannot decide what is helpful to the commissioner.

No one is better placed to assess relevance or helpfulness than commission counsel. They have a continuous and central presence at all inquiry hearings. By contrast, counsel for a party may attend hearings sporadically, if at all. In the Toronto Computer Leasing Inquiry, for example, counsel for Mr. Lyons has attended fewer than twenty of the over one hundred and twenty-five hearing days to date, quite understandably attending on days that directly involved Mr. Lyons' interests, but which dealt with only a narrow sub-set of Inquiry issues. Mr. Lyons is a summoned witness for the second Inquiry. Commission Counsel are simply better placed to assess relevance than the parties. Further, Commission Counsel are best placed to assess helpfulness. Documents relevant to the Terms of Reference may not be helpful because the Inquiry has acquired a narrower focus, or because the matters covered in the document can be fully addressed with materials from other sources. These important insights would not necessarily be apparent to someone who is not fully immersed in the Inquiries.

Conversely, if someone other than Commission Counsel needed to assess documents for relevance first and then privilege, it would be necessary for that other party to be fully briefed on the Inquiry issues. This would entail much needless additional effort and could require Commission Counsel to be in breach of our own Rules (see below). In any event, even with the effort expended, the information transfer could never be perfect. The result would be that the relevance and privilege review conducted by the outside party would suffer in quality. This in turn would affect the quality of the public hearings and fulfilment of the terms of reference.

In the *Consortium* case, the Supreme Court described an inquiry as a relatively unstructured "giant multi-party examination for discovery", moving "in a convoy carrying participants of widely different interests, motives, information, involvement and exposure"(paragraph 41). This description aptly captures the present Inquiries. The inevitable result of such a work-in-progress is that relevance and helpfulness are fluid concepts, changing shape with the ebb and flow of evidence and investigation. In this context, it is simply wrong to think that an outside party could be adequately briefed at one point in time to assess relevance and helpfulness for the duration of the Inquiries. Several briefings over time would no doubt be required, thus multiplying the opportunities for imperfect knowledge transfer and consequent error in assessing relevance and helpfulness.

At the same time as the public hearings are taking place, Commission Counsel outside the hearing room are conducting investigations. These investigations are necessarily confidential and cannot be shared beyond Commission staff (see, for example, Rule 14 of our Rules of Procedure). However, these confidential investigations may have a substantial bearing on what is relevant and/or helpful. Accordingly, it is impossible for anyone but Commission Counsel, who are privy to the results of confidential investigations, to comprehensively appreciate what is relevant and helpful.

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A commissioner and his or her counsel, working together, are the only persons placed to make fair-minded strategic decisions on how to conduct an inquiry. Accordingly, commission counsel reporting to the commissioner are best placed to minimize privilege disputes because they have the decision-making authority to adjust the flow of evidence where it would eliminate or avoid a privilege issue, and would otherwise well serve the Inquiry's purposes.

The foregoing practicalities all converge into one basic policy issue. Since privilege and relevance/helpfulness are so tightly intertwined, all of them must be addressed, at least initially, by the same decision maker. Who should that be for a judicial inquiry? The commissioner, with the assistance of commission counsel. Control of a public inquiry should be in the hands of the person presiding. If the commissioner has no control over relevance, he or she has little control of the judicial inquiry. The Supreme Court in *Consortium* has recognized that it is a "tall order to orchestrate" the processes of a public inquiry (paragraph 41). The task would be virtually unmanageable in many instances if control over something as basic as relevance were taken away.

Turning to the evidence before me, the blanket claim of irrelevance and privilege argued by Mr. Lyons' counsel, who conceded he had not seen any of the documents covered by the claim, is unlikely to lead to substantial privilege issues . The privilege claim is diametrically opposed to Mr. Lyons' sworn evidence that he acted solely as a lobbyist for those of his clients involved in these Inquiries.

Again on the facts before me, Mr. Lyons' conduct in responding to the summonses could be seen by some as unco-operative with these Inquiries. That is the City of Toronto's position. I am not, at present, prepared to make a finding on that issue. The evidence regarding the two boxes Mr. Lyons apparently removed from Morrison Brown Sosnovitch in 2002 is incomplete. Observers could conclude that Mr. Lyons has been unco-operative, at least at this stage. Mr. Lyons was unresponsive to Commission Counsel's request that he make inquiries of Morrison Brown Sosnovitch. He has not discharged his undertaking as a party under our Rule 13 to produce all documents having any bearing on the Inquiry. He has not discharged his obligation under the summonses to locate and produce documents about his participation in the leasing RFQ. Therefore, the perception of these Inquiries by reasonable observers could be adversely affected if Mr. Lyons and his counsel were now entrusted as the sole arbiters of what is relevant, helpful and privileged in the eighteen sealed boxes in the Inquiry offices.

On the facts before me, Commission Counsel was right to seek the Lyons material directly from Morrison Brown Sosnovitch. The opportunity for Mr. Lyons to review the documents himself lapsed months ago. The progress to date of the hearings and the continuing investigation in the Toronto Computer Leasing Inquiry and the investigation in the Toronto External Contracts Inquiry means that Commission Counsel is now in a better position than Mr. Lyons or his lawyers to conduct this review. On the other hand, Mr. Lyons is in fairness entitled to participate in an expeditious review. The boxes are now on site, and Commission Counsel are fully capable of reviewing them in confidence with Mr. Lyons' counsel. Considerations of simple convenience dictate that they should be reviewed in accordance with the routine practice that has been followed invariably when summonsed material arrives at Inquiry premises.

The final practical point to be made is that my confidential meetings with Commission Counsel outside the hearing room are frequent and informal. Accordingly, I can much more readily

Appendix G(vii): Commissioner's Ruling regarding an Application by Commission Counsel to Unseal & Inspect Boxes Containing Documents Belonging to Jeffrey Lyons, October 15, 2003

monitor the confidential review of documents than would be the case if it were done by an outside party.

Conclusion and Ruling

I have concluded that it is fundamentally fair to Mr. Lyons and his clients that the eighteen sealed boxes now on Inquiry premises be reviewed at this site in confidence in the presence of Mr. Lyons and/or his counsel if he so chooses. I have concluded that such a review will preserve the sanctity of solicitor-client privilege and is also in the best interests of these Inquiries.

My formal ruling is set out below. In paragraph 9 of that ruling, I have followed the Walkerton precedent and decided that privilege disputes will be resolved by the Regional Senior Justice or his designate, not by me. I do so not because I have any doubt about the propriety of deciding those issues myself. For the reasons set out at length above, I believe that it would be entirely fair for me to decide privilege issues. Judges routinely disabuse their minds of evidence they have considered and ruled inadmissible, and a privilege hearing conducted by me would involve nothing more difficult than that. However at the outset of these Inquiries, I chose to follow the precedent that had worked well in the Walkerton Inquiry and Commission Counsel have consistently offered this avenue of review to parties in these Inquiries. I am grateful to Regional Senior Justice Blair for his commitment.

1. Commission Counsel will unseal all eighteen boxes received at the Inquiry premises from Morrison Brown Sosnovitch and review their entire contents for relevance, helpfulness and possible privilege, taking into account all issues in both the Toronto Computer Leasing Inquiry and the Toronto External Contracts Inquiry.

2. The review will be conducted confidentially on Inquiry premises. It will begin immediately after the expiry of five full working days following the date of the release of this Ruling, and continue during business hours on consecutive working days until completed.

3. Mr. Lyons and/or his counsel, including counsel's student-at-law, may attend and participate in the review within the time frame set out above.

4. If documents relating to Dell Computer Corporation are discovered, Dell may participate in the review within the time frame set out above.

5. Unhelpful material and privileged material will be returned as soon as practicable.

6. Helpful and non-privileged material will be distributed to parties with standing in the usual manner employed by these Inquiries.

7. Helpfulness and privilege issues will be resolved between counsel wherever possible.

8. Materials that are the subject of unresolved helpfulness claims will be placed before me for a ruling. Affected parties may make submissions as I direct.

9. Materials that are the subject of unresolved privilege claims will be placed before the Regional Senior Justice for the Toronto Region, or his designate, for a ruling. Notice of any

hearing before the Regional Senior Justice or his designate will be provided to all parties with standing in both Inquiries. It will be for that judge to decide whether intervenor status will be given and whether the hearing will be *in camera* or in public. Claims for privilege must be accompanied by: a description of the document including the date, type and parties to whom it pertains; a description sufficient to identify the contents without compromising the alleged privilege; and the reason for the privilege claim. Affected parties may make submissions as the Regional Senior Justice or his designate may direct. Without necessarily agreeing that there will not be material facts in disputes, parties are agreed that a proceeding before the Regional Senior Justice or his designate is deemed to be an application pursuant to Rule 14 of the *Rules of Civil Procedure*.

10. If a notice seeking review of this ruling in any appropriate court is properly served and filed before the eighteen sealed boxes are unsealed in accordance with paragraph 2 above, then the boxes shall remain sealed and stored on Inquiry premises. The sealed boxes shall then be dealt with only as directed by either the reviewing court, or by me as authorized by the reviewing court.

Commission Counsel:	Mr. David Butt and Mr. Christopher Thiesenhausen
Counsel for Jeffrey Lyons:	Mr. Richard Auger
Counsel for the City of Toronto:	Mr. Ian Roland and Mr. Andrew Lewis
Counsel for Dell Computer Corporation:	Ms. Valerie Dyer

Motion heard:	Friday, October 10, 2003
Ruling released:	Wednesday, October 15, 2003

Appendix G(vii): Commissioner's Ruling regarding an Application by Commission Counsel to Unseal & Inspect Boxes Containing Documents Belonging to Jeffrey Lyons, October 15, 2003

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.

Appendix G(viii): Commissioner's Ruling regarding a Motion by Tom Jakobek and Deborah Morrish, April 30, 2004

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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]

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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.

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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.

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- 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).

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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

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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

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- 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

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- 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

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Toronto Computer Leasing Inquiry

The Honourable Denise Bellamy, Commissioner

Ruling on Application by Counsel for Tom Jakobek

On September 2, 2004, the Commission received an Application by Alan Gold, counsel for Tom Jakobek, to permit him to examine Mr. Jakobek pursuant to Rule 26 of the Inquiry's Rules of Procedure. Mr. Gold states that such an examination would be more effective and in the best interests of his client. Parties with standing were advised of this Application, and none have made any submissions.

Rule 26 provides as follows:

> In the ordinary course, Commission counsel will call and question witnesses who testify at the Inquiry. Counsel for a witness may apply to the Commissioner to lead a particular witness' evidence in-chief. If counsel is granted the right to do so, examination shall be confined to the normal rules governing the examination of one's own witness in court proceedings, unless otherwise directed by the Commissioner.

Having considered Mr. Gold's application, I have decided that Mr. Gold will be permitted to lead Mr. Jakobek's evidence in-chief, contrary to the usual practice whereby Commission counsel conduct the initial examination of each witness. Mr. Gold will examine his client in accordance with the normal rules governing the examination of one's own witness in court proceedings. Cross-examination by Commission counsel will follow. Other parties with standing may cross-examine Mr. Jakobek following Commission counsel. Mr. Gold will be permitted a right of re-examination when all cross-examinations are completed, followed by Commission counsel (Rule 27(d)).

The Inquiry's Rules of Procedure further provide that following an interview, Commission counsel will prepare a summary of a witness' anticipated evidence (Rule 19). The

summary, once approved by the witness, will be shared with people with standing (Rule 20). In this case, since Commission counsel have not interviewed Mr. Jakobek since April 2003 and counsel for Mr. Jakobek will be leading the evidence of this witness, I order that counsel for Mr. Jakobek provide a detailed summary of Mr. Jakobek's anticipated evidence to Commission counsel by 10:00 a.m. on Tuesday, September 7, 2004. Commission counsel will circulate the summary to parties with standing. Since March 2003, Commission counsel have endeavoured to provide affidavits of witnesses to all parties with standing. Accordingly, if Mr. Jakobek prefers to prepare a detailed affidavit as opposed to a summary of anticipated evidence, he may do that by the same date, and, again Commission counsel will circulate this to the parties with standing.

Application by counsel for Tom Jakobek received on:	September 2, 2004
Decision released on:	September 3, 2004

Toronto Computer Leasing Inquiry

The Honourable Denise Bellamy, Commissioner

Ruling

Regarding a Motion by the City of Toronto
To Extend the Deadline for Closing Submissions

At the end of the day this past Friday, the City brought a motion on short notice to extend by two weeks the deadline for closing submissions to the Toronto Computer Leasing Inquiry. The City's position is that, despite its best efforts, it simply will not be able to meet the deadline of November 22, 2004, without seriously prejudicing the City's interests. The City's motion was either supported or unopposed by counsel present.

I will grant the City's request, although I do so reluctantly. As I have said many times previously, I remain committed to controlling costs. Every delay increases the costs of this Inquiry. On the other hand, I am well aware that there is a substantial amount of material to synthesize. Indeed, in support of her motion for the extension, counsel for the City reported that the City's written materials would likely exceed 1200 pages organized into 29 chapters.

It would not be fair for me to extend the deadline for the City and not for others. Nor does the City take that position. Accordingly, I make the following ruling:

1. All those who were to provide their closing submissions by November 22 will now have until 4:00 p.m. Monday, December 6, 2004 to do so, although I encourage and welcome submissions earlier than that date;

2. The submissions will be posted on our website shortly thereafter. Our goal is to have them up by the morning of Friday, December 10. If there is any change to this, it will be posted on our website;

3. It follows that if the deadline for submissions is extended, so too is the deadline for the presentation of oral or written reply submissions. I have asked Commission Counsel, Daina Groskaufmanis, to invite all those who might be making reply submissions to inform us by the end of next week whether they expect to be making those submissions orally or in writing. This will enable us to set the appropriate amount of time for the submissions. For now, I will tentatively set the week of January 10, 2005 to hear oral reply submissions, and a deadline of Monday, January 17, 2005 for the receipt of written reply submissions;

4. Apart from these dates, the other provisions which address Closing Submissions continue to apply. These are posted on our website;

5. In so far as submissions for the Toronto External Contracts Inquiry are concerned, I remind counsel of Ms. Groskaufmanis's e-mail of October 26, 2004. Counsel should expect to submit closing submissions approximately four weeks after the evidence is completed.

Motion Heard: Friday, November 5, 2004
Ruling: Monday, November 8, 2004

Appendix G(x): Commissioner's Ruling regarding a Motion by the City of Toronto to Extend the Deadline for Closing Submissions, November 8, 2004

Toronto Computer Leasing Inquiry

The Honourable Denise Bellamy
Commissioner

RULES OF PROCEDURE

GENERAL

1. The Toronto Computer Leasing Inquiry is an independent Commission set up by unanimous vote of Toronto City Council with specific terms of reference to inquire into all aspects of the transactions related to certain computer leasing and software contracts entered into by the City of Toronto. The Commission will be considering the history of these contracts 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 the City's public business. Following the conclusion of hearings, the Commissioner will make any recommendations she deems appropriate and in the public interest.

1.1 The findings and recommendations of the Commissioner in both this Inquiry and in the Toronto External Contracts Inquiry will be contained in one report.

2. Throughout these Rules, the words "Commission" and "Inquiry" are used interchangeably, and both refer to the Toronto Computer Leasing Inquiry.

3. Public hearings will be held at the East York Civic Centre Council Chamber, located at 850 Coxwell Avenue, Toronto, Ontario, M4C 5R1. The Commissioner will set the dates

for the hearings. Hearings will take place between 10:00 a.m. and 4:30 p.m., Monday through Thursday each week.

4. The Commission is committed to a process of fairness, including public hearings and public access to evidence and documents used at the hearings.

5. The Commissioner encourages anyone who may have information that may be helpful to the Inquiry, including documents and the names of witnesses, to provide this information to the Commission as soon as possible.

6. People are advised that the law offers protection to witnesses to encourage them to come forward and give full and forthright evidence to an Inquiry.

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.

11.1 People with standing in the Toronto External Contracts Inquiry shall, upon request, be granted standing in the Toronto Computer Leasing Inquiry to the extent that the Commissioner determines that evidence received at this Inquiry may engage their substantial and direct interest.

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.

PREPARATION OF DOCUMENTARY EVIDENCE

13. As soon as possible following the granting of standing, people with standing will produce to the Commission all documents having any bearing on the subject matter of the Inquiry. People are encouraged to advise Commission counsel of the names, addresses and

telephone numbers of all witnesses they feel should be heard and, if possible, to provide summaries of the information the witnesses may have.

14. All documents received by the Commission will be treated by the Commission as confidential, unless and until they are made part of the public record or the Commissioner otherwise directs; however, Commission counsel are permitted to produce such documents to proposed witnesses.

15. Commission counsel will try to provide, both to witnesses and people with standing, those documents that will likely be referred to during a witness' testimony. Before being provided with such documents, witnesses and people with standing will be required to sign an undertaking that they will use the documents only for the purposes of the Inquiry.

16. No document will be used in cross-examination or otherwise unless Commission counsel have been advised in advance and the document has been provided to Commission counsel, the witness, and people with standing, unless the Commissioner decides otherwise.

WITNESS INTERVIEWS

17. Commission counsel will interview people who have information or documents which have any bearing upon the subject matter of the Inquiry and may be helpful in fulfilling the Commission's mandate. People who are interviewed are welcome, but not required, to have legal counsel present.

18. Witnesses are advised that the *Public Inquiries Act* provides that no adverse employment action shall be taken against any employee who, acting in good faith, has given information to an Inquiry.

19. Following the interview, Commission counsel will prepare a summary of the witness' anticipated evidence and, before that person testifies before the Commission, will provide a copy of the summary to the witness for his or her review.

20. The witness summary, after being provided to the witness, will be shared with people with standing. Before being given a copy of the witness summary, people with standing will be required to sign an undertaking that they will use the witness summary only for the purposes of the Inquiry.

EVIDENCE

21. The Commissioner may receive any evidence that she considers to be helpful in fulfilling the mandate of the Inquiry. The strict rules of evidence used in a court of law to determine admissibility of evidence will not apply.

21.1 The Commissioner may receive in this Inquiry any evidence from the Toronto External Contracts Inquiry. Parties with standing in this Inquiry may refer to evidence received in the Toronto External Contracts Inquiry.

22. Witnesses who testify will give their evidence under oath or upon affirmation.

23. It will be the practice of Commission counsel to issue and serve a subpoena (summons to witness) upon every witness before he or she testifies.

24. Witnesses are entitled to have their own counsel present while they testify. Counsel for a witness will have standing for the purposes of that witness' testimony.

25. Witnesses may be called more than once.

26. In the ordinary course, Commission counsel will call and question witnesses who testify at the Inquiry. Counsel for a witness may apply to the Commissioner to lead a particular witness' evidence in-chief. If counsel is granted the right to do so, examination shall be confined to the normal rules governing the examination of one's own witness in court proceedings, unless otherwise directed by the Commissioner.

27. The order of examination will be as follows:

    (a) Commission counsel will lead the evidence from each witness. Except as otherwise directed by the Commissioner, Commission counsel are entitled to ask both leading and non-leading questions;

    (b) People with standing will then have an opportunity to cross-examine the witness to the extent of their interest. The order of cross-examination of each witness will be determined by the people with standing and, if they are unable to reach agreement, by the Commissioner;

(c) Counsel for a witness will examine last, unless he or she has questioned the witness in-chief, in which case there will be a right to re-examine the witness; and

(d) Commission counsel will have the right to re-examine last.

28. If Commission counsel elect not to call a witness or to file a document, anyone with standing may apply to the Commissioner to do so or to direct Commission counsel to do so.

29. All hearings are open to the public; however, where the Commissioner is of the opinion that,

(a) matters involving public security may be disclosed at the hearing; or

(b) intimate financial or personal matters or other matters may be disclosed at the hearing that are of such a nature, having regard to the circumstances, that the desirability of avoiding disclosure in the interest of any person affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public,

the Commissioner may hold the hearings concerning any such matters in the absence of the public on such terms as she may direct.

30. Applications from witnesses or people with standing to hold any part of the hearing in the absence of the public should be made in writing to the Commission at the earliest possible opportunity.

31. The transcripts and exhibits from the hearings will be made available as soon as possible for public viewing. If any part of the hearings is held in the absence of the public, the transcripts and exhibits from that part of the hearing will only be made available for public viewing on such terms as the Commissioner may direct.

32. The proceedings are open to the public. The use of television cameras or other electronic or photographic equipment in the hearing room will be permitted at the direction of the Commissioner.

RIGHT TO COUNSEL

33. Witnesses and people with standing are entitled, but not required, to have counsel present while Commission counsel interview them and also when they testify.

34. 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.

NOTICES REGARDING ALLEGED MISCONDUCT

35. The Commissioner will not make a finding of misconduct on the part of any person unless that person has had reasonable notice of the substance of the alleged misconduct and was allowed full opportunity during the Inquiry to be heard in person or by counsel.

36. Any notices of alleged misconduct will be delivered on a confidential basis to the person to whom the allegations of misconduct refer.

AMENDMENT TO THE RULES

37. These Rules may be amended and new Rules may be added if the Commissioner finds it helpful to do so to fulfil the Commission's mandate and to ensure that the process is thorough and fair.

Toronto Computer Leasing Inquiry
East York Civic Centre
850 Coxwell Avenue
Toronto, Ontario
M4C 5R1

Tel: 416-338-3999
Fax: 416-338-3944

www.torontoinquiry.ca

Toronto External Contracts Inquiry

The Honourable Denise Bellamy
Commissioner

RULES OF PROCEDURE

GENERAL

1. The Toronto External Contracts Inquiry is an independent Commission set up by majority vote of Toronto City Council with specific terms of reference to 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);
   - all of the circumstances related to the amalgamated City of Toronto's selection of TMACS and the selection of consultants to develop and/or implement TMACS at the amalgamated City of Toronto;
   - all of the circumstances surrounding the selection of Ball Hsu & Associates Inc. consultants to provide consulting services to the City of Toronto;
   - all aspects of the purchase of computer hardware and software that subsequently formed the basis for the computer leasing Request for Quotations that is the subject of the Toronto Computer Leasing Inquiry.

   The Commission will be considering the history of these contracts 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 the City's public business. Following the conclusion of hearings, the Commissioner will make any recommendations she deems appropriate and in the public interest.

1.1 The findings and recommendations of the Commissioner in both this Inquiry and in the Toronto Computer Leasing Inquiry will be contained in one report.

2. Throughout these Rules, the words "Commission" and "Inquiry" are used interchangeably, and both refer to the Toronto External Contracts Inquiry.

3. Public hearings will be held at the East York Civic Centre Council Chamber, located at 850 Coxwell Avenue, Toronto, Ontario, M4C 5R1. The Commissioner will set the dates for the hearings. Hearings will take place between 10:00 a.m. and 4:30 p.m., Monday through Thursday each week.

4. The Commission is committed to a process of fairness, including public hearings and public access to evidence and documents used at the hearings.

5. The Commissioner encourages anyone who may have information that may be helpful to the Inquiry, including documents and the names of witnesses, to provide this information to the Commission as soon as possible.

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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.

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13. As soon as possible following the granting of standing, people with standing will produce to the Commission all documents having any bearing on the subject matter of the Inquiry. People are encouraged to advise Commission counsel of the names, addresses and telephone numbers of all witnesses they feel should be heard and, if possible, to provide summaries of the information the witnesses may have.

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21.1 The Commissioner may receive in this Inquiry evidence from the Toronto Computer Leasing Inquiry. Parties with standing in this Inquiry may refer to evidence received in the Toronto Computer Leasing Inquiry.

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(b) intimate financial or personal matters or other matters may be disclosed at the hearing that are of such a nature, having regard to the circumstances, that the desirability of avoiding disclosure in the interest of any person affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public,

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37. These Rules may be amended and new Rules may be added if the Commissioner finds it helpful to do so to fulfil the Commission's mandate and to ensure that the process is thorough and fair.

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Toronto External Contracts Inquiry
East York Civic Centre
850 Coxwell Avenue
Toronto, Ontario
M4C 5R1

Tel: 416-338-3999
Fax: 416-338-3944

www.torontoinquiry.ca

TORONTO COMPUTER LEASING INQUIRY

SUMMONS TO WITNESS

RE:

TO:

You are hereby summoned and required to attend before the Toronto Computer Leasing Inquiry at a hearing to be held at Council Chambers in the East York Civic Centre, 850 Coxwell Avenue, in the City of Toronto, Ontario on …….day, the …… day of ……, 2002, at the hour of ten o'clock in the forenoon local time and so from day to day until the Inquiry is concluded or the Commission otherwise orders, to give evidence on oath touching the matters in question in the Inquiry and to bring with you and produce at such time and place all books, contracts, orders, papers, letters, copies of letters, statements, notices, agreements, catalogues, manuals, cards, order forms, and any and all other documentation and writings in your custody, possession or power containing any entry, memorandum, minute, or material relating to the matters in issue before this Inquiry.

Dated this …….day of …….., 2002.

_____

The Honourable Madam Justice Bellamy
Commissioner

NOTE:

You are entitled to be paid the same personal allowances for your attendance at the hearing as are paid for the attendance of a witness summoned to attend before the Ontario Superior Court of Justice.

If you fail to attend and give evidence at the inquiry, or to produce the documents or things specified, at the time and place specified, without lawful excuse, you are liable to punishment by the Ontario Superior Court of Justice in the same manner as if for contempt of that Court for disobedience to a summons.

PRIVATE AND CONFIDENTIAL

[DATE]

[NAME, INSIDE ADDRESS]

Dear [NAME],

The City of Toronto has called a public inquiry to examine all aspects of contracts for services between the City of Toronto and [COMPANY]. The Honourable Madam Justice Bellamy of the Ontario Superior Court of Justice is the Commissioner of the Inquiry, and has appointed legal counsel (Commission Counsel) to fully explore all the issues surrounding these contracts. You may read more about the Inquiry on our web site: www.torontoinquiry.com.

Please find enclosed a Summons to Witness (a subpoena) to appear as a witness before the Toronto External Contracts Inquiry. We appreciate that you have already indicated to our investigator that you do not wish to appear as a witness, or otherwise co-operate with the Inquiry in any way. While the Summons to Witness cannot be enforced outside of the Province of Ontario, your appearance could be of great assistance to the Commissioner in the writing of her report, and we would strongly encourage you to appear. **We must advise that if you fail to appear, the Commissioner may draw inferences unfavourable to you because you failed to appear.** Any adverse inferences that the Commissioner might draw would be published in her final report which will be made publicly available and widely distributed.

Although the Summons requests your attendance on [DATE], you are not required to appear at the hearing on that date. If you at any point change your mind and wish to co-operate with the Inquiry, please contact our administrative assistant at [TELEPHONE NUMBER], as soon as possible. To repeat what our investigators have told you, Commission Counsel wish to first interview you, which we are prepared to do at a place and time in the near future convenient to you.

In addition, I wish to inform you that the Commission might make a finding of misconduct by you in its report. This does not necessarily mean that a find-

ing of misconduct will be made against you, but the Commission is required by law to give you notice if such a finding might be made. The substance of the alleged misconduct is set out in the attachment to this letter.

The Rules of Procedure that govern the Inquiry state that the Commissioner will not make a finding of misconduct on the part of any person unless that person has had reasonable notice of the substance of the alleged misconduct. As a recipient of this notice, you have full opportunity to respond to the alleged misconduct in person or by counsel during the Inquiry. A copy of the Rules can be obtained from our website at www.torontoinquiry.ca or by contacting our office. Do not hesitate to contact me regarding any questions you may have on the application of the Rules of Procedure.

It is possible that during the course of the Inquiry, the Commission, through its counsel, may modify the alleged misconduct as circumstances change or as new information or evidence becomes available.

If you hire a lawyer and prefer that we communicate directly with your lawyer, please have him or her contact our administrative assistant at the above number.

Thank you in anticipation of your co-operation and assistance.

Yours very truly,

David Butt
Commission Counsel

Encl.

TORONTO COMPUTER LEASING INQUIRY
TORONTO EXTERNAL CONTRACTS INQUIRY

WITNESS PHOTOGRAPH FORM

The Toronto Computer Leasing Inquiry appreciates your coming to testify. You are one of many witnesses who will be heard in an inquiry that may take many months to complete. In such a long hearing, it is very important that the Commissioner, Commission counsel, and other lawyers involved in the hearings remember what each witness said. Taking your photograph now puts a face to your evidence, which will help everyone remember what you said at the Inquiry.

You are free to decline to have your photograph taken. If you allow your photograph to be taken, it will be used only in the following two ways:

1. The Registrar of the Inquiry will keep one copy of the photograph, along with the photographs of other witnesses, in a binder in the Hearing Room. That binder will be used during the hearing by the Commissioner, lawyers, and witnesses as a memory aid. At the end of each day the binder will be locked in a secure location.

2. After the hearings are complete, the Commissioner will use your photograph during the writing of her Report to assist in recalling you and your evidence.

The photograph will not be used in any other way. Once the Commissioner's Report is released and the Inquiry is over, all witness photographs will be destroyed.

Please sign below if you agree to have your photograph taken and used as described above.

_____ _____

Date Witness Name Printed

_____

Signature

TORONTO COMPUTER LEASING INQUIRY

CALL FOR APPLICATIONS FOR STANDING

Madam Justice Denise Bellamy has been appointed as the Commissioner of the Toronto Computer Leasing Inquiry that is 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, their history and their impact on the ratepayers of the City of Toronto. The Commissioner is to make any recommendations that she may deem appropriate and in the public interest.

Applications for standing are 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. Standing before a Commission of Inquiry gives the individual or organization the right to take part in the proceedings and to make submissions, on terms set by the Commissioner.

Written requests for standing, setting out the reasons that standing is requested, should reach the Commission no later than **4 p.m. on Friday, June 7, 2002**. Detailed criteria for standing are contained in the Inquiry's Rules of Procedure which can be obtained from the Commission. They will also become available on the Inquiry's web page: **www.torontoinquiry.ca**

The Commission's office is at the East York Civic Centre, 850 Coxwell Avenue, Toronto, Ontario, M4C 5R1. Telephone: 416-338-3999; Fax: 416-338-3944.

Hearings on the applications for standing will start on Monday, June 24, 2002, in the Council Chamber at the East York Civic Centre. The Inquiry is to start in the fall.

PERSONAL AND CONFIDENTIAL
TO BE OPENED ONLY BY ADDRESSEE

[DATE]
[DATE]
[INSIDE ADDRESS]

Dear [NAME]:

On behalf of the Toronto Computer Leasing Inquiry, I wish to inform you that the Commission might make a finding of misconduct by you in its report. This does not necessarily mean that a finding of misconduct will be made against you, but the Commission is required by law to send this notice if such a finding might be made. The substance of the alleged misconduct is set out in the attachment to this letter.

The Rules of Procedure that govern the Inquiry state that the Commissioner will not make a finding of misconduct on the part of any person unless that person has had reasonable notice of the substance of the alleged misconduct. As a recipient of this notice, you have full opportunity to respond to the alleged misconduct in person or by counsel during the Inquiry. A copy of the Rules can be obtained from our website at www.torontoinquiry.ca or by contacting our office. Do not hesitate to contact me regarding any questions you may have on the application of the Rules of Procedure.

It is possible that during the course of the Inquiry, the Commission, through its counsel, may modify the particulars of the substance of the alleged misconduct as circumstances change or as new information or evidence becomes available.

Yours very truly,

Ronald D. Manes
Commission Counsel
Encl.

Lyons v. The Honourable Denise Bellamy, Commissioner

[Indexed as: Lyons v. Toronto (Computer Leasing Inquiry — Bellamy Commission)]

70 O.R. (3d) 39
[2004] O.J. No. 648
Court File Nos. 654/03 and 771/03,
Consolidated as 771/03

Ontario Superior Court of Justice
Divisional Court
O'Driscoll, Then and Swinton JJ.

February 19, 2004

Administrative law — Inquiries — Superior Court judge sitting as Commissioner in inquiry under Municipal Act having power to inspect potentially privileged documents to determine whether documents are in fact privileged — Commissioner properly ordering that potentially privileged documents were to be reviewed by Commission counsel and that unresolved issues of relevance were to be determined by Commissioner while unresolved privilege claims were to be placed before Regional Senior Justice for ruling — Commission counsel acting on behalf of Commissioner and not being in adversarial position with respect to party claiming privilege — Procedure adopted by Commissioner minimally impairing solicitor-client privilege and not violating ss. 7 or 8 of Charter — Canadian Charter of Rights and Freedoms, ss. 7, 8 — Municipal Act, 2001, S.O. 2001, c. 25, s. 274.

Toronto City Council, pursuant to s. 274 of the Municipal Act, 2001, S.O. 2001, c. 25, established the Toronto Computer Leasing Inquiry to investigate transactions related to certain computer and software contracts entered into by the City. The applicant was a lawyer but in recent years had worked primarily as a lobbyist, conducting his business from the law firm MBS. In that capacity, he provided assistance to clients in their dealings with the City. The activities of three of those clients, MFP,

DFS and Dell, were part of the subject matter of the inquiry. The applicant testified before the Commission that he did no legal work for those three clients and that if legal work was needed, it was done by other members of MBS. The applicant was served with a Summons to Witness asking him to locate and provide the Commission with all documents within his custody, control and power touching on the matters in question. He produced some documents relating to MFP but no documents relating to DFS.

The Commission issued a summons directly to MBS, requiring that firm to produce any material it had relating to the issues before the inquiry. MBS initially advised Commission counsel that it did not have physical files pertaining to any of the parties referred to by Commission counsel, but continued its search efforts and eventually discovered a large amount of potentially relevant material, including a file pertaining to the applicant's work for DFS. In testimony before the Commission before the DFS file was located by MBS, the applicant stated that the file had been destroyed. The Commissioner was troubled by the contrast between the applicant's testimony and the subsequent search results. [page40]

MBS delivered to Commission counsel 18 boxes of files on a sealed basis, on the understanding that Commission counsel would not unseal them without either the consent of the applicant or an appropriate ruling from the Commissioner. The applicant asserted a blanket privilege over all the sealed material and questioned its relevance. Commission counsel brought a motion before the Commissioner to unseal and inspect the boxes of documents. The Commissioner ordered that the boxes were to be unsealed by Commission counsel and reviewed for relevance, helpfulness and possible solicitor-client privilege. The applicant and/or his counsel would be entitled to attend and participate. Unresolved helpfulness issues were to be resolved by the Commissioner, while unresolved privilege issues were to be arbitrated by the Regional Senior Justice at Toronto.

The applicant brought an application for judicial review of that decision, arguing that the procedure adopted by the Commissioner was an unreasonable search and seizure under s. 8 of the Canadian Charter of Rights and Freedoms and a violation of the principles of fundamental justice under s. 7 of the Charter. Counsel for the applicant submitted that minimal impairment of the Charter would ensue if he viewed the documents first to determine if privilege existed. That argument rested on the assumption that Commission counsel was an agent of the state in an adversarial position vis-à-vis the applicant, so that allowing Commission counsel a role in screening the documents would not minimally impair solicitor-client privilege. The applicant then brought a motion to vary the ruling, raising grounds that had not been before the Commissioner on the motion by Commission counsel and alleging that Commission counsel had taken an improperly adversarial approach in dealings with his counsel.

Appendix M(i): Divisional Court Ruling in *Lyons v. Toronto Computer Leasing Inquiry,* [2004] O.J. No. 648 (Div. Ct.) (QL), February 19, 2004

The Commissioner declined jurisdiction over the motion to vary. The applicant brought an application for judicial review of that decision.

Held, the applications should be dismissed.

It was questionable whether solicitor-client privilege existed in this case, given that on the applicant's own uncontradicted evidence before the Commission, he did not act as a lawyer and did not practise law during the relevant period while associated with MBS and did not provide legal services to MFP, DFS or Dell, acting for them solely as a lobbyist. However, there was a possibility that there might be privileged documents in the boxes. The screening process put in place by the Commissioner minimally impaired solicitor-client privilege. The task of screening the documents could not be left to the applicant, given his past conduct. To give the task to his solicitor was to introduce a stranger into the review process, as counsel for the applicant had no solicitor and client relationship with the individuals whose privileged documents might be in the boxes. Moreover, although he was an officer of the court, his duty was to the applicant, which could put him in a conflict of interest position in reviewing the documents. The Commissioner, a judge of the Superior Court of Justice, had the power to determine whether documents were privileged and, therefore, inadmissible in Commission hearings. If a judge may inspect potentially privileged documents in the civil litigation context, a judge sitting as a Commissioner in the context of an inquiry under the Municipal Act was also able to do so. The applicant was wrong in his characterization of Commission counsel as an agent of the state who was in an adversarial position, analogous to a Crown prosecutor. The privilege which the applicant sought to protect was that of his clients or former clients, and there was no reason to think that there was any conflict between Commission counsel and the individuals who might claim privilege with respect to the documents in the sealed boxes.

The Commissioner properly declined jurisdiction to entertain a motion to vary, as the order in question was already the subject of a pending application for judicial [page41]review. Moreover, the variation motion appeared to be an attempt to put material before the Commissioner which the applicant's counsel could have presented at the first hearing.

Lavallee, Rackel and Heintz v. Canada (Attorney General), [2002] 3 S.C.R. 209, 216 D.L.R. (4th) 257, 4 Alta. L.R. (2d) 1, 651 A.P.R. 183, 167 C.C.C. (3d) 1, *consd*

Other cases referred to

Ansell Canada Inc. v. Ions World Corp., [1998] O.J. No. 5034 (QL), 28 C.P.C. (4th) 60 (Gen. Div.); Canadian Civil Liberties Assn. v. Ontario (Civilian Commission on Police Services) (2002), 97 C.R.R. (2d) 271, 220 D.L.R. (4th) 86, 61 O.R. (3d)

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649, [2002] O.J. No. 3737 (QL) (C.A.); Church of Scientology and The Queen (No. 6) (Re) (1987), 31 C.C.C. (3d) 449, 30 C.R.R. 238, 18 O.A.C. 321 (C.A.), affg (1985), 21 C.C.C. (3d) 147, 15 C.R.R. 23 (Ont. H.C.J.); Consortium Developments (Clearwater) Ltd. v. Sarnia (City) (1998), 165 D.L.R. (4th) 25, 48 M.P.L.R. (2d) 1, 230 N.R. 343, 40 O.R. (3d) 158n, [1998] 3 S.C.R. 3; Maranda v. Richer (2003), 178 C.C.C. (3d) 321, 232 D.L.R. (4th) 14, 311 N.R. 357, [2003] 3 S.C.R. 193, 2003 SCC 67, 15 C.R. (6th) 1, [2003] S.C.J. No. 69

Statutes referred to

Canadian Charter of Rights and Freedoms, ss. 7, 8

Criminal Code, R.S.C. 1985, c. C-46, s. 488.1

Judicial Review Procedure Act, R.S.O. 1990, c. J.1

Municipal Act, 2001, S.O. 2001, c. 25, s. 274

Public Inquiries Act, R.S.O. 1990, c. P.41, s. 11

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rule 30.10(3)

Authorities referred to

O'Connor, D., "The Role of Commission Counsel in a Public Inquiry" (2003) 22 Advocates' Soc. J. 10

APPLICATIONS for judicial review of rulings of the Commissioner in an inquiry established under the Municipal Act, 2001, S.O. 2001, c. 25.

David Stratas and Brad Elberg, for applicant.

Earl Cherniak, Q.C., Kirk Stevens and

Christine Snow, for respondent.

Linda Rothstein and Andrew Lewis, for intervenor City of Toronto.

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[1] **SWINTON J**: — The applicant has brought two applications, now consolidated, for judicial review under the Judicial Review Procedure Act, R.S.O. 1990, c. J.1. The first application (654/ 03, launched on October 24, 2003) seeks an order in

the nature of certiorari quashing a ruling of the Commissioner dated October 15, 2003, and for an order remitting the matter [page42]back to the Commissioner for re-determination on the basis that the contents of the applicant's 18 sealed boxes of documents be handed over to the applicant's solicitors for them, and them only, to examine the contents for relevance and solicitor-client privilege. The second application (771/03, launched December 18, 2003) seeks an order in the nature of certiorari quashing the decision of the Commissioner made on an unknown date and announced by a letter, dated November 17, 2003, sent to the solicitor for the applicant. This judicial review application concerns the applicant's motion to vary the order of the Commissioner, dated October 15, 2003. The applicant also seeks an order by way of mandamus requiring the Commissioner to determine the motion for variation.

Background and Chronology

[2] In February 2002, Toronto City Council, pursuant to s. 274 of the Municipal Act, 2001, S.O. 2001, c. 25, established the Toronto Computer Leasing Inquiry ("TCLI") and appointed the Honourable Denise Bellamy as Commissioner. The purpose of the inquiry is to investigate all aspects of the transactions related to certain computer leasing and software contracts entered into by the City of Toronto between 1998 and 2001 and to consider their impact on the City's ratepayers as they relate to the good government of the municipality or the conduct of the City's public business. This inquiry was officially commenced in September 2002 and is ongoing.

[3] In October 2002, Toronto City Council, again pursuant to s. 274 of the Municipal Act, supra, established the Toronto External Contracts Inquiry ("TECI"). It is scheduled to begin shortly, according to the respondent's factum. TECI's mandate is to investigate a number of issues relating to consultants retained by the City of Toronto and the former City of North York and the purchase of certain computer hardware that forms the basis for the computer leasing transactions which are also the subject of TCLI, the first inquiry.

[4] The applicant, Jeffrey Lyons, is a lawyer, but in recent years he has worked primarily as a lobbyist. In this capacity, he provided assistance to clients in their dealings with the City of Toronto. Those to whom he provided assistance included MFP Financial Services Ltd. ("MFP"), Dell Financial Services Limited ("DFS") and Dell Computer Corporation ("Dell"). The activities of those three corporations between 1998 and 2001 are part of the subject matter of both inquiries.

[5] Between December 1995 and June 2001, Mr. Lyons conducted his business as a lobbyist from the law firm of Morrison [page43]Brown Sosnovitch LLP ("MBS"). He has testified that he worked as a lobbyist while at MBS, and when legal work was required by his clients, the work was handled by other members of the law firm. For

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example, the following exchange between Commission counsel and Mr. Lyons is found in the Inquiry's transcripts dated May 8, 2003 (p. 14):

Q. All right. Now, at the time that — at the time you became associated with Morrison Brown Sosnovitch as a counsel, were you practicing law anymore?

A. Not really.

Q. All right.

A. I was doing some administrative law but . . .

Q. In relation to — to Dell Financial Services, Dell Computer were you engaged in giving them legal advice or practicing law when they retained you?

A. No.

At another point, when asked whether he was familiar with the practice of law firms sending files to off-site storage, Mr. Lyons gave the following answer:

A. We don't have any legal files.

Q. I'm saying, Mr. Lyons, that you surely developed a practice as a lawyer, over all the years that you practiced of sending closed files to off-site storage?

A. Yes, when I was a lawyer, but I don't practice law.

[6] In August 2002, the applicant was interviewed by Commission counsel and served with a TCLI "Summons to Witness". The summons advised Mr. Lyons that he had an obligation to make every reasonable effort to locate and provide the Commission with all documents within his custody, control and power "touching on the matters in question".

[7] On December 2, 2002, Mr. Lyons applied for and was granted standing at the inquiry. Under TCLI's Rules of Procedure, those granted standing are deemed to undertake to follow the Rules of Procedure. Under Rules 9 and 11 of those rules, Mr. Lyons was thereby required to produce to the Commission all documents having any bearing on the subject matter of the inquiry.

[8] Mr. Lyons produced some documents to Commission counsel relating to MFP, but no documents relating to DFS were produced. On February 14, 2003,

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Commission counsel wrote to Mr. Lyons' counsel and reminded Mr. Lyons of his obligation to [page44]contact the law firm MBS in order to ensure that he, Mr. Lyons, had produced all material relevant to the inquiry.

[9] By the beginning of March 2003, Commission counsel had received no response or assurance that MBS had been contacted in order to search for material helpful to the inquiry. Therefore, on March 7, 2003, Commission counsel issued a TCLI/ TECI summons directly to MBS, requiring that law firm to produce any material it had relating to the issues before the inquiry. Mr. Lyons' counsel has conceded that this summons was properly issued.

[10] Initially, MBS advised Commission counsel that it did not have physical files pertaining to any of the parties referred to by Commission counsel. The firm, however, continued its search efforts and eventually discovered a large amount of potentially relevant material in both electronic and paper format, including a file pertaining to Mr. Lyons' work for DFS. Most of the additional material was located in banker's boxes which were found in the off-site storage facilities of MBS.

[11] On May 8, 12, 13 and 14, 2003, Mr. Lyons testified before Commissioner Bellamy at the TCLI. Unfortunately, Commission counsel did not become aware of the existence of the additional material found by MBS until after Mr. Lyons completed his testimony on May 14. During his testimony, Mr. Lyons stated that the DFS file had been destroyed, although it was found by MBS.

[12] For the purposes of these reasons, there is no need to comment upon the applicant's testimony before the inquiry. The Commissioner's assessment of Mr. Lyon's evidence may be found at pp. 1 to 4 of her Ruling, dated October 15, 2003. Her assessment was summarized in this sentence on p. 3: "With the benefit of hindsight, the contrast between Mr. Lyons' testimony and the later results of the search for material by Morrison Brown Sosnovitch is striking and troubling."

[13] In July 2003, MBS advised Commission counsel in a letter that "we did send two boxes of Mr. Lyons' personal files to Mr. Lyons at his request some time in the calendar year 2002." The Commissioner observed in her reasons at p. 4:

> Mr. Lyons was therefore aware he had boxes in storage at Morrison Brown Sosnovitch. The Toronto Computer Leasing Inquiry was publicly announced in February 2002. Commission Counsel do not know what was in the boxes, nor do they know when in 2002 they were retrieved. Mr. Lyons has not volunteered this information.

[14] On July 22, 2003, MBS delivered to Commission counsel 18 boxes of files which had been retrieved from its storage facilities. In accordance with a suggestion

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from Commission counsel, [page45]MBS delivered the boxes on a sealed basis, on the understanding that Commission counsel would not unseal them without either the consent of Mr. Lyons or an appropriate ruling from the Commissioner.

[15] On August 6, 2003, Commission counsel advised counsel for the applicant that it had received the material and proposed to deal with the unsealing in the manner which had been accepted by other parties at the inquiry. It was proposed that Commission counsel would unseal the boxes and review their entire contents on a without prejudice basis. If desired, the applicant and/or his counsel could be present throughout and review the contents at the same time. Privilege and relevance issues would be resolved through discussion, if possible. If not, relevance issues would be determined by the Commissioner, and privilege issues would be determined by Regional Senior Justice Blair of Toronto.

[16] Counsel for the applicant then asserted a blanket privilege over all the sealed material and also questioned its relevance. A lengthy exchange ensued between Commission counsel and counsel for the applicant. In view of Commission counsel's undertaking to MBS and in the absence of any agreement from Mr. Lyons or his counsel to unseal the boxes, Commission counsel had no choice but to bring before the Commissioner a motion to unseal and inspect the 18 boxes containing documents belonging to the applicant.

The October 10, 2003 Motion

[17] At the motion, argued on October 10, 2003, counsel for Mr. Lyons and counsel for Dell took the position that counsel for the party claiming privilege should review his or her client's material and do so in the absence of Commission counsel. Counsel for the Commissioner submitted that the Commission's practice to that date should be continued — that is, the same procedure that had been adopted on a consensual basis at the Walkerton Inquiry to deal with issues of Cabinet privilege. Counsel for the City of Toronto concurred in Commission counsel's submissions.

[18] Under the Walkerton protocol, the 18 boxes at the Inquiry premises would be unsealed by Commission counsel and reviewed for relevance, helpfulness and possible solicitor-client privilege. Mr. Lyons and/or his counsel would be entitled to attend and participate. Unresolved helpfulness or relevancy issues were to be resolved by the Commissioner, while unresolved privilege claims were to be arbitrated by the Regional Senior Justice at Toronto.

[19] Both counsel for the applicant and counsel for the Commission filed separate records with respect to the motion. The [page46]materials filed by both counsel

included only correspondence from the same time period — that is, from the issuance of the summons to MBS in March 2003 up [to] the hearing of the motion.

[20] After reviewing the material filed and hearing submissions on October 10, 2003, the Commissioner reserved her decision. On October 15, 2003, she released a 15-page ruling. At p. 14 of her "Conclusion and Ruling", the Commissioner accepted the submissions of Commission counsel and counsel for the City and set out her formal order, which adopts the procedure proposed by Commission counsel. The terms of the formal order are as follows:

1. Commission Counsel will unseal all eighteen boxes received at the Inquiry premises from Morrison Brown Sosnovitch and review their entire contents for relevance, helpfulness and possible privilege, taking into account all issues in both the Toronto Computer Leasing Inquiry and the Toronto External Contracts Inquiry.
2. The review will be conducted confidentially on Inquiry premises. It will begin immediately after the expiry of five full working days following the date of the release of this Ruling, and continue during business hours on consecutive working days until completed.
3. Mr. Lyons and/or his counsel, including counsel's student-at-law, may attend and participate in the review within the time frame set out above.
4. If documents relating to Dell Computer Corporation are discovered, Dell may participate in the review within the time frame set out above.
5. Unhelpful material and privileged material will be returned as soon as possible.
6. Helpful and non-privileged material will be distributed to parties with standing in the usual manner employed by these Inquiries.
7. Helpfulness and privilege issues will be resolved between counsel wherever possible.
8. Materials that are the subject of unresolved helpfulness claims will be placed before me for a ruling. Affected parties may make submissions as I direct.
9. Materials that are the subject of unresolved privilege claims will be placed before the Regional Senior Justice for the Toronto Region, or his designate, for a ruling. Notice of any hearing before the Regional Senior Justice or his designate will be provided to all parties with standing in both Inquiries. It will be for that judge to decide whether intervenor status will be given and whether the hearing will be in camera or in public. Claims for privilege must be accompanied by: a description of the document including the date, type and parties to whom it pertains; a description sufficient to identify the contents without compromising the alleged privilege; and the

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reason for the [page47]privilege claim. Affected parties may make submissions as the Regional Senior Justice or his designate may direct. Without necessarily agreeing that there will not be material facts in disputes, parties are agreed that a proceeding before the Regional Senior Justice or his designate is deemed to be an application pursuant to Rule 14 of the Rules of Civil Procedure.

10. If a notice seeking review of this ruling in any appropriate court is properly served and filed before the eighteen sealed boxes are unsealed in accordance with paragraph 2 above, then the boxes shall remain sealed and stored on Inquiry premises. The sealed boxes shall then be dealt with only as directed by the reviewing court, or by me as authorized by the reviewing court.

[21] In her reasons, the Commissioner observed that "no one has alleged that Commission Counsel's conduct in these Inquiries has disentitled them from assisting me with a confidential review of potentially privileged materials" (at p. 11). She determined that Commission counsel was in the best position to determine relevance and helpfulness, while she also concluded that, given Mr. Lyons' conduct, "the perception of these Inquiries by reasonable observers could be adversely affected if Mr. Lyons and his counsel were now entrusted as the sole arbiters of what is relevant, helpful and privileged in the eighteen sealed boxes in the Inquiry offices" (at p. 13).

[22] Subsequent to the Commissioner's ruling, the first application for judicial review was launched. Then on November 12, 2003, the applicant sought to schedule a motion to vary the ruling, relying on an affidavit of Todd White, a member of the law firm Greenspan White. At the first motion, Mr. Lyons had been represented by Richard Auger, another member of that firm. In the motion to vary, the applicant raised grounds that had not been before the Commissioner on October 10, 2003. He alleged that Commission counsel had taken an improperly adversarial approach in dealings with his counsel and claimed that Mr. Auger had been surprised by Commission counsel's failure to include certain correspondence in its record for the October 10 appearance.

[23] Notably, Mr. Auger did not provide an affidavit to accompany the Notice of Motion to Vary. Moreover, an examination of the transcript from the October 10 hearing does not reveal any objection by him with respect to the material filed by Commission counsel, nor any criticism voiced with respect to the conduct of Commission counsel, nor any request for an adjournment.

[24] The Commissioner, through her assistant, advised that she declined jurisdiction over this motion to vary. This resulted in the second application for judicial review. ***[page48]***

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The First Application for Judicial Review

[25] Pursuant to s. 274(1) of the Municipal Act, if a municipality so requests by resolution, a judge of the Superior Court of Justice shall be appointed to conduct an inquiry into the good government of a municipality or any alleged misconduct with respect to the conduct of public business. Subsection 274(2) confers on the judge the powers of a commission under Part II of the Public Inquiries Act, R.S.O. 1990, c. P.41, as amended. Section 11 of Public Inquiries Act provides that "Nothing is admissible in evidence at an inquiry that would be inadmissible in a court by reason of any privilege under the law of evidence."

[26] Solicitor-client privilege applies to confidential communications between a solicitor and his client which are related to the seeking, forming and giving of legal advice. It is a substantive right that is of fundamental importance in our legal system and protected by s. 7 of the Canadian Charter of Rights and Freedoms as a principle of fundamental justice. In the words of Arbour J. in Lavallee, Rackel and Heintz v. Canada (Attorney General), [2002] 3 S.C.R. 209, 216 D.L.R. (4th) 257, "solicitor-client privilege must remain as close to absolute as possible if it is to retain relevance" (at para. 36).

[27] In that case, the court considered whether s. 488.1 of the Criminal Code, R.S.C. 1985, c. C-46 violated the guarantee against unreasonable search and seizure in s. 8 of the Charter. That section set out a procedure to determine solicitor-client privilege when documents were seized from a law office under a search warrant. In her reasons, Arbour J. emphasized the importance of protecting solicitor-client privilege by adopting a minimal impairment test to measure the reasonableness of state encroachments on solicitor-client privilege. In her words, "Such protection is ensured by labeling as unreasonable any legislative provision that interferes with solicitor-client privilege more than is absolutely necessary" (at para. 36).

[28] The applicant takes the position that the procedure adopted by the Commissioner is an unreasonable search and seizure under s. 8 of the Charter and a violation of the principles of fundamental justice under s. 7. He argues that there is a real possibility that the 18 sealed boxes include privileged documents. Initially during the argument of this application, counsel took the position that the only way to minimally impair solicitor-client privilege would be by allowing his solicitor, Mr. Stratas, to inspect the documents with him to determine if privilege existed. Mr. Stratas would then create a list of privileged documents, similar to Schedule B of an Affidavit of Documents under the Rules [page49]of Civil Procedure. By the time Mr. Stratas made his reply submissions, he argued that minimal impairment would ensue if he viewed the documents as an agent of Mr. Lyons, rather than as Mr. Lyons' counsel. The argument rests on the assumption that Commission counsel is a third party with a

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role similar to a Crown prosecutor — that is, Commission counsel is an agent of the state in an adversarial position vis-à-vis Mr. Lyons. Therefore, the applicant argues that allowing Commission counsel a role in screening the documents would not minimally impair solicitor-client privilege.

[29] The first question in this proceeding is whether privileged documents exist. Solicitor and client privilege may be raised "where such communications are likely to be disclosed without the client's consent" (Lavallee, supra, at para. 18, emphasis added).

[30] Mr. Lyons has provided no affidavit evidence to describe the material which he believes is in the boxes and which may be privileged. On his own evidence before the Commission, which is unchallenged and uncontradicted, he was not acting as a lawyer and not practising law while associated with Morrison Brown Sosnovitch LLP from December 1995 to June 2001. He was, according to his own evidence, a lobbyist. Moreover, he specifically testified that he provided no legal services to MFP, DFS or Dell and acted for them solely as a lobbyist.

[31] Dell appeared by counsel on the October 10, 2003 motion before the Commissioner and submitted that only counsel for the party claiming solicitor-client privilege should review the material in question. However, neither Dell nor any other party for whom the applicant acted joined Mr. Lyons in these applications for judicial review.

[32] On the facts of this case, it appears unlikely that there is material in the sealed boxes which is the subject of solicitor and client privilege. Nevertheless, given that there is a possibility that there may be privileged documents in the boxes, the Commissioner put in place a screening mechanism, with Commission counsel carrying out that task, in the presence of Mr. Lyons and/or his counsel, if Mr. Lyons wishes to participate. The screening mechanism and the reference to a Superior Court judge to determine disputed questions of privilege are designed to protect the Commissioner from reviewing privileged documents.

[33] No one has objected to the Commissioner's jurisdiction to refer the question of privilege to another judge of the Superior Court of Justice — initially, the Regional Senior Justice in Toronto and subsequently to his nominee, Mr. Justice Nordheimer. In the Walkerton inquiry, on which she modelled her order, a [page50]similar process was adopted on consent. Similarly, in Church of Scientology and The Queen (No. 6) (Re) (1985), 21 C.C.C. (3d) 147, 15 C.R.R. 23 (Ont. H.C.J.), the parties consented to [the] review of allegedly privileged documents by a retired judge. The applicant's factum expresses support for this part of her order. Therefore, given the lack of objection to this part of her order on the part of the applicant, he is taken to have consented to the reference.

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[34] On the facts of this case, I am satisfied that the screening process minimally impairs solicitor and client privilege. On the one hand, the claim that there are privileged documents in the boxes is tenuous, given Mr. Lyons' statements about his lobbying activity while at MBS and his failure to give any basis for asserting privilege over the contents of the boxes. On the other hand, the screening process is reasonable, given the facts. The task of screening the documents can not be left to Mr. Lyons, given his past conduct. To give the task to his solicitor is to introduce a stranger into the review process, as Mr. Stratas has no solicitor and client relationship with the individuals whose privileged documents may be in the boxes. He is the solicitor of Mr. Lyons, not those individuals, and therefore, he is in no better position than any other solicitor to conduct the screening process. Moreover, although he is an officer of the court, as Mr. Lyons' solicitor, his duty is to Mr. Lyons, which may put him in a conflict of interest position in reviewing the documents.

[35] No one took issue with the Commissioner's ability to review the documents for privilege. In my view, the Commissioner, a judge of the Superior Court of Justice, has the power to determine whether documents are privileged and, therefore, inadmissible in Commission hearings.

[36] By law, the Commissioner must be a judge of the Superior Court of Justice. He or she has a responsibility to conduct the investigation in such a way as to gather information and make recommendations, while respecting the rights of individuals who are involved in the events under investigation. As Binnie J. stated in Consortium Developments (Clearwater) Ltd. v. Sarnia (City), [1998] 3 S.C.R. 3, 165 D.L.R. (4th) 25 at para. 27, "A good deal of confidence is inevitably and properly placed in the ability of the Commissioner to ensure the fairness of the inquiry." He went on to state that judicial inquiries are not adversarial, in the sense that there is no lis between the participants (at para. 41).

[37] Both in criminal and civil proceedings, a judge has the authority to determine whether a document is privileged and, therefore, inadmissible. For example, the statutory provision struck down in Lavallee, supra, would have permitted judicial [page51]scrutiny of the documents to determine privilege, and the common law procedure for law office searches set out by Arbour J. also envisaged a role for the judge in determining privilege. This would of necessity require the judge to look at the documents. Similarly, rule 30.10(3) of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194 permits a judge or master to determine questions of privilege and, in doing so, to examine the documents if he or she finds it appropriate to do so (Ansell Canada Inc. v. Ions World Corp., [1998] O.J. No. 5034 (QL), 28 C.P.C. (4th) 60 (Gen. Div.) at para. 20). In my view, if a judge may inspect potentially privileged documents in the civil litigation context, a judge sitting as a Commissioner in the context of an inquiry under the Municipal Act is also able to do so.

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[38] Here, the Commissioner has deputized Commission counsel to screen the sealed documents to determine privilege, in part for reasons of efficiency and in part to shield herself from seeing any privileged documents. In doing so, she commented on the special role of Commission counsel, who, like her, have an obligation of impartiality. In her reasons, she made reference to an article by Associate Chief Justice Dennis O'Connor, who commented on the role of counsel in the Walkerton Inquiry as follows:

> It is with the assistance of commission counsel that the commissioner carries out his or her mandate, investigating the subject matter of the inquiry and leading evidence at the hearings. Throughout, commission counsel act on behalf of and under the instructions of the commissioner.

("The Role of Commission Counsel in a Public Inquiry" (2003) 22 Advocates' Soc. J. 10)

The Commissioner also observed that no one in the hearing before her challenged the conduct of Commission counsel.

[39] In my view, the applicant is wrong in his characterization of Commission counsel as an agent of the state who is in an adversarial position, analogous to a Crown prosecutor. Commission counsel is not a prosecutor, nor is an individual such as the applicant deemed to be an adversary of Commission counsel.

[40] The procedure proposed here is very different from the one that was vulnerable in Lavallee, supra. There, the legislation permitted the Crown prosecutor to view the documents prior to the judicial determination of privilege. Moreover, there was a real danger that privileged documents might be disclosed without the client having notice that the documents were in police custody, and the judge was given no discretion to bar the use of privileged information, if no claim of solicitor-client privilege was made within the specified time limits. In the context of a criminal [page52] investigation, the Supreme Court held that the procedure did not constitute a minimal impairment of the right to solicitor-client privilege.

[41] Moreover, the Supreme Court of Canada has recently reiterated that the court's decision in Lavallee was designed to protect privilege in a criminal law context. In Maranda v. Richer, [2003] 3 S.C.R. 193, 2003 SCC 67, LeBel J. stated at para. 12:

> The aim in those decisions was to avoid lawyers becoming, even involuntarily, a resource to be used in the criminal prosecution of their clients, thus jeopardizing the constitutional protection against self-incrimination enjoyed by the clients.

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[42] Here, there is only a possibility that privileged material will be found in the boxes. It was reasonable for the Commissioner to have Commission counsel sift through the material in the boxes, rather than do so herself, given the time required to do such a review and given counsel's obligation of impartiality. The procedure put in place also allows Mr. Lyons and/or his counsel to be present with Commission counsel in order to assert privilege if privileged documents are revealed.

[43] While the applicant has argued that there is an appearance of unfairness because of conflict between Commission counsel and the applicant's counsel, the argument of conflict is irrelevant here. The privilege which he seeks to protect is that of his clients or former clients, and there is no reason to think that there is any conflict between Commission counsel and the individuals who may claim privilege with respect to documents in the sealed boxes. If such material is found, notice will be given to the client, who can then assert the claim of privilege and obtain a ruling, if necessary.

[44] On the facts of this case, I am satisfied that the procedure adopted by the Commissioner in her ruling of October 15, 2003 minimally impairs solicitor-client privilege, and there is no basis to set aside her order.

The Second Application for Judicial Review

[45] At the time of the First Motion, heard on October 10, 2003, Mr. Auger, counsel for Mr. Lyons, did not complain that relevant documents were not before the Commissioner, nor did he allege unfairness or bias on the part of Commission counsel. Counsel for Mr. Lyons commenced the first application for judicial review (654/03) on October 24, 2003, about three weeks before bringing the Motion to Vary the Commissioner's October 15, 2003 ruling. Thus, the Variation Motion sought to vary the October 15, 2003 order, which was already the subject of a pending application for [page53]judicial review in the Divisional Court. Under those circumstances, the Commissioner properly declined the request to entertain a Motion to Vary.

[46] Moreover, the Variation Motion appears to be an attempt to put material before the Commissioner which the applicant's counsel could have presented in the first hearing. He argues that the first hearing was marred by procedural unfairness because of Commission counsel's failure to put certain documents before the Commissioner and because of the attitude of Commission counsel. However, his counsel at the hearing chose not to put these documents in his materials, although he had the relevant letters in his possession, nor did he ask for an adjournment on the grounds of surprise or question the conduct of Commission counsel during his submissions. Thus, it appears that the Motion to Vary was an attempt to raise issues that the applicant could have raised at the initial hearing, but which he did not raise. In

these circumstances, the Commissioner made no error in refusing to hear the motion. The fact that she did not give reasons is not fatal in the circumstances, as there is no apparent prejudice to the applicant's ability to seek judicial review (see Canadian Civil Liberties Assn v. Ontario (Civilian Commission on Police Services) (2002), 61 O.R. (3d) 649, [2002] O.J. No. 3737 (QL) (C.A.) at p. 674 O.R.).

Conclusion

[47] In the result, the consolidated application for judicial review is dismissed. If the parties wish to make brief written submissions with respect to costs, they may do so within 30 days of the release of this decision.

Applications dismissed.

Appendix M(i): Divisional Court Ruling in *Lyons v. Toronto Computer Leasing Inquiry,* [2004] O.J. No. 648 (Div. Ct.) (QL), February 19, 2004

Case Name:

Jakobek v. Toronto (Computer Leasing Inquiry)

Between
Tom Jakobek and Deborah Morrish, applicants, and
The Honourable Denise Bellamy (Commissioner - Toronto Computer Leasing Inquiry), respondent

[2004] O.J. No. 2889
Court File Nos.: 217/04 and 223/04

Ontario Superior Court of Justice
Divisional Court
Then, Gravely and Swinton JJ.

Heard: June 16-17, 2004.
Judgment: July 6, 2004.
(35 paras.)

Administrative law — Public inquiries — Powers of — Compelling witnesses — Evidence — Witnesses, attendance and oath — Attendance, subpoena — Setting aside — Constitutional law — Federal jurisdiction (s. 91) — Criminal law — Matters not criminal.

Application by Jakobek and Morrish for judicial review of the decision of the Commissioner of the Toronto Computer Leasing Inquiry to issue summons to each of them. The applicants sought to quash the summons because the Inquiry became an inquiry into allegations of criminal misconduct directed to specific individuals. It became unconstitutional since matters of criminal law and procedure were under exclusive federal jurisdiction. The Inquiry was created in February 2002 to inquire into all aspects of certain leases that the City of Toronto signed with a company named MFP Financial Services. Jakobek was a former City councillor who was chair of its budget committee and a member of its policy and finance committee. Morrish

was his wife. In his affidavits he referred to his father-in-law as being the source of certain funds that were of interest to the Inquiry. The father-in-law could not testify because of illness. His daughter exercised power of attorney over his financial affairs and controlled his financial records. Jakobek was alleged to be the recipient of improper payments from MFP.

HELD: Application dismissed. A provincial or municipal inquiry that was directed to matters within provincial jurisdiction could proceed despite incidental effects on the federal criminal law power. It would not be rendered ultra vires if it made findings of misconduct, provided they were necessary to fulfil the purpose of the inquiry, as described in its terms of reference. The terms of reference of the Inquiry were within provincial jurisdiction. The matters that the Inquiry wanted to question the applicants about was linked to evidence that was heard earlier. This testimony was necessary so that the Commissioner could make recommendations about the future good governance of the City. This was not a case where the Commissioner deviated from her terms of reference by engaging in an investigation of criminal activity. The evidence sought from the applicants was relevant and necessary to the broader investigative and policy development purposes of the Inquiry.

Statutes, Regulations and Rules Cited:

Constitution Act, 1867, ss. 91(27), 92(8), 92(13), 92(16).

Municipal Act, R.S.O. 1990, c. M-45, s. 100.

Counsel:

Alan D. Gold, for the applicant Tom Jakobek.

Morris Manning, Q.C and J. Peasby, for the applicant Deborah Morrish.

H. Lorne Morphy, Q.C. and Davit Akman, for the respondent.

Linda Rothstein and Robert Centa, for the intervenor City of Toronto.

The judgment of the Court was delivered by

¶ 1 **SWINTON J.**:— The Applicants Tom Jakobek and Deborah Morrish have brought separate applications for judicial review of the decision of The Honourable Denise Bellamy, Commissioner, Toronto Computer Leasing Inquiry ("TCLI") to issue a summons to each of them on March 31, 2004. The applications are brought to quash the summons and to prohibit the Commissioner from hearing evidence from the

Applicants, principally on the basis that the inquiry over which the Commissioner is presiding has become an inquiry into allegations of criminal misconduct directed to specific individuals and is, therefore, unconstitutional, since criminal law and criminal procedure are matters within exclusive federal jurisdiction under the Constitution Act, 1867.

The Factual Background

¶ 2 The Toronto Computer Leasing Inquiry was created by a resolution of Toronto City Council in February, 2002 pursuant to s. 100 of the Municipal Act, R.S.O. 1990, c. M.45 to inquire into all aspects of certain leases which the City had signed with MFP Financial Services Ltd. ("MFP"). The Terms of Reference are three pages in length. They read in part as follows:

> 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 Court (General Division), now the 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 the public inquiry would permit (i) the Commissioner to investigate the existence of any malfeasance, breach of trust or misconduct, (ii) the Commissioner to make recommendations that would be a benefit for the future conduct of the public business of the City, and (iii) the public to understand and evaluate fully the above noted transactions;
>
> NOW THEREFORE the Council of the City of Toronto does hereby resolve that:
>
> 1. an inquiry is hereby requested to be conducted pursuant to s. 100 of the Municipal Act which authorizes the Commissioner to inquire into, or concerning, any matter related to a supposed malfeasance, breach of trust or other misconduct on the part of a member of 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, or other person to the corporation or to any matter connected with the good government of the municipality, or the conduct of its public business, and
>
> 2. the Honourable Chief Justice Lesage, Chief Justice of the Superior Court of Justice, be requested to designate a judge of the Superior Court of Justice of Ontario as Commissioner for the inquiry and the judge so designated is hereby authorized to conduct the inquiry.

Appendix M(ii): Divisional Court Ruling in *Jakobek v. Toronto (City) Computer Leasing Inquiry*, [2004] O.J. No. 2889 (Div. Ct.) (QL), July 6, 2004

> 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 his 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;
>
> ...

¶ 3 In the paragraphs which I have omitted from the Terms of Reference, the MFP leases are identified as the subject matter of the inquiry and the City's concerns about the MFP leases are set out in 13 paragraphs. Among other things mentioned is the fact that City Council had approved the lease of computer equipment and related software at an estimated cost of $43 million, while the actual cost was over $80 million. The Terms of Reference also state that it is anticipated that the inquiry may include an inquiry into all relevant circumstances pertaining to the various transactions referred to in the resolution and an inquiry into the relationships, if any, between 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.

¶ 4 The inquiry was first scheduled to start on September 30, 2002, but was adjourned by the Commissioner at the request of the Ontario Provincial Police to permit a police investigation into possible wrongdoing. After the OPP announced that it had completed its investigation and had concluded that no criminal charges would be laid, the inquiry resumed on December 2, 2002. To date, Commissioner Bellamy has heard evidence from 107 witnesses over 165 hearing days.

¶ 5 The Commissioner has organized the Inquiry into three separate, but interrelated phases: the Toronto Computer Leasing Inquiry, the Toronto External Contracts Inquiry, and the Good Government phase. In the first two phases, the Commissioner heard evidence about the transactions relevant to those phases of the Inquiry. With respect to the TCLI phase, the Commissioner heard evidence over the course of many months. She then adjourned the TCLI phase on November 25, 2003, commenting that the Inquiry was "nearly" at the end of the TCLI phase, and that she would take under consideration the City's request for the recall of certain witnesses.

Appendix M(ii): Divisional Court Ruling in *Jakobek v. Toronto (City) Computer Leasing Inquiry*, [2004] O.J. No. 2889 (Div. Ct.) (QL), July 6, 2004

¶ 6 She then commenced the Good Government phase, which proceeded by a more informal process than the earlier fact finding phase. In this phase, held between January 19, 2004 and February 5, 2004, she met with experts to assist her in making policy recommendations in her report, focussing on conflict of interest, lobbying, procurement and municipal government.

¶ 7 Following the Good Government phase, the Commissioner issued a summons to the Applicant Tom Jakobek, a former City Councillor who, at the relevant times, was also Chair of the City's Budget Committee and a member of its Policy and Finance Committee. He had testified on May 14, 15, 21 and 22, 2003 and had provided sworn affidavits dated October 15, 2003 and December 2, 2003. In his affidavits he referred, among other things, to his father-in-law Kenneth Morrish as the source for certain funds that are of interest to the inquiry. Mr. Morrish is unable to testify because of illness. Deborah Morrish, Mr. Jakobek's wife, exercises power of attorney over the financial affairs of her father and controls his financial records. She was given a summons so that she could explain her efforts to retrieve the relevant financial documents of her father.

¶ 8 The TCLI phase resumed on April 19, 2004. Among those witnesses to be recalled were Dash Domi, the lead contact person between MFP and the City of Toronto, and Mr. Jakobek. One of the areas of questioning was to be whether Mr. Domi, having received the first instalment of commission funds from his employer MFP on October 29, 1999, met with Mr. Jakobek in the garage of City Hall on November 1, 1999 and gave him monies, which Mr. Jakobek then used to pay for a family trip to Disney World. One of the areas of inquiry is with respect to $21,000 in payments on Mr. Jakobek's American Express card which he made on November 3, 1999.

¶ 9 On April 26, 2004, after Mr. Domi had been re-examined, the Applicants asked that the Commissioner limit the recall evidence to areas other than the issue of whether or not improper payments had been made in connection with the leasing transactions, and that any information about improper payments should be given to the police for investigation.

¶ 10 On April 30, 2004, the Commissioner issued a 13 page Ruling rejecting the Applicants' motions. She declined to exercise her discretion to turn the matter over to the police and refused to limit the recall evidence as requested by the Applicants.

The Issues

¶ 11 Essentially, the Applicants take the position that the recall phase can not proceed to look into the propriety of alleged payments because the Commissioner

would be conducting a criminal investigation, which is beyond her Terms of Reference and unconstitutional. As well, they argue that the Terms of Reference are flawed, since they fail to give specifics with respect to alleged misconduct of individuals. Ms. Morrish also argues that there is no basis to conclude that she has relevant evidence to give.

The Law

¶ 12 The Supreme Court of Canada has dealt many times with the constitutionality of provincial inquiries which have been attacked on the basis that they are engaged in criminal investigation, a matter within the exclusive jurisdiction of Parliament pursuant to s. 91(27) of the Constitution Act, 1867, "Criminal Law and Criminal Procedure".

¶ 13 The Applicants rely heavily on the case of Starr v. Houlden, [1990] 1 S.C.R. 1366. In that case, the Supreme Court of Canada held that a provincial Order-in-Council establishing an inquiry into the relationships of Patricia Starr and Tridel Corporation Inc. and unnamed officials was unconstitutional, as it was, in purpose and effect, a substitute criminal investigation. Writing for the majority, Lamer J. stated his conclusions at para. 30:

> In my view, the commission of inquiry before this Court is, in pith and substance, a substitute police investigation and preliminary inquiry into a specific offence defined in s. 121 of the Criminal Code, alleged to have been committed by one or both of the named individuals, Patricia Starr and Tridel Corporation Inc. This is not to say that an inquiry's terms of reference may never contain the names of specific individuals. Rather, it is the combined and cumulative effect of the names together with the incorporation of the Criminal Code offence that renders this inquiry ultra vires the province. The terms of reference name private individuals and do so in reference to language that is virtually indistinguishable from the parallel Criminal Code provision. Those same terms of reference require the Commissioner to investigate and make findings of fact that would in effect establish a prima facie case against the named individuals sufficient to commit those individuals to trial for the offence in s. 121 of the Code. The net effect of the inquiry, although perhaps not intended by the province, is that it acts as a substitute for a proper police investigation, and for a preliminary inquiry governed by Part XVIII of the Code, into allegations of specific criminal acts by Starr and Tridel Corporation Inc.

¶ 14 A more recent decision of the Supreme Court of Canada, Consortium Developments (Clearwater) Ltd. v. Sarnia (City), [1998] 3 S.C.R. 3, both explains Starr and articulates the legal principles to be applied in determining whether a provincially or municipally constituted inquiry is acting within constitutional jurisdic-

tion or whether it trenches on the federal criminal law power. Essentially, the Supreme Court of Canada held in Consortium that an inquiry established pursuant to provincial legislation is constitutional provided that its primary purpose is to inquire into matters within the constitutional jurisdiction of the province.

¶ 15 Consortium also dealt with an inquiry constituted under s. 100 of the Municipal Act, and the Terms of Reference of that Inquiry and the TCLI are very similar. In that case, Binnie J. made it clear that a Commissioner appointed to inquire into issues of good government pursuant to s. 100 of the Municipal Act may inquire into misconduct as well (at para. 36). He went on to say, at para. 39, that the ruling of the Supreme Court of Canada in the Blood Inquiry case (Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System in Canada - Krever Commission), [1997] 3 S.C.R. 440) ought to be applied to a s. 100 inquiry under the Municipal Act "to hold that not only may the Commissioner acting under the second branch of s. 100 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 para. 57):

> ... make findings of misconduct based on the factual findings, provided that they are necessary to fulfill the purpose of the inquiry as it is described in the terms of reference."

¶ 16 Binnie J. explained that the inquiry in Starr was ultra vires because it was evident from the Terms of Reference that the inquiry was being asked to undertake a substitute police investigation against named parties, and it was doing so simultaneously with a police investigation. He went on to say, at para. 50:

> 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.

He emphasized that Starr was an exceptional case, to be contrasted with the line of cases in which the Supreme Court has given broad scope to provincial inquiries. Furthermore, he noted that even in Starr, Lamer J. stated at p. 1409 [para. 39]:

> There is no doubt that a number of cases have held that inquiries whose predominant role it is to elucidate facts and not conduct a criminal trial are validly constituted even though there may be some overlap between the subject-matter of the inquiry and criminal activity. Indeed, 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.

Lamer J. continued, in a sentence to which the Applicants have pointed,

> But in no case before this Court has there ever been a provincial inquiry that combines the virtual replication of an existing Criminal Code offence with the

Appendix M(ii): Divisional Court Ruling in *Jakobek v. Toronto (City) Computer Leasing Inquiry*, [2004] O.J. No. 2889 (Div. Ct.) (QL), July 6, 2004

naming of private individuals while ongoing police investigations exist in respect of those same individuals.

¶ 17 Finally, Binnie J. also referred to comments in the Blood Inquiry case, where Cory J. expressed approval of a number of cases where provincial inquiries have been held constitutional, even though they inquired into conduct that might be the subject of criminal liability (at para. 52). See, for example, Attorney General of Quebec and Keable v. Attorney General of Canada, [1979] 1 S.C.R. 218 (inquiry into illegal acts committed by police officers); O'Hara v. British Columbia, [1987] 2 S.C.R. 591 (inquiry into injuries suffered by a prisoner while in police custody), and Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy), [1995] 2 S.C.R. 97 (inquiry into the deaths of workers in the Westray mine). In each case, the inquiry spent part of its time examining conduct that may have had the potential for criminal liability.

¶ 18 In sum, a provincial or municipal inquiry that is in pith and substance directed to matters within provincial jurisdiction may proceed despite possible incidental effects on the federal criminal law power (Consortium, supra, at para. 51). An otherwise validly constituted provincial or municipal inquiry will not be rendered ultra vires if, as part of its larger mandate, it investigates or makes findings of misconduct, provided that such findings are necessary to fulfill the purpose of the inquiry, as described in the terms of reference, or properly relevant to the broader purposes of the inquiry, as set out in the terms of reference (Consortium at paras. 39, 52).

Analysis

The Constitutional Validity of the Terms of Reference

¶ 19 There is no question that s. 100 of the Municipal Act is valid (see Consortium, supra at para. 47). In this case, the Terms of Reference of the Inquiry are clearly within provincial jurisdiction. The Commissioner has been asked to inquire into all aspects of computer leasing transactions and to make recommendations that will benefit the future conduct of the public business of the City of Toronto. Thus, the dominant purpose of the inquiry is to inquire into good government of the City, a matter relating to s. 92(8) (Municipal Institutions in the Province), 92(13) (Property and Civil Rights in the Province), and 92(16) (Generally all Matters of a merely local or private Nature in the Province) of the Constitution Act, 1867.

The Validity of the Recall Phase

¶ 20 During the argument before the Commissioner on April 26, 2004 and before this Court on these applications, the Applicants conceded that the Inquiry is generally intra vires and constitutional. However, they argue that to the extent the recall phase

investigates and inquires into the propriety of alleged payments, it has embarked on a criminal investigation into allegations of bribery involving specific individuals. They point to correspondence from Commission counsel to Mr. Jakobek seeking answers to questions which they say are directed to allegations of bribery and corruption, as well as media reports characterizing this phase of the inquiry as one into corruption. This, they argue, is part of the overall indicia of the true purpose and function of this recall phase of the inquiry. They note that the Commissioner herself has stated that she must consider relationships between city councillors and MFP representatives around the time that the City signed the MFP leases in order to fulfil her mandate (see p. 3 of her April 30, 2004 Ruling). She observed that some of the evidence called raises questions about the possibility of improper payments related to the computer leasing transaction (at p. 6 of the Ruling).

¶ 21 In making their argument, the Applicants seek to isolate the recall phase from the earlier fact finding phase in the Toronto Computer Leasing Inquiry and to characterize the current stage of the Inquiry into the alleged payments as a targeted investigation of criminal activity. In so doing, they mischaracterize what the Commissioner has said that she is doing, and they fail to look at the recall stage in context. In determining the constitutional validity of a law, the courts look first to the dominant purpose or aim of the legislation, although effect may be considered, as well, as a way of determining the legislation's purpose (R. v. Morgentaler, [1993] 3 S.C.R. 463 at paras. 24, 25, 32).

¶ 22 The Commissioner has made it clear that the evidence gathered at the recall stage is inextricably linked to evidence heard earlier, and it should be assessed in light of what has already been heard. For example, on April 19, 2004, she welcomed everyone back to the "final evidence phase of the Toronto Computer Leasing Inquiry". She explained that new information had come to light. As well, she stated that some witnesses were being recalled, which would give them an opportunity to explain important contradictions or inconsistencies in the evidence previously given. She also reminded everyone to "please listen to the evidence with an open mind and not to draw any conclusions based on this evidence alone, as the testimony we are about to hear is only a small component of the entire body of evidence that has been presented in this Inquiry" (Transcript, April 19, 2004, pp. 8-9).

¶ 23 All of the evidence in the Inquiry, including the evidence at the recall stage, is being gathered to allow the Commissioner to assess what occurred with the MFP leases and to make recommendations for the future good governance of the City. If there was misconduct with respect to the awarding of the contract for the leases, that is a matter that she must consider in order to fulfill her Terms of Reference. The fact that such conduct might also be grounds for criminal charges does not prohibit her from proceeding. It is clear from Consortium, supra that she may properly proceed

Appendix M(ii): Divisional Court Ruling in *Jakobek v. Toronto (City) Computer Leasing Inquiry*, [2004] O.J. No. 2889 (Div. Ct.) (QL), July 6, 2004

with this line of investigation and make findings of fact and findings of misconduct if necessary or relevant to fulfill the purposes of the Inquiry as described in the Terms of Reference.

¶ 24 This not a case where the Commissioner has deviated from her Terms of Reference by engaging in an investigation of criminal activity. Rather, she is acting within her Terms of Reference in inquiring into the improper payments so as to complete the fact finding necessary for her report. The evidence sought from the Applicants is incidental, relevant and necessary to the broader investigative and policy development purposes of the Inquiry. As she has stated (at p. 3 of the April 30, 2004 Ruling):

> 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 to turn a blind eye to such alleged potential misconduct.

Moreover, when viewed in context, this line of inquiry is only one part of her investigations into a complex computer leasing transaction. As set out in the Appendix to her Ruling, the Inquiry has received evidence on at least 60 topics of importance since its commencement. The alleged payments are but one important issue among many that the Inquiry is considering.

¶ 25 The Applicants argued that the overall effect of the Inquiry into the alleged improper payments leads to the conclusion that the Inquiry has become involved in a criminal investigation. In my view, this is not a case where the effects of the Inquiry determine its characterization for purposes of constitutional law. The Commissioner is pursuing an investigation of potential misconduct, which may or may not be grounds for criminal prosecution. She is doing so as one part of a lawful and wide ranging investigation into the computer leasing transactions. This is not a case like Starr, with its focus on the alleged wrongdoing of two named parties in an inquiry without any policy mandate. Rather, this investigation falls within the line of cases where the Supreme Court has upheld provincial investigations into matters within provincial jurisdiction, despite some overlap with a possible or actual criminal proceeding - see for example, O'Hara v. British Columbia, supra; Phillips, supra; Keable, supra; and Di Iorio v. Warden of the Montreal Jail, [1978] 1 S.C.R. 152.

¶ 26 In sum, the Commissioner acted within jurisdiction, in the constitutional law sense, in issuing a summons to each of the Applicants and continuing with her investigation as she had proposed. Evaluating whether or not there were improper payments is relevant and necessary both to a complete and accurate understanding of the transactions between the City and MFP and, given the inextricable link between

the Commissioner's findings of fact and her policy recommendations, to her formulation of useful recommendations for the future conduct of the public business of the City.

¶ 27 Counsel for Ms. Morrish also argued that the Commissioner exceeded her jurisdiction in the administrative law sense, in that she is seeking to inquire into the administration of justice. He argued that the terms of s. 100 of the Municipal Act do not permit a municipal council to create an inquiry into the administration of justice.

¶ 28 In my view, the Commissioner is not embarking on an investigation of the administration of criminal justice. In Attorney General (Que.) and Keable, supra, Estey J. characterized a provincial inquiry as one into the administration of justice, rather than criminal law or procedure, if it investigated the incidence of crime or the profile and characteristics of crime in a province or the operation of provincial agencies in the field of law enforcement (at pp. 254-55). That is not the focus of the TCLI Inquiry. Rather, the Commissioner is inquiring into certain contracts of a municipal government and the conduct of public business in the municipality. The subject matter of her Inquiry, including the recall phase, is properly the subject for an inquiry under s. 100 of the Municipal Act.

The Need for Particulars in the Terms of Reference

¶ 29 The Applicants also take issue with the Commissioner's ability to inquire into matters related to specific persons when those persons are not named in the Terms of Reference. They argue that the Terms of Reference lack sufficient particularity, and that a municipal commission of inquiry cannot inquire into specific allegations against an elected official unless that official is named in the Terms of Reference. Reliance is placed on Hydro-Electric Commission of Mississauga v. City of Mississauga (1977), 13 O.R. (2d) 511 (Div. Ct.), where the Court held that the Terms of Reference of an inquiry acting under branch one of then s. 240 of the Municipal Act (an inquiry into malfeasance, breach of trust or other misconduct) must specify the specific matter to be investigated (at p. 9 (Quicklaw)). Reliance was also placed on the dissenting judgment of Gwynne J. in Godson v. Toronto (City) (1890), 18 S.C.R. 36 at p. 11 (Quicklaw).

¶ 30 The Toronto Computer Leasing Inquiry was constituted under branch two of s. 100 of the Municipal Act - that is, as an inquiry into good government. Again, the reasons in Consortium, supra, provide the answer to this challenge. Binnie J. noted that an inquiry under branch two could look into and make findings of misconduct (at para. 39). As to the requirements for drafting a resolution creating a s. 100 inquiry, he held that the resolution must be intelligible; it must convey to the Commissioner and other interested persons the subject matter of the inquiry; and it must connect the sub-

ject matter to one or more of the matters referred to in s. 100 of the Act. However, there is no requirement that the City name specific individuals or make specific allegations of misconduct in the Terms of Reference (Consortium, supra, at para. 35).

¶ 31 The Terms of Reference in this case are very close in their terms to those in the Consortium case. In my view, they meet the criteria enunciated by Binnie J. in that case. The Terms of Reference explicitly include an inquiry into the relationships between existing and former elected representatives of the City and MFP representatives at the relevant times. Thus, former Councillor Jakobek is included in the Terms of Reference, even if he is not named.

¶ 32 As Binnie J. noted in Consortium, the rules of natural justice and procedural fairness will ensure that adequate notice is given to an individual whose rights or reputation may be affected by the proceedings. However, the names and acts of individuals do not need to be spelled out in the Terms of Reference of the Inquiry. Moreover, the Inquiry's Rules of Procedure provide the Applicants with a number of procedural protections. As well, they are protected by an array of statutes, cases and the Canadian Charter of Rights and Freedoms from any direct or derivative adverse civil and criminal consequences that might otherwise flow from their appearances before the Inquiry.

¶ 33 The final recital to the resolution establishing the Terms of Reference states that a public inquiry would permit the Commissioner to investigate any malfeasance, breach of trust or misconduct. While the Applicants argued that this converts the TCLI into a first branch inquiry into misconduct under s. 100 of the Municipal Act, that is not the case. The recital merely reflects the state of the law after Consortium - namely, that the Commission of Inquiry, while inquiring into good government, may make findings of misconduct, provided those findings are necessary or relevant to fulfill the purpose of the inquiry, as described in the Terms of Reference. Therefore, the attack on the particularity of the Terms of Reference fails.

The Relevance of Ms. Morrish's Evidence

¶ 34 Finally, counsel for Ms. Morrish argued that she is unable to provide relevant evidence to the Inquiry, and this is a further ground to quash the summons. In fact, she does appear to have relevant evidence to provide. Mr. Jakobek has stated that he received funds from his father-in-law, Mr. Morrish, which explains the payments on his American Express card that are in issue. Ms. Morrish holds a power of attorney for her father, and she is the custodian of his financial records. The Commissioner wishes to examine her on her efforts to locate the relevant records. In my view, Ms. Morrish is in a position to provide relevant evidence to the Inquiry.

Appendix M(ii): Divisional Court Ruling in *Jakobek v. Toronto (City) Computer Leasing Inquiry*, [2004] O.J. No. 2889 (Div. Ct.) (QL), July 6, 2004

Conclusion

¶ 35 For these reasons, the applications for judicial review are dismissed. If the parties are unable to agree with respect to costs, they may make brief written submissions within 21 days of the release of this decision.

SWINTON J.
THEN J.
GRAVELY J.

QL UPDATE: 20040716
cp/e/nc/qw/qltlc

Appendix M(ii): Divisional Court Ruling in *Jakobek v. Toronto (City) Computer Leasing Inquiry*, [2004] O.J. No. 2889 (Div. Ct.) (QL), July 6, 2004

Case Name:

Jakobek v. Toronto (Computer Leasing Inquiry)

Between
Jakobek, and
The Honourable Denise Bellamy (Commissioner - Toronto Computer Leasing Inquiry)
And between
Morrish, and
The Honourable Denise Bellamy (Commissioner - Toronto Computer Leasing Inquiry)

[2005] O.J. No. 797
Court File Nos. 217/04 and 223/04

Ontario Superior Court of Justice
Divisional Court
E.F. Then, R.T.P. Gravely and K.E. Swinton JJ.

March 7, 2005.
(7 paras.)

Counsel:

Alan D. Gold for the Applicant Thomas R. Jakobek

Morris Manning Q.C. for the Applicant Deborah Morrish

H. Lorne Morphy for the Respondent Commissioner

Linda R. Rothstein for the Intervenor City of Toronto

Ruling on Costs

The following judgment was delivered by

¶ 1 **THE COURT**:— The Respondent Commissioner seeks costs of these applications for judicial review on a partial indemnity basis in the amount of $68,132.84, while the Intervenor, the City of Toronto, seeks costs on a partial indemnity basis of $50,223.24. The Applicants argue that no costs should be awarded, or the quantum should be reduced significantly.

¶ 2 The Applicants argue that no costs should be awarded to the Respondent because this litigation raised an important constitutional question of public interest. As well, they argue that a Commission of Inquiry should not seek costs in an application for judicial review of its own decision.

¶ 3 The Commissioner, having succeeded on the applications for judicial review, is entitled to seek costs. In the similar case of Consortium Developments (Clearwater) Ltd. v. Sarnia (City), [1998] 3 S.C.R. 3, for example, costs were awarded by the Supreme Court of Canada when it dismissed a challenge to the validity and conduct of a judicial inquiry authorized under the Municipal Act.

¶ 4 Moreover, these applications are not properly characterized as litigation in the public interest. They were brought by the Applicants in an effort to avoid testifying before the Inquiry. Therefore, there is no reason to depart from the usual practice of awarding costs to the successful party.

¶ 5 The Applicants argue that the costs claimed are excessive. The Court of Appeal has held that judges fixing costs should consider the calculation of fees in accordance with the costs grid on an hours and fees basis, but they should then consider whether, in all the circumstances, the result is fair and reasonable (Boucher v. Public Accountants Council for the Province of Ontario, [2004] O.J. No. 2634 (C.A.) at para. 24). In determining what is fair and reasonable, the Court of Appeal has stated that the expectations of the parties concerning the quantum of costs is a relevant factor for consideration (at para. 38).

¶ 6 While this case was complex factually, the costs claimed were increased because outside counsel were retained who had to familiarize themselves with the file. Taking this into account, as well as the reasonableness of the amount which the unsuccessful parties should have to pay, costs of the Commissioner for the two applications for judicial review are fixed at $25,000.00, payable jointly and severally by the Applicants.

Appendix M(iii): Divisional Court Ruling in *Jakobek v. Toronto (Computer Leasing Inquiry, Commissioner)*, [2005] O.J. No. 797 (Div. Ct.) (QL), March 7, 2005

¶ 7 The Applicants argue that the City of Toronto should be awarded no costs, since the City participated as an Intervenor. In our view, the Intervenor provided assistance to the Court, and costs should be awarded. However, the primary role in responding to the applications for judicial review was performed by counsel for the Commissioner. Therefore, costs to the Intervenor are fixed at $10,000.00, payable jointly and severally by the Applicants.

E.F. THEN J.
R.T.P. GRAVELY J.
K.E. SWINTON J.

QL UPDATE: 20050310
cp/e/qlmxd

PRIVATE & CONFIDENTIAL

[DATE]

Dear Counsel:

Further to Mr. Manes's discussions with you, I am writing to advise you of the Commissioner's revised schedule for closing submissions.

As a result of delays in completing the Toronto Computer Leasing Inquiry, to better assist in reviewing and understanding the evidence and to facilitate preliminary drafting of her report, the Commissioner would like to receive written closing submissions regarding the evidence heard to date by Friday, August 13, 2004. At this time, she is not asking for closing submissions from any parties or witnesses who may be affected by any recall evidence in the Toronto Computer Leasing Inquiry. She will decide on a date for those submissions in due course, but it will likely be after all the evidence on that Inquiry is completed. For those who make submissions before August 13th and who find themselves affected by any of the recall evidence, the Commissioner will permit supplementary closing submissions to be made should it become necessary. The Commissioner will also invite written closing submissions from parties with standing in the Toronto External Contracts Inquiry following the completion of the evidence in that Inquiry.

The following rules will apply to closing submissions:

Parties with standing in the Toronto Computer Leasing Inquiry and other persons who are affected by the evidence, as set out in Rule 35 of the Inquiry's Rules of Procedure, are invited, but are not required, to make written closing submissions.

Written closing submissions regarding the evidence heard to date in the Toronto Computer Leasing Inquiry shall be received no later than Friday, August 13, 2004 at 4:00 p.m.

Closing submissions must be delivered to the Commission offices in both a printed (hard copy) and electronic format (Microsoft Word document). There is no page limit on written submissions. Closing submissions need not be delivered to all other parties with standing at the Toronto Computer Leasing

Inquiry until such time as the recall evidence in the Toronto Computer Leasing Inquiry is completed and the closing submissions from any parties affected by the recall evidence are received. At that time, closing submissions should be delivered to all parties with standing. As well, once all closing submissions are received, they will be posted on the Commission's website.

Counsel will be permitted to file written reply submissions with no page limit, or to make brief oral reply submissions, but not both. The date for the hearing of reply submissions or the receipt of written reply submissions has not been set.

Reply submissions (oral or written) will only be received by way of reply to written submissions and only to the extent that they engage the interests of the person or corporation seeking to reply.

Oral reply will be time-limited. Parties with standing will have no more than one-half day for oral submissions. Other persons who are affected by the evidence, as set out in Rule 35 of the Inquiry's Rules of Procedure, will be advised of their time limit but, in any event, will not be permitted more than one-half day.

Reply submissions may be made without having made written submissions; however, such reply may only address the written submissions of others and only to the extent that they engage the interests of the person or corporation seeking to reply.

Oral reply submissions will be made in an order to be agreed upon among counsel and, absent agreement, as may be directed by the Commissioner.

If you have any questions, please do not hesitate to contact me.

Yours very truly,

Daina Groskaufmanis
Commission Counsel

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