Toronto Computer Leasing Inquiry
Toronto External Contracts Inquiry

REPORT
Volume 2: Good Government

The Honourable Madam Justice
Denise E. Bellamy, Commissioner

2005

ISBN: 1-895739-57-8 (set)
ISBN: 1-895739-54-3 (v.2)

Copies of this report, in print or on CD-ROM, may be obtained by contacting Access Toronto at 416-392-7410. An online order form for City of Toronto publications is available at www.toronto.ca/publications.

The City of Toronto has a link from its website www.toronto.ca/inquiry to the Toronto Computer Leasing Inquiry/Toronto External Contracts Inquiry website, where this report will be posted. This link will be maintained until the Toronto Computer Leasing Inquiry/Toronto External Contracts Inquiry website is closed, at which time the City will post this report, along with the papers issued by the inquiries on conflict of interest, municipal governance, lobbyist registration, and procurement, directly on its own website and maintain them there until further notice.

Contents

I. A Question of Trust: Recommendations after a Long Look at the Inner Workings of the City of Toronto's Government

SCANDAL, WRONGDOING, SALACIOUS GOSSIP, and the downfall of the mighty get attention, and the stories behind the Toronto Computer Leasing Inquiry and the Toronto External Contracts Inquiry provided some of each. Day after day, people of Toronto read the stories in the press, heard them on the radio, watched them on television news, or followed the inquiry proceedings on our website. Some came to the public hearings every day and listened intently to the testimony of their elected officials and civil servants, and of the people these individuals deal with on behalf of the public. But those who followed the events were interested not only because a gripping story was unfolding. I believe they were also interested because they care about their city and care about how it is governed. The inquiries trained a spotlight on the inner workings of their municipal government and laid bare some of the ways in which it is vulnerable.

The issue at the heart of these vulnerabilities is trust. Specifically, it is trust in public officials who spend public money. Those with control of public funds have a special duty of trust to the public. They must discharge their duty of trust fairly and objectively and they must be seen to be doing so. That should be obvious. So why is that trust broken so often?

Democracies must handle the taxpayers' money, but the structures of democratic government have become sufficiently complicated that people are unable to track their tax dollars day to day. But government consists of human beings. Both politics and the civil service attract bright, ambitious, dedicated people. And some people in both politics and the civil service are susceptible to human failings like incompetence, greed, and dishonesty. All of them regularly work with the ingredients for scandal. With each new scandal, public trust is eroded.

The conditions for scandal will not go away, and therein lies the challenge because, looked at closely, the recipe for scandal is part of democratic government itself. As Winston Churchill observed, "No one pretends that democracy is perfect or all-wise. Indeed, it has been said that democracy is the worst form of Government except all those other forms that have been tried from time to time." Eruptions of scandal involving public money do indeed show that our democratic system is not perfect, but much can be done to mitigate the imperfections and restore public trust.

The Toronto Computer Leasing Inquiry and the Toronto External Contracts Inquiry involved to some extent the same people and organizations. Their purpose was to examine a series of events in the government of the City of Toronto, and their central concern was with how public money was spent. I conducted both inquiries from 2002 to 2005. In almost three years, during which I held 214 days of public hearings, I heard evidence of transactions where millions of dollars had been spent in troubling ways. In some cases, there was clear conflict of interest in the transactions. In others, proper procedure had not been followed. There were instances where elected officials improperly inserted themselves into matters outside their purview. Through the inquiries, these matters were thoroughly investigated and publicly aired.

The stories of how the system broke down are told in *Facts and Findings*, the main volume of this report. It is important to understand what hap-

pened and what went wrong, but this volume is about learning from those mistakes and preventing them from being repeated. Indeed, a significant part of my mandate was to make recommendations that would be of benefit in the future conduct of the public business of the City.

In fulfilling that part of my mandate, I decided to hold a separate phase of public hearings specifically to examine issues that touched upon public trust in the system of spending public money. We called these hearings the "Good Government phase."

The Good Government hearings were just one part, however, of gathering information on municipal governance. Before they began, the inquiries had thoroughly canvassed written sources of insight: municipal laws and regulations across Canada and beyond, academic writings, and reams of press clippings. The inquiries employed Executive Resource Group, a firm of governance consultants, as expert researchers to help distill all of the written material. Partners Sam Goodwin and Valerie Gibbons also conducted interviews with politicians and senior civil servants across a wide spectrum of experience and expertise. The result was vast quantities of objective and subjective data, crystallized into discussion papers by the experts. The discussion papers were posted on our website and distributed to City Council on CD. Those papers are on our website still, but they are also reproduced as addenda in this volume and on the CD version of this report. The versions appearing in this report have been edited, but only to remove the original references to recommendations in order to avoid confusion with my recommendations.

Another round of exhaustive interviews followed the discussion papers, with experts from all areas of municipal affairs and beyond. Based on those interviews, panels of experts were assembled to participate in the Good Government hearings.

I heard from forty-one individuals. They were elected officials such as current and former mayors, former Toronto councillors, and members of the provincial parliament in Ontario; senior civil servants such as former provincial deputy ministers, the former provincial auditor, the integrity commissioner and the lobbyist registrar for Ontario, and the federal ethics counsellor; and academics, procurement specialists, lobbyists, lawyers, accountants, and representatives of the media and of citizen advocacy groups.

Of course, we paid special attention to the City of Toronto itself. The chief administrative officer (now the City Manager) testified at length, and the City provided a great many additional documents, all of which were pored over with care and interest.

The panel discussions built on all of the work that had gone before, exploring and analyzing points in the discussion papers, hearing from their authors, and hearing questions from the City's lawyer. The hearings went on for three intense weeks. One of my commission counsel led the forty-one individuals, many of whom participated in panel discussions, through all their evidence. There was spirited debate. Indeed, I encouraged the airing of conflicting views on the same subject because I wanted to obtain the best possible foundation for practical recommendations.

The topics covered in the Good Government hearings fell into four broad categories: ethics, governance, lobbying, and procurement. Within those topics, the panels explored the relationships between lobbyists and public officials, the power and influence of the office of the Mayor, the role of councillors, City Council, and community councils, the role of the chief administrative officer and senior staff, effective procurement practices, ethics, codes of conduct, and conflict of interest policies.

The views and presentations of these forty-one individuals added important perspective to the excellent research and discussion papers. Along with the materials provided by the City of Toronto and the others who filed exhibits, and the many books and articles located by our researchers, they provided me with a wealth of valuable information.

I want to point out that each of the forty-one people who participated in the Good Government phase of the inquiries did so without charging a fee. A complete list of participants is found in the appendices to this volume. I would like to express my thanks to all of them for giving their time so generously. Links to the transcripts of their evidence are found in the CD version of this volume. For a year after this report is released, they will continue to be available on the inquiries' website, www.torontoinquiry.ca, and thereafter they will be found on the City's website, www.toronto.ca/inquiry. These transcripts alone constitute a vast collection of excellent insight and perspective into municipal governance.

After the hearings, we carefully and laboriously compiled the information and the views expressed, including the copious notes I made along the

way, into areas to be considered for possible recommendations. It was a mammoth task, entailing three years of analysis, discussion, and revision. And, of course, a great many more recommendations developed in the course of hearing testimony throughout the inquiries. Apart from noting any possible recommendations that came to me during the hearings, at the end of all the witnesses' testimony, I asked them if they had any suggestions that they would like to leave with me on how to improve matters at the City. Many responded with thoughtful suggestions, and some of those have become recommendations. The recommendations included in this report are in all instances my own, but I am deeply indebted to my dedicated and tireless team for their support throughout the process.

There are four volumes in this report: a volume dealing with the facts of specific IT-related transactions at the City of Toronto, this volume of recommendations, a volume on the process used in conducting the inquiries, and an executive summary. This volume stands alone, however; readers do not need to refer to the other volumes to understand the recommendations and the general principles from which they flow. Each chapter in this volume covers one of the four broad categories examined in the Good Government phase: ethics, governance, lobbying, and procurement.

In a discussion of the value of public inquiries, the Supreme Court of Canada said, "Good government depends in part on the availability of good information."[1] The Good Government phase yielded a generous amount of first-rate information. At the same time, some fundamental principles of municipal governance emerged. Some of them may sound like simple common sense, but the events leading to these inquiries have shown all too clearly that common sense is not common enough.

There is one subject from the Good Government phase that deserves special attention in this introduction. It is vital to the City and all who live here, but it is not, for reasons I will explain shortly, the focus of any recommendations. That subject is the basic structure of Toronto's government.

In 2005, the City of Toronto is at a significant crossroads in its young history. Amalgamation in 1998 brought the City into being, and it came with a great deal of turmoil. Almost eight years later, there is a growing recogni-

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

tion that it is time for a potentially far-reaching reassessment of how the City operates. A spirited public debate on how Toronto should be governed is going on as I write this report. It is an important debate. Toronto is Canada's most populous city, the sixth-largest government in Canada (after the federal government and the provincial governments of Ontario, Quebec, British Columbia, and Alberta), with a budget larger than that of any other city in Canada and bigger than those of most provinces. By any measure, Toronto is a major economic and cultural engine for Ontario and Canada.

The discussion about changing how Toronto is governed seems to stem from a broadly held but by no means unanimous view that the present model does not work. The present governance model for Toronto dates to the mid-1800s. It was designed for the pastoral towns and villages that dotted the newly formed Dominion of Canada. The starched-collared framers of that mid-Victorian municipal governance model could not have begun to imagine the Toronto of today: a sprawling city of millions of people, with concerns and priorities of daunting complexity. The very age of the present governance model, for a modern city of the size of Toronto, is enough in the eyes of many to demonstrate the need for change, and it is hard to disagree with the logic of that position.

Toronto City Council gave me broad latitude to inquire into every aspect of a number of complicated procurement and contractual transactions related to information technology. My terms of reference extended to examining these transactions, "as they relate to the good government of the municipality . . . and to make any recommendations which [I] may deem appropriate and in the public interest. . . ." These terms of reference were broad enough to anticipate that governance matters might have played a role in any problems with the transactions at issue and therefore accorded me the jurisdiction to address relevant governance concerns. However, the terms of reference did not intend for me to redesign the governance of Toronto in all of its parts.

Some crucial aspects of Toronto's governance picture were not before me at all. For example, the current public discussion of Toronto's governance issues is almost inextricably connected to finances: how Toronto should be funded and by whom. My terms of reference focused on specific transactions and quite properly accorded me no jurisdiction to address the thorny fiscal policy dimension of Toronto governance. Necessarily, therefore, my

comments on governance reform address major parts of the picture, but not the whole picture.

Nevertheless, through months of evidence, hundreds of witnesses, dozens of experts, and thousands of documents, I conducted an exhaustive review of how some areas of Toronto's City government work. I had a virtually unparalleled opportunity to form views about what works and what does not in those areas.

The perspective of a judicial inquiry is necessarily impartial and independent, with no vested interests and no partisan leanings. The impartial voice is by no means the only voice that should be heard in debates as large and important as those touching on the future of the government of Toronto, but it can be useful.

The debate about Toronto's governance taking place throughout the City at present is fundamentally about democracy and the form it should take. This debate should therefore be conducted democratically, with many voices heard, and visionary leadership from the political realm.

I am making specific recommendations on some aspects of City governance in Chapter III. They are operational rather than political in nature. I confined myself to areas of conduct that require consistent standards, regardless of the political structure in which they operate. These recommendations are applicable regardless of how Toronto eventually decides it should be governed.

At the same time, my close view of Toronto's governance over the last three and a half years has given me the opportunity to identify certain problems and offer suggestions for ways in which they might be addressed. The following observations are my considered contribution to the discussion of the City's future.

A. The Problems

Despite the astounding scope and complexity of the task of governing Toronto, the structural governance problems I observed can be described in relatively brief and simple terms. Sometimes the details of the status quo become so familiar to those involved that it becomes difficult for them to see the overall problems.

I know this will offend some people, and that is not my intention, but it must be said: Toronto City Council meetings often resemble barely con-

trolled chaos. An uncharitable observer might even say they border on the chronically dysfunctional. From what I observed, the root causes are interrelated and cannot be ranked in any definitive order of importance.

1. The Office of the Mayor

Under Toronto's current governance model, the office of the Mayor lacks both the accountability and the power necessary to give optimal leadership. I use the phrase "office of the Mayor" as referring to the official responsibility of the Mayor.

Toronto needs visionary policy on urban renewal, infrastructure, the environment, housing, public safety, fiscal planning, immigration, education, intergovernmental relations, and a host of other social and political issues of great breadth and depth. The City needs to empower leadership that can define and execute visionary policy in these areas while remaining accountable to the voters. The Mayor is elected city-wide and represents the City to the media; these facts lead the public to expect that he or she will provide visionary leadership. But the Mayor has only one vote in Council and cannot implement an agenda with the same efficiency as can leaders of the federal and provincial governments.

In the current structure, theoretically, every vote poses a new and time-consuming challenge for the Mayor: to cobble together a supportive coalition. Thus, every initiative risks being diluted to attract the requisite support on Council. The process of passing even slightly controversial initiatives and sometimes even the most straightforward proposals can be unwieldy and long.

Yet the *Municipal Act* says that the Mayor is to act as chief executive officer of the municipality, preside over Council meetings, provide leadership to Council, represent the municipality at official functions, and carry out the duties of the head of Council. The mechanism by which the Mayor is to accomplish all this is not clear. It can be said that there are expectations of the Mayor that he or she has no formal means to deliver.

It follows that the present model dilutes accountability, too. The Mayor can readily take credit for initiatives that pass through Council, but when initiatives fail, a politically astute mayor can all too easily fall back on citing his or her status as simply one vote among forty-five. By contrast, voters are

in far less doubt about where to direct either their admiration or displeasure over federal and provincial government policy. At those levels, political leadership is clearly defined and therefore completely accountable at all times.

Formally, the Mayor does indeed have just one vote in forty-five. He or she is the political head but not the administrative head. Informally, however, the Mayor can exert considerable influence with both staff and Council behind the scenes. Thus, the Mayor has tremendous power over the administration and Council without the corresponding direct accountability.

The net effect of this diffuse form of leadership, with the Mayor drifting in and out of prominence from issue to issue, is to set the scene for a lack of consistent vision. Raucous, unfocused Council debates are no substitute for a clearly articulated policy agenda upon which the leadership must stand or fall. Desirable as it may be to accommodate free-for-all debate when issues are purely local, complex visionary policies in far-reaching areas like economic development or urban infrastructure call for the discipline of a democratically accountable body that can speak with one voice: the voice of the government of the day. To that end, the power relationship needs to be brought into the open and regularized, so that the public knows who is really in charge. That means formally according to the office of the Mayor the power that he or she may now exercise quietly and informally.

2. Councillors

Running Canada's sixth-largest government presents policy challenges at a level of complexity rivalling that of a provincial or federal jurisdiction. Federal and provincial governance models have long recognized the need for cabinet ministers, who must have the ability to master complex areas of policy and who are given posts from which they oversee a reasonably limited subject area. The time seems to have come for a similar approach to subject matter oversight at the City of Toronto, however it might be structured. Accountability would be enhanced when councillors with serious questions could turn to one designated politician and demand that they provide the answers that the public is entitled to expect.

Some say allowing individual councillors to discharge functions roughly equivalent to those of cabinet ministers in the federal or provincial system

would create two tiers of councillors. Arguably, though, the benefits would markedly outweigh the drawbacks. If one councillor were charged with political oversight and responsibility for a particular sphere of City operations, accountability would be enhanced and each policy area could be more effectively overseen through regular briefings to the councillor in charge. Further, healthy competition for these posts would likely attract well-qualified candidates who could contribute positively to the deliberations of Council.

The absence of any formal substructure accountable to Council, comparable to cabinet in the federal and provincial systems and able to efficiently implement a policy agenda, can be seen as creating too many opportunities for councillors to quietly cultivate unseen influence with staff and other councillors, affecting policy in non-transparent ways.

Some believe party politics has no place in City government. However, at least one councillor who testified before the inquiries suggested that factions and alliances are now formed along party lines anyway. Some of the experts who testified in the Good Government phase of the inquiries predicted that formal party politics will inevitably come to the City government, and sooner rather than later.

3. Council Meetings

Council meeting agendas are hopelessly overloaded. The pile of reading for every meeting can be measured in reams of paper, not pages. One expert who testified before the inquiries commented that the number of issues and decisions before Toronto City Council is probably ten times greater than in any other municipality in Canada. In 2002, for example, Council considered more than 1,000 bills and more than 3,600 committee clauses. Councillors themselves routinely complain, and with good reason, about the punishing workload.

The volume is simply unworkable at any acceptable level of diligence and attention to detail. No councillor could find time to read such a mountain of paper, let alone absorb all the detail in it. Council agendas need to be streamlined to focus on broad policy rather than intricate implementational detail, but it is also essential that staff rework their reports to be tightly crafted and short, with background material readily

available and easily navigated as necessary. "Brief" needs to be reflected in "briefing notes."

Perhaps because of the volume of work, or because the role of staff is misunderstood, or because of simple human failings, Council meetings are all too often characterized by a lack of civility and common courtesy. Ill-mannered behaviour impedes the effectiveness of Council as a decision-making body and diminishes the stature of Council in the eyes of the public. Such behaviour has pronounced and multiple negative effects, and no redeeming qualities. Recommendations on this important issue are found in Chapter II.

Combine the huge volume of work with unfocused accountability, and the result is that the meeting agenda bears no clear relationship to the attention each particular issue may deserve. Minor matters can consume precious hours of debate time, while major issues either do not get the careful attention required or pass with barely a whimper.

Delay in decision making is a serious issue as well. Council meets only periodically. The time may have come to increase the number of Council meeting days. Inefficient meetings result in fewer decisions, and the pace of decision making can slow to the point where Council does a disservice to the public. Effective decision making includes timely attention to urgent issues. That is not always happening.

Perhaps some of the preoccupation with narrow matters of purely local concern at the expense of visionary policy making at meetings flows from the way some councillors see themselves, namely as ward administrators. Councillors are sometimes even called "ward bosses." Some refer to them as having "feudal instincts." Service to constituents is an essential aspect of elected office, but Toronto would be better served by a more balanced combination of attention to local detail and broader policy planning. City government must do both, but when hard choices must be made, the City needs visionary, strategic, and policy-based leadership from its councillors far more than it needs councillors micromanaging the placement of speed humps.

No one could seriously suggest that the parliament of Canada should debate whether a two-kilometre stretch of the Trans-Canada Highway should have solid or broken yellow lines. Likewise, a debate over whether one provincial park should have four or six more picnic tables would not

likely reach the agenda of the Ontario legislature. Yet matters of narrow local detail seem to occupy Council with great regularity, at the expense of matters of far greater scope and vision. Matters of purely local detail could be delegated to staff; smaller provincial governments have done so with no adverse effects. Alternatively, they could be delegated to community councils for final determination.

Breaches of confidentiality are a serious problem for Council. The public release of private information can embarrass and humiliate individuals, impede the development of social policy, hamper appropriate political debate, and drive away businesses that do not trust the City with their trade secrets. An unwieldy and cumbersome legislative process is inevitably more prone to leaks, and that is yet another reason to streamline governance at the City of Toronto.

Debate persists about the optimal size of Council. Advocates of making Council as small as possible advance the following arguments:

- The smaller the membership, the more likely it is that decisions will be made by the entire Council. A smaller council would reduce horse-trading among councillors and decrease the likelihood that agreements will be reached behind closed doors.
- Fewer councillors would make for shorter Council sessions, and it would be easier to get measures passed.
- The smaller the council, the more time each councillor would get to speak. Councillors need time to bring issues before Council. With a larger council, each member's speaking time must be limited.
- With a small council, lobbyists have less influence because other councillors would be much more likely to know of any lobbying, and thus to mitigate its impact if necessary.
- With a large council, it is hard to identify priorities, set goals, or even get to know one another. On smaller councils, councillors can concentrate on policy matters. More staff could be assigned to relieve councillors of constituency business.

Those opposed to a smaller council say:

- Meetings might be shorter, but the agenda would stay the same, and there is no reason to believe that fewer councillors will achieve consensus more easily. No matter what the size of Council, there will always be factions.
- Council has to be large enough to staff all of its committees and other bodies. To have proper synergy, each committee needs about six or seven members. With a small council, the burden of committee work for each councillor would be heavy. Councillors would have more work and responsibility generally.
- Council must be able to represent all citizens. Municipal government is the level closest to the citizenry, and each councillor must have a manageable constituency. The more constituents a councillor has to represent, the smaller the chance that any individual will be heard. A smaller membership would undermine local representation and local democracy. A large, boisterous council can represent the diversity of a municipality in a way that a smaller council could not.
- Small councils can more easily be influenced by lobbyists because the fewer people they have to lobby, the easier it is for them to mount a lobbying effort.
- Citizens' contact with an elected representative, not staff, is the important thing in municipal government.

Ultimately, if Council becomes a more deliberative body, taking the lead in setting broad policy parameters for staff implementation, Council could shrink in size for this reason, although it must keep in mind the need to adequately staff the necessary committees.

The City of Toronto has a constituency and a service delivery mandate that are comparable to those of many provincial governments. However, under the present structure, it does not function on that level. Much of the debate currently surrounding reform of City of Toronto proposes that the City be accepted and treated as a senior level of government. If Toronto wants to be a senior level of government, it must also accept the need for a more rigorously accountable governance structure. It might well be time to set aside the nineteenth-century form of government. But Toronto is a creature of the provincial legislature and cannot accomplish this task alone, although it can show leadership in this direction.

B. Grappling with the Problems—An Alternative Model

The gap between the Mayor's perceived responsibilities and his or her real power to carry them out has led to a great deal of discussion about revising the role of the Mayor in Toronto. Our current system is based on a "weak mayor/strong council" model, where governmental power is shared equally among councillors, including the Mayor. "Weak" and "strong" here refer to the power of each position, not to the personal qualities of any current office holder.

There is virtually no end to the variations on the theme of how to strengthen the executive leadership of the Mayor. Many different "strong mayor" models are to be found in the literature and the practices of other jurisdictions.

Ultimately, the outcome of the debate about how Toronto should best be governed is not for me to decide. However, for the purposes of discussion only, it might be helpful to consider an example of one alternative model that gives the Mayor stronger executive leadership powers. The example below involves variations and compromises that arose from the extensive hearings in the Good Government phase of the inquiries. This model captures many different threads of governance reform, as identified by writers, experts, and Good Government panellists, but no part of it should be taken as a recommendation on my part. As I have said, these choices are fundamentally political.

1. The Mayor as the Chief Executive Officer of the City

- Under the *Municipal Act*, the Mayor of Toronto is the chief executive officer of the City. In this alternative model, the Mayor would be clearly and publicly accountable for the effective administration of the City, as opposed to the current model of collective accountability of Council that critics characterize as "everyone and no one" in charge. The City Manager and City staff, through the City Manager, would report to and be directly accountable to the Mayor rather than to Council. This measure would replace the considerable unofficial power the Mayor may currently exer-

cise over the administration with an official role, and with the corresponding and appropriate public accountability that goes with it.

- To avoid politicization of the public service, this change would have to be accompanied by structures and processes to safeguard the professional independence of the civil servants reporting through the City Manager. For example, the Mayor could have direct power to appoint the City Manager but only limited direct involvement in recruiting senior department heads, and no involvement at all at lower levels. At the senior department head level, the City Manager would manage the recruitment process and bring forward recommendations to the Mayor for his or her approval.

2. Executive Committee

- The Mayor could govern the city through an executive committee. The members of the executive committee would have portfolio responsibilities. The Mayor would have exclusive power to select those executive committee members from among the elected members of Council; if Council were to share this selection power, the change from the status quo might not be significant enough. Members of this executive committee would serve at the pleasure of the Mayor. The executive committee would be responsible for approving and recommending to Council strategies and policies developed by the administration. This structure would address the need for focused areas of policy expertise and would enhance accountability of staff by having a political point person for each major area.
- An executive committee would streamline the development of policy and should reduce the likelihood of breaches of confidentiality.
- Council would be focused almost exclusively on reviewing and approving strategies and policies put forward by the Mayor and the executive committee. This would mean that Council would not be approving speed humps, stop signs, and so on. As in any legislature, the elected representatives would set the policy for how administrative decisions would be made; staff, with the oversight of the Mayor and/or the councillor with that portfolio of responsibility, would actually make the necessary decisions.

3. Election of Councillors "at Large"

- Councillors could be elected "at large" rather than on a ward-by-ward basis. The aim would be to ensure that each candidate has a City-wide, policy-oriented mandate rather than a "ward boss" mandate focused on the administrative matters that would devolve to staff under this model.
- At-large election of all councillors would educate the voting public about the city-wide policy priorities of all Council candidates, not just the Mayor. Voters could more readily elect a slate of candidates who reflect widely prevailing policy preferences. The result could be a more democratically responsive and yet cohesive Council.
- Under this election-at-large approach, the size of Council could be reduced, and a smaller council would streamline the decision-making process.
- To provide a brake on the power of the Mayor and executive committee, a two-thirds majority of Council could reject or modify items brought forward by the Mayor.

4. Changed Role for Community Councils

- The role of community councils would need to be revisited in this alternative model. The risk in keeping them in their current form is that the focus on the details of local issues would remain within Council. This would create an untenable situation for the Mayor and the administration. If the administration were to be in charge of executing the policy decisions of Council, it would need the clear authority to do so. This could not be achieved if community councils had the power to give direction to the administration.
- An alternative role for community councils would be to act as final decision makers on matters of a purely local nature, such as traffic issues.
- Another alternative role for community councils would be to act primarily as consultative bodies for engaging citizens on strategy and policy matters. As committees of Council, they would advise Council, the official policy-making body, rather than the Mayor and the administration. This would be consistent with the proposed role of the full Council as an "at large" body focused on strategy and policy. To the extent that these community bodies would be empowered to consider local operational

> matters that are the responsibility of the Mayor and the administration, this advice would focus on local priority setting. However, their role would be advisory only: they would provide only non-binding advice and recommendations to the Mayor and the administration.

This model is obviously very different from Toronto City Council today, and many will be vehemently opposed to some or all of its features. Indeed, it is by no means the only plausible governance reform option available. It is just an example to illustrate that a workable alternative municipal governance structure could be devised to address the shortcomings of the current system.

A new municipal governance structure will inevitably require a broad commitment to change. Many will resist change: some because of objective conviction, and some because change would challenge the strategic advantages they enjoy under the status quo. The type of change that comes will be decided democratically, but from my observations during these inquiries, change—soon—is necessary.

Naturally, because these inquiries were mandated by the City of Toronto, I have tailored the discussion and recommendations in this report to Toronto. The people of Toronto who paid for these inquiries deserve nothing less than my exclusive attention. Like every city, Toronto has an unwritten culture that can make some ways of doing things seem preferable to others. In considering my recommendations, I tried to think in terms of Toronto specifically, and I have done all I can by way of research and deliberation to speak from a position of knowledge and understanding.

Nevertheless, since it is possible to learn from the experiences of others, this volume may be of interest to other municipalities and other levels of government. Through the Good Government research, it became clear that city governments conduct essentially the same business everywhere, but in many different ways. The principles that emerged are broadly applicable, but there will be significant differences in putting them into practice, depending on the size of the government. Staff and councillors in a town of ten thousand who peruse this volume might find my recommendations useful, while recognizing that their town can properly do things quite a bit differently.

Around the time I was preparing to write my report, I had a chance discussion with someone who had been mayor of a small Ontario town. He told me that when he was first elected, he felt there was nowhere for him to turn for answers to questions about municipal governance. What was he to do if he was approached in the grocery checkout line by an acquaintance wanting to do business with the municipality? How did one deal with perceptions of conflict of interest in a small community? His insightful and very practical questions made me realize that the issues I was wrestling with in the inquiries in faraway Toronto were just as relevant elsewhere, in cities and towns big and small.

I do not intend this volume to be a scholarly analysis, nor is it a comprehensive guide to municipal governance. I do not deal with matters such as financing, urban planning, green spaces, garbage pickup, snow removal, or the numerous other indispensable services provided by the City. The inquiries I conducted, and therefore the lessons learned, had a narrower but still very important scope: the duties imposed on everyone who has anything to do with spending taxpayers' money.

Sometimes, several very different approaches can achieve the same objective, and it is often simply not possible to assert that one method of accomplishing a particular aim of municipal governance is best. I recognize, therefore, that there is bound to be reasonable disagreement with some of the approaches I have recommended. I hope there is. Reasoned debate is good for democracy, and I welcome the prospect of far-ranging debate on what methods will work best to serve the people of Toronto. In particular, I hope that the issues will be widely discussed within City government itself.

My recommendations are for and about the government of the City of Toronto. They are also for the people of Toronto. What would be the best result of these inquiries? I hope it is to convey excellent lessons in some key aspects of city government. If those lessons are learned by people in government, and by people dealing with government, we can hope to see scandals arising from spending public money far less frequently.

II. Ethics: Recommendations and Commentary

A. Ethical Culture

Every large institution has a culture: the unwritten ways in which people believe they can and should—and therefore do—act. Nobody works in a cultural vacuum. Beliefs about what can and cannot be done will quietly guide behaviour whether or not there is any sustained effort by the organization to create a particular culture. Since a culture that guides action is inevitable, large organizations like the government of the City of Toronto should not leave the evolution of that culture to chance. The City should actively define and seek to instill appropriate public service values.

Values must be more than "ethical art": a nicely framed code of conduct hanging on the wall. The ethical dimensions of each decision must be taken into account, and must be seen to be taken into account. They should animate everyday decisions by everyone at all levels of activity. What makes an ethical culture strong is acceptance and internalization of ethical values by individuals through involving them in the process of articulating those values. As an oft-quoted saying attributed to Confucius put it: "Tell me and I forget; show me and I remember; involve me and I understand."

People usually want to do the right thing for the right reasons. Leaders usually want to help people in their organization do the right thing for the right reasons. This is the fertile soil out of which almost any organization can grow a vibrant ethical culture. But it takes work, attention, and encouragement.

The ethical culture of an organization is the set of values operating within it. Those values constitute the first line of defence against unethical behaviour, and they exert by far the most powerful influence. In any organization, there is a formal ethical culture and an informal ethical culture. Formal culture is written policy. Informal culture is learned from observing the behaviour of others—and it usually prevails. Ideally, formal culture and informal culture are the same, and the values set down on paper reflect the real values at work in the organization every day, the values that people respect and have embraced.

B. Ethics in Government

Commercial organizations with clearly articulated values may outperform those without them, enjoying greater customer and employee loyalty. In government, however, where officials have a duty of trust to the public, putting ethical values first is imperative.

Everyone who works in democratic government, staff member or elected official, is discharging the function of a trustee for the public in every minute on the job. In every decision, at every level, they must put the public interest ahead of their own. Public service is a noble calling, and the word "servant" in "public servant" is meant in the most admirable sense of contributing to something greater than one's own self-interest. In all its many forms, public service can be one of the most rewarding ways to earn a living. But public service is not for everyone. People who work in government should be fundamentally content to devote their talent and ability to serving the public good. Those who cannot commit themselves to that principle should not choose public service as a career.

The reputation of a government can easily be tarnished by allegations of unethical behaviour by public servants. Obviously, this can affect a government's financial dealings. But repeated ethical lapses also generate a negative public perception of public service, eroding morale, some-

times unfairly tainting innocent people through mere proximity to the wrongdoers, and making it more difficult to attract qualified people. A strong ethical culture reinforces the incalculable value of serving the community and can inspire talented individuals to choose public service as a career.

How can people be encouraged to respect, embrace, and understand the importance of putting the public interest first? The place to start is at the top. In municipal government, that means starting with the mayor and councillors.

C. Leadership: The Tone at the Top

Every individual is responsible for his or her own actions, but we have all heard the excuse that everyone else was doing the same thing. Appropriate and inappropriate behaviour is often learned by example, the most powerful teacher, starting in the earliest years of childhood. As adults, we continue to be influenced by example in the form of leadership.

A mayor's powers may vary by municipality, but the ethical culture of municipal government trickles down from the mayor's office regardless of the mayor's mandated role. Unethical or inappropriate behaviour by the mayor is not an excuse for anyone to follow suit, but the mayor does set a powerful example.

A mayor is the public face of a city or town, and the public holds the mayor most accountable. Ethical culture trickles down from the mayor's office, but problems percolate back up. Having campaigned on a set of issues and values, the successful candidate is expected to deliver. The media go to the mayor for the definitive word on a question, but the mayor's influence consists of much more than sound bites. As the person most visibly responsible to the electorate, and in many communities the only position all constituents vote for, the mayor has an opportunity to set the tone for the conduct of municipal business at home, and to personify the municipality to the rest of the country.

A mayor's influence over ethical culture extends to the productivity of council meetings. In some cities and towns, councillors work as a co-operative team. In others, council meetings may degenerate into verbal brawls. Once again, the mayor sets the tone, both by example and by stepping in if

individual council members disrupt the process or thwart the business of running the municipality on behalf of the people who elected them. The current prevalence of cynicism about politics and politicians increases the need for leaders like mayors to provide a strong ethical example.

The history of political offices reinforces the value of leadership. The legacy of political actors revealed as corrupt has been, invariably, corrosion of respect for the offices in which they served. Equally, political leaders widely admired for their integrity have enhanced the status of the offices they occupied. It follows that a continuing exploration of how best to ensure ethical behaviour by leaders is good for democratic institutions and for those they govern.

Every time scandal forces us to go back to the ethics drawing board and adjust how we are governed, enlightening talk about the importance of ethics will be part of the response. But not everyone is going to behave better just because someone explains why they should. There must also be new and more effective ways to expose and dissuade those tempted to behave in ways that debase public service. Strong measures should be accompanied by discussion of the importance of preserving and enhancing ethical behaviour in government, so that those affected understand why their new obligations are necessary.

Mayor and councils appoint the most senior managers. This is yet another opportunity to send a strong ethical message from the top down. What message has the mayor given to the public service about core values in the senior appointments he or she has made? Policy is properly made by elected officials, but municipal employees deliver services based on that policy. The mayor's perceived values, as reflected in the appointment of senior staff, affect how policy is formed and implemented.

Serious candidates for senior staff positions have track records. If the best predictor of future behaviour is past behaviour, then these track records can be a reliable forecast of future ethical behaviour. What sorts of decisions have the candidates made under pressure? How susceptible were they to potentially inappropriate influence? Did they demonstrate the courage to make principled and correct but unpopular decisions? Did they set an example of ethical leadership? A mayor should ensure that the best candidates are chosen, and are seen to be chosen, in a way that advances an ethical governance agenda.

Leadership is not restricted to elected officials. One reason why the best candidates should be selected for senior staff appointments is that they set an example for the civil service. And at every level, managers should set an example of ethical behaviour for the people who report to them: "involve me and I understand."

A mayor should be committed to ethical governance and should persuade both elected officials and top civil servants to commit to them also. The mayor has to kick-start the process, but if the message is not driven down to every single employee, it may not be sustainable. For example, inappropriate actions at the middle management level can have a huge impact on the public purse. Middle managers exercise discretionary power over large sums of the taxpayers' money, and this is where dishonesty, lack of training or direction, or just losing control of a situation can have a disastrous effect. The mayor should see that ethics policies are clearly understood at the middle level by making sure that senior managers put mechanisms in place for communication, training, advice, and enforcement. The recommendations that follow will cover all of these mechanisms.

D. Reinforcing and Promoting Ethics

Important messages always need to be repeated, reinforced, taught by example, and explained once more in new contexts. Governments are not much different when it comes to the ongoing challenges of ensuring that key ethical messages remain current at all times, because governments themselves are always changing. Staff turnover, expansion or contraction of the public service, turnover of elected officials, new policy directions, changing social conditions, and the simple fading of memory all combine to ensure that key ethical messages will fall off the radar screen unless ongoing attention is paid to keeping them fresh and relevant.

In many municipalities, rules on ethical behaviour exist, but they may be almost meaningless in practice because of vague language, loopholes, and special exceptions. Some governments may have codes of conduct setting out acceptable behaviour, but politicians and staff may be hazy about the requirements or not even know the codes exist. Consequently, important recommendations below address methods of keeping ethical policies fresh, relevant, and well understood.

E. Ethics Audit

An ethics audit is an in-depth re-examination of ethics policies, the level of compliance, and the level of satisfaction with them. An ethics audit can serve as the foundation of a renewed or reinvigorated commitment to ethical practices.

The City has matured in the nearly eight years since amalgamation. It may or may not be necessary to conduct such an ethics audit immediately. However, an ethics audit is an important tool in assessing and improving the ethics culture of an organization, and it can be deployed helpfully at regular intervals. One aspect of an ethics audit is a comprehensive review of applicable provincial legislation that may cover matters of ethics to ensure that the City is in full compliance and that the City has policies to address any gaps in legislation.

A second part of an ethics audit is assessment of the present ethical culture. This can be done by strictly confidential surveys of employees, designed to assist the City in understanding how its own employees feel about the organization's culture. The surveys should cover all departments and all levels of staff. The aims are to make an internal evaluation of the City's current ethical culture and to see what could be improved. It should be made clear to staff that the confidential survey is a first step in a collaborative process of change. Disseminating the results of an ethics survey can stimulate discussion, move the organization toward consensus, and foster a sense of ownership of ethical values among all stakeholders.

Once areas for improvement have been identified, manageable goals should be defined. Broad or comprehensive change may be best managed in small stages. Following adequate consultation, an improved code of conduct could be developed.

Care should be taken to ensure that a new ethical culture does not overemphasize prohibitions, which can lower workplace morale. Instead, the positive aspects of key ethical values should be emphasized. If a new code of conduct is developed after an ethics audit, appropriate training about the new code is essential.

Finally, City managers should be constantly looking for opportunities to apply the newly refined values in a given division or department. When implementing any change flowing from these recommendations, the City

should bear in mind the need to implement change in a way that meaningfully includes staff at all levels in the process of change.

F. Codes of Conduct: General Principles

Below are general principles that should animate codes of conduct, followed by recommendations that could readily find their way into a code of conduct. Having considered the matter carefully, I have not put together a model code of conduct, for a number of reasons.

First, there may be many different reasonable approaches to codifying any one of my recommendations. The City should have the flexibility to implement these recommendations as it sees fit.

Second, the City already has a code of conduct and a conflict of interest policy. Thus, implementation will necessarily involve comparing my recommendations with what is already in that code and that policy, considering essential differences, and then deciding how best to integrate them. That is a task for the City, not for me.

Third, I do not have the overarching knowledge necessary to draft a code or codes of conduct that could apply throughout City government in every department. Conducting these inquiries gave me an opportunity to examine several central aspects of Toronto's government in depth, but by no means did I cover the entire field. Many important departments at the City had nothing to do with my terms of reference. Consequently, while I have identified key ethical precepts, I cannot suggest how they should be put into action in departments not included in my mandate.

Fourth, and perhaps most important, achieving a vibrant ethical work culture is not simply a matter of imposing codes of conduct by decree. The impetus should come at least in part from within, with input from all levels of City government. Ethics must matter to everyone, and everyone should be as involved as possible in defining what is ethical. Therefore, I leave it to the City, guided by the recommendations below, to engage its staff in improving its codes of conduct.

The City currently has a "code of conduct" for councillors and a "conflict of interest policy" for staff. The City may choose to have separate

policies for councillors and staff, or it may combine them. Regardless of whether there is one code or two, staff and councillors should be given the same ethical scope. No one at the City should feel that anyone else at the City is held to either a stricter or a more lenient standard of behaviour.

The preferable model for codes of conduct is one that rewards appropriate conduct, rather than one that penalizes lapses. Under a compliance-based model, councillors and staff should be considering daily whether their activities are in the best interests of the City and whether those activities meet the standards in the applicable ethics code, with which they all should be very familiar.

The codes of conduct should reflect the City's core values. In 1996, the federal Deputy Minister Task Force on Public Service Values and Ethics issued a report entitled *A Strong Foundation*. It is now known as the Tait Report, after the late John C. Tait, QC, a widely respected federal civil servant. The report identified four categories of core values in the public service, which may help the City refine its code or codes of conduct.

- Democratic Values (including respect for the rule of law and due process, respect for the authority of elected officials, loyalty, accountability, loyalty to the public interest)
- Professional Values (traditional values such as excellence, professional competence, continuous improvement, merit, effectiveness, economy, frankness, objectivity and impartiality in advice, speaking truth to power, balancing complexity, and fidelity to the public trust; and "new" values such as quality, innovation, initiative, creativity, resourcefulness, service to clients/citizens, horizontality, partnership, networking and teamwork)
- Ethical Values (integrity, honesty, impartiality, taking responsibility and being accountable, probity, prudence, fairness, equity, objectivity, disinterestedness, selflessness, trustworthiness, discretion, respect for law and due process, and the careful stewardship of public resources)
- People Values (courage, moderation, decency, reasonableness, balance, responsibility, humanity, respect, concern, civility, tolerance, patience, benevolence, reciprocity, courtesy, receptivity, openness, fairness and caring, a high concern for participation, involvement, collegiality, consultation and communication, respect for diversity, respect for official languages, and respect for other collective or individual rights)[2]

[2] *A Strong Foundation: Report of the Task Force on Public Service Values and Ethics (Tait Report)*, Canadian Centre for Management and Development, 1996, Ottawa.

1. **The City should expand its current code of conduct for councillors and its conflict of interest policy for staff to include broader ethical considerations.**

"Code of conduct" is a more positive phrase than the admonishing phrase "conflict of interest" and is therefore preferable. The phrase also covers broader ethical considerations, rather than conflict of interest alone. However, having two separate documents entitled "code of conduct" would likely be confusing, so if the City decides to have two codes, it should find some easy way to distinguish them. For example, the councillors' code of conduct could remain as the Code of Conduct for Members of Council; the staff's code could be called the Ethics Code for the Toronto Public Service.

2. **The codes of conduct should go beyond the minimum standards of behaviour and set out the highest ideals and values toward which all public servants should be working.**
3. **The codes of conduct should be written in plain language that can be understood by all public servants as well as by the public.**
4. **The codes of conduct should reflect the difference in the roles of councillors and staff without setting different ethical standards.**
5. **Political staff should be required to adhere to the same ethical guidelines that apply to councillors and City staff. Councillors should have their staff execute an agreement to abide by the City's codes of conduct.**

G. Hiring

6. **The City's hiring processes should include appropriate questions designed to elicit some perspective on the ethics of applicants. Applicants' responses to the ethics questions should then be considered prominently in hiring decisions.**
7. **New City employees should receive immediate training on the ethical dimensions of their particular work.**

Hiring provides an excellent opportunity to advance and protect the City's ethical culture. On the protection side, it is far better to avoid hiring

the ethically challenged than it is to cope with the fallout once they are on staff. And on the advancement side, new employees with strong ethical standards can inject new vigour into the City's ethical culture.

Absorbing the unwritten ethical culture of a large organization is not something a new employee can accomplish overnight. The City should therefore do more than simply give new employees a code of conduct to read and acknowledge. Ethical obligations are more than contractual obligations. They are values to be internalized and applied.

H. Training, Ongoing Education, and Monitoring

8. **Training on codes of conduct should be mandatory for all City staff and councillors.**

Senior management, councillors, and the Mayor should all actively participate in ethics training. Such training is of course valuable to them. But, equally important, the active participation in training of senior City leaders sends a strong message throughout the organization about the importance of ethics.

Training should be practical, perhaps problem-based, but in any event directly job-related to ensure that it is relevant to each trainee. Training also should be guilt-free, taking a supportive approach to ethical dilemmas, rather than a censorious approach that implicitly chastises trainees for not being able to make correct decisions.

Training need not be expensive. Cost-effective training can be provided through peer training and interactive, Internet-based programs, for example.

9. **The City's internal newsletter, *Inside Toronto*, should feature a regular column on ethics and a question-and-answer section where ethical concerns from staff are addressed anonymously.**

10. **Subject to collective bargaining restraints, all staff and councillors should be required to sign an annual declaration that they are aware of the codes of conduct, are versed in them, and will uphold them.**

11. **Staff and councillors should meet regularly with their co-workers or colleagues to discuss work-related ethical issues.**

12. **Staff and councillors should be encouraged to discuss ethical issues that arise from time to time with peers, managers, or the integrity commissioner.**

Both structured and informal discussions of ethics can maintain or boost morale and collegiality. Special events, such as the City's 2004 Learning Summit, are an excellent way to foster increased understanding and acceptance of key values and should be encouraged.

Often, ethical issues can be uncovered by asking a few simple questions that dig below the surface of a situation. For example, if a public servant is invited to a function by a colleague, it is easy to ask: Where did the tickets come from? Who paid for them? What relationship does the person who paid for them have with the City? How did the colleague get invited? Should either of us be going? City staff and councillors should be encouraged to ask such questions and not passively accept apparent favours that come their way. This sort of questioning actively preserves essential standards of ethical behaviour.

The City already requires non-union City staff to sign a declaration indicating that they have read and understood the existing conflict of interest policy. Awareness of this policy is part of their annual performance reviews. This is a sound practice that should be expanded.

13. **The City's codes of conduct should be monitored vigilantly to ensure that they provide appropriate guidance. Change should be made promptly when necessary.**

14. **The City should promote awareness of the codes among all councillors and staff and provide guidance in complying with the codes.**

There are many ways to promote understanding and compliance with codes of conduct. As noted above, the codes must be more than just ethical art. They should come down off the walls and be understood by all who are guided by them. This can be done through the City's website, pamphlets, training seminars, electronic correspondence, events, discussions at regular staff meetings, and other means.

I. Relations between Councillors and Staff

15. Both elected officials and staff should understand and honour their respective roles and responsibilities, act only within them, and never blur the distinction.

Staff should not intervene in functions properly carried out by councillors, and vice versa. Elected officials and unelected staff perform very different functions, both of which are essential to sound democratic municipal governance.

Broadly speaking, elected officials set policy direction. Staff provide neutral, professional advice on the objective merits of various policy options, then implement the policy decisions taken. In working together, neither councillors nor staff should cross the line. It is unacceptable for staff, under the guise of neutral advice, to manipulate the policy agenda. For example, a staff member with a highly sophisticated professional understanding of engineering should not exploit that knowledge advantage over councillors to unduly influence policy choices related to City building priorities. It is equally unacceptable for councillors to intervene in functions properly carried out by staff. The micromanaging councillor politicizes activities where objective decision making is essential. For example, the politician aggressively intervening in the placement of speed humps runs the risk of compromising impartial decisions about safe and optimal traffic flow.

16. The Mayor in Council meetings, a committee chair, or anyone else in a formal or informal leadership role should immediately intervene in instances of uncivil behaviour and politely remind the person responsible of his or her duty to be civil.

Politics is a pressure cooker. Angry constituents, bad press, thorny policy thickets, or a huge workload can sometimes make an elected official's job unpleasant. But these pressures are no excuse for abusive behaviour to staff members or to one another. In the heat of debate, some councillors treat staff and fellow councillors in an astonishingly rude and derogatory fashion. This behaviour demeans everyone involved and casts City government as a whole in an unflattering light. People want to see their elected representa-

tives dealing with the issues professionally, not trading barbs and insults.

Public service as a City staff member can be equally challenging in different ways. Workload is often voluminous, resources are scarce, deadlines are tight, and councillors who do not have professional expertise in a given area need careful, sometimes repeated explanations. But again these pressures are no excuse for unprofessional behaviour. Some staff members seem to view elected officials with disdain. Their answers to councillors' legitimate questions are chippy or condescending. Staff have expertise and training in their specialties, but that is no excuse to withhold information that elected officials are entitled to have or to patronize them. The office of an elected representative of the people deserves our deepest respect because it is the heart of democracy. One shows respect for the office by showing respect for the officeholder.

Principled criticism of others' positions is to be expected at times, but it should be delivered respectfully and civilly. Angry or abusive language and personal attacks are inappropriate at all times.

A person treated inappropriately is entitled, regardless of rank or seniority, to politely insist that he or she be treated with respect and dignity. Without such treatment, he or she should be free to disengage. All councillors and managers have a duty to support their staff or peers who reasonably exercise the right to disengage from uncivil treatment.

17. **Councillors should not ask staff to perform personal services for them.**

18. **Councillors should not attempt to influence staff behaviour by direct or indirect coercion of any kind, including intimidation, bullying, or alluding to future promotion or employment prospects.**

19. **Councillors should not ask staff to engage in partisan political activities for them.**

Sometimes the line between legitimate staff advisory functions and political activity can be unclear. In these circumstances it is the responsibility of the councillor to respect the distinction between the two in making requests of staff, and to refrain from any request that involves the staff member in partisan political activity.

J. Conflict of Interest and Apparent Conflict of Interest

A conflict exists when an individual's independent judgment is swayed or might be swayed from making decisions in the organization's best interests. An apparent conflict exists when an outside observer could reasonably conclude that an individual's judgment is or might be swayed from making decisions in the organization's best interests.

There are four main causes of real and apparent conflicts of interest:

- past or present personal relationships that influence one's judgment through emotion, loyalty, or lack of proper perspective
- self-interest, such as when a favour, gift or bribe influences a decision
- fraud
- misunderstanding

Many conflicts can arise without any wrongdoing. Being in a conflict is not by itself cause for censure or stigma, unless one has created the conflict by a prior wrongful act.

20. **Rules about conflicts of interest and apparent conflicts of interest should form part of the City's codes of conduct.**

21. **Councillors and staff should be made aware that it is unacceptable for them to act on a matter in which they have either a real or an apparent conflict of interest.**

22. **Councillors and staff should take steps to avoid as best they can both real and apparent conflicts of interest. For assistance, they should seek the guidance of the office of the integrity commissioner.**

1. Conflicts of Interest

Conflicts of interest confuse decision-makers and distract them from their duty to make decisions in the best interests of the public, which can result in harm to the community.

The driving consideration behind conflict of interest rules is the public good. In this context, a conflict of interest is essentially a conflict between

public and private interests. Conflicts affect both councillors and staff, but in different ways. The core concern in a conflict is the presumption that bias and a lack of impartial judgment will lead a decision-maker in public service to prefer his or her own personal interests over the public good.

Having a conflict of interest is not in itself a sign of dishonesty. Honest people can and do find themselves in conflicts of interest. For example, a councillor deserves absolutely no condemnation because her enterprising nephew with his freshly minted computer science degree has started up an IT company that is bidding on a municipal contract. But that councillor has a conflict of interest and should not vote with Council on the decision to award that contract. Conflict itself may have nothing to do with unethical behaviour. The individual's actions when faced with a conflict of interest are what matters.

It is also important to note that one cannot necessarily determine the motives of a person in a conflict of interest. That is why conflict rules are essential. The person's motives should not have to be interpreted.

Conflict of interest should be considered in its broadest possible sense. It is about much more than money. Obviously, a conflict of interest exists when a decision-maker in public service has a personal financial interest in a decision. But conflicts of interest extend to any interest, loyalty, concern, emotion, or other feature of a situation tending to make the individual's judgment less reliable than it would normally be.

A potential conflict of interest exists when a public servant has a private interest that could influence the exercise of his or her public duties or responsibilities. The potential conflict exists even when the public servant has taken no action to reap a tangible private benefit. The potential conflict persists until the public servant deals with the conflict by, for example, disclosing it, withdrawing from the matter, or divesting the assets creating the conflict. The potential conflict becomes an actual conflict as soon as the public servant takes any action at all to influence the decision on any issue in which he or she has a private interest.

2. Apparent Conflicts of Interest

An apparent conflict of interest exists when someone could reasonably conclude that a conflict of interest exists. In other words, it is a matter of public perception.

Public perceptions of the ethics of public servants are critically important. If the public perceives, even wrongly, that public servants are unethical, democratic institutions will suffer from the erosion of public confidence.

Circumstances can arise where a public servant has been behaving ethically, yet that person's actions look unethical to someone else. The problem, though real, does not lie with the public servant. The appropriate response to such misinterpretation is to improve understanding, through communication and education, of what does and does not constitute unethical behaviour.

On the other hand, public servants should not dismiss the importance of apparent conflicts of interest just because they can arise even where there is no wrongdoing. By disregarding perception, the public servant runs the risk of eroding public confidence, not only in himself or herself but also in government generally.

Experienced elected officials know all about public perception. They tend to have good antennae, and they apply the "newspaper test." As Ontario's integrity commissioner, the Honourable Coulter A. Osborne, put it during the Good Government hearings, "If you wake up tomorrow morning and see this matter explored on the front page of one of Toronto's newspapers, how's it going to affect you politically? How's it going to look?" This is sound advice. Before they act, public servants should ask how their proposed action or inaction would look spread across page one.

In short, when in the slightest doubt, disclose. Disclosing unnecessarily has no adverse consequences. Failing to disclose when required can be disastrous.

3. Some Specific Conflicts of Interest

These recommendations address what the City should do to prevent councillors and staff from acting in conflicts of interest.

23. **Councillors and staff should not use their positions to further their private interests.**

24. **Councillors and staff should not concurrently accept employment by an outside interest that is either incompatible with or in conflict with their official duties.**

25. Councillors and staff should not ask other City employees to perform work that is unrelated to City business during office hours.

The dividing line between work and personal life is not an iron curtain. It is perfectly acceptable to attend to short items of personal business that crop up during a workday. It is also perfectly acceptable, for example, to do a quick personal favour for someone else. That is basic human kindness.

This recommendation is aimed at something different. Councillors or staff with outside interests or projects should not impose on staff to further them. Councillors or staff should not run the risk of making a worker feel obliged to do something during work hours that is not the City's work. The keys to ascertaining what crosses the line are whether the task is obligatory, or more than a trivial intrusion on the staff member's time. If the task is either one of these, councillors or staff should not ask that it be done during work hours.

26. Councillors and staff should not divulge confidential information to those not entitled to it.

27. Councillors and staff should not access confidential information if not required to do so for work purposes.

Failing to respect confidentiality is a serious breach of ethics. People who misuse confidential information can abuse, degrade, and humiliate others. They can steal a competitive advantage away from a company that has worked extremely hard to earn it legitimately. Leaks of confidential information can corrode the public's trust in government as quickly as any other kind of scandal.

Political leaks undermine the utility of Council deliberations by chilling the confidential discussions necessary to address a delicate situation. Leaks of proprietary commercial information can drive away reputable companies reluctant to leave trade secrets in the hands of councillors or staff who fail to respect confidences. The long-term impact of breaches of confidentiality is the corrosion of public confidence. Openness in government fosters accountability, but governments also need to respect confidentiality when a matter must remain, at least temporarily, private. Duties of confidentiality are far too important to be sacrificed for political or strategic expediency.

The City of Toronto should pay particular attention to greatly invigorating the commitment among councillors and staff to respecting confidential information. This should be accomplished through increased emphasis on confidentiality in training and advisory programs and materials. Where necessary, the integrity commissioner should aggressively pursue breaches of confidentiality. Those who misuse confidential information in any way should face consistently strong sanctions to accentuate the seriousness of this type of ethical misconduct.

28. **Recently departed City employees should not promote themselves as having otherwise unavailable access to City information, processes, or decision-makers.**

29. **Former councillors and City staff should not accept employment in which they would be dealing with matters or files that they worked on while at the City.**

4. Preferential Treatment

Councillors and City staff will have past or continuing close relationships with members of the community. But the potential for real or apparent conflict of interest is great. Such conflicts can lead to preferential treatment or the appearance of preferential treatment.

30. **Elected officials and staff should take all necessary steps to avoid preferential treatment or the appearance of preferential treatment for friends or family.**

Here are specific examples of this general principle.

- Councillors and staff should not conduct City business with individuals with whom they have or had a close relationship.
- Preferential treatment should not be given, or appear to be given, to any person based on whom that person has hired as a representative.
- Councillors and staff should not use confidential City information to improperly benefit any person.
- Councillors and staff should not encourage the City to enter into contractual relationships with close family members, close friends, or close

professional colleagues. If the City is dealing with a family member or friend of a councillor or staff member on its own initiative, that councillor or staff member should play no part in the City's hiring or contracting process.

- Councillors and staff should not be involved in entering into contractual relationships with close family members or close friends of other councillors or staff, except in designated roles in an impartial hiring or contracting process.

5. Disclosure and Recusal

31. Councillors should not vote on any issue at Council or committee that puts them in a real or apparent conflict with their personal finances. They should declare their conflict and recuse themselves.

32. Councillors should recuse themselves from matters that pose a real or apparent conflict with the finances of their spouse, parents, or siblings.

Councillors should also use good judgment about issues involving the interests of other close relatives, good friends, or close professional colleagues. When in doubt, it is always best to disclose and withdraw. Nor is there any harm in raising a possible conflict unnecessarily, but great harm may result from failing to raise one that ought to have been disclosed.

33. Staff should refrain from any involvement in analysis or decision making on an issue in which they have a real or apparent conflict of interest. Conflicts or apparent conflicts should be disclosed to or discussed with the staff member's supervisor.

Managers have a duty to encourage reporting of conflicts by receiving such reports supportively, and accommodating as necessary.

K. Integrity Commissioner

34. A full-time integrity or ethics commissioner should be hired.

In this report, the title "integrity commissioner" is used; "ethics commissioner" is an equally appropriate title.

Elected officials and staff should be asking themselves regularly whether there are ethical concerns arising from their activities. Informal consultations with peers or trusted mentors can be an important source of advice. But it is necessary to supplement these informal efforts with a more formal source of ethical guidance, advice, surveillance, and enforcement: the integrity commissioner. In a municipal government like that of the City of Toronto, that office is valuable for the following reasons.

- An integrity commissioner can help ensure consistency in applying the City's code of conduct. Compliance with policy improves when everyone is seen to be held accountable under the same set of rules.
- Busy councillors and staff cannot be expected to track with precision the development of ethical norms. The integrity commissioner can therefore serve as an important source of ethical expertise.
- An integrity commissioner provides significant profile to ethical issues inside City government and sends an important message to constituents about the City's commitment to ethical governance.
- No matter how comprehensive the rules, there will on occasion be situations where the ethical course of action is not clear and an individual will need authoritative advice and guidance.
- Without enforcement, the rules are only guidelines. Although research shows that a values-based approach to ethics policy, focusing on defining values and encouraging employee commitment, is preferable to a system of surveillance and punishment, where the public interest is involved, there should be a deterrent in the form of consequences for bad behaviour. The rules must have teeth.

The roles of elected officials and staff are distinct, and the ethical demands are different, which may suggest that two different commissioners are required. However, until that need is demonstrated, there is nothing inherently wrong with one commissioner responding to the ethical needs of both staff and councillors.

The City is to be commended for having already created the position of part-time integrity commissioner. The recommendations and commentaries below will address some of the dimensions of the integrity commissioner's role, and how that role can be helpfully expanded or varied from the present format.

1. Appointment and Tenure

35. **To ensure that the integrity commissioner has the independence necessary for the job, he or she should report directly to Council, not the Mayor. He or she should serve for a fixed term and should be removable only by a two-thirds vote in Council.**

The integrity commissioner should be a person with a high degree of real and perceived independence from municipal politics. He or she would also ideally have the following attributes:

- excellent and effective communication skills in functions including presentations, public speaking, and one-on-one interactions with employees of all levels
- objectivity and thoughtfulness
- ability to establish and maintain credibility and trust throughout the organization
- ability to quickly assimilate information relating to complex issues
- ability to network on all levels of an organization
- political astuteness
- personal and professional maturity
- levelheadedness in tense interpersonal situations
- organizational knowledge
- working knowledge of applicable laws and regulations
- experience with training and development, including best practices in ethics and compliance education
- solid and broad management skills
- discretion and ability to protect confidential information
- ability and willingness to take a difficult or unpopular position if necessary
- common sense
- the highest level of integrity

The process to select the integrity commissioner should both be and appear to be beyond reproach. Selection could be undertaken by a panel of elected officials and senior municipal staff from outside the City. The selection could be made from a short list provided by an independent search firm.

To help ensure that the integrity commissioner is both independent and seen to be so, the selection committee might consider the following criteria:

- membership in a law society for a long time
- municipal or other administrative law experience
- municipal law adjudication experience
- proven impartiality and neutrality, in roles such as those of a judge or arbitrator
- availability to provide services without competing employment demands
- no other dealings or employment with the City
- no involvement in political campaigns or endorsements, and no conflict of interest
- no financial interest in the work of the City

2. Functions of the Integrity Commissioner

An effective integrity commissioner system provides two basic services:

- an advisory service, to help councillors and staff who seek advice before they act
- an investigative or enforcement service, to examine conduct alleged to be an ethical breach

When one integrity commissioner provides both advisory and investigative services, a potential for conflict arises when a City councillor or staff member who has sought advice from that commissioner should also be investigated for an alleged ethical breach. If this occurs, another qualified person such as an integrity commissioner from another jurisdiction should be retained to conduct the investigation. If conflicts arise frequently, it may be necessary to split the office of the integrity commissioner into an advice branch and a separate investigative and enforcement branch.

3. Advice

36. Senior management should investigate, in consultation with the integrity commissioner, the feasibility of establishing "divisional

ethics coordinators." These would be point persons in the various City departments to whom staff could turn for department-specific, confidential ethical advice. They would supplement the work of the integrity commissioner locally in the various departments and on the front lines of service delivery.

37. **The City should encourage staff and councillors to consult the integrity commissioner when necessary.**

There should be no stigma attached to such requests for advice. City staff and councillors should be educated that ethical concerns arise naturally and inevitably, and are not necessarily themselves a problem. Only the failure to address them is a problem.

Some councillors apparently turn to senior City staff when they have ethical queries. In future, councillors should consult the integrity commissioner on these matters rather than City staff.

If at all possible, staff should try first to resolve their concern with someone in their own department before going to the integrity commissioner.

38. **The integrity commissioner should offer his or her opinions to all members of Council and staff who request it. These opinions should be given in the strictest confidence. However, if a councillor or staff member makes public part of a commissioner's report on a matter, the integrity commissioner should be free to make all of it public in response.**

39. **Council should consider expanding the role of the current integrity commissioner to allow confidential review of the personal finances of councillors, at their request, so that the commissioner can advise them on potential conflicts of interest.**

40. **The integrity commissioner should have enough staff to allow councillors and City staff to efficiently seek advice in advance on matters of ethical concern—issues where ethics policies may be violated in letter or spirit.**

History has shown that ethical lapses by elected officials or staff can have huge negative repercussions, including crises of confidence in government and heavy monetary costs. Upfront advice that avoids a problem is there-

fore far better than enforcement action taken after the damage has already been done. Resources devoted to giving the integrity commissioner an effective advice capacity would be well spent.

It should be fast and easy to get advice from the integrity commissioner. Life preservers are light and kept close to the swimming pool for good reason. There should be ready and secure phone and e-mail access to the commissioner's office.

The integrity commissioner should be able to give practical guidance and to clarify the meaning of ethics policies with helpful examples. The scope of the integrity commissioner's advice should cover both real and apparent ethical dilemmas, because even the appearance of an ethical problem can erode public confidence in civil servants, elected officials, or the government generally.

Each member of staff or councillor should personally ensure that he or she never strays into an ethical no-fly zone.

4. Complaints, Investigation, and Enforcement

41. **Members of the public should be allowed to make complaints to the integrity commissioner. Complaints can be anonymous and need not be in the form of sworn affidavits.**

42. **To preserve the necessary independence of the office of the integrity commissioner, no elected official should pre-filter complaints to that office.**

43. **Councillors and staff should not be allowed to withhold their co-operation from investigations by the integrity commissioner. Sanctions for withholding co-operation should equal the sanctions for ethical breaches, so a clear message is sent that withholding co-operation offers no advantage.**

44. **To guard against misuse for political purposes of the integrity commissioner's complaint process, the commissioner should be free to dismiss frivolous complaints at the outset, publicly identifying them as such, if appropriate. The commissioner should also be able to identify those who launch bad-faith complaints, and recommend to Council that bad-faith complainants reimburse the City for the expenses of the investigation.**

The integrity commissioner should consider all complaints on their merits. Only if a complaint is frivolous should the motive behind the complaint receive consideration.

In general, the complaints process should be user-friendly, so that complainants are not discouraged by onerous procedural requirements.

45. **The office of the integrity commissioner should have broader investigatory power than it currently has. For example, it should have summons powers.**

The integrity commissioner's central focus is on ethics in municipal government. Therefore, it is quite possible that the commissioner may be invited to investigate and address issues that are also of interest to the police. Often, the commissioner may find it desirable in these cases to defer his or her investigation until any criminal investigation or prosecution is complete. The commissioner should also be free to refer matters to the police as necessary.

Despite the propriety in principle of conducting ethics-related investigations of matters that may also attract police investigation, the integrity commissioner should take care to ensure that his or her function is kept totally distinct from the police function. In all investigations that may also be of interest to the police, the integrity commissioner should take legal advice when necessary to maintain the independence of his or her office.

46. **The City should give the integrity commissioner the power to recommend to Council an appropriate range of sanctions for ethical misdeeds by councillors. Sanctions should include public reprimands, public apologies, expulsion from one or more committee meetings, removal from committee posts or committee chair positions, expulsion from one or more Council meetings, or, at the high end of the spectrum, a fine or declaration of a vacancy in the councillor's seat.**

47. **The City should give the integrity commissioner the power to recommend to Council an appropriate range of sanctions for ethical misdeeds by staff. These should be closely modelled on sanctions allowable under prevailing labour and employment law. To emphasize the importance of ethics within the organization, ethical**

misconduct should be regarded as among the most serious misconduct, and the sanctions should include the most serious penalties.

48. **The integrity commissioner should not have powers to impose sanctions directly. Council should rule within a fixed time on the integrity commissioner's recommendations for sanctions.**

The City should regard sanctions for ethical breaches as a last resort in the effort to preserve and enhance ethics in government. First and foremost should be the cultivation of ethical behaviour in a supportive and educational way.

Council should consider the integrity commissioner's recommendations very seriously and depart from them only where they are manifestly unfit. At present, Council itself has limited power to impose sanctions. Under the *Municipal Conflict of Interest Act*, a Councillor can lose his or her seat and not return for a period of seven years, but there is no allowance for mere suspension. A more finely tuned gradation of penalties should be available to Council, so that the integrity commissioner can make recommendations that are fair and proportionate to the ethical misconduct in question.

A fixed schedule for voting on sanctions will preserve the independence and authority of the commissioner's office by ensuring that disciplinary matters are not undermined by delay in Council.

Council should not go behind the commissioner's investigations into the conduct in question and undertake its own investigation. This would undermine the authority of the commissioner's office by replacing an independent professional investigation with a political one.

5. Education and Outreach

49. **The integrity commissioner should have the mandate and resources to participate actively in the development of ongoing ethical education programs or materials for City staff and councillors. Outreach of this type is an important part of ensuring a strong ethical culture.**

50. **The integrity commissioner should have a website for education, reference, and outreach purposes. The commissioner's office should also be available to provide advice on ethics training as necessary for both councillors and staff.**

Codes of conduct often use general language to cover a multitude of circumstances. It would therefore be useful for the integrity commissioner to supplement the code of conduct by periodically issuing lists of concrete examples of activities that contravene the code, are permissible, or fall into a dangerous grey area. Other helpful publications could include case studies, edited to ensure the anonymity of those involved, or interpretation bulletins that clarify an ethical question.

Currently, the City's integrity commissioner publishes an annual report including "typical advice and complaint cases; providing outreach programs to members of Council and staff on legislation, protocols, and office procedures emphasizing the importance of ethics for public confidence in municipal government; and disseminating information available to the public on the City's Web site." This is commendable and the report should be expanded to include the following:

- examples of generally informative questions received and answers given, modified as necessary to preserve confidentiality
- examples of frivolous complaints received, with explanations if necessary about why they were frivolous, again modified as necessary to preserve confidentiality

The integrity commissioner need not await an annual report; information could be issued publicly whenever it is thought desirable for educational or other purposes to do so. Information released throughout the year could also be collected and reissued in the annual report.

In the annual report, the integrity commissioner should have the latitude accorded an outside financial auditor to comment on areas in need of ethical improvement, with prescriptions for positive change.

City management should view the release of the integrity commissioner's annual report as a regular opportunity to refocus attention where necessary on ethical issues. The annual report could also be a foundation for new ethics education materials or programs.

The City should ask the Canadian Conflict of Interest Network to consider making municipal integrity commissioners members of the body.

6. Review

51. **An external auditor should periodically review the operations of the office of the integrity commissioner.**

L. Doing Business with the City

52. **The City should require all organizations with which it does business to adhere to the following principles, at a minimum.**
    a. **Follow commonly accepted business practices.**
    b. **Obey all applicable provincial and federal laws.**
    c. **Adhere to the terms of the contract signed with the City, unless amendments are negotiated.**
    d. **Conduct business with integrity and in accordance with their obligations under specific agreements.**
    e. **Keep detailed and accurate records of all contracts and goods and/or services provided to the City.**
    f. **Refrain from divulging confidential information.**
    g. **Avoid the appearance of conflict.**
    h. **Refrain from conduct contrary to the values of the City.**
    i. **Treat workers with respect and dignity and ensure that workers are not subjected to any form of physical, sexual, psychological, or verbal harassment or abuse.**
    j. **Refrain from engaging in price collusion with other bidders or suppliers.**
    k. **Explain clearly the cost to the City of any bid.**
    l. **Refrain from contacting anyone but the designated contact person during a procurement blackout period.**

53. **The City should make its codes of conduct available to all current suppliers, to ensure that they are in no doubt about the ethical imperatives involved in doing business with the City.**

54. **The City should include references or links to its relevant codes of conduct in tender documents, as part of the procurement process, emphasizing that all bidders are expected to learn and abide by those policies.**

55. **The City should require that all responses to a procurement process include a promise to learn and respect the City's relevant codes of conduct.**

56. **The City should include a term in all procurement documents providing sanctions if a business fails to adhere to the City's relevant codes of conduct.**

Sanctions could include disqualification from a bidding process, nullification of contracts, or removal from a preferred supplier list.

57. **City staff should not publicly state their views of an organization the City does business with, unless requested to do so by Council or other staff. In carrying out such a request, staff should not endorse or appear to endorse any organization.**

City staff and councillors may share their views of suppliers with other public sector staff and elected officials, in order to assist in wise procurement decisions.

Staff should be aware of how their conduct with suppliers or bidders may be perceived by other suppliers or bidders. Staff should not show preferential treatment toward or spend inordinate amounts of time outside the professional relationship with any one supplier or bidder.

M. Contractors and Consultants

A large and complex government like the City of Toronto's, with widespread operational responsibilities, will likely use contractors or consultants regularly. There is of course an important balance to be maintained between staff expertise and expertise brought in on short-term retainer, but the assumption must be that consultants are likely to be a continuing part of the municipal workforce. Therefore, the City should pay serious attention to ethical constraints on these workers.

The City cannot govern a contractor's hiring of his or her own staff or subcontractors, but that should not present a significant impediment to the City's execution of a comprehensive ethics strategy that covers consultants, contractors, and subcontractors. If an individual does not meet minimum ethical standards in any respect, the City should be able to protect itself,

whether this means replacing a contractor or consultant, or directing a contractor to replace a subcontractor.

The City need not invest in the ethical education and training of contractors, subcontractors, and consultants in the way that it does for permanent staff. Nevertheless, to protect itself, the City needs to pay attention to ethical issues at the hiring stage for these workers. It should ensure that there are clear contractual undertakings addressing ethical behaviour in discharging duties. The City needs to monitor the ethical performance of these workers as closely as it monitors its own staff. Staff working with a consultant or contractor should be clearly empowered to protect the ethical integrity of the City's work environment from compromise by temporary workers.

Finally, consultants or contractors should understand that in accepting work with the City, they also accept the ethical obligations of staff, including the duty to act in the public interest.

58. **The City should screen for understanding of ethical issues when hiring contractors and consultants and should consider applicants' performance in this area in hiring decisions.**

59. **Consultants and contractors should be informed about the City's codes of conduct before they begin their work for the City and should be required to adhere to the codes as a term of their contract of employment.**

60. **Consultants and contractors should be required to agree to abide by the following ethical requirements in addition to any that apply generally to all suppliers.**
    a. **Disclose any conflict or potential conflict of interest in advance.**
    b. **Provide receipts for reimbursable expenses.**
    c. **Refrain from claiming entertainment expenses involving elected officials or employees of the City.**
    d. **Refrain from billing for work not done.**
    e. **Refrain from giving gifts to municipal employees.**
    f. **Refrain from possessing confidential material not required for the completion of the services for which they contracted.**
    g. **Refrain from divulging confidential information.**

N. Gifts, Entertainment, and Other Benefits

61. **The City should permit councillors and staff to accept gifts, entertainment, or other benefits of nominal value, except from lobbyists. The definition of nominal value and other criteria for acceptable gifts should be established in consultation with the integrity commissioner.**

62. **Under no circumstances should staff or councillors accept gifts or benefits of any value from lobbyists.**

63. **City staff should not accept meals paid for by commercial suppliers.**

64. **On the occasions when work demands that City staff and commercial suppliers eat together off-site, the City should permit its staff to expense the meals. City staff should not be out of pocket personally for a work expense. Allowing these expenses to be submitted also allows their frequency to be monitored, so that work patterns can be adjusted if necessary.**

65. **This policy should be reviewed after it has been implemented for two years.**

Many ethics questions, for both elected officials and staff in Toronto, have to do with accepting gifts and entertainment. The current code of conduct and conflict of interest policy at the City of Toronto, for councillors and staff, are less helpful than they might be, and it is not surprising that gifts regularly precipitate ethical dilemmas.

Toronto's current integrity commissioner had the following to say about gifts and other benefits in his first report to Council:

> Reaction among Councillors to the current policies concerning gifts and benefits was extremely varied. At one extreme were those who would put a total ban on gifts or who have made a personal decision never to accept them. The vast majority were of the view that there should be at least some room for accepting gifts and benefits, particularly in many of the contexts dealt with in the current rules.... There was a clear sense among many Councillors that the current language

> dealing with situations in which gifts and benefits could be accepted was vague and did not make bright line distinctions between the permissible and impermissible. Some also felt that the current wording left too much room for the receipt of gifts and benefits that were inappropriate.[3]

There are occasions that have nothing to do with procurement when entertainment and gift giving plays a traditional role. For example, political delegations from other jurisdictions will often come bearing gifts. Politicians will travel and be hosted, often lavishly, by politicians in other jurisdictions. The City may be a vendor, hoping to persuade a company to locate within its limits. Trips to see officials at that company or meetings with them in Toronto may quite properly involve some entertainment, meals, and the exchange of gifts. As another example, a public servant invited to give a speech may be given an inexpensive gift or plaque as a token of appreciation from the host organization. These are within normal standards of courtesy, protocol, or hospitality.

A thorny problem is the value of the gift or benefit. It is impossible to correlate the quantum of influence with the value of the gift. For example, if someone happens to adore a particular brand of chocolates, the strategic gift-giver who presents a box of them to that person may curry favour vastly disproportionate to the price of the chocolates. The gift-giver's flattering message is, "I have paid careful attention to what you like." On the other hand, an expensive dinner and tickets to a hockey game will have little influencing power over someone who would rather spend evenings with family and is not a hockey fan. So it is imprecise at best to try to control the corrosive effects of business-related favours by setting monetary limits, because the monetary value of a gift simply does not accurately reflect what might really be going on.

Some civil servants want simply to be given a number. They want certainty. For that reason, "nominal" should be given a numerical value, such as less than $25 or less than $50. In no case should it be over $200. It must be remembered that what might be nominal for a public servant at one salary level could well be significant for one at another salary level.

[3] Interim Report, Integrity Commissioner's Office, David Mullan, Integrity Commissioner, April 11, 2005.

However clear the problems with gifts or benefits may be in theory, in practice, some are just too small and ubiquitous to worry about—for example, mugs and other low-cost promotional souvenirs. The practical problem of nominal gifts and benefits remains and is unlikely to disappear entirely. Given that reality, control rather than elimination is the best strategy.

Assuming it is desirable to control and limit rather than completely eliminate gifts and entertainment, the two keys are clarity and transparency. Clarity should be in the codes of conduct, to the extent possible. The integrity commissioner's office should clear up any confusion about the type of gifts considered acceptable, and under what circumstances, so that an inappropriate gift is not accepted in the first place. Transparency can be accomplished through a gift registry, discussed below.

Business-related entertainment and gift giving is inconsistent with ethical decision making in public sector procurement. The civil servant deciding what goods or services to buy with taxpayers' hard-earned money should have one overarching goal: spend public money in the best interests of the public. Business-related gifts and benefits have no principled role to play.

Some sales strategies encourage salespeople to cultivate personal relationships, peppered with personal contact through entertainment, precisely because prevailing wisdom in the sales world suggests that the strategy pays off. Ultimately, though, it does not matter if the influence-seeking strategy pays off or not. It looks like it could, and that is enough. A public servant who is entertained by a supplier and then does anything that benefits that supplier looks compromised, whether contact with the supplier affected his or her behaviour or not. When it comes to spending public money, the appearance of compromise is more than enough to corrode public trust. Public servants therefore have a duty to avoid even the appearance of compromise, because the public trust is in their charge.

Gifts and other benefits can often have a confusing dual purpose. They can be a token of respect and admiration for the recipient and a reflection of the generosity of the giver. Such favours can also be cunningly deployed as instruments of influence and manipulation. The problem is that the same gift can have both characteristics.

The consequences of favours or benefits are impossible to predict, quantify, or control. A gift or invitation offered as a sincere expression of respect may be misinterpreted as an attempt to influence. Or, even though offered

in a sincere spirit of generosity without the slightest ulterior motive, it can achieve the unintended effect of exerting undue influence over the recipient. The person offering cannot say, "Here are your favourite chocolates, but don't overreact or anything—they only cost me $3.99." The point is that bestowing favours of any kind is a dangerous form of social interaction in a public sector procurement setting because the practice can precipitate both unintended and uncontrollable consequences.

Many public servants bristle with indignation at the suggestion that their integrity could be bought with meals or trinkets. Others laugh off the suggestion of influence, responding that a dinner or golf game or two is no big deal. This misses the point. Influence is immeasurable, nuanced, cumulative, and often subconscious. Who is to say with certainty that in a close decision, the winner did not have some intangible advantage as a result of cultivating a relationship with the decision-maker through tactics like entertainment or gift giving?

Some politicians, sadly, still cling to the belief that they exist to be lobbied. They insist that their opinions could not be swayed by mere sports tickets, for example. They argue that attending events as the guest of suppliers of goods or services to the municipality is the only way for them to get information from suppliers directly. But how much can one learn about computers or waste management at a concert? When would this information be given—during a preconcert dinner? Intermission? At 10 or 11 o'clock at night when it ends? An evening like that would easily stretch to four hours or more. A half-hour substantive presentation in the politician's office during business hours would serve at least as well for gathering information.

There are other problems with the outlook that it is all right for politicians to be wined and dined by suppliers or potential suppliers. Politicians set an example for staff, and accepting entertainment from suppliers sends the message that this is an appropriate way to deal with them. A civil servant might well say—and they do—"Councillor so-and-so was there, so what's wrong with my being there too?"

The recommendations on gift giving move strongly in the direction of curtailing the practice. This is both advisable and necessary in a public service context. However, there is an important human dimension that senior managers in government would be wise to keep in mind: everybody likes to receive gifts. They make us all feel special.

Public sector staff adhering strictly to ethical principles might, on occasion, look wistfully at their private sector counterparts who may have more freedom to indulge on the job, although even that is changing in this more aware age. Staff deserve recognition and reward for their hard work. As a matter of sound human resources policy and good management, governments wisely moving toward stricter policies on outside gifts should at the same time consider how employees can be rewarded internally in appropriate ways.

Changing a culture of generous entertainment and gift receiving takes time and continual reinforcement. For this reason the policy should be reviewed within two years of implementation.

O. Gift Registry

66. **The City should establish a registry for gifts received by staff and councillors. The registry should be run by the integrity commissioner's office.**

67. **The gift registry should contain the following details in a searchable database:**
    a. **the name of the individual who received the gift and the capacity in which he or she was serving at the time**
    b. **a description of the gift**
    c. **the person or group who presented it**
    d. **the date on which the gift was received**
    e. **the occasion on which the gift was given**
    f. **the estimated value of the gift, if known**
    g. **a running total of the value of gifts received by staff or councillors from that person or group in the previous twelve months**
    h. **what the individual intends to do with the gift**
    i. **whether the gift should remain with the City if the recipient leaves**

Gifts of a nominal value would not need to be registered. For clarity, "nominal" should be given a numerical value, such as less than $25, less than $50, but in no case should it be more than $200. The amount chosen should balance the need for a comprehensive registry with the need for

practicality in its operation. As well, as mentioned earlier, what might be nominal for a public servant at one salary level could well be significant for one at another salary level. The integrity commissioner may have any gift appraised if its value is not apparent.

The registry would achieve four aims.

- It would inform the integrity commissioner of each gift received of greater than nominal value, providing an opportunity to assess the appropriateness of the gift.
- It would allow tracking of items in possession of an individual that should remain with the City when that person leaves, unless the integrity commissioner decides otherwise.
- It would create a level of procedural inconvenience that would naturally limit gift giving and receiving.
- It would level the playing field by ensuring that all competitors for the City's business are obliged to follow the same gift-giving practices.

68. Councillors and staff should be encouraged to consult with the integrity commissioner about the propriety of accepting or continuing to keep any gift of any value.

Any doubts about the propriety of a gift should be resolved in favour of not accepting it or not keeping it. Councillors and staff can begin to address the propriety of a gift by asking themselves the following questions.

- Is the gift nominal or substantial? Does it have symbolic or personal value that exceeds its monetary value?
- What is the gift's intended purpose?
- Under what circumstances was it given? For example, diplomatic gifts may be far less worrisome than gifts given in a commercial context.
- Does the recipient have any position of power or authority to help the gift-giver? If so, the gift would be problematic.
- Could receiving the gift appear problematic to a reasonable member of the public?
- Even if the gift is of a nominal value, do the answers to the other questions suggest there may be problems in accepting it?

It should be made clear to staff and councillors that they are always free to politely decline gifts, and that they should decline gifts of any value if they think the gifts might cause or appear to cause undue influence. It may be helpful to the integrity commissioner to be informed of gifts declined as well as those accepted, so that he or she can keep up to date with gift giving practices.

If a recipient chooses to keep a gift, the integrity commissioner should still have the authority to decide whether keeping the gift is appropriate. If the gift should not be kept and cannot graciously be returned, it should be given to a charity, used at a charity raffle, or otherwise disposed of as the integrity commissioner's office directs.

Companies or individuals should be limited to an annual total in gifts given, regardless of recipient. This will ensure that gift giving is limited not only in value per gift, but in the number of gifts. The total allowable value of gifts given should be low. The amounts could be monitored through the gift registry's searchable database.

A recipient allowed to keep a gift could retain it even after leaving the City, unless the integrity commissioner directs otherwise.

P. Charity Events

69. The City should have a clear policy on when it is appropriate for councillors and City staff to attend charity events.

City staff and Councillors acting in their public service capacity ideally should focus their charitable activities on events organized internally, or sponsored by a charity directly.

Q. Elections Financing

Some aspects of campaigns and campaign contributions are covered by laws that apply to municipal elections. A code of conduct for elected officials should go farther.

Running for elected office costs money, and political fundraising is a necessity for most people seeking public office. But political fundraising runs the risk of looking like buying and selling influence. Limits are placed on fundraising because everyone in a democracy should be allowed an equal voice.

70. The City should ask the Province to ban the practice of "bundling" in municipal elections, including bundling through lawyers' trust accounts.

Individual voter campaign contribution limits are useless if a person can donate under someone else's name. Therefore, accepting donations from an individual on behalf of someone else should not be permitted. This prohibition already exists in Ontario law, and wisely so, but it may need to be tightened to make clear that donations through lawyers' trust accounts are not permitted.

Bundling occurs when an intermediary collects a number of political donation cheques and presents them to a candidate in a bundle. The intermediary has solicited donations in lawful amounts from a number of other donors who donate in their own names, but the practice of delivering them through one person sends the inappropriate message that the bundler controls more campaign money than he or she could lawfully donate. It therefore creates the dangerous potential that a bundler could exercise undue influence on candidates or councillors.

Sometimes, multiple donations are made by donors through the trust accounts of law offices. This practice should stop. A law office delivering multiple cheques in lawful amounts from separate individual voters is still sending the troubling message that inevitably flows from bundling: that this firm deserves to be listened to far more than individual voters, because it can deliver far more money. Ontario law should be clarified to ensure that the prohibition against making donations to municipal elections on behalf of another person includes transactions handled through a lawyer's trust account.

Bundling negates the intent of a ceiling on donations, since the individual collecting and presenting numerous donations, adding up to an amount not allowed for an individual, inevitably appears to be asserting an enormous amount of influence. The covering letter that invariably accompanies a bundle of cheques whispers in its subtext, "I got this money for you. I can take it away, too." For this reason, bundling is essentially anti-democratic influence peddling.

R. Suggestions for the Private Sector

In the public procurement context, ethical imperatives extend beyond public servants to the private sector. Public sector customers are not like other customers. They are buying not for their own good but for the public good. This makes a big difference in how day-to-day business should be transacted. Businesses should take a proactive approach to adapting to the special ethics that should prevail in the public sector. When they do business with a public sector entity, the free-for-all competition of the marketplace is replaced with the public interest. Codes of conduct for public sector suppliers should educate suppliers about how they should deal with governments if they wish to deal with them at all.

The core value for a supplier is to recognize that the people who make government spending decisions are not spending their own money. Therefore, what the public sector buyer thinks of a company or its employees on a personal level should not matter.

People buy from people. It would be naive to think that the private sector is not going to try to build and then capitalize on personal relationships with decision-makers and people with influence in government. From the private sector point of view, there is nothing really wrong with that. But government officials should not be making decisions based on personal relationships.

So what can companies do to sell to government if they cannot cultivate personal relationships? They should learn about how the best public sector procurement decisions are made, and adapt their sales techniques accordingly. This is simply the tried and true approach of meeting a potential customer's need better than anyone else in the market.

Civil servants engaged in procurement are required to assess the public interest in any given situation and offer what will best serve that interest. Suppliers therefore need to approach government procurement decision-makers armed not with gifts, entertainment, and other influence-seeking enticements, but with sound presentations on how their product best meets the aims a civil servant is furthering. Only the supplier who best meets the public need in the circumstances deserves the taxpayers' money.

Recognizing that the public sector is indeed different, companies should take the initiative to learn the rules. For governments, the message to suppliers should be simple and clear: If you want public sector business, learn

the special rules that apply and stick to them closely, or the taxpayers' money will go elsewhere.

Vendors should not try to cultivate personal relationships with public sector buyers that undermine the primacy of the public interest in the procurement decision. Businesses and public servants have a joint responsibility to ensure that sales practices respect the primacy of the public interest.

Businesses seeking contracts with the City should draft codes of conduct for their dealings with councillors and City staff. Businesses should study closely the City's own code of conduct and mirror the policies it contains so that employees never, deliberately or inadvertently, invite City councillors or staff to breach their own codes. Businesses engaged with many different governments should draft codes that either require employees to know and abide by each government code or respect the strictest standards in the various government codes.

Business codes of conduct should hold employees accountable for their actions. Real damage can be done to the reputation and bottom line of a company if it appears that its employees exerted undue influence on councillors or City staff.

Suppliers to the City may feel justifiably proud that City staff and councillors are pleased with the products or services they have provided. However, suppliers should never ask City staff or councillors to in any way personally and publicly endorse their products or services.

The City and provincial officials are encouraged to work together on any enabling legislation that is necessary to implement any of these recommendations. The City should, however, move forward diligently on those recommendations which it can implement independently.

III. Governance: Recommendations and Commentary

These are some central benchmarks of good governance:

- good financial stewardship
- good financial management systems
- protection of assets (including the government's reputation)
- due regard for economy and efficiency in managing human, financial, and physical resources
- systems for measuring, reporting, and evaluating performance and for taking corrective action to improve it
- compliance with legislation, policies, and established procedures
- procedures to measure and report on program effectiveness

A. The Mayor

71. For the Mayor, integrity in government should be a top priority.

The Mayor of Toronto has many responsibilities, pressures, and functions, but perhaps the greatest is providing leadership for integrity in government. The Mayor is the face of City government, both internally and

externally. Maintaining the integrity of government is the Mayor's most important job.

B. Council and Committees

72. Council should urgently address a variety of ways to reduce its workload.

Typical Council agendas are, at present, greatly overburdened, and City governance suffers as a result. Many recommendations aimed at streamlining Council meetings are set out below. However, these recommendations should not limit the breadth of Council's efforts to return meeting agendas to a manageable size. If Council cannot bring its agenda under control, it should sit for more days.

73. Council should delegate the administrative, day-to-day operations of the City to staff and concentrate on matters of policy.

Municipal councils have been headed in this direction for some time, and the trend should continue in a city as large as Toronto, with so many widespread and complex policy issues.

Council should increase delegation, but its members, not staff, should decide what to delegate. Only Council can pass bylaws, adopt estimates, make decisions affecting taxes, or appoint or remove people in statutory positions. Beyond those items, Council should consider which matters are essential for Council to retain for legal, financial, strategic, or other risk-related reasons. Everything else should be delegated. Staff should delegate to the lowest possible level, according to the risk involved.

74. Council should consider ways to enhance its effectiveness as a deliberative leadership body.

Councillors need to balance local concerns with those of the entire city. Advocating for their constituencies is part of their job, but in a city as large and diverse as Toronto, the decisions of Council have a potential impact on the well-being of the entire country. Councillors should also give significant attention to initiatives that would benefit the whole city.

Streamlined Council agendas and committees would increase the pace of City government decision making. However, in addition, staff should always

clearly identify issues for Council's decision that have time limitations. And Council should have the capacity to control its agenda sufficiently to ensure that important time limitations are met.

Council meetings should strike a balance between healthy oppositional debate and unity of purpose in political leadership. This balance is very difficult to maintain; it shifts constantly depending on the issues of the day. However, the natural tendency is often to overemphasize fractious debate and underemphasize the value of a deliberative body acting with unity of purpose. Holding a retreat periodically, where councillors work on legislative goals and priorities, would help councillors forge bonds and promote a desirable level of unity of purpose.

Councillors should make every effort to be present and attentive in the Council chamber for the duration of the session. At all times, councillors should display courtesy toward the presiding officer, to one another, and to others present.

75. Council should take steps to enhance the openness of Council meetings.

Meetings behind closed doors should take place only when authorized. The City clerk's office, in consultation with the Legal Services Division, should provide clear reasons why any such meeting is necessary, and unless the *Municipal Act* specifically requires that something should be discussed in camera, it should not be.

Individual councillors should object to meeting behind closed doors if they believe that it is not necessary or justified.

The clerk should make public all comments or discussions held in camera that do not rightly belong there.

76. Breaches of confidentiality are a serious problem and should be eliminated.

Where confidentiality is necessary, it should be maintained. Leaking information when there is a risk of litigation or when a contract is being negotiated can have serious consequences and can be or seem to be an abuse of power.

The integrity commissioner should be empowered to impose sanctions for breaches of confidentiality.

77. **With appropriately increased delegation to staff, Council should substantially rationalize and reduce the number of ad hoc, special, and other committees and special-purpose bodies.**

A review of committees aimed at accomplishing this rationalization and reduction should be conducted alongside efforts to increase delegation.

As part of the review of committees, the City should ensure that remaining committees have clear mandates or areas of responsibility, so everyone understands which committee deals with each of the City's issues. Committees should be established and defined to minimize the need for ad hoc committees or task forces.

When an ad hoc committee or task force is established, its mandate and tenure should be spelled out in advance as clearly as possible, to avoid overlap with other committees, unnecessary duplication of effort, and unnecessary proliferation of committee responsibilities.

78. **The term of a Council committee chair's tenure should be tied to the type of work the committee does.**

For example, a committee dealing with budgetary matters should have a chair whose tenure coincides effectively with the City's budget cycle.

Whenever possible, changes in the chair of a committee should be made at a time when the committee is less active and less in need of sustained leadership.

79. **Council committee meeting schedules should accommodate the committee's work.**

Committees that may have to address matters of urgency should have flexible schedules that permit meetings on short notice where necessary.

C. Relations between Staff and Councillors

80. **Relations between staff and councillors should always be civil and premised on mutual respect.**

A feature of municipal government not shared by the provincial or federal legislative models is the opportunity for elected representatives to

question staff publicly about policy initiatives. It creates a unique culture of openness in City government. However, with this additional benefit of openness comes the obligation for questions and answers during such public questioning to be respectful and civil in tone.

A civil work environment attracts capable candidates to City government; an uncivil work environment can keep capable candidates away. Council should therefore view civility in meetings as an important part of a strategy to maintain and enhance the quality of City councillors and staff by attracting and keeping the most talented people.

Good relations between members of Council and members of staff are essential. If councillors do not have faith in staff, they will not delegate authority to them. But sometimes trust has to be earned. Staff should ensure that all information provided to councillors is fair, accurate, thorough, informative, timely, and understandable. If staff and members of Council do not have any faith in each other's abilities, the entire city will suffer for it.

Staff preserve, on behalf of the City, essential corporate memory and accumulated wisdom that survives changes in Council following elections. Staff are the primary source of the neutral and professional expertise needed for councillors to govern wisely. Without a strong and proficient staff, the strength of Council's decisions can be seriously compromised. For these reasons, staff can provide valuable guidance to members of Council, which should at all times be respected.

On the other hand, staff in turn should always respect the office of a duly elected democratic decision-maker by respecting the individual councillor who holds that office. Staff with professional expertise have a serious duty to explain difficult professional issues plainly and patiently.

The duty of staff and councillors to treat each other at all times with civility cannot be overstated. Inappropriate behaviour such as finger-pointing, yelling, and personal criticisms debases City government. The Mayor or committee chairs should play the key leadership role in ensuring civil discourse, both by example and by prompt intervention where necessary. Outside the Council chamber, both staff and councillors should promote and encourage civility. This issue is also addressed in several recommendations found in Chapter II.

One method of improving civility is to ensure that councillors and staff understand each other's proper and different roles, so that there are no unre-

alistic expectations or competition, which can lead to frustration and incivility. The City should ensure that all councillors and all staff who deal with councillors understand how the two roles are both essential to sound municipal governance. Staff may wish to organize information-sharing events about the roles of the various departments and the services and advice they can or cannot provide to councillors.

It is the job of staff to provide insight and expertise to Council and the Mayor. Sometimes Council motions can be murky. Often, staff can turn them into something workable.

Councillors should respect boundaries between the professional and the personal in all dealings with staff. As a general rule, it is inappropriate to place unsolicited calls to staff at home.

81. Maintaining civil and professional relations between councillors and staff should be given ongoing attention.

Elections bring in new councillors, and considerable attention should be paid to building or reinforcing productive working relationships with them. After each election, the Mayor and the City Manager should turn their minds to what both staff and councillors might do to ensure that the working relationship is maintained if it is good, and improved if necessary.

82. Members of staff, apart from those working directly for a councillor, should remain neutral in their service to all councillors.

City staff should neither be politicized nor appear to be, despite the close working relationships that will frequently arise between councillors and staff. Staff should therefore be careful that close professional working relationships do not cross the line into political allegiances.

Councillors are expected to advance their legislative goals in the Council chamber; they should not politicize the process of preparing staff reports.

Elected officials should understand the unique reporting obligations of staff. The City's staff answer to Council as a whole, not to individual councillors. This is a very important distinction. Staff are available to provide impartial advice and direction to councillors in the discharge of their duties in Council.

83. Staff should have more latitude to speak at meetings of Council.

The City Manager and the most senior staff should be free to take the initiative, without waiting to be asked, in advising members of Council if key facts are misunderstood or if any proposed policy direction has serious flaws, and to suggest a different course. Staff should be entitled to be entirely frank in giving knowledgeable advice and commentary on proposed courses of action. Council should not be deprived of the best professional advice.

D. Hiring

84. The Mayor should be involved in hiring the City Manager and should have limited input into hiring the small handful of officials immediately below the City Manager. Beyond that, all City hiring should be entirely free of any input or influence from the Mayor or individual councillors.

Although Council as a whole may make appropriate decisions on human resources matters, it is not appropriate for individual members of Council to make suggestions to senior staff on who should be hired to fill certain posts. Sound City governance depends on staff both being and appearing to be politically neutral. Councillors' involvement in hiring undermines the appearance and/or reality of staff neutrality.

The Mayor and the City Manager should jointly communicate the message that all staff are empowered to resist efforts by councillors to influence staff hiring decisions. The integrity commissioner should reinforce this message as necessary with advice, education, and investigation of complaints.

Councillors may on occasion receive job applications from people they do not know personally: for example, constituents or members of the public. These applications may be passed on to the relevant department, provided the councillor does not take the opportunity to express any views to staff about the applicants. Of course, councillors are entitled to continue to provide references for people they know.

E. City Manager

85. Although the Mayor can properly be involved in hiring the City Manager, there should be a clear division of responsibility between the Mayor and the office of the City Manager—a separation of the political from the administrative.

The Mayor and the City Manager should acknowledge each other's roles and respect each other's spheres of authority.

The relationship between Council and the City Manager is a very important one. The City Manager is a leadership position, the head of the Toronto Public Service. Council should give the City Manager clear and unequivocal responsibility and accountability for the overall management of the administration of the City. Not doing so undermines the City Manager's effectiveness. A detailed description of the mechanism of authority should be set out as between the City Manager, department heads, and the Mayor and Council.

F. Staff Advice on Budgetary Matters

86. Staff should keep Council closely apprised of budgetary matters.

Staff have an affirmative duty to promptly alert Council to every significant cost overrun.

It is impossible for Council to exercise sound fiscal stewardship or provide the public with the requisite transparency in fiscal matters if it does not have ready access to accurate data on budgetary overruns. Staff should therefore devise a regularized method of accurately and clearly communicating to Council whenever any City projects encounter significant cost overruns. Staff at lower levels who first encounter significant cost overruns should be obliged to report them to superiors as necessary to get the information before Council promptly. Explanations for cost overruns should be equally clear and as comprehensive as promptness in reporting will permit.

G. Staff Reports to Council

87. Staff reports to Council should be concise, while remaining scrupulously accurate and containing the best possible advice.

The substance of staff reports should always be guided by the maxim that one must tell truth to power. Staff have a duty to give the best and most accurate impartial advice possible without regard for politics or for what they think a councillor does or does not want to hear. Councillors should understand this important aspect of staff's role and not "shoot the messenger" when staff advice is politically unwelcome.

City staff should have guidance on how to draft reports. If necessary, the City should hire experts to assist in developing appropriate report formats and in training staff to write reports more effectively. The aim in every report is to provide Council with a clear, concise, yet comprehensive understanding of how and why staff recommended some options and not others.

Reports should be much shorter than they are today. The City should aspire to standards under which important issues are treated sufficiently comprehensively in briefing notes of two or three pages, eliminating much unnecessary detail.

Reports should be in plain language so that all can understand them clearly. Experts can provide effective training in this important yet difficult skill. Staff members should make their reports easily understood by anyone who does not have professional training in the report's subject matter, including the general public.

Staff reports should always include certain types of information, such as consultations with relevant stakeholders, members of Council, other governments, representatives of potential bidders, and lobbyists.

Reports should state key assumptions to help prevent misunderstandings.

The recommendations in reports to Council should address—supportively or not, as necessary—all that Council may have been trying to achieve on a particular issue.

Staff should exercise their best judgment and keep options discussed in each report to a reasonable number, to streamline debate and ease decision making.

Staff should prepare reports with a view to facilitating informed questions by councillors. For example, controversial topics likely to lead to questions should be addressed in a way that aids rather than limits appropriate questioning.

If circumstances warrant, staff should consider supplementing their reports with digital slide shows. In preparing these computer-slide-based presentations, staff should be careful not to promote format over content.

Pressing deadlines should be clearly identified for Council whenever they exist.

To save resources, minimize environmental impact, and take advantage of technology, Council background documents should be provided electronically, and on paper only if specifically requested.

If staff, after exhausting all options, cannot actually do what Council asked them to, they should advise Council that they made their best efforts, and they should recommend to Council what changes could be made to Council's instructions to make them workable.

Staff may find a decision by Council, particularly on a motion introduced during the Council session, to be unclear or perplexing. Staff should bring their concerns to Council as soon as possible. It is hard to implement or prepare a report based on wording of a motion that cannot easily be understood. If the matter is not urgent, the concern can be brought before Council at the next meeting. But if the matter is urgent, there should be a mechanism to advise Council promptly.

H. Relations among Members of Staff

88. City staff should act at all times to further the public trust. This duty applies regardless of whether staff functions are visible to the public.

Staff members should remember at all times that the public must trust them to design and deliver most government initiatives. This is the source of their obligation to put maintaining the public trust first and foremost.

All members of staff have a positive obligation to remain aware at all times of the limits of their delegated decision-making authority, financial or otherwise, so they can always remain within it.

89. Large City projects should have clearly defined roles and responsibilities

Tracking accountability should not be a byzantine endeavour. For large projects that cross departments and divisions, there should be clearly defined roles and responsibilities. Particular attention should be paid to the chain of authority, including who has the leadership role of ensuring that others fulfill their obligations on time. The individuals assigned should have the appropriate skills for the job. All this should be worked out in advance as part of a business or project plan. The City may wish to develop general guidelines for interdepartmental working groups, so that these working groups are formed with consistency from project to project.

90. Staff who have benefited from any form of outside training, or who have attended an event showcasing what is available in the market, should spread that knowledge internally at the City by briefing colleagues with a presentation or report, as appropriate.

91. Communication among staff members should be civil at all times.

It is inappropriate for members of staff to berate, disparage, or ridicule other members of staff, particularly in the presence of non-staff, including members of Council, of course, but also lobbyists and vendors. Familiar relations that may arise from long-term working relationships between staff and, for example, outside vendors cannot justify harsh treatment of staff in front of outsiders.

An efficient, collegial, and harmonious working environment is an important asset in both recruitment and retention of talented staff. Amalgamation was disruptive and collegiality at the City suffered because of it. While much corrective work has been done, the City should continue to cultivate and then promote a harmonious working environment as one way of attracting and keeping the best possible candidates for City positions.

I. E-mail Etiquette

92. City staff should use e-mail with professionalism and courtesy.

The content of e-mail correspondence should be specific. For example, instead of saying, "IT is looking after this," a message should state who in the Information Technology Division is looking after the matter, so the recipient knows the person responsible, not just the department. Accountability cannot be managed effectively without knowing who is to be held accountable.

E-mail can be sent to multiple recipients with great ease. Staff should resist the temptation to overuse this feature, and should copy others on e-mail with discretion and restraint. Indiscriminate copying of e-mails imposes unnecessarily on the time of others and results in no one knowing who is to take ultimate responsibility. It should be clear who has the responsibility to respond to the e-mail.

Writers of e-mails should always recognize the limitations of the medium. The tone of e-mail is often informal, which is not by itself problematic. However, tone is important and can be ambiguous in e-mail. Misunderstandings of tone arise easily and can be exacerbated by informal style. When composing all e-mail, staff and councillors should be aware of tone and should favour restraint and courtesy. Irony, sarcasm, exaggeration, and other rhetorical devices are dangerously prone to misinterpretation. Before sending e-mails, writers should consider how they might be interpreted outside the context in which they were sent. Asking oneself, "How would this e-mail look on the front page of the newspaper?" is a useful guide to appropriate tone in e-mail correspondence.

Staff should also keep in mind that the workplace computer belongs to the employer, not the employee. This might help them remember to use e-mail with restraint.

J. Legal Counsel

93. City departments should understand that the City's Legal Services Division is a valuable team member, dedicated to ensuring that projects are conducted according to law at all times.

The Legal Services Division, when working with other departments, should convey whenever possible an ethic of co-operative goal seeking within the law. For example, whenever it is necessary to advise against a pro-

posed course of action because of legal problems, the negative impact of that advice can be mitigated by offering alternatives.

94. The Legal Services Division should continue to ensure that outside counsel to the City are made well aware of their responsibilities and the reporting structure they should follow.

Outside legal counsel might not be conversant with the City's organizational structure and the pre-existing reporting relationships among various departments. Consequently, it can be difficult sometimes for outside counsel to identify the "client" for reporting purposes. City staff should take care to inform them of who issues their instructions and to whom they report.

The Legal Services Division should always make clear to outside counsel that they can do only what they are authorized to do by City Council.

95. The City should review its retainer policies for outside counsel.

It appears that the federal and provincial governments can attract competent outside counsel with a pay grid lower than the hourly rates of top outside counsel and lower than what the City currently pays for outside counsel. The result seems to be considerable savings to the public purse. The City should adhere to a similar grid in retaining outside counsel.

K. Annual Report by the City

96. The City, through the Mayor, should report to the public annually.

The annual report should include information about the following, in plain language:

- the budget
- operations and services
- audited financial statements
- the business plan
- specific goals, objectives, and City accomplishments
- expenses, remunerations, and benefits paid to councillors
- major contracts or tenders awarded

The annual report should be available on the City's website. The objective should be to disclose information that is not confidential.

IV. Lobbying: Recommendations and Commentary

97. The City should treat lobbying as a potentially helpful practice that should be carefully controlled.

Lobbying is best understood broadly as an organized effort to influence the development or ultimate fate of anything the government does: pass a law, develop a policy or program, award a contract, or give away money. Lobbying takes place through meetings or the arrangement of meetings between a public servant and interested parties or their representatives. The professional lobbyist charges a fee for these services, but not all lobbying work is paid. Volunteer lobbyists are still lobbyists, but volunteer activists are not a focus of concern in this discussion.

Not all lobbyists call themselves lobbyists. They have other titles, such as "government relations consultants." Many lobbyists provide other services to their clients, including polling and public affairs or communications advice.

Often, lobbyists do not have a specific proposal or matter in mind when they approach elected officials or City staff. They also gather general information for their clients and cultivate contacts so that, when a matter of interest to a client arises, they will have relevant contacts in place.

Sometimes, it is easy for a cynical public to assume that lobbyists are up to no good, pushing the democratic process unfairly in the direction of their

well-heeled clients. Some members of the public think lobbyists sell access to government officials. This is seen as giving those with funds an unfair advantage over those who cannot afford a lobbyist. There is also the perception that money talks, and those with the deepest pockets might get the best hearing. Others dismiss that suspicious attitude as unreasonable and uninformed. They say lobbyists help organizations to navigate the complexities of government and take important messages to the right ears. Lobbying can be a legitimate way for diverse interests to bring their views before the people who will shape and make decisions.

In general, lobbying is neither as bad as some fear nor as good as some hope. And in any case, it is not going to go away; nor should it—as long as it is properly done. Some lobbying practices, especially those that are not out in the open, undermine the democratic ideal. Lobbying can best contribute productively to the democratic dialogue when everyone can see and understand what is going on. Thus, one key to overcoming skepticism about lobbying is a clear understanding of what lobbyists should and should not be able to do. That may be achieved through a code of conduct for lobbyists. Another key is transparency in lobbying, through a lobbyist registry.

All councillors should clearly understand that they are not lobbyists. A lobbyist advances the private interests of his or her client. A councillor is an elected official holding a public office who is to act at all times in the public interest. On some occasions, councillors may advocate for policies or programs that are in the public interest, and that will also benefit the private interests of some suppliers. But this is very different from the much more limited role of a lobbyist.

A. Code of Conduct for Lobbyists

98. The City of Toronto should set out its own code of conduct for lobbyists. That code should set mandatory minimum standards for lobbyists in their dealings with the City. Every lobbyist should agree to be bound by the City's code of conduct before he or she can begin any lobbying activity.

Because of the proximity of professional lobbyists to government decision making and, just as important, the perception that they *might* be close, the City should establish some binding minimum ethical standards.

Lobbyists are unregulated. They have no oversight body to impose and enforce minimum standards of conduct. For the present, governments must fill the regulatory gap individually. The City of Toronto should establish its own code of conduct for lobbyists. It would help ensure that lobbyists operate appropriately in their dealings with the City. It would also inform councillors, staff, and the public of the City's standards of appropriate behaviour for lobbyists. Once mandatory minimum standards have been set, every lobbyist should be required to agree to be bound by them before carrying on lobbying activity at the City.

Some lobbyists feel that a registry alone is sufficient to achieve transparency, and that imposing a code of conduct would suggest that lobbying is somehow a profession in need of safeguards. But mandatory regulatory standards apply to many professions whose associations have their own codes of conduct. The Canadian Bar Association has a code of conduct for lawyers that complements the mandatory codes of the provincial and territorial law societies. The Canadian Medical Association has a code of conduct that complements mandatory ethical rules enforced by the provincial colleges of physicians. There are many other examples. Lobbyists should welcome a mandatory code of conduct, since it serves to establish lobbying as a profession in the public mind. A code of conduct is no threat to professionals.

The federal government has had a lobbyists' code of conduct since 1997. The stated purpose is to "assure the Canadian public that lobbying is done ethically and with the highest standards with a view to conserving and enhancing public confidence and trust in the integrity, objectivity and impartiality of government decision-making." All lobbyists at the federal level are required to adhere to the code of conduct. There is no reason why the City should not take a similarly proactive approach to ensuring ethical lobbying at Toronto City Hall.

The Government Relations Institute of Canada (GRIC), an industry association of lobbyists, has its own code of conduct. The part that deals with government decision-makers covers the essential elements: putting the public interest first, integrity, transparency, fairness, accuracy, avoiding conflicts, and civility. It is admirable that GRIC has developed such a code, but not all lobbyists belong to the institute; and in any case, lobbyists should be held to the City's standards also. A municipal code of

conduct would certainly add weight by adding consequences for transgressions. The rules must have teeth.

The City's code of conduct should apply to those who are paid for their lobbying activity.

99. Lobbyists should be held to the highest ethical standards.

Lobbyists can legitimately seek to persuade councillors and staff toward a decision in favour of their clients. However, the onus on lobbyists to conduct themselves with integrity and honesty is extremely serious. This is because lobbyists have such close access to decision-makers, and because their meetings often do not take place in a public forum. The general duty of honesty and integrity also applies to all communications that lobbyists make to staff or councillors about their clients' competitors.

Lobbyists can provide valuable advice on how to communicate effectively with City decision-makers. But lobbyists should never portray themselves, even implicitly, as gatekeepers who must be paid before members of the public can have access to the City's decision-makers. Decision-makers should be equally accessible to the public, regardless of anyone's ability to pay for such access.

100. No lobbyist should ever practise influence peddling. Councillors and staff should not risk compromising their positions by accepting any benefits of any kind from lobbyists.

Influence peddling includes giving gifts, buying meals, entertaining, bestowing favours, trading secrets, or taking any other steps with a government official to attempt to create a relationship of personal obligation. This is the heart of misconduct for a lobbyist.

Entertainment-based influence and relationship building have no place in lobbying the public sector. Entertainment- or favour-based relationship building does absolutely nothing to advance the public interest. It undermines public trust in the independence of public sector decision making, and therefore it has no legitimate role to play.

The practice of giving benefits, favours, or entertainment to staff or councillors can sometimes be subtle and indirect. A lobbyist might invite a member of staff to a friendly dinner. Vendors' associations and commercial interests of all kinds organize "information nights" or other forms of

social contact with elected officials and staff involving meals or entertainment paid for by vendors. Such an event might be a boat cruise, the opening night of a hot new play or musical in town, a sports event, a concert, or a golf tournament. Elected officials and staff may be sorely tempted to accept such treats at a lobbyist's or commercial supplier's expense. But this would be wrong, and staff and councillors alike should decline these invitations.

Commercial suppliers and lobbyists who spend money on entertainment events for public servants expect an eventual return on their investment. They hope for influence. This practice, however, amounts to using favours or benefits to acquire influence. It is an inappropriate lobbying practice in the public sector, and as such should neither be offered by lobbyists or vendors nor be accepted, if offered, by councillors or staff.

The responsibility to stop these practices lies primarily with government officials, both councillors and staff. They should decline these types of invitations, explain why, and put forward policies that discourage lobbyists and vendors from offering favours or benefits as part of their public sector strategies. Lobbyists and businesses, for their part, should respect and abide by these imperatives. They should devise alternative ways of promoting their products or ideas that focus on the merits of the product or the idea itself, rather than on lavish dinners or professional sports events.

101. Lobbyists should state clearly whom they are representing and why. They should never misrepresent themselves to the people they are attempting to influence.

102. Lobbyists should not be permitted to work for competing or conflicting interests without the written permission of both.

Lobbyists should inform all councillors and staff with whom they meet if they have a conflict. They should tell each public servant that they have resolved the apparent conflict with both parties who retained them.

103. Lobbyists should refrain from placing or proposing to place an elected official or City staff member in a conflict of interest of any sort.

Lobbyists should not seek to take advantage in any way of any conflict of interest which they believe a public servant might have.

104. Lobbyists should be completely familiar with the City's ethics, lobbying, and procurement policies and abide by them at all times.

B. Limitations on Lobbying Activity

105. Lobbyists' access to councillors and staff should be restricted to regular office hours and locations.

a. Contact with Elected Officials

There are times when it could be in the public interest for a councillor to meet with a lobbyist. A lobbyist could be a useful source of information about what is happening in an industry or a business sector. Lobbyists should have access to elected officials, but that access should be restricted to contacts that are subject to some form of public scrutiny, such as through a lobbyist registry.

Business meetings between lobbyists and elected officials should be conducted in a business environment, during business hours whenever possible. If lobbyists expect access to government decision-makers to persuade them directly, they should also expect that opportunities to persuade will be granted only in places of business, during appropriate work hours.

This is not to say that lobbyists can never have social contact with councillors and staff. Of course they can. But it is reasonable to spell out limitations on socializing. Lobbyists may use an invitation to an apparently social event as a thinly disguised lobbying opportunity. Councillors and staff should recognize that they have been invited for a reason: the lobbyist wants to build goodwill with them.

b. Contact with Staff

Staff are not elected and therefore are not accountable to citizens in a direct way. Yet a great many decisions at Council are made based on staff reports: staff weigh the pros and cons of policy choices and provide briefing notes. Their influence on the decision-making process cannot be underestimated. They are often the drivers of policy and are an excellent source of information. Knowing this, effective lobbyists will often focus strategically on City staff rather than on councillors. Lobbyists' contact with staff should be

subject to the same requirements for transparency as their contact with elected officials.

106. Staff reports to Council should list lobbyists who made presentations to staff on the subject matter of the report.

107. There should be no lobbying of any kind at any time during a City procurement process.

Public money, politics, and private interests are a volatile mix, and a source of scandal throughout history. Government procurement is one of the areas subject to the most intense lobbying, and if lobbying on behalf of commercial interests did not work, it would not continue.

Elected officials may of course be lobbied on policy matters. They may also be lobbied on the desirability of acquiring particular goods and services for which there is no ongoing tender process, broadly defined. But elected officials have no legitimate role in the details of specific procurements. Their job is to set procurement policies and procurement priorities before a competitive bid starts, then openly debate and vote on the procurement recommendations proposed by staff after the competitive bid has ended. It is the responsibility of staff to carry out procurement by holding competitive bids and analyzing proposals based on value for the taxpayers. There should be no political component in that analysis, no involvement of elected officials, and therefore no lobbying of elected officials or staff during the tender process.

Although lobbyists should not lobby staff or councillors during a tender process, vendors can hire a lobbyist to lobby on their behalf before a call for tenders, or to advise them in preparing a proposal in response to a call for tenders. With the help of a lobbyist, the vendor who is not familiar with the City's processes might produce a proposal that is more useful to the City. Naturally, any City policies that govern the conduct of vendors should apply equally to the vendors' advisers, including lobbyists.

Lobbying should be permitted when there is no tender process ongoing for the goods or services in question. However, presentations by lobbyists should not be combined in any way with gifts, favours, or entertainment for staff or councillors.

Lobbyists should adhere strictly to the contact conditions stipulated in a tender document, and City staff should ensure that permissible contact is clearly defined and limited accordingly.

The City should require bidders responding to major tender documents to declare in the response whether they have used a lobbyist in any way and at any time in relation to the procurement in question, and if so, how.

108. Legitimate education of decision-makers about the value that a company can offer the City should be considered appropriate; lobbying aimed at influencing the procurement process before it occurs—so that when it occurs, it favours the lobbyist's client—should be considered inappropriate.

There is a fine line between the type of activity that is impermissible in advance of a procurement process, and legitimate education of decision-makers about the value that a company can offer the City. In their dealings with each other, both City officials and lobbyists should recognize an important separation of roles. Vendors and their lobbyists can educate City staff about available products and services and promote their merits. However, City staff should always retain complete control over the design of the procurement process, ensuring that it seeks the products or services needed in the fairest way possible.

For major acquisitions, the City may find it wise to carefully structure a pre-procurement process that will allow them to gather information necessary to issue a tender document that accurately captures both the City's needs and prevailing market conditions. If such a pre-procurement process is used, the City should define the types of lobbying that will and will not be permitted.

When consulting the private sector during a pre-procurement process, City staff should be vigilant to ensure that such consultation is open and fair to all potential competitors and is perceived to be so. No one lobbyist should have special or secret access to City staff at the design stage of a procurement process.

109. Outside of City procurement processes, ethically appropriate lobbying is permitted. However, at no time should lobbying take the form of entertainment or the bestowing of gifts, meals, trips, entertainment, or favours of any kind on staff or councillors.

Social or entertainment events paid for by private businesses, even those events with a stated educational purpose, either are or will be perceived to be

an attempt to influence through the bestowing of benefits. Neither staff nor councillors should attend such events. Educational events at which no benefit of any kind is bestowed are acceptable.

Ethically appropriate lobbying includes educating City staff or councillors about trends, ideas, and technologies in the marketplace that might help the City. Staff and councillors are encouraged to expand their knowledge base in this way, provided the educational events do not also dispense benefits.

110. City staff who leave the public service should not be permitted to become lobbyists at the City for at least twelve months after they leave. Former councillors should not be permitted to lobby for twelve months after leaving office.

A former public servant is typically at the peak of his or her influence over former colleagues immediately after leaving the City. Therefore, a cooling-off period before a former public servant can work as a lobbyist is necessary to avoid the perception of undue influence.

111. At no time after leaving City positions should former councillors or staff become involved as lobbyists on specific matters on which they worked during their time at the City.

112. Lobbyists dealing with the City should not be permitted to receive contingency fees or any other type of bonus or commission tied to a successful outcome.

In Ontario, where there is a *Lobbyists Registration Act*, lobbyists who lobby the provincial government are required to indicate whether they are being paid a contingency fee. But such fees are not common. During the Good Government phase of the inquiries, the lobbyist registrar for the province of Ontario stated that roughly 5 per cent of registered lobbyists declare a contingency fee.

Given their rarity, contingency fees are unlikely to be a pressing issue for the City. Nevertheless, the subject is contentious, and there are many arguments for and against them. One of the main arguments in favour of contingency fees is that they allow smaller organizations to hire lobbyists and pay them only if they win a contract. An argument against contingency fees is that they are said to encourage lobbyists to bend the rules and lobby too

aggressively—if they do not win a deal for their clients they will not get paid, or will get paid far less.

Neither side of the debate over contingency fees for lobbyists convincingly carries the day: it is not likely that contingency fees will improve the availability of this service to smaller businesses, nor is it likely that contingency fees by themselves will spawn widespread ethical misconduct by lobbyists in pursuit of bigger fees.

Yet the public might reasonably conclude that a lobbyist paid by a contingency fee might be more prone to stepping over the line in pursuit of financial gain. Therefore, on balance, it is better to prohibit contingency fees. Given that so few lobbyists even operate that way, the prohibition is unlikely to be onerous. Further, based on the evidence from the Good Government phase of the inquiries, it seems that some lobbyists would prefer to be paid for all of their efforts and are therefore opposed to contingency fees in any event.

If contingency fees are prohibited, some lobbyists might try to hide them in bonuses. This is difficult to prevent, but lobbyist registration legislation should prohibit lobbyists from receiving commissions or bonuses tied to successful lobbying efforts.

Until the City has its own lobbyist registry, it should require that all lobbyists appearing before any councillor or staff person sign a declaration that they do not accept such fees from any of their clients. The City should reserve the right to prohibit lobbying by any lobbyist who fails to abide by this declaration.

113. Professional lobbyists should not engage in any type of political fundraising for candidates or councillors they lobby, beyond making their own donations.

Campaign contributions by lobbyists are not as prevalent in Canada as they are in the United States. In 2003, Senator John Edwards, later a vice-presidential candidate, commented, "Washington's filled with high-priced lobbyists who walk around with drafted legislation in one hand and envelopes filled with campaign contributions in the other." The connection between political donations by lobbyists and influence peddling is obvious. And whether political donations actually translate into inappropriate influence for the lobbyist does not really matter. The public reasonably believes

that the connection exists, and this perception alone is enough to chip away at public trust in governments. Naturally, lobbyists are free to make lawful political donations on their own behalf like any other person, but they should not be involved in political fundraising. In other words, a person can carry on political fundraising or lobbying but should not do both.

It should go without saying that lobbyists should not donate other people's money, hiding the identity of the true donor. This is a punishable offence.

Also objectionable is for a lobbyist to engage in the practice known as "bundling," in which one person bundles together a number of political donations and delivers them to a candidate under one covering letter. The practice is a blatant form of influence peddling. The obvious message is that the lobbyist deserves special care and treatment because he or she can deliver large sums of money to the candidate. Another equally obvious message is that the money can go elsewhere next time if the lobbyist or the lobbyist's clients are not given special treatment.

Lobbyists might be making contributions not so much to try to influence the politicians, but rather to increase their access to decision-makers. They hope that a councillor may consider an unsolicited proposal from them if their clients donated to a campaign. This is improper influence. It is an attempt to buy a favourable impression and even favourable treatment.

Councillors who receive bundled donations should immediately report the bundling to the integrity commissioner and be guided by the integrity commissioner on the use of the donations.

114. City councillors and staff should not under any circumstances endorse or recommend any one specific lobbyist to anyone.

115. The City should maintain a clear distinction between lobbying and charitable events.

The City may organize charitable events, which lobbyists or vendors may support financially and attend. However, City staff and councillors should make clear that such support does not entitle any lobbyist or vendor to preferential treatment. Neither should the failure to attend or support such an event have any detrimental impact on the vendor's prospects for doing business with the City. Lobbyists and vendors, for their part, should attend or

support such functions if they choose without any expectation that it will earn them favourable treatment, and they should feel able to stay away from these events without any fear that their absence will harm their position at the City.

C. Lobbyist Registry

116. The City should establish and maintain a lobbyist registry.

A lobbyist is in business to try to exert influence. That is not necessarily against the public interest. What is against the public interest is when lobbying occurs in secret.

a. Purpose

The fundamental purpose of requiring lobbyists to register is to achieve greater transparency in government decision making and dispel the perception that influence is being brought to bear by private interests unknown to the public—in a "back-room deal." The public has a right to know how decisions are being made and what attempts are being made to influence government decision-makers. When people are being paid to influence political decisions, it should be disclosed, in the same way that campaign spending is disclosed. Many lobbyists are not opposed to lobbyist registries, recognizing that increasing their exposure improves their profile and dispels mistrust of lobbying activities.

b. Limits

A lobbyist registry cannot stop lobbyists, if they are so inclined, from engaging in corrupt or unethical practices. Nor can it stop elected officials or staff, if they are so inclined, from engaging in corrupt or unethical practices in their dealings with lobbyists. Mandatory firearms licensing does not put an end to all gun crimes.

A registry is an achievable transparency measure, albeit an imperfect one. But it is better to do the achievable than to do nothing. A lobbyist registry benefits the public by accounting for all ethical lobbying. Beyond increasing transparency, a registry will serve to highlight the ethical transgressions of those who are caught lobbying inappropriately—for example, lobbying on behalf of two different clients on the same transaction.

Another purpose of a registry is to change the interaction between lobbyists and public servants by requiring both parties to think about the consequences of their conduct. But it is more likely that a lobbyist registry will affect ethical behaviour if it is part of a larger program of ethics policy. The goal is to change behaviour, and, as discussed in Chapter II, achieving such change requires a multipronged approach and ongoing attention.

c. Weaknesses of Existing Registries

Most current lobbyist registries are not sufficiently user-friendly. They are difficult to navigate unless users already know exactly what they are looking for. In general, they are designed for people who are involved in the process, using language unclear to outsiders, including members of the public. As a result, those who should be referring to registries, such as citizens' groups and interested individuals, do not use them as often as they should, and a valuable opportunity to reassure the public is wasted. If a registry is not easy to decipher, the benefit of transparency is lost. To be effective, therefore, a lobbyist registry should be not only available to the public but also easy to understand.

d. Opposition

Some lobbyists contend that a lobbyist registry would decrease lobbying. In fact, the opposite has happened in jurisdictions where a registry is in place. The registry seems to bring lobbying out of the shadows. The number of registrants in federal and provincial lobbyist registries has increased every year. At the same time, various registration statutes have sought to demystify the subject. It has become part of the political landscape, and companies and organizations no longer feel awkward about hiring a lobbyist.

Another concern raised by lobbyists is that their competitors will use the registry to keep track of them and poach their clients, or to learn who their contacts are in government. These may be legitimate concerns for those in the business of lobbying, but where the public interest is concerned, transparency in decision making is paramount.

Lobbyists who are against a registry often invoke their right to privacy when it comes to disclosure. However, nobody has a right to earn a livelihood in a way that undermines the public interest. The public has a right

to know who is lobbying whom, a right that far outweighs the commercial interest of lobbyists in pursuing their livelihoods in secrecy.

Some politicians have voiced the concern that their opponents could glean information from a lobbyist registry and use it for political advantage. The information in the registry may indeed give more ammunition to critics of a City decision. That is what accountability is all about. The prospect of criticism is no reason to prevent public scrutiny of decisions that are supposed to be made in the public interest alone.

Other objections to a lobbyist registry play on fears that the registry would be misused by the media to present lobbyists, and the relationship between lobbyists and politicians, in a negative light. But the media cannot be criticized for exposing information. That is their job. Neither can it be assumed that a lobbyist registry will be misused by journalists to carelessly or deliberately portray lobbyists in an inaccurate and unflattering light.

The information in the registry should answer the questions that citizens might have about lobbying. The greater the amount of information available to the public, the more transparent lobbying will be.

Public officials, especially staff members who already have a great deal of paperwork to do, might complain that a lobbyist registry would be time-consuming. No doubt, complying with the demands of a lobbyist registry will take extra effort, and the task of setting up and running a comprehensive registry will take some dedicated resources as well as training.

e. Registries in other jurisdictions

Lobbyist registries exist in other jurisdictions, and at the provincial and federal level. The City should not simply copy one model. Rather, the City's registry should contain only the features that best meet the City's needs.

117. The City's lobbyist registry should cover all who are paid to attempt to influence elected officials or City staff on behalf of others for a specific purpose.

Concerned citizens acting on their own behalf and volunteer activists should not need to register. The registry should cover, for example, lawyers, sales representatives, government consultants, and in-house lobbyists, if a significant part of their duties is lobbying.

118. No one should be permitted to engage in any lobbying activity at the City without first registering in the lobbyist registry.

On occasion, the City may itself launch a formal public consultation process. In these circumstances, those who respond need not register, whether they act on their own behalf or on behalf of others, and whether paid or not.

119. The following information should be collected in the lobbyist registry.

- **a. The lobbyist's name, company or partnership name, and the names of all principals in the company or partnership.**
- **b. Whom the lobbyist ultimately represents, not just the names of the clients. If the client is an organization or company, the names of the principals or of the CEO and directors should be given. If the lobbyist is working for a coalition of groups, the same information should be given for each group.**
- **c. The client's business activities or organizational interests.**
- **d. Whether the lobbyist's client is already doing business with the City.**
- **e. Who is being lobbied. In the case of City staff, it is not enough to simply list the name of a department. A department could have several divisions and hundreds of employees. The registry should show the name, title, and department of the civil servants the lobbyist proposes to contact.**
- **f. The subject matter of the lobbying activity.**
- **g. A brief statement of the position taken on the issue.**
- **h. The total amount paid to the lobbyist for the lobbying activity. To accord the lobbyist some privacy on financial matters, the amount paid can be a choice of preset ranges: for example, under $10,000, $10,000 to $25,000, $25,000 to $50,000, $50,000 to $100,000, or over $100,000. The total amount paid to the lobbyist should include all background work (for example, polls commissioned, research, preparing and producing materials), entertainment, gifts, fees paid to the lobbyist and to third parties, and any other expenses related to the lobbying campaign.**
- **i. Whether the lobbyist or client has in the past received money from the City for any purpose, and if so, the amount.**

Lobbyist registration should not become so onerous as to be impractical for either the City or the lobbyist. Therefore, a lobbyist need register only once for each major lobbying project. Sometimes, a lobbyist may be kept on a retainer for general advice and intelligence not related to a specific initiative or project. In these cases the lobbyist should register when retained and estimate the amount he or she is to be paid over a set period of time. Consideration should be given to requiring the lobbyists to reregister every six months for as long as the general retainer continues.

Lobbyists should be required to provide full information to the registry before doing any lobbying activity.

120. When registering, lobbyists should certify that they have not engaged in political fundraising at the City beyond making their own allowable donations.

121. The City should consider whether councillors and staff should also be required to record basic information on their meetings with lobbyists in the lobbyist registry.

This information could include a clear record of the meeting including the date, time, and place of the meeting, the name of the lobbyist, the client, the issue, the position taken by the lobbyist, any printed or electronic correspondence or documents from the lobbyist, and the decisions taken at the meeting, if any. In considering the desirability of this practice, the City should weigh the practicalities for staff against the benefits of cross-referencing with the information provided by the lobbyist upon registration.

Monitoring, Enforcement, Advice, and Education

122. To oversee the lobbyist registry, the City should have a lobbyist registrar.

A successful lobbyist registry will require resources and a well-trained staff of sufficient size. The lobbyist registrar should be an individual or office staffed according to the City's needs. This position should report to the integrity commissioner.

The registrar and his or her staff should monitor the registry for incomplete or inaccurate entries and communicate their concerns to lobbyists.

123. There should be sanctions for failing to register in the lobbyist registry as required.

Working in conjunction with the integrity commissioner, the registrar should have available a range of sanctions to address failure to comply with registry requirements. These sanctions could start with a warning, or a demand that a registration error be rectified within a set time period, and go up to prohibiting a lobbyist from meeting with councillors and staff for specific periods of time, according to the severity of the misconduct.

Registry misconduct is a specific form of ethical misconduct. If the City decides that staff and councillors should also provide information to the registry, there should be sanctions for those who fail to abide by those requirements as well.

124. The lobbyist registrar should prepare an annual report.

The annual report should include a substantial analysis of the lobbyist registry and establish a context for interpreting registry information. The registrar should also evaluate the effectiveness of the registry in achieving its purpose. An annual report will contribute to the important ongoing task of making lobbying visible and comprehensible to the general public. The overall aim of the report is to make clear how lobbying affects City government.

125. The lobbyist registrar should have an educational role.

Staff and councillors should get registry training, in both the purpose and the operation of the registry. Training or educational materials should also be offered to lobbyists, particularly upon their first registration. These educational steps are important tools in fostering and nurturing an ethical lobbying culture.

126. The lobbyist registrar should work closely with the integrity commissioner.

The integrity commissioner, to whom the lobbyist registrar would report, can play an important role in overseeing and advising on lobbying-related issues.

Generally, the integrity commissioner could help in the following ways:

- providing advice to councillors and staff on contact with lobbyists
- working with the lobbyist registrar on complaints about lobbying activity
- assisting the registrar with education of all public servants as necessary about lobbying issues
- advising on lobbying issues for a code of conduct or other ethics policies

It is particularly important that the lobbyist registrar and the integrity commissioner, working together, periodically assess how well the lobbying regulation regime at the City is working and suggest necessary changes, such as closing loopholes. When completed, this assessment should be reported in the lobbyist registrar's annual report.

127. The lobbyist registry should be readily accessible and user-friendly for both the public and lobbyists.

To maximize accessibility, the lobbyist registrar's office should have a website, with a link on the City's site. The website should offer a sophisticated search engine, using existing technology, so the public can link lobbyists, issues, councillors, and staff. The registrar should develop frequently asked questions for the site, with potential questions from the public, elected officials, staff, and lobbyists.

To facilitate remote entry of required information, lobbyists (and, if necessary, councillors and staff) could be given user names and passwords. To the extent feasible, the registry should accommodate the importation of data electronically from lobbyists, so that registration involves a minimum of manual entry of data.

Once a lobbyist registry is in place, the public should be informed about it.

D. Periodic Review

128. Lobbying practices, the prevalence of lobbying, and the procurement context in which much lobbying may take place all change over time. Therefore, the City should review lobbying policies comprehensively after three years and then at regular intervals: for example, every five years.

V. Procurement: Recommendations and Commentary

In 2004, the City of Toronto spent $873 million on procurement. Taxpayers should care about how their tax dollars are spent, so they should care about procurement. Procurement can be understood as simply the City government going shopping with taxpayers' money.

The first rule of procurement is that taxpayers' money should be spent only in the public interest. Easy and obvious to state, this basic rule is more difficult to put into practice than it might seem. The City of Toronto is a huge government with far-flung and complex procurement needs. The scale of the task complicates procurement but does not dilute the primary duty to spend every taxpayer dollar in the best way possible for the good of the public.

There is a difference between purchasing and procurement. Purchasing is essentially the process of buying, whereas procurement is the broader process of dealing with clients, budgets, contract management, and defining and following procurement policies, codes of conduct, approvals, and so on. The term "procurement" better captures what wise expenditure of taxpayers' money is about.

Sound procurement is a crucial aspect of sound governance. If City government does not spend taxpayers' money well, it simply is not governing

well. Therefore, procurement is one of the most important tasks a government performs.

Procurement is frequently focused on price because price is an essential ingredient of value. But because procurement is so closely related to sound governance, price is not the only ingredient. One important difference between private sector and public sector procurement is that in the public sector, procurement must often be viewed in the context of a government's overall objectives. For government, effective procurement should also be measured by social, environmental, and other benefits to the community. Balancing price with these qualitative dimensions is at the heart of effective best-value procurement in the public sector. In other words, procurement practices are an important way of putting a government's policies and priorities into action.

For example, if a government's policy gives priority to the local economy, a large procurement decision might properly favour a company that is a bit more expensive but local, so that tax dollars stimulate the local economy. Or a government that places environmental issues at the top of its agenda might sensibly choose a slightly more expensive supplier whose environmental practices are exemplary. The essential point is that public sector procurement itself is a way of governing wisely by serving the public in the best possible way. And the public is not necessarily always best served by focusing exclusively on price.

For their part, companies seeking to do business with the public sector should recognize that they are dealing with the trustees of public money. They should realize that in the public sector, their real relationship is with the taxpayers, and the taxpayers expect the trustees of their money to insist on value that is easily and objectively demonstrated. Softening up a public servant with a nice dinner or a round of golf does nothing to advance the public interest. Such sales stratagems wrongly appeal to the personal interests of public servants. These tactics are inappropriate and should not be used. Favour-based relationship building with public servants as a deliberate and calculated sales tactic undermines the integrity of public sector procurement. If companies use these tactics for private sector sales, they should change their habits for the public sector. If they fail to do so, taxpayers may quite properly hold the company to account.

In return for recognizing the special duty of public servants, potential suppliers can expect a level playing field. They can expect open competition, based on objective factors, defined in advance. They can expect that focusing on showing why their product best meets the public need will give them the best possible chance of prevailing. In short, companies should concentrate on promoting their products, not flattering and wooing public servants.

This chapter examines what happens before, during, and after procurement and recommends best practices for the City.

BEFORE

A. Councillors

129. City Council should establish fair, transparent, and objective procurement processes. These processes should be structured so that they are and clearly appear to be completely free from political influence or interference.

Taxpayers have a right to expect that their money will follow a well-lit trail on every step of its journey into the marketplace. Procurement decisions and processes should be as transparent as possible in all respects. Rigorous procurement procedures should be in place so that, if necessary, transactions can be easily reviewed after the fact to prove to the public that the spending decisions were sound.

Public procurement needs to run efficiently and smoothly. Decisions should be made and be seen to be made according to sensible guidelines. Prudence and deliberation should be balanced with accomplishing public objectives with appropriate speed. The public needs to know that all those involved in spending public money, in every department, are working together seamlessly, communicating well, and pulling their weight as team members to get the job done. Council's procurement policies are the essential guidelines that set the conditions for successful procurements.

130. Councillors should separate themselves from the procurement process. They should have no involvement whatsoever in specific procurements. They have the strongest ethical obligation to refrain from seeking to be involved in any way.

In the aftermath of lengthy public inquiries that produced evidence of staff errors and misdeeds during large procurement processes, individual councillors may understandably feel some trepidation about retreating altogether from any involvement in the execution of particular procurements. However, increased political involvement in procurement will only make matters worse. Protection of the integrity of procurement lies instead in a combination of two responses. First, actual procurements should be carried out entirely by staff to ensure that they are resolutely apolitical. Second, procurement should be governed by appropriate guidelines. The City itself has already moved forward with great energy in implementing procurement policy reforms. Council can continue this process, aided by the recommendations set out below. The recommendations and commentary in this report will help the City to reassess procurement quality assurance standards and make further strides toward improving the procurement process.

What, then, are the legitimate roles for Council and individual councillors in regard to procurement? Their roles should be strictly limited to the following:

- developing procurement policies
- establishing fair procurement processes and providing overall direction to staff
- identifying procurement needs
- approving budgets
- discussing particular procurements in committee and making recommendations to Council
- making final procurement decisions in Council

Council as a whole can have much more involvement in procurement than individual councillors. This is because Council is a public body that deliberates only in public, and it is the body formally vested with decision-making authority. Individual councillors have no legal decision-making authority except when they vote in Council. Councillors who have procurement experience can still offer their expertise at Council or committee meetings. Bringing procurement ideas forward is part of their job, but the appropriate place to do so is in public debate. Thus, councillors should discuss specific procurements during committee meetings and Council

sessions, but they should be prohibited from attempting to influence or make suggestions to staff during the execution of a tender.

Councillors may properly identify, in a general sense, equipment or services that the City should procure that will better serve the public. This is part of Council's larger job of setting procurement priorities and budgets.

To this end, councillors may meet with potential suppliers or their lobbyists to discuss how the goods or services they offer would advance the public good. However, councillors should not be entertained or be given any other sort of benefit or favour by a potential supplier or a lobbyist for the supplier.

The setting up and running of particular procurements is for staff alone. The reason for prohibiting councillors from participating in specific procurement processes is both simple and powerful. If a politician can control the procurement process, success in public tenders risks becoming a form of political leverage. A politician may offer to help a bidder in return for a political or financial favour. Taxpayers' money then goes not to the bidder who offers the best value but to the bidder who offers the most strategic advantage to the politician in control.

Sadly, we do not have to look as far back as the Pacific Scandal of the 1870s that toppled the government of Sir John A. Macdonald to see public outrage erupting from the volatile mixture of politics and public procurement. Diversion of taxpayers' money to the friends and allies of powerful politicians, often in return for political favours or outright graft, is historically one of the most popular recipes for political scandal. But despite the lessons available from the frequent spectacle of yet another political career in ruins, it seems there are always politicians who are willing to involve themselves in procurement for political or financial gain, gambling that they will not get caught. Politicians should be entirely disengaged from any active procurement process. That way politicians are neither tempted nor tainted.

Even the noblest motives do not justify councillors' involvement in the procurement process. The risk is far too high that the appearance will be one of political interference. It is the responsibility of all members of Council to ensure that they do not approach staff in any way to try to influence an ongoing tender.

Toronto taxpayers have a right to expect both elected officials and City staff to adhere to the highest standards in conducting public business.

Therefore, elected officials should set general procurement policy, priorities, and budgets, and debate particular procurements in public in committee or the Council chamber. But that is all. They should never intervene in active, ongoing tenders or other procurements. Staff, for their part, should earn and maintain the public's trust by spending taxpayers' money where it will buy the best goods and services at the best price, without political pressure of any kind. Perhaps the taxpayers will not agree with all of their decisions, but they have a right to expect that each decision will be made for the right reasons.

131. Members of Council should not see any documents or receive any information related to a particular procurement while the procurement process is ongoing.

Drafting tender documents should be left to the expertise of members of staff, and councillors should not have access to such drafts. It would put them in the awkward position of having information beneficial to individual vendors who might attempt to communicate with them.

Any councillor who wishes access to information regarding a procurement should first seek the permission of the City manager. The councillor should provide a reason in writing to the City manager for seeking access to the information. Oversight of the procurement process is not a valid reason for seeking access to procurement documentation. The City manager should then inform the Mayor and the fairness commissioner or, if there is no fairness commissioner, the integrity commissioner. The fairness commissioner or the integrity commissioner should then make a recommendation in response to the request, keeping in mind that it is imperative that the procurement process be, and be seen to be, free from political influence.

Since procurement processes are public, councillors are able to readily access basic information about any particular procurement from the City website, or wherever else that information may be published.

132. Councillors who receive inquiries from vendors related to any specific procurement should tell them to communicate with one or more of the following three people, as is appropriate in the circumstances:

a. the contact person in the tender document, in accordance with the contact rules in place
b. the fairness commissioner

c. the person in charge of the complaints process, as set out in the tender documents

A bidder may seek an advantage by asking a councillor to intervene or provide information before a recommendation is made. The only appropriate response is to direct the supplier to the staff responsible for the process or, in the case of an unsuccessful bidder, to the complaints process. Since councillors should have no access to confidential tender documents, councillors who are approached by a bidder during a tender can quite properly advise the bidder that they have no information beyond what is public and have no role to play in the tender.

B. Central Procurement

133. Procurement should be overseen and managed by one City department.

Central oversight of procurement is necessary to limit abuse where responsibility is delegated and to ensure openness and consistently high standards. It is also essential in order to remove from the procurement decision-making process those individuals in the various departments who have direct relationships with vendors or suppliers.

134. Since effective procurement is fundamental to the good governance of the City, the head of the central procurement department should be a very senior position.

Procurement should be approached as a strategic function rather than as simple transaction management, and therefore the position should be as close to the executive as possible. The head of the department should be qualified to serve as a policy adviser to Council on large procurements.

135. The City should consider alleviating some of the great pressure on the Purchasing and Materials Management Division caused by volume of work by raising the threshold for the division's involvement in procurement from the current minimum contract value of $7,500.

The City should explore the impact of raising the threshold to an amount between $10,000 and $25,000.

C. Staff Training

136. City procurement staff should receive adequate and ongoing training.

Procurement officials are required to make and execute critical strategic decisions with great financial and service delivery impact. For sound procurement, officials should have an understanding of the market and of how government should act as a participant in it; they should also uphold values of fairness, transparency, sound governance, and value for taxpayers' money. The public is entitled to expect that everyone with a decision-making role in spending public money will have the expertise, training, and education necessary to carry out their parts of the process. That is essential in order to make informed decisions and maximize the value of every tax dollar spent.

Training is often one of the first things cut when governments reduce spending. That is shortsighted and should be avoided wherever possible because training and development are important components of a strong procurement process. Training costs can be offset by the savings realized through more efficient and effective procurement.

Training could include traditional classroom training, computer-based training, and attendance at conferences. The City should develop plans to identify the resources needed to train staff, both in the central procurement department and in the line departments.

The City should carefully allocate training resources to those matters which in-house staff can be expected to deal with regularly. For matters that arise infrequently, it may be more cost-effective to retain outside expertise.

137. Training in operational matters for City procurement staff should include the basics of procurement policy as well as training focused on specific sectors.

Major topics should include:

- how to write specifications
- specific stages in the process
- process flow charts
- basics of procurement planning
- structuring and conducting evaluations

- managing risk
- case studies
- checklists
- templates

Staff involved in procurement should have ready access to materials, suggestions, and experience from other departments and jurisdictions to assist in decision making.

138. Consistent, centrally mandated training in the ethical aspects of procurement should be mandatory for those involved in the procurement process at the City.

Ethics training is just as important as subject-matter expertise. The underlying values and principles should be stable and very familiar to staff, so that they are not lost in the flux of shifting procurement priorities and objectives.

The emphasis in procurement ethics training should be on values-based procurement: what it is and how to impart it to others, and a commitment to openness and professionalism. Major topics to address include:

- general overview of the procurement policy and process
- integrity in the process
- low-dollar-value procurement
- vendor debriefing
- handling complaints
- value for money
- why projects fail

139. Despite the desirability of central procurement, line departments have an important role to play in determining the City's needs. Therefore, designated staff in line departments should be given time to keep up with market developments in their field.

140. Secondments for City procurement staff to work at other organizations in the private or public sector should be considered.

Secondments can offer access to excellent career and professional development opportunities, leading to higher levels of career satisfaction and morale, and in turn making the City a more attractive work environment. Secondments and reciprocal secondments would also bring in interesting and original procurement ideas from other environments.

141. City procurement staff should engage in regular discussions with their peers at other governments, including the provincial and federal governments, to study their approaches and analyze what works and what does not.

142. Some staff view vendor-sponsored events as an opportunity to network with their own City colleagues. The City should consider facilitating this important aspect of work culture by holding its own internal educational events, thereby avoiding the risk of undue influence from vendors.

143. Each procurement professional in a key City position should have paid membership in at least one relevant professional organization.

144. The Purchasing and Materials Management Division should issue a procurement manual.

The best in-house expertise on purchasing lies with PMMD. Staff there should prepare a manual and distribute it to anyone outside the division who is involved in any way in the procurement process.

The manual should include key considerations at each stage of the procurement process, as well as purchasing bylaws, policies, procedures, and forms. It should be available electronically.

PMMD should take the initiative to generate this manual and make it widely known, because those without procurement expertise may not appreciate potential pitfalls in the process. PMMD personnel should be available to respond to departmental questions about the contents of the manual.

145. Senior staff and councillors should all receive training necessary to be able to read and understand financial statements.

Senior staff and councillors should have some understanding of financial management because such a wide range of senior management issues have

significant financial management implications. This facility in financial management should include awareness about internal controls and their importance.

D. Achieving Openness

146. There should be a strong presumption in favour of mandatory competitive tendering for all significant City procurements. Criteria for exemption from mandatory tendering should be tightly defined in advance.

The criteria for exemption from mandatory tendering should be approved by Council and would depend on Council's confidence in internal controls. The criteria could include some or all of the following conditions.

- One supplier has a monopoly on the goods or services required.
- No bids were received in a competitive process.
- The acquisition is covered by a lease-purchase agreement.
- It is necessary to ensure compatibility with products currently in use.
- Competitive bidding would not attract bids or would not be economical.
- The product or service is urgently needed.

147. The City should make public the training and education materials it provides to its own procurement staff.

There should be full disclosure of all bylaws and procedural manuals as well as staff guidebooks, protocols, checklists, tip sheets, and the like. Disclosure would ensure that the public and potential suppliers are aware of City policy and would increase transparency in the procurement process.

148. When the City makes changes to its procurement policies, it should make them public.

149. All potentially interested parties should be made aware of the City's intent to issue a tender.

It is important that the procurement opportunity be well known in the marketplace in order to obtain a significant range of bids.

The City should consider using MERX to publicize its tenders. MERX is the Internet-based public tendering system used by all levels of government in Canada, including the MASH (municipal, academic, school boards, and hospitals) sector. Public sector business opportunities are tendered through MERX for goods and services ranging in value from hundreds of dollars to millions of dollars. One benefit of using a widely known system such as MERX is that, combined with consultations with the private sector, it gives those in public sector procurement ready access to information about the goods and services available in the marketplace.

E. Project Management, Teamwork, and Expertise

150. The Purchasing and Materials Management Division should work closely with line departments in acquiring goods or services.

While procurement is a complex field of expertise in its own right, procurement is not an end in itself. Procurement is simply one necessary step in the process by which line departments deliver City services. Because they are just one part of a larger service delivery process, PMMD staff should work closely with line departments to ensure that the timing of procurement and the way it is carried out helps the line department to deliver its services in the best possible way.

151. At the outset of any major City procurement, a project charter should be established to set out the scope of the project, the associated risks, the resources needed, the competencies required, and the tasks to be completed, with due dates.

The project charter should demonstrate the process to be followed and set out which departments are involved. In designing a procurement project charter, the key functions of needs assessment, preparation, selection, contracting, supervision, and control should be separated.

152. For large City procurements, key documents should be tracked by who has reviewed them, who has had input, and what that input was.

Document tracking and control can be very important to ensure that all appropriate input is obtained and that everyone is working from the same generation of documents. One person should be responsible for "version control": knowing which version of a given document is the most recent and/or authoritative.

153. Project teams should be carefully assembled for major City procurements.

City staff initiating requests for purchase of goods or services should identify any intended procurements they consider unusual because of their type, dollar value, volume, or impact on the public. Staff should report these unusual proposed procurements to their supervisors, who should consult with PMMD or other City staff to form the necessary project team for the procurement.

Care should be taken to staff the project with enough people for the work to be done, and with people who have the right expertise for the job. Expertise should not be assumed; it should be actively considered when staffing a team for major procurements.

154. When more than one City department is involved in a procurement, each relevant department should designate a lead individual for the project.

Departmental leads should be responsible for co-ordinating all of the responses from that department or that division.

155. The roles and responsibilities of City staff involved in the procurement should be clearly defined in advance.

The reporting structure should be made very clear. Each individual involved in the project should know to whom they are to report. For complicated interdepartmental procurements, a project organizational chart can serve as a useful reference and monitoring tool.

With a well-organized project charter and clearly defined individual responsibilities, all involved staff should proactively fulfill their functions and not simply wait for instructions.

156. A standard checklist should be prepared indicating all of the elements that should be in place before the City launches a tender.

The City should not find itself in the position of appearing to have rushed into an acquisition before it has carried out all due diligence. A checklist can ensure appropriate preparations are made. Items for the checklist could include these questions.

- Has the business case been adequately explained?
- Has a detailed needs assessment been carried out?
- What benefits will accrue to the City as a result of this procurement?
- Is the procurement method appropriate?
- Has the person responsible for the bidding process been identified?
- Have all relevant staff stakeholders been made aware of the intended acquisition?
- Have staffing requirements been identified?
- Has there been adequate time to develop the request document?
- Does the request document need to be reviewed by the Legal Services Division ?
- Will prospective vendors have adequate time to respond?
- Will the evaluation committee have time to evaluate, prepare the necessary reports to committee and Council, select the right vendor, and negotiate the contract?
- Is the document clear and unambiguous?
- Does it identify and describe the scope of the work to be done?
- Are the specifications complete and accurate?
- Have municipal procurement policies been taken into account?
- What steps have been taken to ensure that the evaluation process will be fair?

157. One senior person on the procurement team should be designated as the contact person in case councillors have questions outside the committee or Council process.

All members of the procurement team should refer all inquiries from councillors to the designated contact person. The designated contact person should keep a suitable record of contact with councillors during a procurement process.

158. Managers on large procurement projects should increase reliance on face-to-face meetings, with confirmatory minutes, when it is essential to ensure that communication is clear and that everyone understands their roles.

159. Gaps in in-house expertise essential to any City procurement should be filled by outside consultants.

Conducting a competitive process each time that outside procurement experts are needed could delay specific procurements. Unless the acquisition is unique, the City should generate a selection of pre-approved respected, qualified, independent, and very well informed professionals. The City should try to anticipate its needs on a yearly basis.

The manner of identifying and selecting outside experts should be in line with overall City procurement policies. Contracts offered to these experts should go through the same process as all other contracts, including evaluation and oversight.

160. External consultants hired by the City should not help any potential bidder in a forthcoming tender.

If a consultant on the City's pre-approved list wants to help a vendor to bid, that person should inform the City and be excluded from consideration for consulting work in that area.

161. Consultants who are retained by the City should be accountable for specific deliverables.

The City should identify a clear need for an outside consultant before he or she is retained to assist with a procurement process. This need, once defined, becomes the basis for the deliverables for which the consultant is accountable. When the consultant is brought onto the procurement team, it should be made clear what the City expects him or her to contribute.

162. Council should commit resources sufficient to ensure that the Purchasing and Materials Management Division has the necessary in-house information technology procurement expertise to carry out this significant and permanent part of its work.

An essential task for the IT leadership at the City will be to improve interaction with PMMD during IT procurement. This would be greatly facilitated by having accomplished IT personnel in PMMD.

Education and training for those working in the information technology (IT) procurement field at the City should keep pace with the rapid evolution in the sector. Those involved in IT procurement need ongoing training that addresses how procurement practices can keep up with technological change. They should always ensure that any computer hardware or software specifications are the most current available.

163. Council should commit sufficient resources to ensure that the City has the best available IT leadership at all times.

The City of Toronto is a very complex, sophisticated, and demanding IT environment. IT expertise is essential to delivering services and to the sound governance of the City. The unrelenting pace of technological change means that IT procurement will always be a serious ongoing concern for the City. In these circumstances, the people of the City of Toronto deserve nothing less than the very best available in-house IT expertise in City government. Adequately resourcing IT leadership means taking into account the prevailing market for the top expertise the City needs.

F. Legal Services

164. The Legal Services Division should be involved in major procurements from the outset.

Early advice from the Legal Services Division can prevent problems before they arise, which is more beneficial than identifying them when it might be too late.

165. An information bulletin should be sent from the Legal Services Division to all senior managers to clarify signing authority for contracts.

This information should be posted on the City's intranet site, so as to be easily accessible to all staff, and should be updated as signing authority changes.

G. Fairness Commissioner

166. For major, high-risk, controversial, or complex tenders, the City should consider retaining a fairness commissioner.

In a report to the City on the RFP process regarding Union Station, the Ontario integrity commissioner recommended the appointment of a fairness commissioner in major projects to oversee the RFP evaluation process, and in some cases the development of the RFP, to ensure that the process is objective and fair throughout. Introducing a fairness commissioner could be a helpful step in creating a perception of impartiality in awarding major contracts.

Ideally, a fairness commissioner would be someone with a strong procurement background and no current or recent ties to the City. Someone with private sector procurement experience is preferable, as this would enhance bidders' confidence in the appointee. The fairness commissioner should have sufficient expertise to be able to knowledgeably discuss technical procurement challenges with City staff. The commissioner should also be sufficiently accomplished to provide authoritative guidance to staff on difficult issues. Fairness commissioners might be found in the ranks of retired business executives, retired senior civil servants, or retired academics.

A fairness commissioner should approach his or her function mindful of the need to balance two competing needs: the need for fairness and objectivity in procurement processes, and the need for some flexibility in determining which commercial entity can best meet the City's procurement needs. An overly rigid approach to procurement processes may eliminate bidders on insubstantial grounds and thereby deprive the City of access to bidders who could provide excellent value to the taxpayer.

The fairness commissioner should be involved in the tender process from beginning to end, as opposed to coming in merely at the evaluation stage. Developing the evaluation criteria, for example, is as important a part of the tendering process as any other. The fairness commissioner should be able to determine that the tender is being prepared fairly and, later, that selection criteria are adhered to.

The fairness commissioner should carefully read each proposal, make sure that neither the City nor the bidders make any errors, assess the fairness of the information provided by prospective vendors, and identify possible ambiguities.

If members of staff have questions or concerns about the process itself (as opposed to the relative merits of particular bids), they should consult with the fairness commissioner. The commissioner's advice would not be binding on staff, but staff should bear in mind that the commissioner would report publicly after the procurement on any fairness issues that arose and on their resolution.

The fairness commissioner should sit with the evaluation committee to ensure that the successful bidder is chosen based on the criteria in the City's tender. The fairness commissioner should not evaluate the correctness of the successful bid. Instead, he or she should simply determine whether the decision-making process was fair.

At the end of the process, the fairness commissioner should prepare a report, available to the public, describing what happened during the tendering process and outlining the commissioner's involvement. The report should identify the issues at play, the actions taken, and the results: whether the process was fair and what could be done in the future to make it more fair and efficient.

A fairness commissioner should be seen as an adjunct to the procurement process, not as a substitute for the procedures, policies, and conduct of staff that show commitment to fairness and transparency in procurement.

H. Pre-Procurement Market Consultation

167. Before issuing a complicated tender, the City should consider engaging in a prerelease consultation.

As part of the consultation, the City could conduct research and solicit ideas and suggestions from the vendor community. Pre-procurement consultations could also be helpful by familiarizing vendors with the City's procurement strategy in a controlled environment. This practice could lead to better-quality bids and give the City immediate feedback so that refinements to the specifications can be made. The consultation should be an open forum where vendors could query the City about its procurement intentions. In any case, the City should make all vendor questions and answers available to all other prospective bidders, so as not to give one bid-

der a relative advantage and to provide assistance to all parties. The source of each query could remain anonymous.

To facilitate a pre-procurement consultation, the City should describe to the public and the vendor community the major attributes of the proposed procurement, insofar as they are known. However, since one important purpose of a pre-procurement consultation is to learn what relevant goods and services are available to meet the City's perceived need, the major attributes of a proposed procurement need not be specified in great detail.

168. The City should remain vigilant to ensure that lobbying does not persuade the City to design the tender so as to unfairly favour one competitor in a pre-procurement consultation.

Acceptable forms of contact between vendors and City staff should be defined by the City for the pre-procurement consultation process, and lobbying outside of the permitted vendor contacts should be prohibited.

I. Leasing

169. Leasing should remain a viable financing option for the City.

The option of leasing should always be assessed with great care, but it should not be presumptively discarded. Once the City is confident that appropriate safeguards are in place, leasing may be considered seriously if it arises as a potentially desirable option in any given procurement context.

170. The City should not enter into a leasing contract without the expertise to evaluate and implement it successfully.

Appropriate expertise is required to understand the risks and tradeoffs of leasing and how to use it in the best interests of the City. It is better not to lease than to enter a leasing deal unprepared.

The City may or may not choose to lease with sufficient frequency to justify permanent in-house leasing expertise. If not, the City should retain outside expertise for every leasing transaction, because such expert assistance is essential.

171. The City should establish and update as necessary a checklist of questions that staff should answer in exploring the viability of leasing.

These questions should include the following.

- What alternatives are there to leasing?
- Does it make financial sense to lease?
- What additional costs might accrue from proceeding with leasing?
- Which departments will be involved in co-ordinating and implementing the lease?
- Who will lead the leasing process?
- Will outside expertise be required?
- Should the Legal Services Division be involved? If not, should outside legal counsel with leasing expertise be retained?
- Has a complete analysis of the requirements been made prior to leasing, so that costly adjustments do not have to be made during the term of the lease?
- How will the City ensure that it does not develop a continued dependence on the leasing company?
- If leases are extended, how will the City ensure that the rates remain competitive?

172. In future leasing arrangements, the City's Finance Department should lead the tender, not the department whose business assets are being leased.

Finance is best placed to determine the best financial mechanism to deliver the required equipment and to negotiate future lease rates. After the tender is over, the department acquiring the business assets can then take the lead in managing those assets. However, the line department using and managing those assets should take care to consult closely with the Finance Department on any ongoing financial issues that may arise.

173. The City should establish best practices for setting competitive lease rate factors.

Before signing on to lease rate factors, staff should first determine if the rates are competitive. Analyses should be conducted regularly to determine appropriate market rates. A vendor's lease rate should not be accepted without staff first determining whether the rate fairly reflects the market. Often

it may be desirable to tie lease rates to an objective financial indicator such as an interest rate posted by a government or private financial institution.

174. The Purchasing and Materials Management Division should be more proactive in the leasing process.

It is for PMMD to decide when to use purchase orders or when to use blanket contracts. On forms such as purchase requisitions and contract orders, the annual cost of leasing should be clearly identified. If lease terms change during the life of a contract, PMMD should be made aware of the changes in advance, so it can assess cost implications in advance.

175. The City should require the leasing company to set out clearly the amount of interest payable throughout the term of the lease along with any additional costs to the City of leasing beyond the periodic lease payments.

176. In any lease transaction, the City should not rely on the leasing company to keep track of its inventory.

Each line department with leased equipment should have procedures to track leased assets. Methods include bar coding, regular inventory checks, and designating the contract lead to monitor the leased items.

177. If the City wishes to consider any sale-and-leaseback transactions, City Council authorization should first be sought.

In approaching Council about such a proposed transaction, staff should prepare a report to outline the advantages and disadvantages of such a transaction, with guidelines for executing and monitoring such a transaction within the City.

178. Leasing IT hardware and software poses many special challenges. If the City decides to lease IT equipment or software again, it should retain expertise in this leasing subspecialty.

Leasing IT equipment is a subspecialty of leasing and should be understood and managed closely to realize the advantages. Failure to do so can result in advantages evaporating and costs skyrocketing. In a competitive marketplace and in an arm's-length transaction, the City should be vigilant, perform its own due diligence, and make sure it understands all of the terms before it signs.

Change occurs rapidly in the IT hardware and software industry. As well, the leasing vehicles change to accommodate the shifting life cycle of the assets under lease and the need to replace or refresh the assets. The rights and obligations of contracting parties to leasing transactions and the triggering events for each can be many, varied, and complex. Further, the language in lease documents can be baffling to the non-expert. As a result, the City should consult experts (leasing and legal) before again leasing IT hardware or software.

J. Blanket Contracts

179. The City should standardize and clarify procedures for blanket contracts.

To clarify departmental responsibilities, the City should reiterate that each department should perform these tasks:

- Issue its own contract release orders against blanket contracts.
- Record all transactions properly.
- Monitor contracts to ensure that dollar values are not exceeded.
- Monitor contracts to ensure that the goods and services provided are the same as required under the contract.
- Ensure that the purchases stipulated in the contract are made.
- Ensure that payments are properly approved before they are processed.

K. Vendors of Record

180. The City should clearly define its use of the term "vendor of record," to avoid confusion in the way this term is applied.

181. The City should consider whether having multiple vendors of record would prove useful in major procurements.

A business case analysis should be conducted to determine whether a given area of procurement would benefit from more than one vendor of record.

182. Unless the nature of the contract warrants it, terms for the City's vendors of record should be short.

At the end of each term, other potential vendors should be permitted an opportunity to qualify.

183. The City should improve its position in contractual relations with vendors of record.

Vendors of record should sign a detailed agreement with the City. The contract should set out the rules and procedures that the vendor of record should follow in its conduct with the City. Failure to do so would result in loss of vendor of record status.

The contract should also require the vendor of record to adhere to the City's codes of conduct and confidentiality provisions, and allow the City to inquire, at regular intervals, into the vendor's continuing capability and financial standing. It should guarantee the right of the City to enter into a contract with the vendor of record under agreed-upon terms and service delivery levels.

The City's contract should allow for termination if a vendor of record violates the rules laid out by the City, including those in the contract, or commits ethical violations or other infringements. A vendor who violates any conflict, ethics, or procurement policy provisions should be barred from bidding again for a prescribed period.

184. The City should post the list of its vendors of record, and the goods and services each provides, on its website.

Posting vendors of record and the goods or services they provide serves two purposes. Internally at the City, it is a helpful reference for line departments that need to acquire goods or services provided by those vendors. And by making this information public, the City shows interested observers with whom the City is dealing and how it is distributing this type of business.

185. The City should improve its oversight of vendors of record.

Given that the vendor of record was selected for "best value," staff may, perhaps incorrectly, assume that the vendor will provide just that. Oversight will prevent the City from being caught off guard if that proves not to be the case. The oversight responsibilities of line departments should be clearly set out. Staff, Council, and vendors should all know who is responsible for what.

Great care should be taken before the City asks a vendor of record to provide any service that it was not explicitly contracted to perform. While it may seem efficient to simply ask an on-site vendor of record to perform an additional service, this has the effect of undermining competitive procurement processes and unfairly benefiting an incumbent simply because that vendor is present.

In awarding contracts to vendors of record, the City should avoid becoming so reliant on one vendor that withdrawing from the relationship with it would imperil programs or services.

L. Preferred Suppliers

186. The City should take steps to ensure that every person with a place on a preferred suppliers' list is in substance a different business entity.

City decisions to spread potential business around by naming multiple suppliers to a preferred suppliers' list should not be undermined. Suppliers may undermine the apparent breadth of the preferred suppliers' list by, for example, bidding for a place on the list under multiple business or corporate names. Before awarding any entity a place on a preferred suppliers' list, the City should take steps to ensure that all potential winners are, in substance, separate entities.

M. Tender Documents and Processes

187. Before issuing any tender document, the City should establish criteria and an evaluation process to allow it to determine whether each bidder has the quality, experience, and capacity to deliver what the City needs.

When designing the tender evaluation process, the procurement team should create a checklist of necessary vendor attributes. The team should also define minimum acceptable levels of compliance with those attributes. For example, a bidder may be eliminated if it scores below 80 per cent on any essential attributes.

To maintain a high degree of certainty in the tendering process, the City should have rigorous mandatory requirements. For example, on a

large procurement the City could insist that bidders open their financial books for inspection, so the City can assess whether they will be stable business partners.

188. The project lead for each City procurement should ensure that the correct request document is used for the tender.

Although they are in some ways similar, a request for proposal (RFP) and a request for quotation (RFQ) are not the same. Staff should be careful not to refer to one when they mean the other.

Often, the line department will have a greater idea of the subject matter in a tender than PMMD. The line department and PMMD should discuss whether the tendering document will be an RFP or an RFQ.

With RFPs, the lowest bid is not necessarily the superior bid. For complicated tenders, price should not be the sole consideration but should be one of many. The fundamental consideration should be who best can comply with the City's needs, and on the City's terms, as set out in the tender document. Awarding the bid on price alone might result in an improvident bid being selected.

189. In procurements where, by virtue of the dollar value or their contentious nature, Council will make the final decision, the request document should indicate that Council approval will be required and incorporate any criteria or conditions that Council considers necessary.

190. The specifications for a product in the City's tender should be very clearly set out and be kept simple and fair without being simplistic.

The specifications should set out the factors to be evaluated qualitatively, the "pass or fail" elements, and the weight to be given to various elements such as cost. They should allow for some discretion and creativity from the bidders yet not be so detailed that they prevent differentiation of the bids.

The specifications should provide an equal opportunity for all potential suppliers to offer goods or services which may meet the needs of the City, including suppliers offering alternative solutions. The City should not give or appear to give any bidder an advantage.

191. The Purchasing and Materials Management Division should maintain a library of examples of previous specifications drawn from its own experience and those of other jurisdictions.

The library could be maintained on the City's intranet site or in some other easily accessible form. When there is nothing in the library to give guidance in setting out specifications, the experience of other jurisdictions should be researched.

192. The City's specifications should indicate a cost range, to assist vendors in tailoring their bids.

Care should be taken not to overestimate the value of a contract, in order to avoid having bidders submit proposals based on a maximum "budget" that exceeds the actual value. Submitting bids involves time and money, so in the case of smaller initiatives, disclosing the potential value will alert potential bidders to projects that are out of their scope.

193. When setting deadlines for submission of bids, the City should balance the urgency involved against giving vendors enough time to understand the requirements, ask questions, take the answers into account, and prepare their responses.

194. The City should protect the integrity of its own deliberative processes and the need for Council approval by requiring vendors to hold terms in their bid open long enough for Council to make a considered decision and long enough for the necessary contracts to be thoughtfully entered into.

195. On a case-by-case basis, the City should consider whether the final contract that it expects the successful bidder to sign should be attached to tender documents.

When the tender is issued, the City should have enough of an understanding of its procurement objectives that a contract could be fully drafted in advance. The tender documentation would make it clear that the successful bidder would be expected to sign the contract with only minor variations, if any. Obviously, this practice would make it essential that the Legal Services Division participate as a team member in drafting tender documents.

196. Bidders should be clearly advised in the tender document that they are not permitted to advance their case by alluding in any way in their bid documents to a relationship with a councillor, the Mayor, or senior staff.

Such allusions are an indirect way of putting inappropriate political pressure on staff conducting procurement processes.

197. The City should hold bidders to the ethical standards set out in the City's ethics policies as applicable.

This issue is treated in further detail in Chapter II.

198. The City should continue to provide all potential bidders with its suppliers' briefing document.

This document should also be posted on the City's website, with the web address listed on appropriate bid documents. It should be updated as procurement policies evolve.

199. Both paper and electronic drafts of tendering documents should state, in large letters on each page, that they are internal City documents and strictly confidential.

The front page of each document should also have a notice, similar to the standard legal notice, stating plainly that an unintended recipient should not read the document and should either destroy or return it.

200. One individual or one small committee with clear membership should have complete version control and supervision over the draft tender documents for each City procurement.

No matter how many departments are involved in the tender, one person or one small committee should be clearly assigned the ultimate responsibility over how the final draft will look. For major tenders, the City should ascertain in advance the best person or team of people to exercise this important authority.

201. The appropriate times and ways to have contact with a bidder should be carefully designed as part of the procurement process, and made very clear to City staff.

202. The manner and timing of notification to bidders of the outcome of the procurement process should be settled in advance, so that bidders can have appropriate expectations and so that unnecessary and potentially problematic communication between City staff and vendors will be prevented.

N. INCUMBENTS

203. The City should be vigilant in not favouring incumbents unfairly in any tender process.

A supplier with a long-term relationship with the City may no longer appear to be at arm's length from the City. City staff need cordial, functional, and professional relationships with suppliers. However, an ongoing business relationship by itself should offer no advantage in a new competitive tender. So, for example, tendering documents should not favour or appear to favour an incumbent simply because it is the incumbent. And staff who are evaluating responses to competitive tenders should not rank an incumbent higher simply because it is an incumbent.

In no circumstances should incumbents be relieved of any procedural obligations that apply to all other bidders. For example, when information is required in written form, an incumbent who is already on-site doing work should not be permitted to simply deliver the information orally. Even such minor variations, which may be more convenient and more efficient, are inappropriate because they offer or appear to offer a selective advantage to an incumbent.

When an incumbent is ultimately favoured, the decision-makers should articulate a principled and wherever possible quantifiable reason why, apart from mere incumbency, the incumbent deserves to win.

DURING

A. Gifts, Favours, Entertainment, and Benefits

204. All City staff involved in any way in active tenders should be, and be seen to be, beyond reproach. Accepting gifts, favours, entertainment, or benefits of any kind from a vendor or potential vendor should be prohibited.

Most people understand that taxes are necessary so that governments will have the means to provide the services we need. Nevertheless, we all know that paying taxes is not voluntary. If we disagree with the way a government is spending our tax dollars, we can let the politicians know at the ballot box, but we are still obliged to pay taxes. Moreover, even though elected officials make the policy decisions about how our tax money is spent, in broad terms, it is civil servants, who are rarely in the public eye and who do not stand for election, who implement the actual spending. Thus, we have no choice but to trust them to spend it wisely.

Given this compulsory trust, the taxpayers have a right to expect civil servants to manage public money properly and not spend it as though it were their own. The antidotes to skepticism about that trust are transparency in decision making, manifest objectivity, and full accountability. Those conditions are not met if a vendor wins a contract because a civil servant has a better personal relationship with the vendor than with the competition. That is an intangible and unquantifiable factor. Transparency, objectivity, and accountability demand specific and measurable reasons.

Of course, it would be naive to suppose that the human element can be wholly eradicated from procurement decisions, even in the public sector. That is why good procurement practices demand that civil servants follow rules designed to keep the allure of a good relationship with a vendor from affecting their decisions in the course of spending the taxpayers' money. That is why it is inappropriate to accept any gifts, benefits, or favours of any kind under any circumstances that might give rise to an appearance of inappropriate influence.

B. Designated Contact Person

205. When a tender document is publicly released, it should always state the name and full contact information of the person whom prospective bidders can contact with any questions. The tender document should make clear that this is the only City person bidders may contact regarding this tender for the entire procurement process.

The designated contact person can clear up questions about the tender but should never afford any bidder any advantage in winning the contract.

206. Bidders may not use the designated City contact person as a conduit to promote their bids.

The City should make clear in tender documents that misconduct of this sort may disqualify a bidder. Contact persons should report bidders' self-promotion to their supervisor, or to the fairness commissioner, as appropriate.

207. To ensure that there is no appearance of advantage for bidders who communicate with the designated City contact person, that person should not participate in evaluating the bids.

Information given by the contact person to one bidder after the bids are in should be given to every other interested bidder as well, with enough time for them to give it consideration

As a general rule, the contact person should be the vendors' or bidders' only point of contact at the City at all stages of procurement, including before bid solicitation, if possible—for example, when the specifications for goods and services are being developed.

C. Blackout Period

208. Every tender document should contain a definition of the "blackout period" when communication between the City and bidders is prohibited.

The tender document should clearly set out when the blackout period begins, when it concludes, and what vendors can and cannot do during this

period. In principle, a blackout period should cover all times during which communication with the City by a bidder may give rise to an appearance that the bidder is able to gain an advantage of any kind over other bidders.

This principle should be given a liberal interpretation. In general, the most prudent approach is to define the blackout period to cover all times when the propriety of any communication between bidders and staff would be seriously questionable.

Generally, a blackout period should start on the day the tender is released. The blackout should continue until a final decision is made on the procurement. This should be stated in the tender document itself. If Council is the final decision-maker, this should be clearly indicated.

Suppliers who have ongoing contracts with the City may wish to bid on new tenders. This poses special problems for blackout periods. During a blackout period, bidders who are also suppliers should be able to continue to communicate with City officials as necessary to supply their goods and services. However, communication related to the tender process should be prohibited. To achieve this result, the City staff should put in place the necessary internal firewalls to ensure that ongoing business communication continues but competitive marketing relating to that tender does not. The City should consider taking the following steps:

- When possible, the City should staff the team for the new tender with people who are not involved in the ongoing business relationship with the supplier/bidder.
- When this is not possible, City staff involved in the ongoing relationship with the supplier should be vigilant to ensure that the supplier does not in any way try to advance its bid through them.
- Suppliers who are also bidders should be clearly advised that their communication with the City during the blackout period is to be restricted to the ongoing business relationship and should not address the tender.
- Suppliers should be advised of the penalties for breaching a blackout.

Some supplier contracts have terms that are legally required to be renegotiated periodically during the life of the contract. A blackout period should also apply immediately before and during those negotiations.

D. Confidentiality

209 Any misuse by a bidder of confidential information belonging to the City or to another bidder should be grounds for disqualification from the bid.

The City should make clear that all bidders who come into possession of confidential information in any way have an affirmative duty to forward that information immediately, unread and unused, to the City's contact person immediately.

E. Issuing the Bids

210. The City should release tenders on the Internet to allow fair and equal access to them.

Electronic release is preferable to sending paper copies of tender documents to interested potential bidders. Internet access is sufficiently widespread that electronic release can be assumed to be fair.

F. Filing the Bids

211. Bids that have been received on a specific City tender should be organized and filed together.

All correspondence from each bidder should be filed together. The filing system should be sufficiently comprehensive that information in it is complete and accurate. Included in the file should be the evidence of when the bid was received: for example, the envelope with a date and time stamp.

G. Reading the Bids

212. The City should have clear practices surrounding the reading of bids.

If the bids received will be read out, this should be clear in the tender document. There should be no ambiguity.

A record should be made of whether a bid was read out. This could be as simple as a check mark and the reader's initials on the appropriate document

The prices should not be read out in the case of an RFP.

H. Evaluating the Bids

213. No one involved in evaluating the bids at the City should have a pre-existing relationship with any of the bidders or be influenced in any way by anyone else's pre-existing relationship with a bidder.

The fact that one or more bidders might be well liked is no reason to circumvent or manipulate the competitive process. To ensure that an incumbent's productive relationship with City staff does not unduly influence procurement decisions, those individuals who deal regularly with an incumbent supplier who is also a bidder should not, whenever possible, evaluate the bids. Sometimes this is not possible. In those cases, staff with no relationship to the supplier should make up the majority on the procurement evaluation team.

214. For major procurements, the City's evaluation committee should be a group that is representative of all areas affected by the procurement. To ensure fairness, no one involved in the pre-procurement phase or the bidding process should be involved in evaluating the proposals.

All members of the evaluation team for major procurements should be qualified to properly evaluate the proposals received. Members of the panel should typically include:

- division heads (or a representative to serve as chair)
- representatives of line departments
- users of the product or service
- impartial outsiders
- outside experts as necessary
- the fairness commissioner (as an observer only)

Often it can be helpful to have PMMD involved in evaluating the bids, to check that the requirements of the tender itself are met.

215. Each member of the City's evaluation team should sign a conflict of interest declaration disclosing any entertainment, gifts, or other benefits, in cash or in kind, received from any of the proponents or

their representatives. All members should also declare that they will conduct the evaluation in a fair and objective manner, free from any conflict of interest or undue influence.

A copy of this declaration should be kept with the records of the tender.

216. The City should develop, in consultation with the senior financial staff and the City solicitor, a protocol for treatment of mathematical errors or other obvious mistakes in submissions.

Bidders should be permitted to correct obvious typographical or mathematical errors in their bid documents. There should, however, be a protocol in place in advance for handling changes of this type. The protocol should identify who decides if a bid can be corrected and should permit efficient correction of obvious errors. However, bidders should not be allowed to alter the terms or other substance of their bid. The protocol for correction should involve creation of a suitable record to demonstrate after the fact that a bidder was permitted to address only an obvious error.

217. Contact with bidders by the City's evaluation team should occur only in accordance with fair principles identified in advance.

The evaluation team should keep suitable records of any contact with bidders, and the reasons for that contact, so that anyone who reviews the procurement later can be satisfied that the contact was appropriate.

The project charter for a major procurement should identify the principles that will determine whether or when the City evaluation team will contact a bidder. The project charter should also allocate to one person the responsibility for making the decision about whether a bidder should be contacted.

If the fairness commissioner is involved in a procurement, he or she may be consulted about the wisdom of contacting a bidder in the circumstances.

218. The weight to be assigned to price in determining the winning bid should be carefully considered and settled upon in advance.

Selecting the lowest bid is appropriate for goods and services that are easily identifiable and easily comparable. However, in many cases, the best value is not always the lowest price. Quality, risk of non-performance, and

other factors contribute to value. Ideally, the lowest bid would also present the best value, but it should be selected only if the entirety of the bid or proposal meets the objectives set out in the request document.

Artificially low bids should arouse suspicion. The costs should be evaluated over a series of years, including over the life of the proposal.

If the lowest bid is not selected, the evaluation committee should indicate its reasons in writing.

I. Electronic Tenders

219. When circumstances require a rapid RFP or RFQ for a City procurement, the process can be done electronically: for example, by telephone, fax, or e-mail.

220. Special effort should be made to ensure that rapid tenders for City procurements are public.

Rapid tender methods can lack adequate public exposure. Accordingly, the City should devise a method of posting these tenders publicly, for example on the City website, so it is clear that an RFQ is taking place and that all necessary processes have been followed.

221. For tenders with short turnaround times, the City's lead person on the tender should choose a deadline that allows bidders a fair chance to respond.

A fair response time will depend on a number of factors, including the nature and value of the goods or services put out to tender and the capabilities of the vendor community.

222. For tenders with short turnaround times, the City's lead person on the tender should make reasonable efforts to ascertain before the tender is issued that prospective bidders are available to respond.

Provided reasonable efforts are made to contact potential bidders in advance, an urgent tender need not be held up by some potential bidders' failure to respond.

J. Reports to Committee and Council

223. If there is a deadline in a tender—for example, if a vendor is offering a particular term for only a limited time—committee and Council should be clearly notified, with sufficient time to respond in a deliberative fashion.

K. Debate on Procurements at Council Meetings

224. During debate on procurements in Council, all councillors should be guided by one principle: what will best serve the public in the circumstances.

Once a final report on a procurement process is before Council, Council is entitled, in the usual manner, to information behind the report as necessary to decide on the staff recommendation.

225. If Council decides to alter the fundamental terms of the tender after the bids have been submitted, the procurement should be retendered, to be fair to all the bidders.

Councillors should not try to reformulate the procurement process from the floor of the Council chamber. If a specific procurement is, in the considered view of Council, flawed, it should be returned to staff to be independently run again with such modifications as Council directs.

If a course of action proposed in committee or in Council would change the tender substantially, staff should immediately bring this to the attention of the appropriate person at the Council or committee meeting, so that Council or a committee is aware that it is discussing something that will require a new tender.

226. When debating procurement decisions, councillors should respect necessary timelines for decision making as set out in staff reports.

Staff should be vigilant in advising Council of any time constraints that affect the procurement under debate. If Council or a committee proposes changes to a tender that put timelines at risk, staff should immediately make these risks known.

227. Wherever possible, Council and committees should make procurement decisions in public.

Unless there are justifiable reasons why procurement decisions should take place behind closed doors, the procurement process should be as open as possible. Decisions on contracts debated at Council should not be made in camera unless there is a compelling reason for it, such as preserving a bidder's trade secrets.

AFTER

228. The City should maintain a record of when and by whom a bidder is told it has been successful.

This is one aspect of the important task of regularizing communication between the City and bidders during a procurement process.

A. Debriefings

229. Following the decision to award a contract, unsuccessful bidders are entitled to a debriefing explaining the evaluation process that led to the City's selection of the successful bidder.

Debriefings serve the City's best interests because they can reduce subsequent complaints or appeals and lead to better proposals from vendors in the future.

Whether debriefings are done orally or in writing, the City should keep a record of each one.

B. Complaints

230. To demonstrate its commitment to maintaining integrity and transparency in the procurement process, the City should have a comprehensive bidder complaints policy.

This policy should be made available publicly and should be part of the bidder documentation. An open and fair complaints policy can decrease the likelihood of lawsuits, and it can provide useful information about how to improve procurement.

231. A bidder should not be allowed to file a formal complaint without having made a post-debriefing submission to the City.

232. Councillors should not act as advocates for aggrieved bidders.

Advocating for an aggrieved bidder is inappropriate political involvement in the procurement process. If politicians can advocate for particular bidders, they can distort or appear to distort the procurement process for political ends. An independent bidder complaints process should be established so that vendors' concerns can be addressed without councillors' involvement.

233. The City should adopt a formal two-stage process to manage bidder complaints, to replace the current standing committee/deputation approach.

Complaints should initially be adjudicated by a neutral panel of administrative staff that does not include anyone who was involved with the procurement. The initial adjudication could be reviewed by an official or officials with a high level of independence, such as the fairness commissioner, the integrity commissioner, or personnel from the auditor general's office. The decision of the second panel would be final and not subject to further review within the City.

Councillors should not be involved in the complaints process.

Complainants should be required to announce their intention to appeal within a prescribed period after receiving a response to a post-debriefing submission and should be given a further specified period to file the complaint in writing. All other bidders should be notified of the complaint and the nature of the complaint, preferably electronically so as not to significantly affect staff workload.

If it will not undermine the City's best interests, final approval of a successful bid may be delayed until the complaint process is concluded. However, a decision to delay final approval may be set aside and final approval given at any time during the complaints process if it is in the City's best interests to do so. The formal complaints process should have tight deadlines that will move the matter forward quickly.

The results of bidders' appeals should be made public.

Records should be kept of all complaints. These records should be analyzed from time to time to discover if they reveal any systemic problems with the bidding process.

C. Altering Contracts or Major Terms of Procurements after Bidding Closes

234. Those authorized to sign contracts at the end of a City procurement process should be identified at the outset in the project charter.

235. Once a tender process has closed to the bidders, the major terms of the City's tender should not be changed. Major terms of a contract signed with a winning bidder should not be changed either.

Making major changes to terms and conditions after the bidding has closed is unfair to the unsuccessful bidders. Those bidders might well have submitted different bids had the major changes been identified earlier. Only a clear mistake or other manifest flaw in the terms should lead to a major change in the terms of the tender or contract.

Effective pre-procurement processes that identify the City's needs and lead to drafting of responsive contractual terms are key elements in avoiding the need to unfairly alter the terms of a procurement or a contract after the bidding has closed.

236. When it is necessary because of error or other circumstances to change major terms in a tender or contract after bidding has closed, staff should report to Council on the reasons for the change and on how the change will be managed.

The process for managing the change should follow as closely as possible the same steps as the original bid, with the same restrictions and limitations. The report to Council should set out, as appropriate:

- where necessary, the costs associated with setting aside any contract.
- the bid/proposal solicitation method
- evaluation criteria, including the weight assigned to each factor
- the composition and technical knowledge of the evaluation team
- the justification for the contract award
- the length of the contract, including any renewal options

- the total value of the contract
- the total value of any contingencies in the contract
- key terms and conditions in the contract

D. Contract Management

237. The City should treat contract management as an important priority and resource it accordingly. For effective contract management, a well-staffed contract management office is needed.

Contract management is an essential part of the post-contract process. The City has a responsibility to know that it is receiving precisely what it contracted for. The City should devote the necessary time to develop contract management processes and refine them whenever necessary.

Contract management includes the following elements:

- designating the program areas that can access the contract
- identifying staff contacts for each program area
- verifying that the prices are in accordance with the contractual terms
- developing procedures for reporting contractual problems
- making certain, throughout the life of the contract, that the vendor adheres to the terms and that no changes are made
- developing approaches and remedies for problems that may emerge during the course of the contract, through the fault of the City, the vendor, or for any other reason
- keeping the contract on an appropriate timetable

The responsibilities of individual staff members involved in the contract should be set out in detail. They should be communicated to all staff involved, along with a summary of key contractual terms and conditions and any changes from earlier contracts with the vendor or previous vendors providing the same goods or services. The governance structure should assign a clear point of accountability for managing each contract, making sure that both staff and the supplier understand their respective responsibilities.

It would be useful to prepare a "responsibility table" that outlines the roles and responsibilities of the vendor and the City. This table could also

be used to outline which risks the vendor assumes and which risks the City assumes. Risks include price inflation, theft, tax changes, quality of goods, and timelines.

E. Accounting Procedures

238. The City should put in place procedures to track spending on contracts that affect more than one department.

Variances from contractual terms should be reported to the designated divisional head promptly. In addition to detecting variances, the system should provide depletion figures that reveal the percentage of the total value of the contract used to date. Planning milestones and budgets should be compared with these figures.

There should be a more effective means of comparing expenditures against the value of a contract, and in particular a more effective means of determining in advance whether expenditures are likely to exceed contract values.

239. Staff should be vigilant in ensuring that all data is entered into accounting systems to permit full tracking of expenditures against approved contract amounts.

Difficulties in expenditure monitoring may occur not so much in the accounting system itself as in the use of it. Therefore, appropriate use should accompany an appropriately designed system.

The provincial government records expenditures at the time they are incurred, not when they are paid. A similar approach should be considered for the City.

The City should meet its payment schedules in a timely manner in order to maintain good relations with current suppliers and its reputation with future suppliers.

VI. Other Recommendations

A. Implementation

240. The City should work with provincial officials as necessary to implement these recommendations.

The City and provincial officials are encouraged to work together on any enabling legislation that is necessary to implement any of these recommendations. The City should, however, move forward diligently on those recommendations which it can implement independently.

241. At the first Council meeting after the first anniversary of the release of this report, the Mayor should report to Council on progress made in implementing the report's recommendations.

B. Inquiry Process

The recommendations in Volume 3 of this report, *Inquiry Process*, are repeated below.

> 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.

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.

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.

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.

Appendices

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.)

Appendix A(ii): Terms of Reference, Toronto External Contracts Inquiry

Name	Position/Title
Shirley Hoy	Chief Administrative Officer, City of Toronto
Erik Peters	Former Ontario Provincial Auditor
Valerie Gibbons **Sam Goodwin**	Executive Resource Group Executive Resource Group
Sean Moore **Duff Conacher**	Public Policy Advisor and Partner at Gowling Lafleur Henderson L.L.P. Coordinator of Democracy Watch
Howard Wilson	Federal Ethics Counsellor Office of the Ethics Counsellor
Len Brooks	Executive Director of the Clarkson Centre for Business Ethics & Board Effectiveness, Professor of Business Ethics and Accounting, Master of Management & Professional Accounting Program, Director of the Diploma in Investigative & Forensic Accounting
Lynn Morrison **Honourable Coulter Osborne**	Lobbyist Registrar for the Province of Ontario lobbyist.oico.on.ca Integrity Commissioner for the Province of Ontario integrity.oico.on.ca
David Shugarman **Rick O'Connor** **Ian Greene**	Director of the Centre for Practical Ethics at York University Deputy City Clerk, Ottawa Professor of Political Science at York University

Name	Position/Title
Ron Kanter	Lawyer, McDonald & Hayden L.L.P.; former M.P.P.; former Toronto City Councillor
David Crombie	Former Mayor of the City of Toronto
John Sewell	Former Mayor of the City of Toronto
Mayor Ann Mulvale	Mayor of the Town of Oakville
Nancy Diamond	Former Mayor of the City of Oshawa
John Cruickshank	Publisher of the *Chicago Sun-Times*, former Managing Editor of *The Globe and Mail*
Peter Kent	Deputy Editor of Global TV News
David Lewis-Stein	Former municipal affairs columnist for the *Toronto Star*
David S. O'Brien	City Manager, City of Mississauga
Michael Prue	M.P.P.; Former Toronto City Councillor
Paul Sutherland	Former Toronto City Councillor
John Fleming	Canadian Arthritis Society, former senior municipal administrator
John Matheson	Government Relations and Communications Strategist at Strategy Corp
Dan Burns	Former Ontario Deputy Minister
Nigel Bellchamber	Former Commissioner of Finance and Administration for the City of London

Name	Position/Title
Katherine Graham	Professor and Dean of the Faculty of Public Affairs and Management at Carleton University
Andrew Sancton	Professor and Chair, Department of Political Science, the University of Western Ontario
J. Anthony Stikeman	President of Tactix Government Consulting Inc. & Director and former President of the Government Relations Institute of Canada
John Scott	Vice President and General Counsel, GPC International
David Hutcheon	Former City of Toronto Councillor
Roy Wiseman	Chief Information Officer/Director, Information and Technology Services for the Regional Municipality of Peel
Patricia Petersen	Director of the Urban Studies Program, Innis College, University of Toronto
Myer Siemiatycki	Professor of Municipal Affairs at Ryerson University
Ronald Vogel	Professor of Political Science, University of Louisville, Kentucky
Errol Mendes	Professor of Law at the University of Ottawa
Meg Angevine	Director at Ethicscentre.ca

Name	Position/Title
Neil Sentance	Director, Procurement Policy & I.T. Procurement Branch, Management Board Secretariat
Howard Grant	President, Partnering and Procurement Inc.

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 C(i): Commissioner's Opening Statement at the Beginning of the Good Government Phase of the Inquiry, January 19, 2004

3

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.

Appendix C(i): Commissioner's Opening Statement at the Beginning of the Good Government Phase of the Inquiry, January 19, 2004

4

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.

Appendix C(i): Commissioner's Opening Statement at the Beginning of the Good Government Phase of the Inquiry, January 19, 2004

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.

Appendix C(ii): Commissioner's Speech at the End of "Good Government," February 5, 2004

TORONTO COMPUTER LEASING INQUIRY

The Honourable Madam Justice Denise Bellamy
Commissioner

East York Civic Centre
850 Coxwell Avenue
Toronto, Ontario
M4C 5R1

Tel: 416-338-3999
Fax: 416-338-3944

www.torontoinquiry.ca

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

Addenda

Toronto Computer Leasing Inquiry

Research Paper

CONFLICT OF INTEREST

Volume 1: Comparative Overview

December 2003

Table of Contents

Executive Summary

Part 1: Introduction

Volume 1 is a comparative overview of conflict of interest policies in public and private sectors workplaces, including the following:

- An overview of definitions of conflict of interest.
- A survey of different approaches to mandating conflict of interest requirements in the public sector, including the Canadian and U.S. federal governments, various Canadian provinces and U.S. states, as well as selected Canadian and U.S. municipalities.
- A survey of different approaches to mandating conflict of interest requirements in the private sector.
- An overview of common compliance provisions.
- An assessment of the effectiveness of conflict of interest policies, including best practices related to institutionalizing ethical behaviour in organizational culture.

Volume 1 is based on reviews of more than 1,500 pages of documents and interviewing 27 individuals including current and former municipal and other government officials, as well as research, academics and other experts. Building on this foundation, Volume 2 will focus on policies currently in place for the City of Toronto, specific conflict of interest-related issues and/or challenges faced by the City, and options and approaches for potential changes to current policies and practices.

Part 2: Origins and Definitions

Origins

Over the past 35 years, there has been an evolution of ethics rules, often layered one over the other in response to scandals. Conflict of interest rules have been part of this movement in both the public and private sectors. The research shows that there is a generally common approach to how the categories of conflict are defined. There is however, considerable variation in terms of how these rules are mandated across North America, including:

- Legislation for elected officials, often with separate statutes applying to different branches of government.
- Regulations that provide authority to an independent body or arm of government to enforce conflict of interest rules.
- Administrative policy, directives, and/or guidelines.
- As part of a broader set of policies and standards that establish organizational values and overall direction for ethical behaviour, commonly known as “codes of conduct”.

Definitions

In the public sector, the provisions of conflict of interest policies generally attempt to ensure that elected officials and employees do not benefit personally beyond what would be normally be considered a regular benefit of the job. In the private sector, the rules are very similar, although the emphasis is on the interests of the corporation and commercial matters as opposed to the public interest. Policies typically include rules related to the use of insider information, trading information with competitors, or use of company property.

Clarifying Conflict

Conflict of interest is generally thought of as any situation involving hidden "self-dealing", "related-party transactions", "non-arms length relationships", or "serving two masters" that results in gain to one party at the expense of another. In the public sector, particularly in relation to elected officials, there have been attempts made to define conflict even more precisely. With respect to employees, broad principles are more likely to be offered than specifying when a conflict could arise. This approach does not attempt to qualify every eventuality that may surface, but rather puts the onus on the employee to determine the ethics of the situation.

Clarifying Interests

In the public sector, most rules are tailored to the setting so that conflicts that occur are more easily recognizable. Definitions often describe situations where direct or indirect benefits are prohibited. Regardless of the setting, however, the organization, or the target audience, the categories used to define interest were generally consistent, e.g. financial interests, gifts and honouraria, and outside employments interests.

Part 3: Mandating Conflict of Interest Policies - The Public Sector

Regulation in some form, whether through legislation or administrative guidelines, has been the typical response to shaping conflict of interest rules in the public sector. Two approaches have been taken in Canada and the U.S.:

- Legislated and non-legislated standards to govern the conduct of elected officials.

- The use of policies, guidelines, directives or other measures to govern public sector employees.

Government of Canada

Elected Officials

There is no single piece of overarching legislation that applies to all elected officials. The *Parliament of Canada Act* is the key piece of legislation that prohibits Senators and members of the House of Commons from engaging in activities that might create a conflict of interest. The Ethics Counsellor administers the Code with respect to Cabinet Ministers including ensuring that the appropriate disclosure of personal interests is made.

The Code sets out a two-pronged approach to disclosure that includes confidential disclosure to the Ethics Counsellor of all assets and contingent liabilities and public disclosure of declarable assets. These requirements do not apply to Senators or members of the House of Commons. In the fall of 2003, federal proposals to make the office of the Ethics Counsellor more independent and to encompass both Senator and MPs under its authority were rejected by the Senate, particularly in relation to financial disclosure.

Public Servants

The federal government's rules for public servants are captured in the document *Values and Ethics Code for the Public Service* – one of the most thorough documents reviewed for this report. The *Code* emphasizes the values of the public service and how these values should be used to guide behaviour. The *Code* includes examples of specific conflict situations and requires public servants to report confidentially all outside activities assets, and direct and contingent liabilities that might give rise to a conflict of interest. The *Code* also

allows individual departments to customize requirements to meet their particular needs.

U.S. Federal Government

Disclosure

Disclosure of personal interests has been the focus of many public integrity initiatives in the U.S. since the late 1970's as a way to achieve greater accountability on the part of elected officials. The current approach to financial disclosure is seen in the U.S. as the basic tool for identifying real, perceived, or potential conflicts of interest and working out how to manage these conflicts.

Most often, financial disclosure statements reflect an individual's personal financial information for the previous calendar year. Along with personal information, individuals must disclose certain types of investments, sources of income, businesses, etc. in which the filer is an officer or board member, sources of gifts, real estate investments, and creditors and debtors. Some filers are also required to disclose sources of travel expenses, and certain sources of meals, food, and beverages, incurred in connection with official duties.

In the U.S., most of the rules at the federal, state, and municipal level require public disclosure of interests on a regular basis, with reports needed to be available to anyone wishing to review them. At the federal and state level, financial disclosure statements are posted on government websites.

Elected Officials

Detailed rules to govern the conduct of government officials in both the Executive and Legislative Branches have been developed. In 1995, both the House and

Senate adopted specific gifts rules for members and staff based on the existing *Standards of Conduct for the Executive Branch*, including guidance on gifts, conflicting financial interests, impartiality, seeking employment, misuse of position and outside activities.

Separate legal requirements apply to, and are independently administered and enforced by the Senate and House of Representatives through standing committees. In the Judicial Branch, ethics matters such as the financial disclosure system are administered by the Judicial Conference of the United States.

Public Servants

The U.S. federal government uses regulation in the form of Executive Orders to define conflict of interest policies for public servants. These policies are most often expressed in codes of conduct. These are administered by the Office of Government Ethics.

The current *Ethical Conduct for Employees of the Executive Branch* policy applies to all officers and employees in Executive Branch agencies and departments. This policy is intended to establish a standard for employees throughout the Executive Branch. At the same time, individual departments and agencies may supplement these standards with additional requirements that are tailored to meet agency/department-specific needs. Areas addressed in supplemental department/agency standards include prohibited financial interests, prohibited outside activities, and prior approval of outside activities.

Each Executive Branch department or agency is required to maintain a program of ethics training to ensure that all of its employees are aware of the requirements of the conflict of interest laws and the standards of conduct. Many

agencies also provide ethics briefings to employees who are leaving government service.

Canadian Provinces

All Canadian provinces have put in place some form of conflict of interest legislation. As part of ensuring compliance, each province has established an independent oversight body – known variously as Conflict of Interest Commissioners, Integrity Commissioners, and Ethics Commissioners – with responsibility for reviewing ethics issues for MPP/MLAs depending on the legislation in force. There is general consistency in terms of the role and function of the ethics oversight authority and in the categories/definitions included to describe conflict.

In a number of provinces, the rules for the receipt of gifts by MPPs are very specific in terms of the primary focus being on financial gain and the monetary value of the gain, including gifts. In some provinces, the principles and rules that have been developed for elected officials have been used as a prototype to set similar standards for public servants, e.g. Alberta and British Columbia. While most provinces have chosen to embed their conflict of interest rules for public servants in policies, directives, and guidelines, as opposed to legislation, Nova Scotia uses the *Members and Public Employees Disclosure Act* as the vehicle by which conflict of interest rules for both members and public servants are expressed.

Ontario has not established a code of conduct for its public servants. Its *Rules of Conduct for Public Servants* are specified under the *Public Service Act* and accompanying Regulation 435/97 and complemented by policy directives.

U.S. States

Most U.S. states express their conflict of interest rules in legislation. These statutes usually apply to both members of the legislature and the public service. This is consistent with the greater emphasis in U.S. public administration on statute-based administrative policy. Unlike Canadian jurisdictions, many states require disclosure of personal interests for public servants who earn over a certain threshold. In part, this reflects the fact that in most U.S. jurisdictions, the top two layers of the public service are political appointees who are required to resign automatically when the administration changes.

Most U.S. jurisdictions have established arms-length ethics boards or commissions. Thirty-nine states have established two oversight bodies – a legislative committee and an arms-length commission as part of ensuring that there will be independent, external monitoring of ethical conduct in government. In the eleven states that do not have a separate ethics commission or board, oversight is through other state agencies such as the Office of the Secretary of State or Attorney General.

In terms of the incidence of conflict at the state level, the research indicates that 41 out of the 50 legislatures are run by part time elected officials who meet only a few months each year and draw salaries that average about $18,000 annually. This compares with those states that had full-time officials with average annual salaries of $57,000. Researchers concluded that conflict of interest was inevitable in states where elected officials were making such a small salary, since they needed to find income from other sources. They also found that when not in session, elected officials often had no choice but to follow careers that were regulated by the states.

Canadian Municipalities

All Canadian provinces have legislation in some form that governs conflict of interest matters respecting members of municipal councils. This can be part of more general legislation governing municipalities or a separate statute dealing specifically with conflict of interest. Municipal conflict of interest legislation in Ontario, Nova Scotia, Manitoba, and Alberta is focused solely on elected officials rather than municipal staff. This legislation serves as a backdrop for more individualized by-laws and codes of conduct that are developed locally and tailored by the municipality in response to local issues and needs.

There are differences between and among provinces in terms of the detail of the various definitions provided in provincial legislation. In some provinces, the definitions are provided at a high level. In others, the definitions and practical description of potential conflicts are much more detailed and in some cases, such as Nova Scotia, quite specific.

U.S. Municipalities

Many states have overarching legislation that sets the standard for conflict of interest policy in municipalities. Often there is some type of financial disclosure legislation that requires certain individuals, officials and candidates for elected office to file statements of financial interests. In states that do not have legislation in place that specifically speaks to conflict of interest, there is usually some generic statute that requires the municipality to develop their own local conflict of interest policies. As part of these internal policies, most municipal organizations provide scenarios for their employees to help them to understand the rationale behind the rules and include provisions dealing with former employees.

Part 4: Mandating Conflict of Interest – the Private Sector

Conflict of interest policy is usually conveyed in the private sector as policy documents in the form of codes of conduct. A review of a number of corporate codes indicates that there is great variance in the way these statements are drafted. However, these codes generally contain elements that are similar to public sector codes, e.g. broad statements of principle that the organization attempts to advance for its employees, and definitions of conflict of interest as a means of providing the context in which employees will make decisions about ethical behaviour.

Many private sector codes use a case study approach as a way to illustrate examples of conflict of interest situations and as a way to help employees understand the meaning and intent behind the rules. This typically includes posing questions for employees to help them to distinguish what might be a conflict in certain situations. Many corporations also rely on committees or task forces to oversee the ethics initiatives in the organization, lend legitimacy to the ethics agenda, and communicate the organization's commitment to employees.

Part 5: Achieving Compliance

Public Sector

At the federal and provincial level, the most common approach to ensuring compliance with conflict of interest legislation or codes of conduct is usually through the establishment of an ethics or integrity commissioner. In most cases, these bodies review and adjudicate on conflict cases, recommend how conflicts

should be resolved, provide ongoing guidance, and ensure consistent application of the rules. At the federal level in Canada, the Ethics Counsellor reports to the Prime Minister and currently focuses on advice to members of Cabinet. The provinces have created commissioners who are officers of the legislature, usually with significant investigatory powers, who are designated to provide advice to both Cabinet members and members of the legislature.

Codes of conduct for public servants emphasize disclosure at the time a real or apparent conflict arises as the first step in the process, with a view to allowing the employer to participate in the decision as to which interests may lead to conflicts (and, as suggested in the research, providing some level of protection for the employee if s/he has made an honest error in judgment). While the ultimate responsibility rests with the employee to identify a possible or real conflict, management most often provides opportunities to disclose the interest and discuss possible lines of action. Designated parties will review disclosure forms to determine if there is a conflict of interest and advise employees of appropriate actions.

Private Sector

Codes of conduct for the private sector also emphasize disclosure of potential or real areas of conflict to management as the first step. How supervisors then deal with the disclosures varies somewhat from organization to organization. Most often, there is a committee or department where employees are instructed to discuss confidential matters of conflict. Monitoring of employee compliance with the conflict of interest regulations is also commonly seen as a direct line management responsibility, in addition to or instead of ethics advisors.

In cases where a real conflict exists, common organizational responses range from counselling, oral/written warnings, formal reprimands, suspensions with or without pay, and dismissal. However, the universally preferred approach is to

encourage awareness of employer concerns regarding conflict of interest situations and provide strategies to assist employees to avoid conflict situations.

Part 6: Ensuring Effectiveness

Do Conflict of Interest Rules Work?

Few if any empirical studies prove a correlation between ethics regulation and the behaviour of public officials and trust in government. The research, however, strongly supports the notion that conflict of interest rules, whether set out in legislation or in policy, are an important part of creating an ethical environment because they provide guidelines for ethical behaviour.

Yet, the proliferation of ethics laws has not translated into a high level of public trust. Studies have found a steady decline in confidence from more than 60 percent in the early 1960s to less than 30 percent by the year 2000. At the same time, experts generally suggest that the bulk of elected and non-elected public officials in fact do act ethically but that efforts to "over-regulate" with increasing levels of detail usually become progressively less effective and can actually damage public confidence.

Experts emphasize that having clear guidelines that shape organizational culture are essential because they provide a frame of reference that has an impact on behaviour. Consistent with this emphasis on shaping behaviour, the process of developing codes of conduct and conflict of interest rules and making them part of every aspect of the organization's culture, is as important as the content of the rules themselves.

Institutionalizing Ethical Behaviour

The importance of culture and values for guiding employee behaviour is strongly emphasized in the research. A key starting point is that the entire organization must agree on the importance of ethical behaviour, and, more importantly, there must be a collective standard for the entire organization to follow. It is also clear that successful institutionalization takes place over years rather than weeks or months. This typically requires a sustained effort to ensure that that ethics and standards of ethical behaviour are clearly and formally made part of every aspect of the organization.

Key best practice components from the research include:

- *Ensuring Management Commitment to the Ethics Process:* The literature stresses that management needs to be a visible example in demonstrating the organization's belief in ethical behaviour. This includes guiding the process of developing, ongoing communication, the creation of ethics "champions", as well as demonstrating clear and explicit consequences for unethical behaviour.
- *Articulating the Organization's Values:* The research confirms that it is essential to communicate the core values of the organization so that employees understand what is fundamentally important to the organization. This process of reflection and dialogue is seen as one of the most important aspects of creating an ethical organization and is a key to successful implementation.
- *Organizational Analysis:* Experts emphasize a thorough analysis of the culture and/or ethical climate of the organization against the desired values/guiding principles. The purpose of this review is to determine organizational readiness, i.e. the extent to which current policies, culture, behaviour, structures, etc. are aligned or not aligned with the new vision of the future.

- *Training:* Ongoing training emerges as a key component of institutionalizing ethics in the workplace. Training typically also involves statements from senior management emphasizing ethical business practices, discussions of the corporate code of ethics, case studies, commendations, or other public acknowledgement of good ethical behaviour by employees).
- *Follow-up:* Follow-up refers to monitoring change, evaluating the results, and ultimately determining whether institutionalization of the desired behaviour has taken place within an organization.

Part 7: Conclusion

In the present day, most organizations have some form of conflict of interest policy, although varying in complexity and comprehensiveness. A central conclusion from the research is that there is a basic or common approach across all of these jurisdictions with respect to how the categories of conflict and specific instances of conflict are defined. In generally consistent terms, they describe the values of the organization and set the tone for ethical behaviour. There is, however, considerable variation in terms of how these rules are mandated.

With respect to municipalities, most Canadian provinces and many U.S. states have legislation in some form that governs conflict of interest matters respecting members of municipal councils, as part of more general legislation or as a separate statute dealing specifically with municipal conflict of interest. In general, governing legislation sets out the requirement that municipalities have conflict of interest policies in place. Some jurisdictions go further to provide more explicit direction, particularly in the U.S. where state legislation is often highly detailed in terms of municipal requirements. Municipalities in the U.S. and Canada do not generally use arm-length oversight bodies.

The research confirms that conflict of interest policies and codes can be effective but not as standalone measures. The importance of culture and values for guiding employee behaviour emerges from the research as paramount. Rather than emphasizing specific policies or statutes, successful organizations are recognizing the importance of developing a "framework of ideals that influence individual behaviour and characterize an organization".

As such, the real determinant of success is effective implementation. Consistent with Change Management theory, the research emphasizes that the process of developing codes of conduct and conflict of interest rules and making them part of every aspect of the organization's culture, is as important as the content of the rules themselves. The requirements for sustained institutionalization of desired behaviours are well documented in the research.

The notion of *practical/real-world* examples emerges from the research as a dominant best practice. This includes providing individuals with interpretative information as well ongoing opportunities to discuss issues, concerns, and examples. Compliance and enforcement efforts also emerge as an important best practices area. As posed by experts, the central question and test of effectiveness in this area is whether there is a willingness to consistently hold people accountable for their actions. Finally, the research is also clear that even in a best practices organization, successful institutionalization cannot be achieved overnight. Often it takes place over years rather than weeks or months.

Part 1
Introduction

"Ethics. It's the defining issue for today's organizations. Governments, companies, professional firms and individuals alike are being held increasingly accountable for their actions, as demand grows for higher standards of corporate social responsibility. Today we are judged not only on the financial performance of our organizations, but also on whether we are good corporate citizens. And at the heart of corporate citizenship is organizational ethics." (Canadian Centre for Ethics and Corporate Policy)

Focus and Structure

Volume 1 is the first of two research reports on conflict of interest. It is a comparative overview of conflict of interest policies in both public and private sector workplaces, including the following sections:

- An overview of definitions of conflict of interest.
- A survey of different approaches to conflict of interest in the public and private sectors, including the Canadian and U.S. federal governments, various Canadian provinces and U.S. states, as well as selected Canadian and U.S. municipalities.
- A summary of conflict of interest approaches and practices in the private sector.
- An overview of approaches to compliance and enforcement related to conflict of interest policies.

- An assessment of the effectiveness of conflict of interest policies, including best practices related to institutionalizing ethical behaviour in organizational culture.

Volume 1 focuses primarily on the ethical issues associated with conflict of interest that can be dealt with through employment policies and sanctions. It does not attempt to address matters that would be considered offences under the *Criminal Code* (e.g. bribery, fraud).

Building on this foundation, Volume 2 will focus on policies currently in place for the City of Toronto, specific conflict of interest-related issues and/or challenges faced by the City, and options and approaches for potential changes to current policies and practices.

Research Approach

The preparation of Volume 1 included reviewing over 1,500 pages of documents and interviewing 27 individuals including current and former municipal and other government officials, as well as researchers, academics and other experts.

Documentary resources focused on publicly available material (either in print or electronic format), including legislation, government and private sector reports and research/policy documents, academic and other expert analysis/writings, opinion pieces, etc.

Part 2
Origins and Definitions

Origins

According to historians, the 1970's marked the beginning of an era of heightened public concern about and interest in ethics in government in both Canada and the U.S. This included growing pressure on government for ethics-related legislation and programs, including conflict of interest rules, campaign financing, and lobbyist registration. Prior to the 1970's, ethical issues did not feature as prominently on the public landscape. This is not to say that ethics related issues did not exist, but rather that public awareness and concern were not as acute.

During the 1970's, the Watergate scandal is noted as representing a major watershed in the U.S. ethics debate. Academics have suggested that in the wake of this scandal, the American public began to assume and accept as a given that there were problems with government. In light of increasing public pressure, the response of many legislatures was to put even further emphasis on ethics regulations, including conflict of interest polices and codes of conduct in order "to be seen to be" addressing the issues.

Some academics note that the move towards more ethical policies and practices was also, in part, a response to what has been described as the general revitalization of state legislatures during the 1970's and 80's. This revitalization has been characterized as a form of "professionalization" as part of which legislators increased the time spent on their tasks, established or expanded their staffs, streamlined procedures, enlarged their facilities, and put more focus on their ethics, including finances (e.g. campaign finances, gifts, etc.) and conflicts of interest. As part of this general development, legislators across North America took steps to codify more precisely what was meant by honest public service

and, in some cases, to create agencies to interpret and enforce these new ethics laws. In the early 1970's, the Canadian federal government first put forward a package of ethics rules that applied to both elected officials and public servants.

Over the past 35 years, there has been an evolution of ethics rules, often layered one over the other usually in response to scandals. Conflict of interest rules have been part of that movement in both the public and private sectors. The research shows that there is a surprisingly common approach to how the categories of conflict are defined. There is, however, considerable variation in terms of how these rules are mandated across North America, including:

- Legislation for elected officials, often with separate statutes applying to different branches of government.
- Regulations that provide authority to an independent body or arm of government to enforce conflict of interest rules.
- Administrative policies, directives, and/or guidelines.
- As part of a broader set of policies and standards that establish organizational values and the overall context for ethical behaviour, commonly known as "codes of conduct".

The latter are generally broader than conflict of interest policies, most often describing the values of the organization and setting the tone for ethical behaviour. Codes of conduct typically include practical descriptions of what would be considered unethical behaviour or situations of conflict.

The code of conduct model of establishing organizational ethics has gained popularity in the public sector over the last fifteen years. In Canada, codes of conduct are in place federally and in many provinces and municipalities. The private sector experience with codes of conduct generally predates that of the public sector. A handbook on ethics and codes of conduct for the private sector that was encountered during the research for this paper was published in 1924.

Some of the larger U.S. corporations have had codes in place since the turn of the century.

Regardless of how conflict of interest rules are mandated, it is clear that in recent years, and particularly in response to major scandals, governments and businesses are placing greater emphasis on creating formal policy statements that define integrity for employees. These policies usually include principles that lay out organizational values and aim to clarify the kind of ethical behaviour expected of everyone in the organization. The challenge appears, however, to be to define conflict of interest in such a way that it anticipates all of the foreseen and unforeseen situations that may arise. In general, this is recognized as not being possible on a practical level and therefore many of the definitions for conflict of interest have been expanded to include not only rules that guard against unethical behaviour, but also guiding principles intended to encourage high standards of ethical behaviour generally.

Definitions

When one assesses conflict of interest rules, no matter what the target audience or how they are mandated and enforced, the fundamental principle is integrity. This is typically defined as making sure someone being paid to do a job is not personally benefiting from actions taken on the job.

A review of a number of public sector and corporate websites indicates that many organizations have some form of conflict of interest policy, although varying in complexity and comprehensiveness. In the public sector, the provisions generally attempt to ensure that elected officials and employees do not benefit personally beyond what would be normally considered a regular benefit of the job. For example, the U.S. rules for federal employees state that public service is

a “public trust requiring employees to place loyalty to the Constitution, the laws, and ethical principles above private gain”.

In the private sector, the rules are very similar, although with the emphasis necessarily being on the interests of the corporation and commercial matters, as opposed to the public interest. Policies typically include rules related to the use of insider information, trading information with competitors, or use of company property.

This distinction aside, most of the definitions appear to have the same intent regardless of their origins. For example:

- *“Conflict of interest means that the decisions made and/or the actions taken by an employee in the course of the exercise of his or her Corporate duties are or may be affected, or could be seen by another party to be affected by: the employee’s personal, financial or business interests; or the personal, financial or business interests of relatives, friends or associates of the employee”.* (City of Mississauga, Employee Conduct Policy and Procedure)
- *“Conflict of Interest is…any situation where an individual’s private interests may be incompatible or in conflict with their public service responsibilities”.* (Conflict of Interest and Post-Service Directive for Public Servants – Ontario)
- *An employee will be considered to have a conflict of interest where he or she or a member of his or her family has a direct or indirect financial interest in a contract or proposed contract with the City, and where the employee could influence the decision made by the City with respect to the contract. A conflict exists where the employee could directly influence the decision made in the course of performing his job duties, and also where he could indirectly influence the decision through exerting personal*

influence over the decision-maker (Corporation of the City of Burlington, Code of Conduct, Policies and Procedures)

- *"A conflict of interest occurs when personal interests interfere with your ability to exercise your judgment objectively or to do your job in a way that is certain to be in the best interests of our company".* (ITT Industries)

Clarifying Conflict

As suggested in the literature, conflicts of interest in and of themselves are not exceptional or unusual occurrences. People have interests of all sorts and it is seen as unrealistic and unacceptable to expect that simply because someone is a public office holder they could not have outside interests. The dilemma occurs when conflicts of interest are either acted upon or disregarded in situations in which the interest may affect or appear to affect both the process of decision-making and decisions themselves. To put it another way, the interest is only a problem if a person uses her/his position to further a personal interest.

Although it is a daunting task to try to define every instance where a conflict could arise, attempts have been made to clarify the definition. Conflict of interest is generally thought of as any situation involving hidden "self-dealing", "related-party transactions", "non-arms length relationships", or "serving two masters" that results in gain to one party at the expense of another. Simmons (1999) developed a definition of conflict of interest for use in private sector organizations, although it has broader application:

"The convergence between an individual's private interests, obligations, relationships and his and his or her professional obligations to the organization:

- *Such that an independent observer might reasonably question the motive, actions and outcomes regarding decisions made or actions taken by the individual, as a director, officer or employee.*
- *Such that an independent observer might reasonably question the motive, actions and outcomes regarding decisions made or actions taken by the individual, the individual's immediate family; or a third party or organization in which the individual or the individual's immediate family has a business interest or association, receives any "thing of value" as a result of decisions made or actions taken by the individual as a director, officer or employee of the organization."*

What Are "Things of Value"?

Simmons (1999) also developed a definition of "things of value", again for use in the private sector, but also with potential broader applicability:

"Things of value" usually implies financial gain to an individual. This could mean:

- *Additional salaries, commissions, finder fees, bonuses, or promotions (other than those received as an employee of the organization).*
- *Receipt of automobiles, boats, or any gifts other than those of nominal value; receipt of paid vacations and trips.*
- *Payment of credit card bills or of any other personal expenses.*
- *Receipt of stocks, bonds, annuities or other investments; insurance policies paid for by a third party.*
- *An offer or promise of employment; realization of business profits or increased business value.*
- *Realization of an unfair competitive advantage.*

- *Any other means of compensation or reward other than those provided by the organization to its directors, officers and employees."*

In the public sector, particularly in relation to elected officials, there have been attempts made define conflict even more precisely. As part of his role as Inquiry Judge overseeing the proceedings related to conflict of interest charges against Sinclair Stevens, Justice W.D. Parker defined conflict of interest in three ways: real, potential and inherent conflicts:

- A real conflict is a "…situation in which a Minister of the Crown has knowledge of a private economic interest that is sufficient to influence the exercise of his or her public duties and responsibilities".
- A potential conflict is a where a Minister "…finds himself or herself in a situation in which the existence of some private economic interest could influence the exercise of his or her public duties or responsibilities ... provided that he or she has not yet exercised such duty or responsibility." A potential conflict becomes a real conflict where the Minister does not dispose of relevant assets or withdraw from certain public duties or decisions.
- An apparent conflict is a "…situation that exists when there is a reasonable apprehension, which reasonably well-informed persons could properly have, that a conflict of interest exists, even if, in fact, there *is neither a potential nor a real conflict".*

The literature indicates that further attempts to refine the conflict definition were undertaken by the federal government in its Conflict of Interest Rules for Federal Legislators. These rules specify three types of conflict:

- *Inherent conflict* – Where a conflict arises that is unavoidable. For example, a MP cannot avoid being in a conflict when he is dealing with legislation that could impact him in a general way. There would be no one

to legislate if all public officials declared a conflict because they would be affected by national policy.

- *Representative conflict* – Where a conflict arises when, for example a MP has a personal interest in representing her/his constituency in matters that are important to that constituency (e.g. farming, fishing, and resource development).
- *Conflicts of Interest* – Where an avoidable conflict arises that created real or perceived personal economic gain that substantially affected the independence of the legislator.

In some cases, broad principles are offered to the employee rather than specifying when a conflict could arise. This approach does attempt to qualify every eventuality, but rather puts the onus on the employee to determine the appropriate course of action. As Motorola puts it: *"If you wouldn't want your action to appear in the media, it's probably not the right thing to do".*

Clarifying Interests

Conflict of interest rules are generally seen as a vehicle to help people to scrutinize aspects of their lives to assess where personal interests could result in a conflict. In the public sector, most rules are tailored to the setting as a way to narrow the scope for elected officials or employees so that conflicts are easily identified. Definitions often describe situations where direct or indirect benefits are prohibited.

"Interests" are usually described as personal interests of the individual that might affect her/his ability to carry out the job as impartially as possible. An employee's personal interest could, for example, be considered to be in conflict where the interest "...would be likely to affect adversely the judgment of an employee and

his loyalty to his employer or which the employee might be tempted to prefer to the interests of the employer". *(Revenue Canada, 1987)*

Direct benefit is usually qualified as being of a financial nature. For example, the *Parliament of Canada Act* specifies that "…receiving outside compensation for services on any matter before the House, the Senate or their committees is prohibited". *Indirect benefit* typically involves relationships and who might benefit from the relationship someone has with someone else. For example, the Ontario *Municipal Conflict of Interest Act* specifies that a "…member of municipal council might benefit indirectly on some matters if a family member has a controlling interest in a corporation or is a shareholder".

In carrying out the research for this report, conflict of interest rules for over 100 public and private sector organizations were reviewed. It became obvious quite early in this review that regardless of the setting, the organization, or the target audience, the categories used to define interest were generally consistent:

- Financial Interests – e.g. investments, controlling interests in corporations, shareholder interests, etc.
- Gifts and Honouraria – e.g. receipt of gifts, travel expenses, entertainment etc.
- Outside Employments Interests – e.g. volunteer positions, political involvement, board involvement on a board of directors etc.
- Family Interests – i.e. any of the above categories affecting spouses, children, extended family.

Part 3

Mandating Conflict of Interest Policies: The Public Sector

"If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself."
(James Madison)

Recently, and particularly in the wake of several notable scandals, considerable attention has been paid to ethical issues in the public and private sectors. As noted earlier, organizations are spending more time and effort than ever before trying to create and embed ethical operating values in their workplaces. This has been accomplished in many organizations by putting forward packages of policies, practices, and structures as a way to guide and shape the culture of the organization. This includes requirements that are written in a way that provides practical assistance to elected officials and employees in recognizing where they find themselves in conflict situations.

Conflict of interest policies in the public sector are designed to protect the public interest and to prevent the use of public office for personal gain. It is widely recognized that public officials have a greater responsibility to uphold ethical standards to protect the "public interest". This means that if the public interest is to be protected, the public official must be able to carry out her/his job responsibilities in as ethical a manner as possible. However, it also means that the public must be able to trust that the activities of government are being carried

out in a way that situations of conflict of interest are avoided at all costs. As suggested in a 2001 article in the International Journal of Public Administration:

- *"Serving the public implies a fiduciary undertaking, which places high responsibility on the part of public servants. The public officials are entrusted with power because of the belief that he or she possesses the personal integrity and professional competence to safeguard the public affairs and to promote the public good." (Strategy for Formulation and Implementation of Codes of Ethics in Public Sector Organizations, Rivka Grudstein-Amado, 2001)*

The two most common approaches to mandating conflict of interest policies in Canada and the U.S. have been:

- Legislated and non-legislated standards to govern the conduct of Elected Officials.
- The use of policies, guidelines, directives or other measures to govern public sector employees.

Government of Canada

Elected Officials

Although many attempts have been made to legislate conflict of interest rules for all Members of Parliament, there is no single overarching piece of legislation that applies to all elected officials. This is not to say that there are no rules related to conflict of interest. They exist in two Acts - the *Parliament of Canada Act* and the *Canada Elections Act* – as well as in the Standing Orders of the House of Commons and Rules of the Senate.

The *Parliament of Canada Act* is the key piece of legislation that prohibits Senators and members of the House of Commons from engaging in activities that might create a conflict of interest. Some of the major prohibitions include:

- Providing that a Senator or member of the House of Commons cannot benefit personally from a government contract (Senators are fined $200/per day for every day they are in contravention of this rule).
- Receiving outside compensation for services on any matter before the House, the Senate or their committees (Senators can be fined up to $4,000 if they accept the compensation and if found guilty, the person who offered the compensation faces potential imprisonment).
- Providing that any person holding a government contract or agreement, directly or indirectly would be ineligible to become a member of the House of Commons or Senator. (Note: there is an exception for members who may be shareholders of incorporated companies that have government contracts that have nothing to do with the building of a pubic work).

There is currently no requirement for members to disclose their financial interests through legislation. However, Standing Order 21 of the House of Commons specifies that members are not entitled to vote on questions in which they have direct interests – this is the only requirement that could capture the interests members might have outside of Parliament.

Standing Order 22 also requires members to register all visits that they make outside Canada on government business. Where travel costs are not paid for by the member, the name of the person or group who pays for such travel must be disclosed, with the information maintained in a public registry by the Clerk of the House. There are no comparable provisions for Senators.

Some critics have suggested that Parliament should enact more stringent rules covering conflict of interest. Others are concerned that this move would

dissuade people from running for public office. The difficulty of striking a balance, while also protecting the privacy interests of elected officials, may explain why, since 1978 eight federal bills related to conflict of interest have been introduced and not one has received Royal Assent.

In May 2002, the federal government introduced legislation covering a new set of ethics relates initiatives. The following is a summary of the major elements:

- The creation of a more independent Ethics Commissioner, with an expended role to oversee both Cabinet Ministers and Members of Parliament and reporting directly to Parliament (as compared to the current Ethics Counsellor who reports directly to the Prime Minister and focuses on Cabinet Ministers).
- The creation of a Senate Ethics Officer who, under the direction of the Ethics Commissioner, would administer a Code of Conduct for the Senate and would be required to table an annual report in the Senate.
- A Code of Conduct to be established for both Members of Parliament and Senators.
- The release of the Guide for Ministers and Secretaries of State, which had not previously been publicly available.
- Revised rules for Ministers and Crown corporations, and guidelines to govern ministerial fundraising for personal political purposes.

Enabling legislation on the above proposals was passed by the House of Commons in 2003, but rejected by the Senate, particularly in relation to financial disclosure and the notion that the same Ethics Commissioner would have responsibility for both the House of Commons and the Senate. In light of the recent change in federal Liberal Party leadership, the federal government is reported to be reviewing its options.

Conflict of Interest and Post-Employment Code for Public Office Holders

As noted in the previous section, the key piece of federal legislation that speaks to conflict of interest rules for members of the House of Commons is the *Parliament of Canada Act*. This legislation does not require disclosure of personal interests by Cabinet Ministers, Parliamentary Secretaries, ministerial staff and other senior officials (e.g. full-time Order-in-Council or ministerial appointees such as Deputy Ministers, heads of Crown corporations and members of federal tribunals). However, this information is captured through mandated provisions under the *Conflict of Interest and Post–Employments Code for Public Office Holders* that require the aforementioned public officials to disclose this information. In fact, the primary focus of the Code is on the requirements and compliance measures for disclosure.

Disclosure

Under the general direction of the Clerk of the Privy Council, the Ethics Counsellor is charged with the administration of the Code and ensuring that the appropriate disclosure of personal interests is made. In some cases, this is accomplished through a confidential disclosure, and in other case through a public disclosure, i.e. a publicly accessible registry is maintained by the Ethics Counsellor.)

The Code sets out a two-pronged approach to disclosure that includes:

- Confidential disclosure to the Ethics Counsellor of all assets and contingent liabilities. In the case of Ministers, Parliamentary Secretaries, and Secretaries of State, spouses and dependent children must also disclose assets and liabilities. Confidential disclosure is also expected with respect to “outside activities” that public office holders were engaged in during the two year period before they assumed their official duties (e.g.

philanthropic or charitable activities, involvement as a trustee, executor or power of attorney).

- Public disclosure of declarable assets (e.g. assets that could be directly or indirectly affected as to the value by government decisions or policy) or gifts or hospitality with a value of $200 or more (other than a gift, hospitality or other benefit from a family member or close personal friend).

The Code also includes ten statements of principle that are intended to guide public office holders in making decisions. These principles define ethical behaviour at a high level in relation to upholding high ethical standards, public scrutiny, decision-making, private interests, public interests, gifts and benefits, preferential treatment, insider information, government property, and post employment.

It is important to note that this Code does not apply to Senators and it does not apply generally to all members of the House of Commons. As noted earlier, there have been many attempts to establish better disclosure rules for this broader group of public officials, but to date there has not been full support to move in this direction.

Oversight

One of the biggest criticisms of the Canadian federal approach to oversight is that the Ethics Counsellor reports to the Prime Minister rather than Parliament. Critics of this approach suggest that the Office of the Ethics Counsellor is inherently flawed since there are no checks and balances beyond a confidential report to the Prime Minister. As noted earlier, the federal government recently, (but to date, unsuccessfully) proposed the appointment of a more independent (i.e. direct reporting to Parliament) Ethics Commissioner. This position would be given full investigative powers, in effect making the post similar to the federal Auditor General.

Public Servants

Values and Ethics Code for the Public Service

In 1973, *Guidelines Concerning Conflict of Interest Situations for Public Servants* were issued by the then Treasury Board Secretariat. These guidelines were followed by another set of rules approved in 1985 called *Conflict of Interest and Post-Employment Code for Public Servants.* As of September, 2003 an enhanced set of guidelines were released called the *Values and Ethics Code for the Public Service*.

The Code begins by describing in explicit fashion, the values of the public service and how these values should be used to guide behaviour. These values include:

- *Democratic Values: Helping Ministers, under law, to serve the public interest.*
    - *Public servants shall give honest and impartial advice and make all information relevant to a decision available to Ministers.*
    - *Public servants shall loyally implement ministerial decisions, lawfully taken.*
    - *Public servants shall support both individual and collective ministerial accountability and provide Parliament and Canadians with information on the results of their work.*

- *Professional Values: Serving with competence, excellence, efficiency, objectivity and impartiality.*
    - *Public servants must work within the laws of Canada and maintain the tradition of the political neutrality of the Public Service.*

- *Public servants shall endeavour to ensure the proper, effective and efficient use of public money.*
- *In the Public Service, how ends are achieved should be as important as the achievements themselves.*
- *Public servants should constantly renew their commitment to serve Canadians by continually improving the quality of service, by adapting to changing needs through innovation, and by improving the efficiency and effectiveness of government programs and services offered in both official languages.*
- *Public servants should also strive to ensure that the value of transparency in government is upheld while respecting their duties of confidentiality under the law.*

- *Ethical Values: Acting at all times in such a way as to uphold the public trust.*
  - *Public servants shall perform their duties and arrange their private affairs so that public confidence and trust in the integrity, objectivity and impartiality of government are conserved and enhanced.*
  - *Public servants shall act at all times in a manner that will bear the closest public scrutiny; an obligation that is not fully discharged by simply acting within the law.*
  - *Public servants, in fulfilling their official duties and responsibilities, shall make decisions in the public interest.*
  - *If a conflict should arise between the private interests and the official duties of a public servant, the conflict shall be resolved in favour of the public interest.*

- *People Values: Demonstrating respect, fairness and courtesy in their dealings with both citizens and fellow public servants.*

- *Respect for human dignity and the value of every person should always inspire the exercise of authority and responsibility.*
- *People values should reinforce the wider range of Public Service values. Those who are treated with fairness and civility will be motivated to display these values in their own conduct.*
- *Public Service organizations should be led through participation, openness and communication and with respect for diversity and for the official languages of Canada.*
- *Appointment decisions in the Public Service shall be based on merit.*
- *Public Service values should play a key role in recruitment, evaluation and promotion.*

This 2003 *Values and Ethics Code for the Public Service Code* is one of the most thorough documents reviewed for this report. Written in more practical language, compared to the *Conflict of Interest and Post-Employment Code for Public Office Holders,* the Code:

- Lays out clear rules about conflict of interest situations as they may arise in relation to assets, outside employment or activities, gifts, hospitality and other benefits, solicitation, avoidance of preferential treatment, and post-employment measures. Signing the Code is a condition of employment.
- Requires public servants, at the time a real or apparent conflict arises, to report all related outside activities, assets, and direct and contingent liabilities. A confidential report must be made to a supervisor or deputy head. It is the responsibility of the supervisor or deputy head to try to achieve mutual agreement with the public servant about how to handle the conflict. If there is a breach in the code, the "Public Service Integrity Officer" will receive a report and will review disclosures and can assist the supervisor or deputy head to make recommendations for resolution.

- Clarifies that in most cases, once the public servant has made a confidential report (re assets, receipt of gifts, hospitality or other benefits, or participation in any outside employment or activities that could give rise to a conflict of interest) no further action is required. However, the Code also speaks to instances where it may be necessary for the public servant to "avoid or withdraw from activities or situations that would place the public servant in real, potential or apparent conflict of interest or having an asset sold at arm's length where continued ownership would constitute a real, apparent or potential conflict of interest with the public servant's official duties".

A noteworthy feature of the Code is the obligations it places on supervisors or Deputy Heads to "encourage and maintain an ongoing dialogue on public service values and ethics within their organizations, in a manner that is relevant to the specific issues and challenges encountered by their organizations". In addition, the Code empowers deputy heads to add compliance measures beyond those specified to reflect their department's particular responsibilities or the statutes governing its operations.

U.S. Federal Government

A general conclusion from this interjurisdictional comparison is that public policy in the U.S., including administrative policy, is much more likely to be expressed in legislation than is the case in Canadian jurisdictions, including conflict of interest policies.

In the U.S. there is a wide range of ethics related statutes, oversight agencies, and related initiatives that have been put in place as part of efforts to manage conflict of interest. The result, as described by experts, is "not a clear system of rules, but an inconsistent and confusing patchwork. The result is a Byzantine

array of complex public integrity rules and regulations that vary tremendously" (Witt, 1998).

Disclosure

Much of what is in place in the U.S. focuses on disclosure and rules to guide the conduct of elected officials. Disclosure of personal interests has been the focus of many public integrity initiatives in the U.S. since the late 1970's as a way to achieve greater accountability on the part of elected officials. A public financial disclosure system for the three branches of the U.S. federal government was established by law in 1978. More recent changes were made in the 1989 *Ethics Reform Act*.

The current approach to financial disclosure, based on the principle of transparency, is seen in the U.S. as the basic tool for identifying real, perceived, or potential conflicts of interest and working out how to manage these conflicts. The financial disclosure requirements were established to remind public officials of financial interests that may conflict with their duties, and to assist the public in monitoring potential areas of conflicts of interest of public officials.

Most often, financial disclosure statements reflect an individual's personal financial information for the previous calendar year. Along with personal information, individuals must disclose certain types of investments, sources of income, businesses, etc. in which the filer is an officer or board member, sources of gifts, real estate investments, and creditors and debtors. Some filers are also required to disclose sources of travel expenses, and certain sources of meals, food, and beverages, incurred in connection with official duties.

The *Ethics Reform Act* of 1989 is also seen as an important statute as it expanded the rules on post-employment for members of the House of Representatives and staff when they left government and the receipt of gifts.

The Act is specific on the conflict of interest rules around remuneration. For example, officials shall not:

- Receive outside earned income in excess of 15 percent of annual salary.
- Receive compensation from the practice of a profession that involves a fiduciary relationship or allow the use of their names by a firm or entity providing such services.
- Receive compensation for service as an officer or board member on any association, corporation or other entity, and receive compensation for teaching without prior notification and approval of the appropriate ethics office.

The *Federal Elections Campaign Act* also has strict rules related to disclosure of personal interests in addition to specifying limits on contributions by individuals, political parties, and political action committees.

One of the biggest differences between the U.S. and Canadian approaches to disclosure of private interests relates to how and when the disclosure is made. In the U.S., most of the rules at the federal, state, and municipal level require public disclosure of interests on a regular basis (e.g. before starting a term of office, before elections, following elections, on a regular reporting schedule – e.g. quarterly, semi-annually, or annually). The emphasis here is on "public" disclosure meaning that reports are available to anyone wishing to review them. At the federal and state level, financial disclosure statements are posted on websites, similar to how lobbyist information is posted.

In Canada, the trend appears to be more towards confidential disclosure of interests to an independent body in some cases and public reporting of declarable assets in other cases. The information gathered through disclosure is not as easily accessible in Canada, with very little posted on public websites as is done in the U.S. Disclosure is discussed further in this report under Part 5 – Complying with Codes.

Elected Officials

Detailed rules to govern the conduct of government officials in both the Executive and Legislative Branches have also been developed. *Standards of Conduct* for the Executive Branch provide guidance on such questions as gifts, conflicting financial interests, impartiality, seeking employment, misuse of position and outside activities. In 1995, both the House and Senate adopted similarly specific gift rules for members and staff.

Oversight

One ongoing development in the U.S. has been the establishment of new offices or agencies to promote ethics and financial integrity. These offices and agencies include bodies such as the Federal Elections Commission, the Office of Government Ethics, the Merit Systems Protection Board, and the Office of Special Counsel. Since their establishment, many of these agencies have subsequently been strengthened and/or given enhanced authority.

In a number of areas, separate legal requirements apply to, and are independently administered by each branch of government. In the Legislative Branch, for example, the Senate and House of Representatives have established their own rules of conduct. In the Senate, these are administered by the Select Committee on Ethics. In the House, administration is the responsibility of the

Committee on Standards of Conduct. In the Judicial Branch, ethics matters such as the financial disclosure system are administered by the Judicial Conference of the United States.

Public Servants

The U.S. federal government uses Executive Orders to define conflict of interest policies for public servants. These policies a have generally been incorporated in into codes of conduct.

John F. Kennedy was the first president to issue an Executive Order to "Provide a guide on Ethical Standards to Government Officials". Since then there have been several iterations with each version attempting to refine and clarify potential conflicts and to more comprehensively define the conduct expected of public officials.

In April 1989, President Bush issued Executive Order 12674, *Principles of Ethical Conduct for Government Officers and Employees*. At that time, the Office of Government Ethics was directed to establish a clear and comprehensive set of Executive Branch standards of conduct that were "reasonable and enforceable" to help to clarify conflict of interest rules relating to gifts, conflicting financial interests, impartiality, seeking employment, misuse of position and outside activities.

The result was a new governing policy entitled *Standards of Ethical Conduct for Employees of the Executive Branch.* This policy applied to all officers and employees in Executive Branch agencies and departments and contained general principles intended to guide the conduct of federal employees. The policy was administered by the Office of Government Ethics. In 1995, the Office released a new policy entitled *Ethical Conduct for Employees of the Executive*

Branch that further refined the previous rules and included additional financial disclosure requirements. The document laid out fourteen rules for federal employees as follows:

1. *Public service is a public trust requiring employees to place loyalty to the Constitution, the laws, and ethical principles above private gain.*
2. *Employees shall not hold financial interests that conflict with the conscientious performance of duty.*
3. *Employees shall not engage in financial transactions using non-public government information or allow the improper use of such information to further any private interest.*
4. *An employee shall not, except pursuant to such reasonable exceptions as are provided by regulation, solicit or accept any gift or other item of monetary value from any person or entity seeking official action from doing business with, or conducting activities regulated by the employee's agency, or whose interests may be substantially affected by the performance or non-performance of the employee's duties.*
5. *Employees shall put forth honest effort in the performance of their duties.*
6. *Employees shall make no unauthorized commitments or promises of any kind purporting to bind the government.*
7. *Employees shall not use public office for private gain.*
8. *Employees shall act impartially and not give preferential treatment to any private organization or individual.*
9. *Employees shall protect and conserve federal property and shall not use it for other than authorized activities.*
10. *Employees shall not engage in outside employment or activities, including seeking or negotiating for employment, that conflict with official government duties and responsibilities.*

11. *Employees shall disclose waste, fraud, abuse, and corruption to appropriate authorities.*
12. *Employees shall satisfy in good faith their obligations as citizens, including all just financial obligations, especially those such as federal, state, or local taxes-that are imposed by law.*
13. *Employees shall adhere to all laws and regulations that provide equal opportunity for all Americans, regardless of race, color, religion, sex, national origin, age, or handicap.*
14. *Employees shall endeavour to avoid any actions creating the appearance that they are violating the law or the ethical standards promulgated pursuant to this order.*

The above requirements are enforced through the regular disciplinary process and are intended to establish a standard for employees throughout the Executive Branch. At the same time, individual departments and agencies may supplement these standards with additional requirements that are tailored to meet agency/department-specific needs. Areas addressed in supplemental department/agency standards include prohibited financial interests, prohibited outside activities, and prior approval of outside activities.

Each Executive Branch department or agency is required to maintain a program of ethics training to ensure that all of its employees are aware of the requirements of the conflict of interest laws and the standards of conduct. Agencies are required to provide one hour of ethics training for all new agency employees to acquaint them with the ethical obligations of public service. In addition, certain covered employees are required to receive one hour of ethics training annually.

Finally, although not required by Executive Order, many agencies provide ethics briefings to employees who are leaving Government service, particularly with respect to their obligations under the post-employment laws.

Canadian Provincial Governments

Standards for Elected Officials

All Canadian provinces have established some form of conflict of interest legislation that regulates the actions of elected officials. To ensure that there is compliance, every province has established an independent oversight body – known variously as Conflict of Interest Commissioners, Integrity Commissioners, and Ethics Commissioners – with responsibility for reviewing ethics issues for MPP/MLAs depending on the legislation in force.

A review of provincial legislation highlights the following commonalities in terms of the role and function of the ethics oversight authority:

- Commissioners act as advisors to elected officials to assist them in understanding their obligations and to provide advice with respect to real or potential areas of conflict.
- Elected officials are generally required to meet with Commissioners on a prescribed basis to review the disclosure of the individual's interests and general obligations imposed the legislation.
- Commissioners have the authority to undertake inquiries into alleged contraventions and carry out investigations where required.

- Commissioners are required to make reports to their Legislatures and where there is substance to the allegations, to make recommendations for further action.

The key difference between the federal Ethics Counsellor and the provincially mandated ethics Commissioners is that the provinces have established systems of oversight that are independent of the Premier/Executive and are expected to report to the legislature. Other similarities of provincial Acts include the categories included to describe conflict, e.g.:

- Not using one's position to further one's private interest.
- Not accepting fees or gifts that are connected in any way to his or her duties of the job.
- Not being party to a contract with the government under which the MPP/MLA receives a benefit.
- Not having an interest in a partnership or in a private company that has a contract with the government.
- Not using insider information to further one's private interest.
- Not having worked for the government for a certain period of time (i.e. one year, eighteen months, two years, etc.) before private employment with the government can begin again.

Ontario, through its *Members Integrity Act*, has an additional conflict rule dealing with travel points. If an MPP receives promotional awards or points from airlines, hotels etc. as a result of travel that was reimbursed by the government, the MPP is not allowed to access these points for personal use.

In many provinces, the rules for the receipt of gifts by MPPs are very specific in terms of the monetary value of any gains. For example, in the *Manitoba Legislative Assembly and Executive Council Conflict of Interest Act*, the value of

the private interest or liability must be $250 or more to create a conflict (reduced in 2003 from $500 cap previously in place). Other provinces such as Saskatchewan and New Brunswick have set limits of $250 and $200 respectively on the value of gifts received. Saskatchewan also stipulates that "any fees, gifts or personal benefits received from the same source in a twelve-month period" must be disclosed. Prince Edward Island has set its limit at a $500 value.

In provinces that have specified a "gift threshold" or "gift tip off" amount, there is usually a requirement that a gift over a certain value is to be reported within a certain timeframe and must be disclosed to the appropriate oversight body. In Ontario for example, any item over $200 must be reported through a disclosure statement to the provincial Integrity Commissioner within thirty days. The statement must include a narrative description of the nature of the gift or benefit, its source and the circumstances under which it was given and accepted.

Standards for Public Servants

In some provinces, the principles and rules that have been developed for elected officials have been used as a prototype to set similar standards for public servants. Alberta was a forerunner in this area, through its *Code of Conduct and Ethics for the Public Service*. British Columbia has a similar code in place in its *Standards of Conduct Guidelines for Public Servants*. Both of these codes speak to the responsibilities of the employee, not only as an individual hired to carry out a particular job, but also as someone hired to protect the public interest.

While most provinces have chosen to express their conflict of interest rules in policies, directives, and guidelines, as opposed to legislation, Nova Scotia uses the *Members and Public Employees Disclosure Act* as the vehicle by which conflict of interest rules for both members and public servants are expressed. The Act requires detailed disclosure of interests by members but does not ask

the same of public servants. However, the “designated person” (i.e. Conflict of Interest Commissioner) does have the investigatory power to look into matters of possible contravention for both elected officials and public servants.

In some provinces, conflict of interest policy is defined by specifying exemptions that would not pose a conflict. For example, the *Nova Scotia Members and Public Employees Disclosure Act* exempts any benefit that one would receive that:

- Is of general public application.
- Affects a member as one of a broad class of persons.
- Concerns the remuneration, allowances and benefits of a member as a member.
- Is so remote or insignificant in its nature that it cannot reasonably be regarded as likely to influence the member.

Ontario has not opted to establish a formal code of conduct for its public servants. Instead, its *Rules of Conduct for Public Servants* are specified under the *Public Service Act* and accompanying Regulation 435/97. Complementing these statutory provisions is a Management Board Secretariat directive (Conflict of Interest and Post-Service Directive, 2000) that, in more plain language, sets out clear rules of conduct for conflict of interest and post-service practices that apply to public servants. These rules speak to conflicts as they may arise for the public servant as s/he carries out her/his job and conflicts as they may arise because of familial ties. Ontario has also added rules specifically for senior public servants who are working on matters related to the Ontario SuperBuild Corporation or privatization issues.

As in other jurisdictions, the principles included in the Ontario Management Board Secretariat directive include:

- *Ethical Standards* - Public servants must act honestly and uphold the highest ethical standards. This will maintain and enhance public confidence and trust in the integrity, objectivity and impartiality of government.
- *Public Scrutiny* - Public servants are obligated to perform their official duties and conduct themselves in a manner that will bear the closest public scrutiny. Public servants cannot fulfill this obligation simply by acting within the law.
- *Private Interests* - Public servants shall not have private interests, other than those permitted pursuant to this directive, laws or statutes that would be affected particularly or significantly by government actions in which those public servants participate.
- *Public Interests* - When appointed to office, and thereafter, public servants must arrange their private interests to prevent real or potential conflicts of interest. If a conflict does arise between the private interests of a public servant and the official duties and responsibilities of that individual, the conflict shall be resolved in favour of the public interest.

In terms of gifts, hospitality and other benefits, Ontario has specified that:

- Public servants must refuse gifts, hospitality or other benefits that could influence their judgment and performance of official duties. Public servants must not accept, directly or indirectly, any gifts, hospitality or other benefits from:
    - Persons, groups or organizations dealing with the government.
    - Clients or other persons to whom they provide services in the course of their work as public servants.

There is, however, a general exception that allows for the acceptance of modest gifts and hospitality that in certain situations requiring individual judgement, including gifts and hospitality that is:

- Associated with their official duties and responsibilities if such gifts, hospitality or other benefits are appropriate, a common expression of courtesy or within the normal standards of hospitality.
- Would not cause suspicion about the objectivity and impartiality of the public servant.
- Would not compromise the integrity of the government.

By way of example, Ontario's conflict of interest rules also include a number of additional and generally common requirements:

- Switching Sides: A public servant who has advised the government on a specific proceeding, transaction, negotiation or case shall not upon ceasing employment with the Crown act for or on behalf of any person, commercial entity, association or union in connection with that specific proceeding, transaction, negotiation or case to which the government is a party.
- Outside Activities: A public servant shall not engage in any outside work or business undertaking that is likely to result in a conflict of interest (e.g. interference with the individual's ability to perform his or her duties and responsibilities, an advantage is derived from his or her employment as a public servant where the outside work would constitute full-time employment, where the work might influence or affect the employee's ability to carry out of her or his duties as a public servant, or that involves the use of government premises, equipment or supplies.
- Prohibited Use of Position: Public servants shall not use, or seek to use, their positions or employment to gain direct or indirect benefit for themselves or their spouses, same sex partner or children (e.g. solicit or

accept favours or economic benefits from any individuals, organizations or entities known to be seeking business or contracts with the government, or favour any person, organization or business entity.

- Confidential Information: Public servants shall not disclose any confidential information about any Crown undertaking, acquired in performing of duties for the Crown, to any person or organization not authorized by law or by the Crown to have such information (e.g. benefit directly or indirectly in return for or in consideration for revealing confidential information, or use confidential information in any private undertaking in which they are involved).
- Avoidance of Preferential Treatment: A public servant shall not grant preferential treatment in relation to any official matter to any person, organization, family member or friend, or to any organization in which the public servant, family member or friend has an interest. The public servant must avoid being obligated, or seeming to be obligated, to any person or organization that might profit from special consideration (e.g. offer assistance in dealing with the government to any individual or entity where such assistance is outside the official role of the public servant).
- Procurement: A public servant shall not help any outside entities or organizations in any transactions or dealings in a way that gives confidential information associated with a transaction to any outside entity or organization.
- Political Activity: A public servant shall not engage in political activity at work and must not associate their positions with political activity. A general prohibition in the Ontario Public Service Act warns against engaging in political activity that would place the employee in a position of conflict of interest.
- Taking Improper Advantage of Past Office: A public servant shall not allow prospects of outside employment to create a real or potential conflict of interest (e.g. seek preferential treatment or privileged access to

government after leaving public service, take personal advantage of information obtained through official duties and responsibilities that is not available to the public, use public office to unfair advantage in gaining opportunities for outside employment.

U.S. State Governments

Standards for Elected Officials and Public Servants

While Canadian provinces have generally conveyed their conflict of interest rules through policy directives, most U.S. states express their conflict of interest rules in legislation. These statutes often apply to both members of the legislature and the public service. As noted earlier, this is consistent with the greater emphasis in U.S. public administration on statute-based administrative policy.

South Carolina's State Ethics Commission provides a generic conflict of interest definition that is typical of most states:

- *"No public official, public member, or public employee may knowingly use his official office, membership, or employment to obtain an economic interest for himself, a member of his immediate family, an individual with whom he is associated, or a business with which he is associated.*

Similarly, Michigan has a fairly typical conflict of interest policy that applies to both elected officials and public servants. It states:

- *A public officer or employee shall not divulge to an unauthorized person, confidential information acquired in the course of employment in advance of the time prescribed for its authorized release to the public.*

- *A public officer or employee shall not represent his or her personal opinion as that of an agency.*
- *A public officer or employee shall use personnel resources, property, and funds under the officer or employee's official care and control judiciously and solely in accordance with prescribed constitutional, statutory, and regulatory procedures and not for personal gain or benefit.*
- *A public officer or employee shall not solicit or accept a gift or loan of money, goods, services, or other thing of value for the benefit of a person or organization, other than the state, which tends to influence the manner in which the public officer or employee or another public officer or employee performs official duties.*
- *A public officer or employee shall not engage in a business transaction in which the public officer or employee may profit from his or her official position or authority or benefit financially from confidential information which the public officer or employee has obtained or may obtain by reason of that position or authority.*
- *A public officer or employee shall not engage in or accept employment or render services for a private or public interest when that employment or service is incompatible or in conflict with the discharge of the officer or employee's official duties or when that employment may tend to impair his or her independence of judgment or action in the performance of official duties.*
- *A public officer or employee shall not participate in the negotiation or execution of contracts, making of loans, granting of subsidies, fixing of rates, issuance of permits or certificates, or other regulation or supervision relating to a business entity in which the public officer or employee has a financial or personal interest.*

Many states require disclosure of personal interests for public servants who earn over a certain threshold. Alabama is one of the states to require such disclosure,

i.e. a yearly filing for elected officials or public servants at the federal, state or municipal level who earn more than $50,000/year. Alabama requires that:

- *A statement of economic interests shall be completed and filed in accordance with this chapter with the commission no later than April 30 of each year covering the period of the preceding calendar year by each of the following:*
    - *All elected public officials at the state, county, or municipal level of government or their instrumentalities.*
    - *Any person appointed as a public official and any person employed as a public employee at the state, county or municipal level of government or their instrumentalities who occupies a position whose base pay is fifty thousand dollars ($50,000) or more annually.*

Oversight

A study conducted by the Washington-based Centre for Public Integrity in 2000 and 2001 revealed that all 50 states had conflict of interest rules focusing on ethical conduct, personal financial disclosure and campaign finance disclosure. As already demonstrated, how these rules are mandated varies from state to state. As also demonstrated, however, there is a high degree of consistency between and among the states with respect to the categories of conflict of interest.

Similar consistency exists with respect to oversight. Most U.S. jurisdictions have established arms-length ethics boards or commissions. In fact, 39 states have established two oversight bodies – a legislative committee and an arms-length commission as part of ensuring that there will be independent, external monitoring of ethical conduct in government.

The table on the following page, prepared by the Center for Ethics in Government provides more detail with respect to the key differences in approaches between legislative ethics committees and arms-length ethics commissions/boards.

According to the Washington-based Center for Ethics in Government, many states have two entities to address the same issue of legislative ethics because “the public tends to question the validity of a government who regulates their own ethical conduct”.

In the eleven states that do not have a separate ethics commission (Arizona, Colorado, Idaho, New Hampshire, New Mexico, North Dakota, South Dakota, Utah, Vermont, Virginia and Wyoming) external oversight is through other state agencies such as the Office of the Secretary of State or Attorney General.

Ethics Committees	Ethics Commissions
Members are State Legislators	Members are citizens or public officials appointed by governor or other leaders. Twenty-four states forbid public officials from serving on ethics commissions.
Internal oversight	External oversight
Legislative Branch: Can be a joint committee, or each chamber within the legislature can have its own.	Executive Branch
Duties can include: • Consider their colleagues' violations of ethics statutes • Administering state ethics laws in states without committees • Authoring chambers codes of ethics.	Duties can include: • adopting regulations pertaining to state's ethics laws, providing ethics training, • investigating ethics complaints and determining penalties or issuing advisory opinions • Receiving financial disclosure and lobbyist reporting statements.
Jurisdiction includes only the legislature.	Jurisdiction sometimes includes the legislature, often includes other branches of state government.
Present in some form in all 50 states.	Present in some form in 39 states, having jurisdiction over the legislative branch in 33. (Commissions in Illinois, Indiana, New York, Michigan, Ohio, and North Carolina do not have authority over legislators.)

Potential for Conflicts to Arise

Another key difference between the U.S. states and Canadian provinces is highlighted by a study undertaken in 2000 by the Centre for Public Integrity on the financial interests of elected officials. The study looked at the "natural occurrence of conflicts" for state legislators based on financial disclosure reports from the 47 states where elected officials are required to disclose income, assets and other information about their personal and family finances. They found that 41 out of the 50 legislatures are run by part time elected officials who meet only a few months each year and draw salaries that average about $18,000 annually. This compares with those states that had full-time officials with average annual salaries of $57,000. The researchers concluded that conflict of interest was inevitable in states where elected officials were making such small salaries, since they needed to find income from other sources. They also found that when not in session, elected officials often had no choice but to follow careers that were regulated by the states.

According to an analysis of financial disclosure reports filed in 1999 by 5,716 state legislators, the Centre for Public Integrity found that:

- More than one in five sat on a legislative committee that regulated their professional or business interest.
- At least 18 percent had financial ties to businesses or organizations that lobby state government.
- One in four received income from a government agency other than the state legislature, in many cases working for agencies the legislature funds.

Despite the overwhelming number of real and potential conflicts of interest, the Center has argued that the real numbers in all likelihood are actually much higher

since the Center's analysis only takes into account those states that require disclosure.

The Centers' study could be taken to mean that Canadian jurisdictions with full-time legislators (federal government, provinces, and larger municipalities) would have a lower incidence of real or perceived conflicts.

Canadian Municipal Governments

Most Canadian provinces have legislation in some form that governs conflict of interest matters for members of municipal council. This can be part of more general legislation governing municipalities or a separate statute dealing specifically with conflict of interest.

Municipal conflict of interest legislation in Ontario, Nova Scotia, Manitoba, and Alberta is focused solely on elected officials rather than municipal staff. Most often, the purpose of this legislation is to convey the rules about disclosure of personal interests. This legislation serves as a backdrop for more individualized by-laws and codes of conduct that are developed locally and tailored by the municipality in response to local issues and needs.

Ontario's experience is reflective of other Canadian local jurisdictions in this regard. The *Municipal Conflict of Interest Act* is an overarching piece of legislation that sets out conflict of interest and disclosure of personal interests requirements for municipalities. Many municipalities have taken that legislation one step further by creating more detailed conflict of interest rules (approaches in place for Mississauga, Burlington, and Ottawa will be discussed in the following section).

While legislation guiding municipal conflict of interest exists in Ontario, there have been some criticisms of the definitions. One of the criticisms is that the Act does not provide a clear definition of what is meant by a "financial interest". There are definitions for indirect interests – e.g. if the council member is a shareholder of a company in a matter before council or pecuniary interests – e.g. the interests of a family member. However, the Act does not specify what constitutes a conflict or a direct pecuniary interest. As described in a 1990 Ministry of Municipal Affairs discussion paper, there has been some concern that "financial involvement may occur in a significant way and with significant potential for personal gain outside of the restrictions of the Act. A member may have some financial opportunity or obligation or shares in a business interest that are involved in a council decision and not be required to declare a conflict."

Other provinces offer more explicit definitions. Saskatchewan defines pecuniary interest as "financial profit from a decision of council". New Brunswick makes clear that a conflict of interest exists if an "interest in a matter" before council would be of "financial benefit". The acceptance of gifts, gratuities or other benefits, as well as the use of insider information for position or gain is also prohibited. Manitoba specifies that a direct pecuniary interest include "a fee, commission, or other compensation paid for representing interests of another person, corporation, partnership, or organization".

Nova Scotia's *Act to Prevent Conflict of Interest in the Conduct of Municipal Government* lays out very specific rules related to pecuniary and indirect interest for members of council, by way of exemption – that is to say, it is aimed at detailing those instances where the Act does not apply. For example:

- *"The Act does not apply to any interest in any matter that a member may have:*
    - *As an elector.*

- *By reason of being entitled to receive any service, commodity or other benefit offered by the municipality or local board in like matter and subject to the like conditions as are applicable to persons who are not members.*
- *By reason of purchasing or owning a debenture or other security issued by the municipality or local board.*
- *By reason of having made a deposit with the municipality or local board, the whole or part of which is or may be returnable to the member in like manner as such a deposit is or may be returnable to other electors.*
- *By reason of being eligible for election or appointment to fill a vacancy, office or position in the council or local board where the council or local board is empowered or required by any general or special Act to fill such vacancy, office or position.*
- *By reason of being eligible for appointment, or having been appointed, by the council to a local board.*
- *By reason only of being a director or senior officer of a corporation.*
- *By reason of having been appointed by the council or local board to a board, committee or other body.*
- *With respect to any allowance, honorarium, remuneration, salary or benefit to which the member is or may be entitled by reason of being a member or by reason of having been appointed, by the council or local board, to a local board or other board, committee or other body.*
- *By reason of having a pecuniary interest that is an interest in common with electors generally.*

- *By reason only of an interest that is so remote or insignificant in its nature that it cannot reasonably be regarded as likely to influence the member."*

The legislation also requires that in instances where a council member has contravened the Act and has received personal financial gain, a judge can fine the member no more than $25,000 (if the member does not pay the fine, s/he would face imprisonment of up to twelve months).

Disclosure and Withdrawal

New Brunswick, Manitoba, and Quebec require mandatory disclosure statements. Alberta, Newfoundland, and Saskatchewan allow councils to decide if members should complete a disclosure statement. Manitoba, New Brunswick, Alberta, and Nova Scotia require their members to withdraw from public as well as "in camera" sessions.

Under the Ontario legislation a member is required to orally declare and describe a financial interest in a matter before the council or the local board, and withdraw from the decision making process. In withdrawing from the process, the member is prohibited from trying to influence the process before, during or after a meeting of the council or board, but the legislation is unclear about how long before the meeting and whether discussions with municipal staff would constitute trying to influence the process. The member must also leave the meeting room if the session is in camera. There are, however, no guidelines given with respect to the form and extent of disclosure. Therefore, it is left up to Councils or individual Councillors to decide whether disclosure is required or not.

Alberta provides thorough guidelines for its members as a way to explain the *Municipal Government Act*. Included are descriptive guidelines intended to assist the member understand how he should disclose situations of conflict:

Alberta Example 1

"… you may not take part in the decision-making on any matter in which you have a pecuniary interest. The legislation attempts to ensure that you are not discriminated either for or against by virtue of your membership on the council.

If you have a pecuniary interest:

- *you are to disclose that you have an interest and its general nature*
- *you are to abstain from any discussion of the matter and from voting*
- *you are to leave the room until the matter has been dealt with, and*
- *you should make sure that your abstention is recorded in the minutes.*

For example, you might say "Mr. Mayor, I am abstaining on this matter because I am a shareholder in the company. I am leaving the room and I ask that my abstention be recorded." If the matter is the payment of an account for an expenditure which has already been committed (for example, payment for gas for town vehicles which were filled up at the service station where you work), you must abstain but you don't have to leave the room.

In this case, if accounts are presented to your council for approval of payment, you would ask to have Cheque No. 123 excepted from the general approval motion. You can vote on the remainder of the list and then when Cheque No. 123 is considered, you might say, "Madam Reeve, I am abstaining from this matter because I am an employee of the service. I ask that my abstention be recorded in the minutes."

If the matter is one in which you, as an elector or property owner, have a right to be heard by council (for example, a land use bylaw amendment, lane or street closure, etc.), you are to disclose your interest and abstain but you may remain in the room to be heard by the council in the same manner as any person who is not a member of the council. In this case, you should follow the procedure required of any other person to be placed on the list of delegations to be heard by the council. When the matter comes up for hearing, you might say "Madam Mayor, I am abstaining from this matter because I own the property affected. I ask that my abstention be recorded."

You should then leave the council table and go to the area where the public sits. The mayor should call you to make your presentation in the same manner as any other person. You should state your case, answer any questions that may be posed to you and then be seated for the remainder of the public hearing.

When the council debates the matter it would be advisable to leave the room during the decision-making process.

Alberta Example 2

Although there is no prohibition on doing business with the municipality when you are a member of the council, every contract or agreement with the municipality in which you have an interest must be approved by council (section 173). So, if your council has delegated purchasing authority to the administration, it is important that those officials know of any business interests that you have and that you make sure the council approves of any contract with your business. You cannot raise the matter

in council but, if you submit a bid or offer, you can note that the matter must receive council approval. If it doesn't, you may be disqualified and the contract has no force or effect.

Of the provinces and states reviewed for this report, Manitoba's *Municipal Council Conflict of Interest Act* has one of the most specific disclosure requirements for council members. The Act specifies that detailed financial statements of assets and interests are to be disclosed *"... not later than the last day in November of each year, and in the case of The City of Winnipeg, not later than the fourth Wednesday in November of each year…*" Financial disclosure includes:

- *All land in the municipality in or in respect of which the councillor or any of his dependants has any estate or interest, including any leasehold estate and any mortgage, license, or interest under a sale or option agreement, but excluding principal residence property.*
- *Where the councillor or any of his dependants holds a beneficial interest in, or a share warrant or purchase option in respect of, 5 percent or more of the value of the issued capital stock of a corporation, all estates and interests in or in respect of land in the municipality held by that corporation or by a subsidiary of that corporation.*
- *The name of every corporation, and every subsidiary of every corporation, in which the councillor or any of his dependants holds a beneficial interest in 5 percent or more of the value of the issued capital stock, or holds a share warrant or purchase option in respect of 5 percent or more of the value of the issued capital stock.*
- *The name of every person, corporation, subsidiary of a corporation, partnership, or organization which remunerates the councillor or any of his dependants for services performed as an officer, director, manager, proprietor, partner or employee.*

- *Bonds and debentures held by the councillor or any of his dependants, excluding bonds issued by the Government of Canada, by the government of any province of Canada, or by any municipality in Canada, and also excluding Treasury Bills;*
- *Holdings of the councillor or any of his dependants in investment funds, mutual funds, investment trusts, or similar securities, excluding Retirement Savings Plans, Home Ownership Savings Plans, accounts and term deposits held in banks, credit unions, or other financial institutions, pension plans, and insurance policies.*
- *Any interest in property in the municipality to which the councillor or any of his dependants is entitled in expectancy under any trust, and any interest in property in the municipality over which the councillor or any of his dependants has a general power of appointment as executor of a will, administrator of an estate, or trustee under a deed of trust.*
- *The nature and the identity of the donor, of every gift given to the councillor or any of his dependants at any time after the coming into force of this Act.*

Ontario Examples

Using provincial legislation as the backdrop for rules to guide the behaviour of elected officials, many municipalities have applied the same principles to employees. These rules are usually found in municipal policies or codes of conduct. A review of rules set out by a number of municipalities in Ontario did not reveal any requirements for mandatory financial disclosure by municipal employees. For elected officials, the usual approach is for the official to withdraw from Council discussions of a matter that poses a conflict.

Mississauga, for example, has developed two policies that speak to the city's conflict of interest policy.

- The first is a "Standard of Behaviour" that defines unacceptable behaviour both on and off duty. The first example of unacceptable behaviour noted is "the failure to disclose a conflict of interest" (other examples include: theft, fraud, unlawful harassment of an individual, excessive absenteeism or lateness, possession or working under the influence of alcohol or illegal drugs, misrepresentation or falsification of employee records etc…).
- The second is the conflict of interest policy which defines conflict of interest in the following terms:
    - *… that the decisions made and /or the actions taken by an employee in the course of the exercise of her/his duties are or may be affected, or could be seen by another party to be affected by:*
        - *The employee's personal, financial or business interests.*
        - *The personal, financial or business interests of relatives, friends or associates of the employee.*
    - *Situations which might result in a conflict of interest include, but are not limited to:*
        - *Engaging in outside employment.*
        - *Having access to confidential information or other City property.*
        - *Accepting favours or gratuities from those doing business with the City.*

One of the differentiating aspects of conflict of interest rules developed by municipalities is how compliance and enforcement is handled. Unlike the steps

that have been taken at the Canada and U.S. federal and provincial/state levels, there are typically no “independent ethics authorities” or “oversight agencies” to address matters of compliance and enforcement. In many ways, the municipal approach to this is quite similar to the approach taken in the private sector – that is, if there is a breach of conflict, disciplinary action will be imposed by supervisory/management staff or, in the case of elected officials, by Council itself.

In Mississauga for example, management will:

- “…consider the circumstances under which the behaviour occurred, the level of responsibility of the employee, and whether the employee should have known that the behaviour was not acceptable when determining appropriate disciplinary action.”

Disciplinary action may be progressive (verbal warning, followed by written warning, followed by suspension and possible dismissal) or, where the conduct is more serious, it may take the form of immediate suspension from or termination of employment.

The City of Burlington has developed a Code of Conduct to guide the behaviour of its employees. It begins with a preamble:

- *Employees of the Corporation of the City of Burlington are expected to adhere to the highest standards of personal and professional competence, integrity and impartiality. Where members of staff are requested to perform functions that are outside their area of specific competence, they are obliged to indicate the extent of their limitations*.

The Code is used as a way to convey very specifics rules that apply to potential conflicts including, for example, rules that apply to the receipt of gifts and golf games. The following example provides a sense of the level of specificity:

Gifts: *In order to preserve the image and integrity of the City of Burlington, business gifts should be discouraged; however, the City recognizes that moderate hospitality is an accepted courtesy of a business relationship. Recipients should not allow themselves to reach a position whereby they might be or might be deemed by others to have been influenced in making a business decision as a consequence of accepting such hospitality. The frequency and scale of hospitality accepted or offered by the City should not be greater that the employee's Department Head would allow to be claimed on an expense account if it were charged to the City. Where gifts are accepted, their acceptance must constitute a benefit to the Corporation or be of nominal value and publicly acknowledged. Employees are under an obligation to consult with their Department Heads regarding accepting specific gifts and benefits. Where the benefit being received is in the form of accepting hospitality, and the acceptance of the benefit is deemed by the Director, General Manager or City Manager to be in the nature of accepted business courtesy, staff should reciprocate a similar benefit to the provider or staff should advise the provider that staff will be making a contribution to a charity in an equivalent amount and retain a copy of the correspondence that confirms this arrangement.*

Golf Tournaments: *In recognizing the value of interaction with business associates, the City periodically participates in invitational golf tournaments. However, if the City is paying the fees, departmental foursomes should not comprise only City staff, but rather should be made up of two members of City staff and two business guests, subject to the approval of the Director. This would allow for the possibility of reciprocal invitations from business associates.*

U.S. Municipal Governments

Many states have overarching legislation that sets the standard for conflict of interest policy in municipalities. In Massachusetts for example, the State Ethics Commission regulates the conduct of all state, county and municipal public employees and volunteers. Often there is some type of financial disclosure legislation that requires certain individuals, officials and candidates for elected office to file statements of financial interests. For example, the City of Chicago, in accordance with state legislation requires financial disclosure on an annual basis for all municipal employees whose income is over $40,000/year.

Wisconsin also has legislation in place to set the minimum standards of ethical conduct for local elected officials. Because the Wisconsin statute relates to ethics and conflicts are interrelated and complicated, the state association representing municipalities, the League of Wisconsin Municipalities, has developed a thoughtful companion document that helps to clarify points of conflict for elected officials and municipal employees. It states:

- *Problems in this area can be avoided primarily by using common sense and applying the "smell test." Stated broadly, when an official, a member of the official's family or a business organization with whom the official is associated is involved in a municipal matter, the official needs to step back and question whether there are problems concerning his or her involvement in the matter. The official may want to discuss the situation with the municipal attorney. Local officials may also contact the League's attorneys to discuss ethics issues.*
- *Many times it might not be clear whether a conflict exists. In these grey areas, the official needs to balance the benefits of involvement (e.g., representing the electors, using the official's expertise) against the drawbacks (e.g., how it would look, the risk of violating a law).*

Sometimes, even if it may be legal to act on a matter, you may not feel comfortable doing so or it may not look good to do so.

In states that do not have legislation in place that specifically speaks to conflict of interest, there is usually some generic statute that requires the municipality to develop, as part of its municipal code and as part of its local government responsibilities, some provision to protect against conflicts. Minnesota uses this approach suggesting that municipalities can "*adopt ethics ordinances that require disclosure of economic interests, establish ethics boards, and prescribe standards of conduct*". Minnesota further specifies in its state-wide statute on conflict of interest that:

- *"The commissioner must develop policies regarding code of ethics and conflict of interest designed to prevent conflicts of interest for employees involved in the acquisition of goods, services, and utilities or the award and administration of grant contracts. The policies must apply to employees who are directly or indirectly involved in the acquisition of goods, services, and utilities, developing requests for proposals, evaluating bids or proposals, awarding the contract, selecting the final vendor, drafting and entering into contracts, evaluating performance under these contracts, and authorizing payments under the contract.*
- *The policies must contain a process for making employees aware of policy and laws relating to conflict of interest, and for training employees on how to avoid and deal with potential conflicts.*
- *The policies must contain a process under which an employee who has a conflict of interest or a potential conflict of interest must disclose the matter, and a process under which work on the contract may be assigned to another employee if possible."*

California, in its Government Code, also provides for a decentralized model of enacting conflict of interest statutes at the municipal level:

- *Every municipality and agency shall adopt and promulgate a Conflict of Interest Code pursuant to the provisions of this article. A Conflict of Interest Code shall have the force of law and any violation of a Conflict of Interest Code by a designated employee shall be deemed a violation…It is the policy of this act that Conflict of Interest Codes shall be formulated at the most decentralized level possible…*

Most organizations provide scenarios for their employees to help them to understand the rationale behind the rules. For example, Massachusetts makes the following statement in its guidelines for municipalities in relation to outside activities:

- *While you are a municipal employee, you cannot be compensated by anyone else in relation to any "particular matter" in which the municipality is a party or has a direct and substantial interest. (A particular matter" is defined as an activity involving decision making or judgment and refers to specific projects and proceedings, rather than-general issues). Working for others in such matters is prohibited even if the interest is held by a different agency within your municipality.*
- *For example, a full-time municipal public works employee is prohibited from serving as a consultant to a private contractor in the preparation of a bid which is to be submitted to the housing authority from the same municipality. Similarly, you cannot act as agent or attorney for anyone in such matters, even if you are not paid.*

Another Massachusetts example involves rules governing activities of former municipal employees:

- *…prevent the "revolving door syndrome." It prohibits former employees from deriving unfair advantages by improperly using friendships and associations formed or confidential information obtained while serving the government. Section 18 is not designed to prevent you from using*

general expertise developed while a municipal employee. It focuses on "particular matters" in which you participated or for which you had official responsibility while you were a municipal employee.

- *If you participated in a "particular matter" as a municipal, employee, you can never become involved in that same "particular matter" after you leave municipal service, except on behalf of the municipality. (This same restriction applies to the partners of former municipal employees for one year).*
- *If you had "official responsibility" for a "particular matter" in your municipal position even if you did not actually participate in it, you may not appear personally before any agency of the municipality on behalf of a private party in connection with the matter for one year after leaving government.*

Part 4
Mandating Conflict of Interest: the Private Sector

"It would be wonderful if the right thing to do were always perfectly clear. In the real world of business, however, things are not always obvious. If you find yourself in a situation where the "right thing" is unclear or doing the right thing is difficult, remember our key beliefs". (Motorola Code of Conduct)

A survey carried out by the Conference Board (a non-profit business research organization based in New York City) in 1991 showed that 82 percent of the companies who responded to the survey had a code of conduct in place (this was an increase of 45 percent from an earlier study that had been done in 1987). Most of the companies surveyed were large, with median annual sales of the participants at $1 billion. The respondents included companies from the U.S. (186 companies), Canada (34 companies) and Europe (40 companies).

In 1996, KPMG did a study on 1,000 Canadian companies. Sixty-six percent reported having a code of conduct.

Conflict of interest policy is usually conveyed in the private sector through policy documents in the form of codes of conduct. Corporate codes of conduct have been defined by the International Labour Organization as *"…policy statements that define ethical standards for their conduct".* A review of a number of corporate codes indicates that there is great variance in the way these statements are drafted. However, codes of conduct generally describe the value system of the organization, its purpose, and provide guidelines for decision making and consequences for breaches of conflict of interest policies.

Research published in 1996 by the University of Ottawa's Business Ethics and Stakeholder Relations Programme suggests that there are essentially five "generations" of issues of ethical and social responsibility that are dealt with in most business codes of conduct. The authors, Mendes and Clark, in their article "Conduct and their impact on Corporate Social Responsibility" describe five generations that organizations go through as they become more sophisticated in defining ethical business practices – conflict of interest, commercial conduct, employee and third party concerns, community and environmental concerns, and accountability and social justice.

Our review showed that statements of conflict of interest policy remain central to all codes. However, as indicated in the research, it is also clear that most corporate codes "tend toward a broad interpretation of conflict of interest that encompasses conflicts of commitment, the impact of outside activities on an employee's energy and time, and the rationale for the code is often combined with the definition". (Conflict of Interest – RCMP)

The Conference Board in its research of ethics practices has identified three streams of corporate writing that may contain conflict of interest policies:

- Compliance code - directive statements giving guidance and prohibiting certain kinds of conduct.
- Corporate credos - broad general statements of corporate commitments to constituencies, values and objectives.
- Management philosophy statements - formal enunciations of the company or CEO's way of doing business.

In other research, a United States Labour Department (1999) made a distinction between the following formats:

- Special documents (typically referred to as "codes of conduct") outlining company values, principles and guidelines in a variety of areas. These documents are a means for companies to clearly and publicly state the way in which they intend to do business to their suppliers, customers, consumers and shareholders.
- Circulated letters stating company policies on a certain issue to all suppliers, contractors and/or buying agents.
- Compliance certificates**,** which require suppliers, buying agents, or contractors to certify in writing that they abide by the company's stated standards.
- Purchase orders or letters of credit, making compliance with the company policy a contractual obligation for suppliers.

Principles and Definitions

The research indicates that conflict of interest policies generally begin with a broad statement of the principles that the organization attempts to advance for its employees.

The code of conduct developed by Bank of Montreal outlines its *First Principle*s that lay the groundwork its conflict of interest policy. These include:

- Doing what is fair and honest.
- Respecting the rights of others.
- Working to the letter and spirit of the law.
- Maintaining the confidentiality of information.
- Avoiding conflicts of interest.
- Conducting ourselves appropriately.

The document then goes on to describe specifics with regard to conflict of interest:

- Personal Interest in a Bank Transaction.
- Abuse of Position.
- Trading in Securities.
- Accepting Gifts and Benefits.
- Taking Another Job.
- Serving as a Director of a Company.
- Managing a Business.

Most corporate codes of conduct provide a definition of conflict of interest. Compaq's (computers) definition follows:

- *"Compaq employees have an obligation to give their complete loyalty to the best interests of the company. They should avoid any action that may involve, or may appear to involve, a conflict of interest with the company. Employees should not have any financial or other business relationships with suppliers, customers or competitors that might impair, or even appear to impair, the independence of any judgment they may need to make on behalf of the company. Solicitation of vendors or employees for gifts or donations shall not be allowed except with the permission of the Office of Business Practices or the Corporate Community Relations Group".*

Bell Canada's definition is as follows:

- *"... when an employee has a direct or indirect interest in or relationship with, an outsider, or with a person in a position to influence the actions of such outsiders, which might be implied or construed to render the employee partial toward the outsider for personal reasons, or otherwise inhibit the impartiality of the employee's business judgment or desire to serve only the company's best interests".*

Many corporate codes attach a broader scope to "interest" providing the context in which they want their employees to make their own decisions about ethical behaviour, as per the following except from the Oracle Corporation's conflict of interest policy:

- *Any circumstance that could cast doubt on an employee's ability to act with total objectivity with regard to Oracle's interests. All employees have a duty to avoid financial, business, or other relationships that might be opposed to the interests of Oracle or might cause a conflict with the performance of their duties. Employees should conduct themselves in a manner that avoids even the appearance of conflict between their personal interests and those of Oracle*.

Various techniques are used to assist employees to understand when interests conflict. Oracle asks its employees to provide actual or potential conflicts to their manager in writing. Oracle emphasizes that the presence of a conflict does not necessarily mean that the proposed activity will be prohibited, but that it is the employee's responsibility to disclose all aspects of the conflict and remove him or herself from the situation.

Many private sector codes use a case study approach as a way to illustrate examples of conflict of interest situations and as a way to help employees understand the meaning and intent behind the rules. This typically includes posing questions for employees to help them to distinguish what might be a conflict in certain situations. For example, Compaq suggests the following questions:

- *Could my outside business or financial interests adversely affect my job performance or my judgment on behalf of the company?*
- *Can I reasonably conduct my business outside of normal company work hours and prevent my customers from contacting me at work?*

- *Will I be using company equipment, materials, or proprietary information in my outside business?*

The University of Toronto's Clarkson Centre for Business Ethics and Board Effectiveness has created an interesting prototype of categories that could serve as a model for private business when undertaking to write a code. Conflicts are identified according to the employer interest likely to be harmed:

- *The Company* - working a second job may impinge on company time or on performance of work.
- *External Relations* - the use of corporate funds/facilities for the support of political parties or candidates may create a potential or actual conflict of interest.
- *Employee Relations* - accepting an inappropriate gift for personal use from a supplier, customer or competitor, the hiring of relatives and self-dealing may adversely affect morale and personal relationships.
- *Customer Relations* - the potential for customers to influence one's judgment in fulfilling one's duties and responsibilities may create conflict.
- *Supplier Relations* **-** having a personal relationship with a supplier may create conflict.

Oversight and Training

Many corporations are relying on committees to monitor the ethical behaviour of the organization. A task force, or standing, or advisory committee on ethics is often established to oversee the ethics initiatives in the organization. They serve two functions within an organization. First, they lend legitimacy to the consideration of an ethics agenda at the highest level of organizational decision making. Second, they symbolically communicate to the employees and external

stakeholders of the organization its commitment to ethical principles in conducting business.

Ethics training programs for employees have also gained popularity. Boeing, Champion, International Chemical Bank, General Dynamics, General Mills, GTE, Hewlett-Packard, Johnson & Johnson, and Xerox are a few of the companies who have formal programs designed to teach ethics (Dunham & Pierce, 1989).

Part 5
Complying with Codes

Experts suggest that regardless of whether legislation, regulation, codes of conduct, or guidelines for conflict of interest are in place, the rules are meaningless without appropriate enforcement. The general view is that if employees are expected to comply with code of conduct rules, they need to understand what conduct is expected and what the consequences are if they do not comply with the standards. For this reason, public and private sector codes require, often on a yearly basis, that employees sign a document to confirm that they have read and understand the rules. In some cases, employees are asked questions (a form of test) to ensure that they have in fact read and understood the requirements.

Public Sector

Compliance measures for elected officials in the public sector usually include three approaches. The Canadian federal government, in its Conflict of Interest and Post-Employment Code for Elected Officials specifies the following:

- Disclosure requires that legislators reveal their assets, typically first confidentially to a designated official, and then publicly so that a personal interest becomes public knowledge and Parliamentarians are prohibited from acting for their personal benefit. Public disclosure also informs the legislator's constituents and colleagues of the situation so that they can consider its implications.
- Withdrawal (also called recusal) requires Parliamentarians to refrain from acting on matters in which they have personal financial interests.
- Avoidance requires legislators to divest themselves of interests or relationships that might impair their judgment, either by a sale at arm's

length or by use of a trust administered by a trustee independently of the legislator; in the latter case, it must be ensured that the trust is beyond the Parliamentarian's control.

Most of the Canadian legislation for elected officials at the federal and provincial level emphasizes disclosure of interests to some form of oversight body. In addition, if there is a potential conflict, the elected official must withdraw from any discussion about that interest when it is before government. Disclosure is usually requested a number of times throughout the elected official's tenure – just before s/he takes office, at various times throughout tenure (e.g. every one or two years), or whenever an "interest" presents itself in the decision making process.

Timely and specific disclosure of a personal interest when the interest comes or appears to come into conflict with public duties and responsibilities is reflected in all legislation. All Canadian legislation suggests that an elected official should withdraw her/himself from discussing a matter before government if it conflicts with private interests. For example, Manitoba's *Legislative Assembly and Executive Council Conflict of Interest Act* states that:

- "where during any meeting there arises:
    - *A matter in which a member or any of his dependants has a direct or indirect pecuniary interest; or*
    - *A matter involving the direct or indirect pecuniary interest of any person, corporation, subsidiary of a corporation, partnership, or organization to whom or which a member or any of his dependants has a direct or indirect pecuniary liability;*
- *The member shall:*
    - *Disclose the general nature of the direct or indirect pecuniary interest or liability.*

- *Withdraw from the meeting without voting or participating in the discussion.*
- *Refrain at all times from attempting to influence the matter*.

Financial disclosure is another requirement specified in legislation and codes of conduct that helps all parties involved to assess whether a potential or real conflict might surface. As was mentioned Part 3 of this report, Manitoba requires detailed financial disclosure.

Codes of conduct for public servants also emphasize disclosure at the time a real or apparent conflict arises as the first step to determining if there is a conflict and what should be done about it. Disclosure of interests is intended to allow the employer to participate in the decision as to which interests may lead to conflicts (and, as suggested in the research, may also provide some level of protection for the employee if s/he has made an honest error in judgment). While the ultimate responsibility rests with the employee to identify a possible or real conflict, management most often provides opportunities to disclose the interest and discuss possible lines of action. Designated parties will review disclosure forms to determine if there is a conflict of interest and advise employees of appropriate actions.

Disclosure may be made to a "designated official" and/or "designated third party". The Ontario Management Board Secretariat's Conflict of Interest and Post-Service Directive lays out an extensive list of designated officials and third parties that will review of conflict of interest case. Designated officials often include (under different titles) Conflict of Interest Commissioner, Premier, Secretary of Cabinet, and Deputy Ministers. Third parties often include Deputy Ministers, the Civil Service Commission, and Conflict of Interest Commissioner, Secretary of Cabinet, and Deputy Ministers. These individuals are charged with the responsibility to review conflict cases depending on the level of staff involved.

At the federal and provincial level, the most common approach to ensuring compliance with conflict of interest legislation or codes of conduct is usually through establishment of an ethics or integrity commissioner. In most cases, these bodies review and adjudicate on conflict cases, including recommending how the conflict should be resolved, providing ongoing guidance, and ensuring consistent application of the rules. As has been discussed previously, at the federal level in Canada, the Ethics Counsellor is appointed by the Prime Minister and provides advice to cabinet ministers. The provinces have created conflict of interest commissioners who are officers of the legislature usually with significant investigatory powers, and who are designated to provide advice to both cabinet members and members of the legislature. A smaller number of provinces, i.e. New Brunswick and Nova Scotia, require disclosure to be made to a designated judge.

In cases where disclosure is made to a designated official, there is often some proviso in legislation or codes of conduct that allows the official in the highest position to make exceptions to the rule. For example, in Ontario, the Premier can make exceptions to divestment where there is undue hardship. In Alberta, the legislation gives the power to the ethics commissioner "to exempt a prohibited activity if it is disclosed and approved." A designated official may assist in determining the appropriate method of compliance, by taking into account:

- The specific responsibilities of the public office holder.
- The value of the assets and interests involved.
- The actual costs to be incurred by divesting the assets and interests as opposed to the potential that the assets and interests represent for a conflict of interest.

Nova Scotia describes the outcome more broadly:

- *Where the judge determines that a member has contravened this Act, the judge shall declare the seat of the member vacant and direct that the*

vacancy be filled in the manner prescribed by law, but if the judge determines that the contravention was committed as a result of inadvertence or a bona fide error in judgment the judge may relieve against such forfeiture of office.

Private Sector

Most codes of conduct in corporations require that employees disclose potential or real areas of conflict to their superiors. Compaq Computers states in its code "Employees are under a continuing obligation to disclose to their supervisors any situation that presents the possibility of a conflict or disparity of interest between the employee and the company. Disclosure of any potential conflict is the key to remaining in full compliance with this policy."

How supervisors then deal with the disclosures varies somewhat from organization to organization. Most often, there is a committee or department where employees are instructed to discuss confidential matters of conflict. Most of the codes that were reviewed for this report did not include any enforcement provisions or were not specific regarding enforcement measures. For example, the Boeing code states simply that "*violations of the company standards of conduct are cause for appropriate corrective action including discipline."*

However, some codes are more specific regarding disciplinary measures. A good example is Coca Cola's Code of Business Conduct, which clearly states that:

- *Violating the Code will result in discipline. Discipline will vary depending on the circumstances and may include, alone or in combination, a letter of reprimand, demotion, loss of merit increase, bonus or stock options, suspension or even termination.*

The code of conduct for Halliburton, a U.S. based multinational oil and heavy construction company, states that:

- *The Company shall consistently enforce its Code of Business Conduct through appropriate means of discipline. Pursuant to procedures adopted by it, the Executive Committee shall determine whether violations of the Code of Business Conduct have occurred and, if so, shall determine the disciplinary measures to be taken against any employee or agent of the Company who has so violated the Code of Business Conduct.*

Ironically, even Enron Corp. in its conflict guidelines had very clear statements about the consequences of improper actions. The following applied to securities trades made by company personnel:

- *"…breach of this policy, however, may subject employees to criminal penalties. The consequences of insider trading violations can be staggering…For individuals who trade on inside information (or tip information to others):*
    - *A civil penalty of up to three times the profit gained or loss avoided.*
    - *A criminal fine (no matter how small the profit) of up to $1 million.*
    - *A jail term of up to ten years.*
- *For a company (as well as possibly any supervisory person) that fails to take appropriate steps to prevent illegal trading.*
    - *A civil penalty of the greater of $1 million or three times the profit gained or loss avoided as a result of the employee's violation.*
    - *A criminal penalty of up to $2.5 million.*

Monitoring of employee compliance with the conflict of interest regulations is most often seen as a direct line management responsibility, in addition to or

instead of ethics advisors. Supervisors are sometimes expected to monitor the situation through a variety of means, including:

- Annual performance reviews.
- Periodically reminding employees of their obligations in light of any possible changes in their personal circumstances.
- Ensuring that annual disclosure forms are filled out if that process is in place in the company.

Motorola is an example of an organization that emphasizes the role of managers in promoting ethical behaviour and in being vigilant with respect to their staff. The Motorola code states that:

- *Motorola managers are expected to lead according to our standards of ethical conduct, in both words and actions. Managers are responsible for promoting open and honest two-way communications. Managers must be positive activists and role models who show respect and consideration for each of our associates. Managers must be diligent in looking for indications that unethical or illegal conduct has occurred. If you ever have a concern about unethical or illegal activities, you are expected to take appropriate and consistent action, and inform your manager, the Law Department, or the EthicsLine*.

In cases where a real conflict exists, common organizational responses range from counselling, oral/written warnings, formal reprimands, suspensions with or without pay, and dismissal. However, the universally preferred approach is to encourage awareness of employer concerns regarding conflict of interest situations and provide strategies to assist employees to avoid conflict situations.

In most employment situations, discipline arises only where intentional misconduct is involved. However, conflict of interest cases may present different

considerations. Some have suggested that the determining factor should not be wilfulness, but rather whether a real (as opposed to potential or perceived) conflict has arisen, with the real conflict being more likely to result in a disciplinary measure. According to an RCMP report on conflict of interest:

- "*Even though legal consequences normally only flow from reality, a finding of conflict of interest does not depend on wilful wrongdoing. Therefore, in a conflict of interest situation, a real conflict could require a disciplinary response, while a potential or apparent conflict of interest, on the other hand, could benefit from a non-disciplinary response"*.

Many definitions of conflict of interest add the word "knowingly", making it a breach only if the individual knows that official conduct might further a private interest. The Manitoba *Legislative Assembly and Executive Council Conflict of Interest Act* forgives an inadvertent breach by elected officials as follows:

- *Notwithstanding anything in this Act, where a judge finds that a member violated a provision of this Act unknowingly or through inadvertence, the member is not disqualified from office, and the judge shall not declare the seat of the member vacant, in consequence of the violation.*

Responses to conflict of interest situations that do not justify discipline could include non-disciplinary measures such as transfer, leave, or other administrative action.

Part 6
Ensuring Effectiveness

Do Conflict of Interest Rules Work?

From the research, it is apparent that conflict of interest rules are standard features in most organizations. This includes the public and private sectors, large and small organizations, and legislated and non-legislated, codes. The most important question remains whether conflict rules have the desired impact on the behaviour of individuals in the workplace.

Few, if any, empirical studies prove a correlation between ethics regulations and the behaviour of public officials and trust in government. One school of thought suggests that no matter what the rules are and how they are enforced, there will always be people who look for loopholes. The research generally supports this view and goes further to suggest that efforts to "over-regulate" with increasing levels of detail usually become progressively less effective – as was suggested a number of times during the research for this paper, "you can't legislate human behaviour".

This prevailing view was reinforced by ethics writer Calvin Mackenzie in his book *Scandal Proof*. In looking at the effects of ethics laws on government, Mackenzie concluded that:

- *Attempts to legislate ethics actually have weakened political accountability. The law is too blunt an instrument to define or ensure proper behaviour. Public employees act ethically when they adhere to high standards of conduct and when they possess sensitivities that cannot all be etched in law. In creating an ethical government, the hard part is accomplishing what the law cannot guarantee. Ethics laws and*

regulations are designed to make government scandal proof, but no institution can be made scandal proof through regulation alone.

Ironically, the proliferation of ethics laws has not translated into a higher level of public trust. In 2000, the American National Election Studies (U.S. based research organization) conducted a poll in the U.S. asking people about their trust in government generally. The results indicate a steady decline in confidence from more than 60 percent in the early 1960s to less than 30 percent by the year 2000.

The suggestion has also been made that tightened conflict of interest rules and other increasingly more detailed ethics initiatives that have been put in place in reaction to scandals may be more detrimental than the scandals themselves. Ethics researchers are often of the view that public scepticism actually increases as government enacts more ethics laws. "When trust in government was at its highest in the early 1960s, there were no major ethics laws in the states" (Kidder, Institute for Global Ethics).

Professor Alan Rosenthal, a widely recognized U.S. expert on ethics in government cautions against the simplistic remedy of laying on more rules:

- *What we're doing by overlegislating ethics is trying to get the bad guys, but we're never going to get the bad guys, because they are very good at being bad. What we succeed in doing is making life increasingly miserable and fraught with danger for the good guys.*

Rosenthal points out that "legislators sometimes try to out-ethics each other and some of the laws being enacted may cause more problems than they solve". Rosenthal and others are careful to point out that, notwithstanding the public perception, the evidence is that the bulk of elected and non-elected public officials in fact, do act ethically. This view was reflected in a 2002 survey of state

ethics commissions and committees by the National Conference of State Legislatures' Center for Ethics in Government. In noting that 98 percent of state legislators are ethical public servants, the respondents observed that elected officials recognize that they need to confront the appearance of conflicts of interest in their private and public duties.

With these general caveats in mind, the research strongly supports the notion that conflict of interest rules whether set out in legislation or in policy are an important part of creating an ethical environment because they provide guidelines for ethical behaviour. As Rosenthal has suggested “what laws do best is to help change the culture."

Stuart Gilman, President of the Ethics Resource Center in the U.S. confirms that having clear guidelines that shape organizational culture and employee behaviour is essential - "they are not what makes someone a decent person, but these guidelines can provide a frame of reference that has an impact on behaviour”.

Consistent with Change Management theory, the research also emphasizes that the process of developing codes of conduct and conflict of interest rules and making them part of every aspect of the organization’s culture, is as important as the content of the rules themselves.

Institutionalizing Ethical Behaviour

The importance of culture and values for guiding employee behaviour is strongly emphasized in the research. Organizations are recognizing that it is not the rules that encourage employees to behave in a certain way – they help those employees to want to act in an ethical manner and they may encourage those who do not to try to find loopholes in the system. Therefore, organizations are

recognizing the importance of developing a “framework of ideals that influence individual behaviour and characterize an organization. An ethics awareness training program, the commitment of supervisors at every level, and a positive tone in the rule structure are important ingredients in establishing an environment that promotes the highest standards of integrity”. (Conflict of Interest, RCMP)

Much has been written about the importance of institutionalizing ethics in the culture and operating values of organizations. However, the rules are meaningless if they have not been properly understood, are not shared within the organization, and are not reinforced by appropriate rewards and sanctions.
It is also clear from the research that achieving effective results requires an ongoing organizational commitment to emphasize the critical importance of ethical business conduct. Commitment in this context would include:

- A clear vision and picture of integrity throughout the organization.
- A vision that is owned and embodied by senior management.
- A reward system that is aligned with the vision of integrity.
- Policies and practices that are aligned with the vision.
- A widely-held understanding that every significant management decision has ethical and value dimensions.

In order for ethics to be truly institutionalized within an organization, the entire organization must agree on the importance of ethical behaviour, and, more importantly, there must be a collective standard for the entire organization to follow. It is also clear that successful institutionalization takes place over years rather than weeks or months. This typically requires a sustained effort to ensure that that ethics and standards of ethical behaviour are clearly and formally made part of every aspect of the organization. “It means getting ethics into company policy formulation at the top management levels and through a formal code getting ethics into all daily decision making and work practices down the line, at

all levels of employment. It means grafting a new branch on the corporate decision tree – a branch that reads "right/wrong." (Purcell & Weber, 1979)

The literature is fairly consistent about the steps an organization should take to institutionalize ethics in the workplace. Organizations that want to build an ethical culture can take several approaches or combination of approaches to make this happen. Carter McNamara, in his handbook *Complete Guide to Ethics Management: an Ethics Toolkit for Managers* identifies a number of benefits in formally managing ethics, rather than as a one-time effort when it appears to be needed. Some of these positive outcomes from the management of ethics in the workplace include:

- Clear operating values and behaviours.
- An awareness and sensitivity to ethical issues.
- Ethical guidelines to decision making.
- Mechanisms to resolve ethical dilemmas.

Ensuring Management Commitment to the Ethics Process

Probably nothing is more important to the institutionalization of ethics than the moral tone and example set by senior management. The literature stresses that management needs to be seen as a visible example in demonstrating the organization's belief in ethical behaviour. This includes guiding the process of developing and communicating the organization's code of ethics. It also includes ensuring that there are processes built into the organization that reward ethical behaviour and establish clear and explicit consequences for unethical behaviour. These steps can be broken down in the following components:

- Ensuring Management Commitment to the Ethics Process.
- Articulating the Organization's Values.

- Analysis and Change of the Culture if Necessary.
- Training.
- Follow-up.

The personal values of senior executives and how they choose to express those values are viewed as setting the tone for the rest of the organization. Just as important is the senior executive's willingness to be an example even when it is difficult or inconvenient. As suggested in the literature, an example of this kind of behaviour was seen in the mid-1980's when Johnson and Johnson chose to pull Tylenol off the shelves and change the packaging after finding that some bottles had been tainted. Johnson and Johnson had had an ethics management program for years (including a code of conduct) that was regularly reviewed and purposely challenged by staff and management at all levels. When the organization was faced with the Tylenol crisis and potential multi-million losses, it has been reported that the senior executives never wavered from their decision to "do the right thing" since it was the expected behaviour in the organization (reported by Kniffin, Vice President of External Affairs, Johnson and Johnson).

The literature also emphasizes that senior management's commitment alone will not be sufficient to move ethics initiatives forward and often refers to the need for organizations that are serious about ethics to find senior level "champions" who will act as role models and set an example for others. Champions from middle and line management are also required. Their role is generally to help other employees understand what is expected of them in a very practical way and where there may be instances of conflict. They are also seen as essential in helping others understand the consequences of behaviour that does not adhere to the organization's ethical orientation.

Steven Barth, in his book *The Business Code of Conduct for Ethical Employees* suggests that all levels of management need to take responsibility for seeing that answers are found to questions such as:

- Are resources (rewards) being provided for ethical behaviour?
- Is this item prominently featured in the corporate strategy and consistently made a part of senior level staff meetings?
- Is there a willingness to change human resource management systems such as performance appraisal and bonuses to reinforce an ethical climate?
- Is there a willingness to consistently hold people accountable for their actions?

Barth suggests that if the answer to all of these questions is yes, the organization has a genuine commitment to ethical behaviour and institutionalization of that behaviour in the organization's culture. If not, then there may be a potential problem with leadership.

Articulating the Organization's Values

The next phase to institutionalize ethics in an organization is referred to in various ways such as "Clarifying your Purpose", "Identifying Corporate Values", and "Understanding and communicating what is most important to your Organization". Whatever the terminology, the message is the same – management at all levels needs to be involved in a process that helps to isolate and communicate the core values of the organization so that employees understand what is fundamentally important to the organization. If employees understand the values of the organization, the likelihood is that they will be more likely to understand what constitutes good and bad behaviour (i.e. better able to

understand where they might have potential conflicts and how to deal appropriately with these situations).

As indicated in the research and reiterated throughout this report, ethics is a matter of values and associated behaviours. Values are discerned through the process of ongoing reflection. As experts point out, while ethics initiatives do produce deliverables (e.g. codes of conduct, policies and procedures, interpretive bulletins about ethical and unethical behaviour etc.), they may seem more process-oriented than most management practices. However, it is this emphasis on the process of reflection and dialogue that is one of the most important aspects of creating an ethical organization and is a key to determining successful implementation.

Barth in his book *The Business Code of Conduct for Ethical Employees* provides guidelines in this regard:

- Values cannot be taught, they must be believed. Employees do what they have seen done, not what they are told. If their superiors engage in unethical behaviour, they will become lax in their own work habits.
- Values must be simple and easy to articulate. Managers should ask themselves whether the values are realistic and whether they apply to daily decision making. Visibility alone is not sufficient to commit individuals to ethical behaviours. It must be combined with explicitness; the more explicit the expected behaviour, the less deniable it is. Explicitness can be enhanced by having all executives, managers, and employees sign a letter affirming their understanding of an organization's ethics policy and stating that they will review the policy annually and report all cases of suspicious (unethical) behaviour
- Values apply to internal as well as external operations. Managers cannot expect workers to treat clients well if they do not treat their employees well in terms of honesty, frankness, and performance-based rewards.

- Values are first communicated in the selection process. It is easier to hire people who identify with the corporate values than it is to train someone who does not identify with them in the first place.

Organizational Analysis

Most organizational ethicists emphasize that once values and guiding principles have been established, and after buy-in has been achieved from all levels of management in the organization, the next step is a thorough analysis of the culture and/or ethical climate of the organization against those values/guiding principles. The purpose of this review is to determine organization readiness, i.e. the extent to which current policies, culture, behaviour, structures, etc. are aligned or not aligned with the new vision of the future. This could include, for example, looking at recruitment, performance appraisals, and reward systems in order to identify contributing factors that might lead to unethical behaviour and to identify ways that the corporate culture may inadvertently reinforce that behaviour.

There are a number of ways that this kind of activity can be supported. An employee survey is often recommended as something that allows people to respond anonymously to detailed questions about the organization. The literature also suggests that in carrying out this activity it is usually advisable to retain some outside help to objectively analyze the information.

Training

Another key component to institutionalizing ethics in the workplace is training – teaching the organization's values in as explicit a way as possible and clarifying what constitutes ethical and unethical behaviour in the workplace.

It has been suggested that this training should focus on ethical awareness, including the development of an increased understanding of personal conflicts of interest and the impact that these could have on the organization. Often, training also involves statements from senior management emphasizing ethical business practices, discussions of the corporate code of ethics, case studies, commendations or public acknowledgement of good ethical behaviour by employees).

In his book *Training Basics for Supervisors and Learners*, Carter McNamara lists a number of steps a manager/supervisor should take with respect to ethics training for staff, including:

- Orient new employees to the organization's ethics program during new-employee orientation.
- Include ethics policies and related matters in management training programs.
- Involve staff in the review of organizational codes of conduct.
- Involve staff in review of policies (ethics and personnel policies).
- Involve staff in practices to resolve “ethical scenarios” to assess how they might respond and how they respond to the suggestions of team members.
- Include ethical performance as a dimension in performance appraisals.

Follow up

Follow-up refers to monitoring change, evaluating the results, and ultimately determining whether institutionalization of the desired behaviour has taken place within an organization. This includes having a centre of accountability and leadership with the organization. Accountability for overseeing the change

process might initially be assigned to an ethics task force or standing committee on ethics. The research suggests, however, that accountability for creating and maintaining the desired change must ultimately rest with every manager. Changes in the performance appraisal and reward processes are often a common means to reinforce this accountability. Other follow-up activities can include additional training, repeating questionnaires used originally to assess the ethical status/readiness of the organization, and the use of focus groups and workshops for ongoing discussions of ethical issues.

Part 7
Conclusion

This paper has attempted to provide an overview of the structure and effectiveness of conflict of interest policies drawing on research and interviews that cut across a number of Canadian and U.S. jurisdictions.

As noted, over the past 35 years, there has been an evolution of ethics rules in the public and private sectors, often layered one over the other, and most often in response to scandals. This corresponds to a general increase in awareness of ethics related issues, particularly in the public sector, and a heightened awareness in the private sector of the business value of ethical behaviour. In the present day, most organizations have some form of conflict of interest policy, although varying in complexity and comprehensiveness.

A central conclusion from the research is that there is a basic or common approach across all of these jurisdictions with respect to how the categories of conflict and specific instances of conflict are defined. Between and among codes, one finds relatively few substantive differences. In generally consistent terms they describe the values of the organization and set the tone for ethical behaviour. They often describe what would be considered to be unethical behaviour or situations of conflict, offer cross-references to specific conflict of interest rules.

There is however, considerable variation in terms of how these rules are mandated. Across North America conflict of interest rules are mandated in different ways:

- Legislation for elected officials, often with separate statutes applying to different branches of government.

- Regulations that provide authority to an independent body or arm of government to enforce conflict of interest rules.
- Administrative policy, directives, and/or guidelines.
- As part of a broader set of policies and standards that establish organizational values and overall direction for ethical behaviour, commonly known as “codes of conduct”.

There is no research to indicate whether incorporating a code into legislation is more effective than an approach that emphasizes policies and guidelines. The former is more likely to be found in the U.S. than in Canada and would appear to reflect a greater emphasis in that country on administrative policies captured at a detailed level in legislation.

In terms of definitions, regardless of the target audience (elected, unelected, etc.), sector (public or private) or how they are mandated and enforced, the principle underlying conflict of interest rules for both the public and private sectors is integrity. The categories used to define interest are generally consistent. In the public sector, the emphasis is on the public interests while in the private sector the interests of the corporation are paramount.

In terms of oversight in the public sector, federal and provincial/state levels of government tend to have fairly similar arms-length oversight bodies (typically an integrity or ethics commissioner or board). In most cases – with the Canadian federal government as a notable exception – the best practice is to establish these as independent of the Executive Branch of government (e.g. Prime Minister, President, Governor, Premier, Mayor) and report directly to the relevant legislature.

One additional area of difference in the U.S. and Canadian approaches relates to how and when the disclosure is made. In the U.S., most of the rules at the

federal, state, and municipal level require public disclosure of interests on a regular basis (e.g. before starting a term of office, before elections, following elections, on a regular reporting schedule – e.g. quarterly, semi-annually, or annually). The emphasis here is on "public" disclosure meaning that reports are available to anyone wishing to review them. At the federal and state level, financial disclosure statements are posted on websites, similar to how lobbyist information is posted. In Canada, where disclosure of interests is required for elected officials (at the federal and provincial level), it is done confidentially to an independent body and is rarely made public. Public servants do not generally have to disclose personal interests at a prescribed time. If those interests pose a conflict, the expectation is that they will be disclosed at that time to management.

With respect to municipalities, most Canadian provinces and many U.S. states have legislation in some form that governs conflict of interest matters respecting members of municipal councils, as part of more general legislation governing municipalities or as a separate statute dealing specifically with conflict of interest. In general, governing legislation sets out the requirement that municipalities have conflict of interest policies in place. Some jurisdictions go further to provide more explicit direction, particularly in the U.S. where state legislation is often highly detailed in terms of municipal requirements.

Again, however, in terms of evaluation, there is no formal comparative research available to indicate whether or to what extent these differences actually result in better outcomes or to what extent they reflect the prevailing culture of public administration or historical traditional within a particular jurisdiction.

One of the differentiating aspects of conflict of interest rules developed by municipalities is how compliance and enforcement is handled. Unlike the steps that have been taken at the Canada and U.S. federal and provincial/state levels, there are typically no "independent ethics authorities" or "oversight agencies" to address matters of compliance and enforcement. In many ways, the municipal

approach to this is quite similar to the approach taken in the private sector – that is, if there is a breach of conflict, disciplinary action will be imposed by supervisory/management staff or, in the case of elected officials, by Council itself.

Effectiveness

As noted earlier in this report, conflict of interest rules are standard features in most organizations. The research confirms that conflict of interest policies and code are effective but not as standalone measures. As noted in this report and throughout the research, conflict of interest rules, whether set out in legislation or in policy are an important part of creating an ethical environment because they provide guidelines for ethical behaviour.

The importance of culture and values in guiding employee behaviour emerges from the research as paramount in terms of effective approaches to conflict of interest. Rather than emphasizing specific policies or statutes, successful organizations are recognizing the importance of developing a "framework of ideals that influence individual behaviour and characterize an organization".

This suggests that the real determinant of success is effective implementation. Consistent with Change Management theory, the research emphasizes that the process of developing codes of conduct and conflict of interest rules and making them part of every aspect of the organization's culture, is as important as the content of the rules themselves. The requirements for sustained institutionalization of desired behaviours are well documented in the research as well as in the theory and practice of Change Management including such things as:

- A clear vision.

- Sustained and demonstrated leadership and example-setting by senior management.
- A reward system that is aligned with the vision of integrity.
- Policies and practices that are aligned with the vision.
- A plethora of practical or “real-world” examples or case studies to guide individuals and ongoing training/discussion opportunities focused on these case studies.
- Effective enforcement/compliance mechanisms.
- A widely-held understanding that every significant management decision has ethical and value dimensions.

The notion of practical/real-world examples emerges from the research as a dominant best practice. The research suggests that the likelihood of success is improved by the extent to which an organization can provide individuals with interpretative information as well ongoing opportunities to discuss issues, concerns, and examples.

Compliance and enforcement efforts also emerge as an important best practices area. The research confirms that regardless of whether legislation, regulation, codes of conduct, or guidelines for conflict of interest are in place, the rules are meaningless without appropriate enforcement. As posed by experts, the central question and test of effectiveness in this area is whether there is a willingness to consistently hold people accountable for their actions. In cases where a real conflict exists, common organizational responses range from counselling, oral/written warnings, formal reprimands, suspensions with or without pay, and potentially dismissal.

Finally, the research is also clear that even in a best practices organization, successful institutionalization cannot be achieved overnight. Often it takes place over years rather than weeks or months, depending on consistency of

leadership, the individual organization's state of readiness, and the extent to which time, energy, and resources are available.

Toronto Computer Leasing Inquiry

Research Paper

CONFLICT OF INTEREST

Volume 2:

City of Toronto Options & Approaches

December 2003

Table of Contents

Executive Summary and Summary of Options and Approaches

Part 1: Introduction

The focus of this second and final volume on conflict of interest includes:

- Selected observations on practices in other jurisdictions.
- An overview of current policies and practices in place at the City of Toronto.
- A set of recommended changes to the City's current policies and practices.

Volume 2 builds on the information presented in the Toronto Computer Leasing Inquiry Research Paper *Conflict of Interest Volume 1*, including

- An overview of definitions of conflict of interest.
- A survey of different approaches to conflict of interest in the public and private sectors.
- An overview of approaches to compliance and enforcement.
- An assessment of the effectiveness of conflict of interest policies.

The preparation of Volumes 1 and 2 involved reviews of over 1,500 pages of documents and interviews with 24 individuals including current and former municipal and other government officials, as well as research, academics and other experts. Documentary resources included legislation, government and private sector reports and research/policy documents, and academic and other expert analysis/writings.

Part 2: Overview of Other Jurisdictions

From the research, four common elements emerged that are addressed in conflict of interest policies across all jurisdictions:

- Definitions, Categories and Rules.
- Disclosure of Interests.
- Oversight.
- Building an Ethical Organization.

Definitions, Categories and Rules

In the public sector, conflict of interest rules are directed at ensuring that elected officials and employees do not benefit personally, beyond what would be normally considered a regular benefit of the job. In the private sector, the rules are similar, although with the emphasis necessarily being more on business/commercial considerations as opposed to the public interest.

Rules: Across organizations the rules of conduct are consistent at a high level, although there is considerable difference in terms of prescriptiveness and amount of detail. In the U.S., the rules are generally more prescriptive and explicit than in Canada, where rules tend to be more *values based*. There does not appear to be any evidence from the research to suggest that one approach is any more effective.

Mandating Policies: There are substantial differences across jurisdictions in terms of how conflict of interest rules are mandated. In the U.S, conflict of interest policies for elected officials are usually enshrined in legislation, including local bylaws or ordinances. In Canada, these are often set out in a combination of legislation and policy, with most provinces having legislation in place that governs conflict of interest matters respecting members of municipal councils. In

addition, individual municipalities often express their conflict of interest policies for elected officials in the form of a by-law. In Canada, conflict of interest rules for federal, provincial, and municipal public employees are usually set out in policies, directives, or guidelines as opposed to statutes.

Disclosure of Interests

In all jurisdictions, officials are expected to use their own judgement in withdrawing from situations on a case-by-case basis as real, perceived, or apparent conflicts arise in the course of regular business. Some jurisdictions, including many municipalities in the U.S., go further to require that public or in some jurisdictions, confidential disclosure of interests be made on a regular basis to an oversight body such as an arms-length integrity/ethics commissioner or commission/board). Other jurisdictions – including most Canadian municipalities – have no requirement for public disclosure, relying solely on the judgement and integrity of the individual elected official.

At the state and federal level, and in some U.S. municipalities, senior levels of the administrative are also required to disclose. This is rarely the case in Canada, although this is anticipated in the next round of federal ethics policy changes expected in early 2004.

Oversight

In jurisdictions where disclosure is required, there is usually some form of oversight body, most often an arms-length commission/board or designated individual. At the municipal level in Canada, independent oversight is typically not in place and is not viewed as being necessary given that most municipalities do not require up-front, regular disclosure of interests. This is generally consistent with the historical tradition of part-time elected municipal officials in Ontario. U.S. research indicates that disclosure of interests for part-time

Councillors is problematic given that by definition, individuals in these positions have other employment.

Building an Ethical Organization

Conflict of interest rules are generally viewed as meaningless if they have not been properly adopted, implemented, or enforced. Successful implementation requires an ongoing organizational commitment to emphasize the critical importance of ethical business conduct. The research indicates that one of the most important aspects of creating an ethical climate is to ensure that ethics are clearly and formally made part of every aspect of the organization. Key best practice components from the research include:

- Ensuring a strong management commitment to the ethics process.
- Articulating the organization's values.
- Organizational analysis against the desired outcome or end-state.
- Ongoing training.
- Follow-up and monitoring.

Part 3: Overview of the City of Toronto

Governing Legislation

Five statutes govern the conduct of elected officials with respect to conflict of interest at the municipal level in Ontario:

- *The Municipal Act, 2001 (Government of Ontario).*
- *The Municipal Conflict of Interest Act (Government of Ontario).*
- *The Municipal Elections Act (Government of Ontario).*

- *The Municipal Freedom of Information and Protection of Privacy Act* (*Government of Ontario*).
- *The Criminal Code of Canada* (*Government of Canada*)

The Municipal Conflict of Interest Act **(Ontario)** is the primary provincial legislation establishing the minimum public expectations with respect to conflict of interest for municipal elected officials. The Act, originally proclaimed in 1990, has been the subject of considerable discussion and debate. A revised version of the Act (the *Local Government Disclosure of Interest Act*) was passed by the provincial government in the mid-1990's but not enacted in response to municipal objections to requirements for confidential disclosure of interests to the clerk of the municipality.

The *Municipal Act, 2001* provides for high-level regulation of the conduct of Councillors through the "Declaration of Office" and provisions requiring Councillors to act or to refrain from acting on certain financial matters.

The Municipal Elections Act establishes offences and penalties with respect to campaigns and elections.

The Municipal Freedom of Information and Protection of Privacy Act provides a right of public access to information under the control of City Council and requires the protection of personal information in the City's records.

The *Criminal Code of Canada* includes three offences with respect to the actions of municipal councillors: breach of trust by a public officer, municipal corruption, and public servants refusing to deliver property.

Code of Conduct for Elected Officials

In 1999, City Council approved a Code of Conduct for elected officials that includes conflict of interest requirements for individual Councillors. In deciding to develop a Code of Conduct that would work in concert with the various provincial and federal statutes, Council put in place rules that are generally viewed as being clearer and more specific with respect to what constitutes ethical behaviour by elected officials. In adopting the less common but more comprehensive Code of Conduct model, Toronto is a forerunner.

Conflict of Interest Policy for City Employees

Prior to amalgamation, most of the former municipalities had some form of conflict of interest policy or code of conduct for their employees. In August 2000 a new Conflict of Interest policy was approved under which City employees are expected to conduct themselves with personal integrity, ethics, honesty and diligence in performing their duties. Particularly valuable and useful are the sample questions and answers in Appendix 1 that provide a range of scenarios. While some other public sector organizations include illustrative examples, they are often not as clear or comprehensive.

Categories of Conflict Rules: Elected Officials

The categories of rules contained in the members' Code of Conduct are for the most part consistent with those codified in other jurisdictions. The Code reflects a values-based approach, rather than rules that are excessively prescriptive in nature, the expectation being that Councillors will exercise appropriate judgement if a conflict situation presents itself.

Categories of Rules: City Employees

The categories of rules for City employees are consistent with those found in other jurisdictions. The City's conflict of interest policy for staff is not exhaustively prescriptive in terms of detailed accounts of prohibited behaviour. Consistent with the Canadian tradition, it relies on higher-level, values-based statements.

Disclosure of Interests

The City of Toronto (as with other Ontario municipalities) does not require confidential or public disclosure of interests for its elected officials or employees. Toronto relies on the protocol for disclosure outlined in the *Municipal Conflict of Interest Act* whereby a member must publicly withdraw from the proceedings when a conflict arises. Employees are expected to disclose first to their immediate supervisor and through to more senior levels if required.

Oversight

The City's Ethics Steering Committee is responsible for:

- *"Ensuring that policy matters contained in the Code of Conduct are adequate as guidelines for Member conduct, as well as establishing any required new policies.*
- *Ensuring that Council establishes a required process to deal with any complaints or concerns regarding alleged non-compliance with the Code of Conduct by a member.*
- *Ensuring that the complaint process is followed and to provide recommendations for any external investigation of alleged non compliance with the Code of Conduct."*

In mid-2002, the Ethics Steering Committee recommended the creation of an independent Integrity Commissioner, based on the current provincial model, to apply and administer the Code of Conduct. This represents a major step forward in the municipal administration of codes of conduct and conflict of interest policies for elected officials in Ontario.

The Commissioner would have responsibility for:

- Complaint assessment/investigation related to Council's Code of Conduct.
- Giving advice to members of Council on potential conflict of interest situations.
- Publishing an annual report on the findings of typical cases/inquiries.
- In cases where a member of Council has been found to be in violation of the code of conduct or other matter, recommending to Council that a penalty be imposed with Council making the final decision with respect to whether and what penalty will be enacted.

Compared to other governments that have independent integrity commissioners, one responsibility that has not been included is mandatory disclosure of interests under the Code of Conduct (the most common approach in Canada being one of confidential disclosure). Council did not include this in its proposed approach, although the issue was raised at the time in staff analysis:

> *"Currently, Council Members do not have the financial and asset disclosure requirements of many other jurisdictions. This actually comprises the central, or sole, mandate of most Ethics Commissioners. The City of Toronto could introduce disclosure requirements for its Council members. This would strengthen justifying the establishment of an Ethics Integrity Commissioner for the City".*

The intention is that this Commissioner would have significant powers with respect to investigation and enforcement, although the final decision on penalties

would rest with Council. As currently proposed, this would require provincial enabling legislation, although in the absence of this legislation it may be possible for worthwhile elements of the City's approach to be implemented, albeit without the enforcement capacity that is ultimately required.

Developing the Culture

It is clear from the research and interviews that during the period following amalgamation, senior City officials were keenly aware of the importance of taking action to build a new, consolidated culture. By necessity, the initial emphasis was on policy development and consolidation with respect to existing conflict of interest policies. Since that time, the City has considerably intensified its effort consolidate and build a unified culture based on high ethical and public service standards through the Toronto Public Service Initiative.

This Initiative is a well-designed and articulated corporate organizational health and development project reporting directly to the CAO. The Initiative focuses on excellence in public service and consolidates all corporate policies, documents, and initiatives that share the same values and principals. The stated long-term vision is the creation of "a strong culture, healthy climate and good morale". City staff have developed a multi-year implementation strategy that incorporates both the theory and best practices of Change Management, including:

- A formal assessment of need as well as framework and goal development in 2002.
- A defined strategy, a multi-disciplined project infrastructure in the CAO's office, staff workshops/training sessions, information meetings and other communications tools in 2003.
- The creation of champions, ongoing workshops and staff guides, additional public communication, and a major staff conference for 2004.

The CAO, other senior executives, and more recently, the new Mayor have been and are expected to continue to be highly visible throughout the process. This is consistent with the emphasis in the literature on Change Management on senior management needing to be a visible example in demonstrating the organization's belief in ethical behaviour.

Part 4: Input and Options/Approaches

The City of Toronto has taken a leadership role in many areas related to ethics. This is not to say that the City has a new, consolidated culture in place at the present – with any major amalgamation, the development of a consistent and mature culture based on high standards and expectations can take anywhere from five to ten years. In both word and deed, however, senior City officials have recognized the need for a clear Vision, commonly understood and shared values that will guide behaviour, and have committed themselves to the rigour required to turn value statements into an operational reality.

In the internal and external interviews for this project, individuals expressed satisfaction with the progress and the direction in which the City is moving. When asked whether changes should be made in any aspects of the City's current approach, identified areas or issues were not view as problems or shortcomings, but rather opportunities to extend Toronto's leadership in this area. Specific themes included:

- It was suggested that the current approach could be further strengthened by the expanding the number of case studies and creating additional descriptive examples based on real job situations.
- It was suggested that there is an opportunity to consolidate other policies that impact on or have implications for conflict of interest for Councillors in the current Code of Conduct. A similar opportunity was identified with

respect to a consolidated approach for City employees, again perhaps in the form of a Code of Conduct.

- There was a general view that the next major leadership step for Council should be in the form of requiring confidential disclosure of interests to the proposed Integrity Commissioner.
- There is a view that the current language and requirements with respect to the receipt of gifts and benefits for elected officials could be made more definitive.
- There was a general sense that Councillor training could be enhanced by more regular discussion between and among Councillors and also involving senior staff, including making more use of a *real-life* case study approach. Similar views were expressed with respect to employees and the benefit of having a more ongoing training, perhaps as an integrated component of the Toronto Public Service Initiative.
- It was noted that no mechanism currently existed to evaluate in an ongoing way the extent to which the policy (and ethics more generally) are uniformly applied, particularly with respect interpretations, advice and disciplinary actions.

Options and Approaches for Discussion

Disclosure of Interests

It is recommended that Council adopt a policy that provides for confidential disclosure of financial assets and contingent liabilities for Council members to the proposed Integrity Commissioner. In addition, it is recommended that a similar policy of confidential disclosure be adopted for the Chief Administrative Officer and Commissioners.

For elected officials, the proposed City Integrity Commissioner would be responsible for reviewing confidential disclosure forms on a scheduled basis and providing advice and guidance to Councillors with respect to areas of apparent, potential, or real conflicts. For senior administrative staff, a designated official in an *ethics centre of excellence* to be established in the CAO's Office (see the next set of options and approaches for discussion with respect to *Continuing to Build an Ethical Culture*) would have similar responsibilities.

Continuing to Build an Ethical Organization

It is recommended that the administration create an *ethics centre of excellence* in the organization that would have a mandate to develop a comprehensive ethics program for the City and would have ongoing responsible for developing and leading the execution of future strategies and plans to enhance ethical behaviour in the City. The centre would be responsible for:

- Developing a comprehensive and leading edge ethics training and management program.
- Ensuring that the review of conflict of interest policy becomes part of performance management and appraisal system for all levels of the organization, in addition to management.
- Ensuring that ethical language and key messages demonstrating the City's commitment to high standards of ethical behaviour are incorporated in all City policy and procedure documents and City communications more generally.
- Creating an "ethics hotline" that would allow confidential disclosure and discussion of conflict of interest and other ethics-related issues by employees.
- Developing a regular, on-line ethics information/interpretation bulletin and discussion forum.

- Developing a user-friendly, plain-language staff guidebook that could be tailored to the needs of different parts of the organization.
- Ongoing professional liaison with recognized external organizations and experts.
- Developing an annual public service week, as a citywide focus of professional development and an opportunity to celebrate achievements.

Secondary Options and Approaches

- As part of the proposed citywide ethics management program, that Council and senior administrative officials meet regularly on an informal basis (i.e. not a formal Council meeting) to discuss ethics and code of conduct issues, including the use of case studies.
- That other policies in place or under development that have an impact on or implications for conflict of interest for elected officials (for example, office expenses for Councillors, the process for dealing with unsolicited proposals) be referenced or included in the Code of Conduct for elected officials.
- That the current Conflict of Interest policy for City employees be incorporated into a broader and more comprehensive code of conduct for the public service and that this include all policies in place or under development that have an impact on or implications for conflict of interest for employees be included, e.g. policies on employee participation, post-employment restrictions, procurement.
- That the language contained in the Code of Conduct for Members of Council with respect to gifts and benefits be clarified and made more transparent and specific.

Part 1
Introduction

The focus of this second and final volume on conflict of interest is on issues and challenges facing the City of Toronto as well as options and approaches for discussion related to potential changes to its current approach to conflict of interest.

In addition to this Introduction, the report is presented in four sections:

- Selected observations on practices in other jurisdictions.
- An overview of current policies and practices in place at the City of Toronto and a description of conflict of interest and related issues and challenges facing the City of Toronto.
- Flowing from the description of issues and challenges, a set of options and approaches for discussion related to potential changes to the City's current policies and practices.

This report builds on the information presented the Toronto Computer Leasing Inquiry Research Paper *Conflict of Interest Volume 1*, including

- An overview of definitions of conflict of interest.
- A survey of different approaches to conflict of interest in the public and private sectors, including the Canadian and U.S. federal governments, various Canadian provinces and U.S. states, as well as selected Canadian and U.S. municipalities.
- A summary of conflict of interest approaches and practices in the private sector.

- An overview of approaches to compliance and enforcement related to conflict of interest policies.
- An assessment of the effectiveness of conflict of interest policies, including best practices related to institutionalizing ethical behaviour in organizational culture.

Research Approach

The preparation of Volumes 1 and 2 included reviews of over 1,500 pages of documents and interviewing 24 individuals including current and former municipal and other government officials, as well as researchers, academics, and other experts.

Documentary resources focused on publicly available material (either in print or electronic format), including legislation, government and private sector reports and research/policy documents, academic and other expert analysis/writings.

Part 2

Overview of Other Jurisdictions

The purpose of this section is to provide a brief overview of general approaches and practices to managing conflict of interest in North American jurisdictions. From the research, four common elements emerged that are generally addressed in conflict of interest policies across all jurisdictions:

- Definitions, Categories and Rules.
- Disclosure of Interests.
- Oversight.
- Building an Ethical Organization.

The following is a brief overview of each element.

Definitions, Categories and Rules

As noted in Volume 1, the literature, practices of other jurisdictions, and expert/practitioner interviews indicate that many organizations have some form of conflict of interest policy, no matter how basic. In the public sector, the provisions are directed at ensuring that elected officials and employees do not benefit personally, beyond what would be normally considered a regular benefit of the job. In the private sector, the rules are similar, but with a different emphasis on business/commercial considerations as opposed to the public interest. This different emphasis includes, for example, rules related to the use of insider information, trading information with competitors, or use of company property. These aspects of private sector conflict of interest policies are often explained in more detail than are other aspects. Regardless of the jurisdiction or

sector, however, most definitions seem to have the same purpose – that of protecting the organization against situations where an individual's private interest conflicts in some way with the interests of the organization.

Rules

Across all organizations, both public and private, that have conflict of interest rules in place, the rules of conduct are generally quite consistent at a high level. The following are typical examples:

- Not using one's position of employment to further one's private interest.
- Not accepting gifts, benefits, or fees that are connected in any way to the duties of the job.
- Not using government or company property for non-work related matters.
- Not using or sharing confidential information.
- Not using insider information to further one's personal interests.
- Not engaging in any transaction in which profit can be made from one's official position or authority.
- Not engaging in or accepting employment for a private or public interest when that employment or service is incompatible or in conflict with employee's official duties or when that employment may tend to impair independence of judgment or action in the performance of official duties.
- Not engaging in work that is directly related to work carried out in an official capacity for a period after leaving employment (i.e. post employment).

Prescriptiveness

While the general types of rules are similar across jurisdictions and sectors, there is considerable difference in terms of the prescriptiveness and amount of detail with which each rule is articulated.

In U.S. jurisdictions, the approach generally is to provide rules that are more directive and explicit in terms of what does and, in some jurisdictions, does not constitute a conflict. This appears to be part of a generally more prescriptive tradition of public administration in that country.

In Canada, conflict of interest rules are more often *values based* in language and description. This approach tends to be less explicit in terms of prescriptive rules. Although often accompanied by extensive practical examples or case studies, the general approach relies on individual judgement/discretion in recognizing and reporting conflicts, rather than providing an exhaustive list of rules that tries to describe every conceivable conflict situation. Frameworks are sometimes developed to help individuals analyse their situation and determine the most appropriate response.

As noted in Volume 1, there does not appear to be any evidence from the research to suggest that one approach is any more effective. Rather, all indications are that the divergence in approach reflects more general differences in the respective national cultures and traditions of public administration. Also noted in Volume 1, the research generally supports the view that efforts to prescribe behaviour in great detail can become progressively less effective.

Mandating Policies

As indicated in Volume 1, there are differences across jurisdictions in terms of how conflict of interest rules are mandated.

In the U.S, conflict of interest policies for elected officials are usually enshrined in legislation. For municipalities, the primary vehicle is local bylaws or ordinances. Often, there is overarching state legislation that is supplemented by this local legislation.

In some cases, these statutory requirements have been embedded in a broader and more comprehensive Code of Conduct that contains, in addition to the statutory conflict of interest requirements, the principles and values of the organization, any additional requirements specific to that municipality, and case studies/examples.

Conflict of Interest rules for public employees in U.S. are also generally reflected in statutes. For municipalities, this can include local ordinances and/or state-wide overarching legislation. As with their elected counterparts, conflict of interest policies for public employee are increasing incorporated into broader Codes of Conduct.

A relatively small number of states have developed consolidated Codes of Conduct that apply to both elected officials and public employees. However, in these states, the ongoing administration and oversight of these Codes for elected officials and public employees is kept separate. Also, within these consolidated Codes, one finds sub-sections of additional requirements that are unique to each group. The separate administration and unique additional requirements are intended to recognize and address the different roles of elected officials and public employees.

In Canada, at the provincial and federal level, conflict of interest requirements for elected officials are often set out in a combination of legislation and policy, with jurisdictions increasingly moving towards the more comprehensive Code of Conduct approach. At the municipal level, most Canadian provinces have

legislation in some form that governs conflict of interest matters respecting members of municipal council. Within this provincial legislation, municipalities often express their conflict of interest policies for elected officials in the form of a by-law. Compared to the U.S., it is less common to find those rules housed under a more comprehensive Code of Conduct for elected officials at the municipal level.

Conflict of interest rules for federal, provincial, and municipal public employees are usually set out in policies, directives, or guidelines as opposed to statute. Again, the more comprehensive Code of Conduct approach is not used as extensively as in the U.S.

Disclosure of Interests

Over the last thirty years, it has become increasingly apparent to elected and non-elected officials that to protect and be seen to protect the interests of the public, third party assurances are required. In response, federal, state, provincial and many municipal jurisdictions across North America have put in place disclosure of interests policies and supporting infrastructures to allow for disclosure.

In all jurisdictions, officials are expected to use their own judgement in withdrawing from situations on a case-by-case basis as real, perceived, or apparent conflicts arise in the course of regular business. Some jurisdictions go further to require that confidential (or in some jurisdictions, public) disclosure of interests be made on a regular basis to a designated third party (typically an oversight body such as an arms-length integrity/ethics commissioner or commission/board). Other jurisdictions have no requirement for public disclosure, relying solely on the judgement and integrity of the individual elected

official. Disclosure requirements typically focus on financial interests in the form of assets or contingent liabilities.

In the U.S., most municipalities require regular, public disclosure of financial interests at predetermined points during the tenure of an elected official. Public disclosure usually takes place before taking office, and can be required quarterly, semi-annually, or annually after that. In terms of the day-to-day conduct of business, most U.S. municipal conflict of interest rules for elected officials usually contain a specific "withdrawal protocol". This protocol prescribes how council members should address a conflict during a council meeting and sets the expectation that the official will withdraw from public or in camera sessions.

It is also not uncommon in the U.S. for public servants at the municipal level who hold certain specified positions to be required to disclose financial interests either publicly or confidentially. Sometimes this is done by position but more frequently by compensation level, with $40,000 to $50,000 ($U.S.) being a common compensation threshold.

In Canada, both at the federal and provincial level, confidential disclosure of private assets by elected officials is required through the submission of a disclosure report at various predetermined times during the term of office, as well as when a specific conflict arises. In some jurisdictions, public disclosure is required, i.e. making the information provided on a disclosure report a public document.

With respect to public servants, the general practice in Canada has been not to require regular, up-front disclosure, either publicly or confidentially. Where there are requirements for public servants (e.g. Deputy Minister at the federal level) to disclose private interests, there is usually a separate body or designate (i.e. separate and distinct from the body responsible for overseeing elected officials) assigned to review these disclosure reports. Disclosure of interests for additional

high-ranking public servants is anticipated to be included in the next round of federal ethics policy changes expected in early 2004.

For Canadian municipalities, confidential or public disclosure of assets by elected officials is generally not in place. Provincial legislation across Canada specifies procedures for elected officials related to withdrawal from council meetings either during public or in camera sessions, but does not require detailed disclosure of financial interests. Disclosure for public employees is governed by policy on a municipality-by-municipality basis, as opposed to provincial legislation. Public employees are generally expected to disclose real, apparent, or perceive conflicts to their supervisors as these arise. In these situations, senior municipal officials would make disclosure to, for example, the City Manager, Clerk or Deputy Clerk, or a subset of Council, for example, the Mayor, Deputy Mayor, and/or head of the administration committee.

Oversight

In jurisdictions where disclosure is required, there is usually some form of oversight body. Commonly an arms-length commission/board or designated individual, this body is charged with the responsibility to review disclosure reports, discuss them with the individual, provide guidance and direction on areas that could present conflicts, hear complaints and in some instances, impose penalties for infractions.

In the U.S., there are two common approaches or combination of approaches to oversight that exist at every level of government:

- An internal ethics committee made up of elected officials and/or
- An arm-length ethics commission made up of independent parties.

Internal ethics committees of elected officials are often in place in parallel with arms-length bodies. Experts indicate that these committees of elected officials alone would not be perceived as effective. In the U.S., it is not unusual for the same body to review disclosure reports for both elected officials and public servants.

In Canada, over the last fifteen years, the federal government and most provinces have put in place similar oversight bodies – usually in the form of an independent (with the exception of the federal government) authority responsible for reviewing ethics issues for elected officials.

At the municipal level of government across Canada, oversight by an independent authority is typically not in place and is not viewed as being necessary given that most municipalities do not require up-front, regular disclosure of interests. Rather, the standing approach puts the onus on the elected official to declare a conflict at the time it presents itself. This is generally consistent with the historical tradition of part-time elected officials at the municipal level. (Research from the U.S. suggests that requiring disclosure for part-time elected officials can be very problematic, given that these individuals by definition usually have significant other employment and/or ongoing business interests.) It also reflects the reality that municipalities – such as those in Ontario – do not have the legal authority under provincial legislation to establish effective, independent ethics oversight bodies with the substantive and compelling investigative and adjudicative powers.

Building an Ethical Organization

An important and central recurring theme in the research is the importance of culture and values for guiding the behaviour of members of an organization. Organizations that are serious about operating with high ethical standards

usually demonstrate this commitment through sustained and well-resourced efforts to develop, support, and reinforce the desired operating values.

Much has been written about the importance of institutionalizing ethics in organizations. As stated in *Conflict of Interest Volume 1*, rules are generally viewed as meaningless if they have not been properly adopted, implemented, or enforced. Successful implementation requires an ongoing organizational commitment that emphasizes the critical importance of ethical business conduct. Effective results in this context would include:

- A clear vision and picture of integrity throughout the organization.
- A vision that is owned and embodied by senior management.
- A reward system that is aligned with the vision of integrity.
- Policies and practices that are aligned with the vision.
- A widely held understanding that every significant management decision has ethical and value dimensions.

In order for ethics to be truly institutionalized within an organization, the entire organization must agree on the importance of ethical behaviour, and, more importantly, there must be a collective standard for the organization to follow.

During the research, experts suggested that one of the most important aspects of creating an ethical climate is to ensure that ethics are clearly and formally made part of every aspect of the organization. Examples of best practices in this regard include:

- Creating a centre of responsibility in the organization, the purpose of which would be to oversee a comprehensive ethics management program (e.g. policies, procedures, training, follow-up) and ensuring that a discussion of ethics was included in every aspect of the organization's business.

- Considering conflict of interest rules throughout the policy development process, including that consideration be given at every juncture about how decisions would be perceived from the "outside", and making sure that the organization was clear on how it would react in a conflict situation.
- Ensuring that there are processes built into the organization that reward ethical behaviour and establish clear and explicit consequences for unethical behaviour.

The literature on ethics and organizational development is consistent with respect to the steps that should be taken to institutionalize ethics in the workplace. Organizations that want to build an ethical culture can take several approaches or combination of approaches to make this happen. As discussed in more detail in *Conflict of Interest Volume 1*, key best practice components from the research include:

- *Ensuring Management Commitment to the Ethics Process:* The literature stresses that management needs to be a visible example in demonstrating the organization's belief in ethical behaviour. This includes guiding the process of developing, ongoing communication, the creation of ethics "champions", as well as demonstrating clear and explicit consequences for unethical behaviour.
- *Articulating the Organization's Values:* The research confirms that it is essential to communicate the core values of the organization so that employees understand what is fundamentally important to the organization. This process of reflection and dialogue is seen as one of the most important aspects of creating an ethical organization and is a key to successful implementation.
- *Organizational Analysis:* Experts emphasize a thorough analysis of the culture and/or ethical climate of the organization against the desired values/guiding principles. The purpose of this review would be to determine organizational readiness, i.e. the extent to which current

policies, culture, behaviour, structures, etc. are aligned or not aligned with the new vision of the future.

- *Training:* Ongoing training emerges as a key component of institutionalizing ethics in the workplace. Training typically also involves statements from senior management emphasizing ethical business practices, discussions of the corporate code of ethics, case studies, and commendations or public acknowledgement of good ethical behaviour by employees).
- *Follow*-up: Follow-up refers to monitoring change, evaluating the results, and ultimately determining whether institutionalization of the desired behaviour has taken place within an organization.

Part 3
Overview of the City of Toronto

The section provides an overview of Code of Conduct/Conflict of Interest policies and practices currently in place in the City of Toronto.

Governing Legislation

As referenced in the City of Toronto's Code of Conduct for Elected Officials, five statutes govern the conduct of municipalities in Ontario with respect to conflict of interest:

- *The Municipal Act, 2001 (Government of Ontario).*
- *The Municipal Conflict of Interest Act (Government of Ontario).*
- *The Municipal Elections Act (Government of Ontario).*
- *The Municipal Freedom of Information and Protection of Privacy Act* (*Government of Ontario*).
- *The Criminal Code of Canada* (*Government of Canada*)

These Acts are briefly described below.

The Municipal Conflict of Interest Act (Ontario)

The *Municipal Conflict of Interest Act* is the primary provincial legislation intended to set out the minimum public expectations with respect to conflict of interest for municipal elected officials. The Act provides the following definition of conflict:

- *"No member of council should engage in any financial or other activity, which would tend to impair the members' independence of judgement or decision, or that is incompatible with the proper discharge of his or her official duties in the public interest. No member should use his or her office to seek to influence a decision, made or to be made by another person, so as to further the member's personal interest or improperly to further another person's personal interest."*

The Act emphasizes that that Councillors should make decisions based on the public interest and not based on their pecuniary interests. Members of Councils are required to disclose any pecuniary interest in a matter under discussion and to refrain from participating in the discussion or decision on any such matter.

The Act, originally proclaimed in 1990, has been the subject of considerable discussion and debate in the intervening years. Within parts of the municipal policy community, the general view is that the Act is becoming increasingly outdated, particularly with respect to the definition of "financial interest" and the exclusion of the category of "gifts and benefits".

The need to strengthen provincial legislative provisions in this area has been recognized by previous provincial administrations. In the early 1990s, the Ministry of Municipal Affairs undertook an extensive review of the Act which resulting in the preparation of a revised statute, entitled the *Local Government Disclosure of Interests Act*. This legislation would have required upfront, regular, and confidential disclosure of the interests of elected officials to the clerk of the municipality. The Act did not propose similar requirements for public employees.

As reported in interviews, the new legislation was the subject of intense opposition from municipal councils across Ontario. As a result, the Act, while actually passed by the provincial legislature, was never proclaimed.

The *Municipal Act, 2001:* The *Municipal Act, 2001* provides for high-level regulation of the conduct of Councillors. Before assuming the duties of office, every Councillor must make a "Declaration of Office" as follows:

> *"I, [name],, do solemnly promise and declare that I will truly, faithfully and impartially, to the best of my knowledge and ability, execute the office to which I have been elected in this municipality, that I have not received and will not receive any payment or reward, or promise thereof, for the exercise of any partiality or malversation* or other undue execution of such office, and that I will disclose any pecuniary interest, direct or indirect as required by and in accordance with the Municipal Conflict of Interest Act …"*

(*Malversation: corrupt behaviour in a position of trust, corrupt administrations of public money, etc.)

The *Municipal Act, 2001* also contains provisions requiring Councillors to act or to refrain from acting on certain financial matters.

The Municipal Elections Act: The *Municipal Elections Act* establishes offences and penalties with respect to campaigns and elections.

The Municipal Freedom of Information and Protection of Privacy Act: The *Municipal Freedom of Information and Protection of Privacy Act* provides a right of public access to information under the control of City Council. The Act also requires that the City protect the privacy of an individual's personal information existing in the City's records and sets out rules regarding the collection, retention, use, disclosure and disposal of personal information in the City's custody and control.

The *Criminal Code of Canada*: The *Criminal Code of Canada* includes three offences with respect to the actions of municipal councillors: breach of trust by a

public officer, municipal corruption, and public servants refusing or failing to deliver municipal property held by a member to a person who is authorized to demand it.

Code of Conduct for Elected Officials

In 1999, City Council approved a Code of Conduct for elected officials that included conflict of interest requirements for individual Councillors. The general view at the time was that it would not be appropriate to rely solely on the various provincial legislative requirements. It was felt by Council that these were too dispersed and potentially confusing, as well as too vague in places.

In deciding to develop a Code of Conduct that would work in concert with the various provincial and federal statutes, Council put in place rules that are generally viewed as being clearer and more specific with respect to what constitutes ethical behaviour by elected officials.

The Code of Conduct is framed by and complementary to the provisions of the various governing statutes. Its preamble establishes an appropriately high-minded tone in stating the expectation that *"The public is entitled to expect the highest standards of conduct from the members it elects to local government. In turn, such standards will protect and maintain the City of Toronto's reputation and integrity"*. In its key statements of principle, it speaks to the responsibilities of members of Council and provides guidance with respect to the separation of public and private interests.

- *"Members of Council shall serve and be seen to serve their constituents in a conscientious and diligent manner.*
- *No member shall use the influence of their office for any purpose other than for the exercise of his or her official duties.*

- *Members of Council are expected to perform their duties in office and arrange their private affairs in a manner that promotes public confidence and will survive close public scrutiny*
- *Members of Council shall seek to serve the public interest by upholding both the letter and the spirit of the laws and policies established by the Federal Parliament, Ontario legislature, or the City Council."*

The statements of principles are generally consistent with those of other jurisdictions and with the core definition of conflict of interest – ensuring that the public interest is protected and that public office is not used to further private interests.

While the trend in Canada and the U.S. at the federal level is to put in place a Code of Conduct for Elected Officials, it is a less common practice at the provincial/state or municipal level. In adopting the more comprehensive code of conduct approach as the umbrella for both statements of principal and conflict of interest rules governing their conduct and behaviour (as opposed to more traditional and narrow conflict of interest rules) Toronto is a forerunner in this regard.

Conflict of Interest Policy for City Employees

Prior to amalgamation, most of the former municipalities had some form of conflict of interest policy or code of conduct for their employees. In August 2000, a new Conflict of Interest policy was developed that harmonized and strengthened the elements of the former policies.

Under this new policy, City employees are expected to conduct themselves with personal integrity, ethics, honesty and diligence in performing their duties. Employees are required to support and advance the interest of the City and avoid

placing themselves in situations where their personal interests actually or potentially conflict with the interests of the City.

The policy defines a conflict of interest as:

> *"…a situation in which private interests or personal considerations may affect an employee's judgment in acting in the best interest of the City of Toronto. It includes using an employee's position, confidential information or corporate time, material or facilities for private gain or advancement or the expectation of private gain or advancement. A conflict may occur when an interest benefits any member of the employee's family, friends, or business associates. The policy is clear that employees are not permitted to use their positions to give anyone special treatment that would advance their interests or the interest of any member of their family, friends or business associates".*

Particularly valuable and useful are the sample questions and answers in Appendix 1 of the policy that provide examples *"that do not exhaust the possibilities for conflict of interest, but they do identify obvious situations covered by the policy*". In easy to understand language, this appendix provides a range of scenarios that could present themselves to a City employee. While some public sector organizations include illustrative examples, they are often not as clear or comprehensive as those provided by the City of Toronto. The following are examples:

> ***"Special treatment:***
>
> *Employees are not allowed to use their positions to give anyone special treatment that would advance their own interests or that of any member of the employee's family, their friends or business associates.*

Sample question: "A member of my family asked me to bring home an extra permit. I could get an extra permit because I work in the Permits Office, but won't do that. Everyone has to follow the standard procedure for permit applications. Am I right?"

Answer: Yes, you are right. Bending the rules to favour a family member or friend would be a conflict of interest.

Receiving fees or gifts:

Employees may not accept gifts, money, discounts or favours including a benefit to family members, friends or business associates for doing work that the city pays them to do. The exceptions to this are promotional gifts or those of nominal value e.g., coffee mug or letter opener with the company's logo or the occasional lunch.

Question: "What should I do if a client gives me a gift or some money to thank me for doing a good job?"
Answer: Politely refuse the gift or money. You could explain that while you appreciate the offer, accepting it would not be proper according to the city's conflict of interest policy. Someone might interpret the gift as a bribe to get special treatment.

Outside work or business activities:

Employees may not engage in any outside work or business activity:

a) *that conflict with their duties as city employees;*
b) *which use their knowledge of confidential plans, projects or information about holdings of the corporation; and*

c) *that will, or is likely to, negatively influence or affect them in carrying out their duties as city employees*

Question: I am a buyer in the Purchasing & Materials Management Division and a friend who is bidding on a city contract has asked me to coach him on the preparation of his bid. Am I permitted to assist him?
Answer: No you cannot assist him even if you are not directly involved in the assessment of the contract on which he is bidding. Your knowledge of city contracts could lead to the perception that your friend would have an advantage over other bidders.

Question: I am a paramedic and I have been asked by an accredited institution to teach a course on CPR. I will be paid a fee for this course. Am I permitted to teach the course?
Answer: Yes, as long as you are not teaching individuals that you would normally be teaching as part of your job and do not wear a city uniform when teaching the course.

Question: I am a licensing enforcement officer and I own an adult entertainment establishment Is this a conflict of interest? What should I do?
Answer: This may well be a conflict. You must disclose this involvement in writing to your executive director or general manager."

Categories of Conflict Rules: Elected Officials

The categories of rules contained in the members' Code of Conduct are for the most part consistent with those codified in other jurisdictions. The Code addresses the following areas:

- Statutory provisions regulating conduct

- Gifts and benefits.
- Confidential information.
- Use of City property, services and other resources.
- Election campaign work.
- Business relations.
- Conduct respecting current and prospective employment.
- Conduct at Council meetings.
- Conduct respecting staff.
- Conduct respecting lobbyists.
- Discreditable conduct.

The Code of Conduct also contains a useful schedule setting out the roles and responsibilities of the Council members and staff – its preamble stating "*Members of Council and Staff of the City are both servants of the public and they are indispensable to one another."* It lists a number of expectations for the following:

- The Whole Council.
- The Mayor.
- Councillors Generally.
- Standing Committees as a Whole.
- Standing Committee Chairs.
- Council Members on Agencies, Boards and Commissions.
- Staff of the City.

In setting out these expectations, the Code reflects a values-based approach, rather than rules that are excessively prescriptive in detail, the expectation being

that Councillors will hold themselves to the highest standard of ethical conduct and exercise appropriate judgement if a conflict situation presents itself.

A good example of a rule where judgement is required is with respect to the acceptance of gifts and benefits. The rule states, *"No member shall accept a fee, advance, gift, or personal benefit that is connected directly or indirectly with the performance of his or her duties of office."* Exceptions to the rule are stated in a likewise general manner leaving the onus on the member to determine the appropriateness of accepting the gift or personal benefit, i.e. *"such gifts or benefits that normally accompany the responsibilities of office and are received as an incident of protocol, custom, or social obligation".* By way of contrast, in jurisdictions that provide for more definition, (e.g. the U.S. and Government of Canada) the legislation or policy would be more specific. For example:

- A prohibition on any gifts over a certain dollar value or, in the case of a gift above that value that cannot be reasonably refused (e.g. for reasons of protocol, etc.), the gift would become the property of the City.
- Any gift over a certain dollar value would have to be disclosed to the ethics/integrity commissioner, including a statement of the value of the gift and the circumstances under which it was received.

Categories of Rules: City Employees

As with the Code of Conduct for members of Council, the categories of rules for City employees are consistent with those found in other jurisdictions, i.e.

- Special treatment for themselves, family, friends, or business associates.
- Receiving fees or gifts.
- Outside work of business activities.
- Using City property.

- Confidential information.
- Financial interest.
- Guidelines for management and professional staff.
- Representing others.
- Appointments.
- Conduct respecting lobbyists.
- Requirement to report conflict of interest.

The City's Conflict of Interest policy for staff is not exhaustively prescriptive in terms of detailed accounts of prohibited behaviour. Consistent with the Canadian tradition, it relies on higher-level statements, such as:

- Employees may not accept gifts, money, discounts or favours for doing work the city pays them to do.
- Employees may not use City property or resources for non-work activities.
- Employees may not use or disclose confidential information.
- Employees with financial interests in organizations doing business with the City must not represent or advise the organization in such transactions.
- Employees conduct respecting lobbyists is consistent with the Code of Conduct for Councillors.
- Certain employees may not appear before Council where the employee is paid to appear or is involved in the issue or policy under consideration.
- Certain employees may not seek or accept appointment to a City committee or board, must disclose membership on other boards that deal with issues related to their work at the City and must declare conflicts of interest where appropriate; and
- Employees must report situations of conflict of interest.

As noted earlier, the City reflects best practice by appending sample questions and answers in Appendix 1 of the policy that provide examples “that do not exhaust the possibilities for conflict of interest, but they do identify obvious situations covered buy the policy”.

Disclosure of Interests

At this time, the City of Toronto (as with other Ontario municipalities) does not require confidential or public disclosure of interests for its elected officials or employees. In this regard, Toronto relies on the protocol for disclosure outlined in the *Municipal Conflict of Interest Act* whereby a member must publicly withdraw from the proceedings when a conflict arises. As noted earlier in this report, the issue of mandatory disclosure of the interests of elected officials was a major feature in the mid-1990’s debate on revised municipal conflict of interest legislation.

Oversight

When Council approved the Code of Conduct for its members, it also created an Ethics Steering Committee to establish a process for enforcing the Code of Conduct and to be responsible for monitoring the implementation and effectiveness of the Code.

The Ethics Steering Committee is a special Committee of Council, as opposed to being a formal sub-committee of a Standing Committee. As such, it has a dual reporting relationship:

- It reports through the Administration Committee with respect to policy recommendations and the creation of protocols to deal with complaints.
- It reports directly to Council on any recommendation to engage an external investigation of a formal complaint involving non-compliance with the Code of Conduct.

The Committee may have up to five members, including the Mayor or the Deputy Mayor/Mayor's designate as chair, the Chair of the Administration Committee and the Chair of the Personnel Sub-committee. It is responsible for:

- Ensuring that policy matters contained in the Code of Conduct are adequate as guidelines for member conduct, as well as establishing any required new policies.
- Ensuring that Council establishes a required process to deal with any complaints or concerns regarding alleged non-compliance with the Code of Conduct by a member.
- Ensuring that the complaint process is followed and providing recommendations for any external investigation of alleged non-compliance with the Code of Conduct.

In mid-2002, the Ethics Steering Committee recommended the creation of an independent Integrity Commissioner to apply and administer the Code of Conduct. This represents a major, progressive step forward in the municipal administration of codes of conduct and conflict of interest policies in Ontario. As proposed, the Integrity Commissioner has been based on the current provincial rather than federal model in that it would operate at arm's length from Council and the Mayor's Office. The Commissioner would make independent recommendations to Council with respect to penalties or other corrective action in the event of infractions by individual members, with Council making the final decision with respect to any penalty – the same approach taken at the provincial level.

More specifically, the Commissioner would have responsibility for:

- Complaint assessment/investigation related to Council's Code of Conduct.
- Giving advice to members of Council on potential conflict of interest situations.
- Publishing an annual report on the findings of typical cases/inquiries.
- In cases where a member of Council has been found to be in violation of the Code of Conduct or other matter, recommending to Council that a penalty be imposed, with Council making the final decision with respect whether and what penalty will be enacted.

The intention is that this Commissioner would also oversee the proposed lobbyist registry.

Compared to other governments that have independent integrity commissioners, one responsibility that has not been included mandatory disclosure of interests under the Code of Conduct to the Commissioner (the most common approach in Canada being one of confidential disclosure). Council did not include this in its proposed approach, although the issue was raised at the time in staff analysis:

> *"Currently, Council Members do not have the financial and asset disclosure requirements of many other jurisdictions. This actually comprises the central, or sole, mandate of most Ethics Commissioners. The City of Toronto could introduce disclosure requirements for its Council members. This would strengthen justifying the establishment of an Ethics Integrity Commissioner for the City".*

As currently proposed, the creation of an Integrity Commissioner with the kinds of powers described above would require provincial enabling legislation, notably the kinds of investigatory and enforcement powers that the research indicates are critical for effectiveness. In this would be included the proposed exemption from

Freedom of Information requirements, the power to make legal decisions about contraventions being divided between Council and the Integrity Commissioner, and the power to conduct an inquiry and access information under oath.

As noted in the Toronto Computer Leasing Inquiry research paper *Lobbyist Registration Volume 3*, the City's ability to take action in this area is not entirely contingent on provincial legislation. It may be possible for worthwhile elements of the City's approach to be implemented, albeit without the extent of enforcement capacity that is ultimately required, including:

- Hiring an Integrity Commissioner that is focused on providing non-binding conflict of interest advice and interpretations for Councillors and City staff.
- Hiring someone to investigate Code of Conduct or other types of ethics policy infractions including violations of ethics related policies, i.e. code of conduct, lobbyist registration, etc. While this kind of investigation would not include the capacity to compel cooperation, there are many precedents within government, i.e. internal investigations into allegations of harassment or discrimination in the workplace.

Developing the Culture

As discussed in *Conflict of Interest Volume 1*, the importance of culture and values for guiding employee behaviour is strongly emphasized in the research. Organizations are recognizing that rules alone do not encourage employees to behave in an ethical manner.

It is clear from the research and interviews that in the wake of amalgamation, the City of Toronto had many priorities to address. The period following amalgamation was particularly challenging with the complexities of simultaneous

changes in governance, structure, processes, policy and personnel, as well as the need to ensure that public services were delivered effectively and efficiently.

At this time, senior City officials were also keenly aware of the different experiences, approaches, cultures, etc. of the various amalgamating cities. They recognized early on the importance of taking action to build a new, consolidated culture, including initiating formal discussions at the Commissioner level. By necessity, the initial emphasis was on policy development and consolidation with respect to new conflict of interest policies, including a substantial investment of time and effort to ensure that these policies were comprehensive and rigorous.

Since that time – and most notably in the past 18 months – the City has considerably intensified its efforts to consolidate and build a unified culture based on high ethical and public service standards through the Toronto Public Service Initiative.

This Initiative is a well-designed and articulated corporate organizational health and development project reporting directly to the CAO, the purpose of which is to build morale and develop the civil service. The Initiative focuses on excellence in public service and consolidates all corporate policies, documents, and initiatives that share the same values and principals. It is intended to reach out to all employees and to commend and challenge them to commit to excellence through stewardship and service.

The need for this initiative was evident from samplings of staff attitudes and morale. Significant challenges were identified with respect to individual perceptions of their own working conditions and the public service in general. As reported, a majority of City staff were experiencing feelings of being taken for granted or being unappreciated, high levels of stress, a general sense of powerlessness, and an overwhelming workload. The City's public service as a

whole was seen as lacking cohesion, being without direction, uniformed, chaotic, and in need of renewal.

The stated long-term vision of the initiative is the creation of “a strong culture, healthy climate and good morale”. Under the direction of the City administration’s senior management team and with the approval of Council and the personal stewardship of the CAO, the following three goals have been established to achieve this long-term vision:

1. *Develop a clear, Corporate Vision, Mission and Role statement that will become widely understood, referred to and practiced.*
2. *Create a single corporate improvement framework which will allow the corporation to:*
    - *Show an overall improvement plan*
    - *Link improvement strategies*
3. *Engage staff and Council in understanding the Corporate Mission, Role, and Improvement Strategy for the Corporation. By next year all management staff will understand the Council Vision and the Corporate Mission, Role and Improvement Strategy.*

As part of achieving these goals, City staff have developed a multi-year implementation strategy that incorporates both the theory and best practices of Change Management, including:

- A formal assessment of need as well as framework and goal development in 2002.
- A defined strategy approved by Council, the creation of a multi-disciplined project infrastructure in the CAO’s office, initial staff workshops/training sessions, information meetings and other communications tools such as videos and newsletters in 2003.

- The creation of champions, ongoing workshops and staff guides, additional public communication, and a major staff conference planned for 2004.

The CAO and other senior executives have and are expected to continue to be highly visible throughout the process. More recently, the new Mayor in one of his first acts in office wrote to all staff reinforcing the key messages of the Toronto Public Service Initiative and indicating his personal support for the direction (this was consistent with his earlier and, as indicated in interviews, very strong support for the initiative as the previous Chair of the Personnel Sub-Committee). These various actions on the part of senior City officials are consistent with the emphasis in the literature on senior management needing to be visible in demonstrating the organization's belief in ethical behaviour.

Part 4
Input and Options/Approaches

As indicated in the previous section, the City of Toronto has taken a leadership role in many areas related to ethics, including the Code of Conduct and conflict of interest policy development, the creation of the Ethics Steering Committee, the proposed Integrity Commissioner and lobbyist registry, and the Toronto Public Service Initiative. This is not to say that the City has a new, consolidated culture in place at the present – with any major amalgamation, the development of a consistent and mature culture based on high standards and expectations can take anywhere (depending on the expert consulted) from five to ten years. As reported in interviews, there continues to be the potential for this very large organization to have considerable variation in practice to occur with respect to interpretation of the rules, compliance and enforcement actions, as well the messaging about the importance of ethics in the workplace. In both word and deed, however, senior City officials have recognized the need for a clear vision, commonly understood and shared values that will guide behaviour, and have committed themselves to the rigour required to turn value statements into an operational reality.

Not surprisingly, in the internal and external interviews for this project, individuals expressed satisfaction with the progress and direction in which the City is moving and more specifically in the design and development of its conflict of interest policies. There is a sense that elected officials and administrative staff, particularly at the senior level, are very aware of and familiar with the content of the policies and their corresponding responsibilities. Many of those were very positive with respect to the work that had been done on the various more descriptive and example-based schedules attached to the Code and Conflict of Interest policies.

When asked, therefore, whether changes should be made in any aspects of the City's current approach, many individuals identified areas or issues that were not necessarily problems or shortcomings, but instead opportunities to push Toronto's leadership in this area to the next level of development.

The major themes that surfaced from interviews included the following:

- For the most part, it was felt that the categories of conflict for elected officials and non-elected officials were clear and inclusive enough to capture the range of conflicts that could surface. It was also noted that the policies were developed so as to be expandable and that subsequent categories could be introduced over time as required.

- The inclusion of case studies and descriptive examples was recognized as having been highly effective. It was suggested that this could be further strengthened, perhaps as part of the Toronto Public Service Initiative, by the expanding the number of case studies and creating additional descriptive examples based on real job situations. As reported in the interviews, some departments have already developed their own materials for use by the staff but not necessarily linked to the corporate direction in terms of key messages and interpretations.

- It was suggested that there is an opportunity to consolidate all of the policies that impact on or have implications for conflict of interest for Councillors in a single, easily accessible document, based on the current Code of Conduct. Examples of the areas that could be included are office expenses for Councillors and management of unsolicited proposals, typically from outside suppliers of goods and services. A similar opportunity was identified with respect to a consolidated approach for City employees, again perhaps in the form of a Code of Conduct.

- There was a general view that the next major leadership step for Council should be in the form of requiring confidential disclosure of interests to the proposed Integrity Commissioner. As noted earlier, this would clearly establish Toronto as leading municipality in North America and is also seen as something that would strengthen the City's case for enabling provincial legislation. It was acknowledged that this would not be a typical approach for an Ontario municipality, but that given Toronto's size, scope, and complexity, (5th largest municipal government in North America, and 6th largest government of all types in Canada) the appropriate comparator should more appropriately be the provincial/state level of government. It was also generally felt that a similar confidential approach would be appropriate for senior public servants, again positioning Toronto in the forefront.

- There is a sense that the current language and requirements with respect to the receipt of gifts and benefits for elected officials, while consistent with the approach in many other jurisdictions, is perhaps somewhat vague and that public perceptions of integrity would be enhanced by more definitive requirements in this particular area.

- There appeared to be a lack of clarity with respect to the Code of Conduct training offered to Councillors. Most were clear about training at the beginning of each term of office but less so with respect to ongoing training or development. There was a general sense that development in this area could be enhanced by more regular discussion between and among Councillors and also involving senior staff, including making more use of a real-life case study approach. Similar views were expressed with respect to employees and the benefit of having more ongoing training, perhaps as an integrated component of the Toronto Public Service Initiative. It was suggested that this should include a greater emphasis on

guidance to managers with respect to handling situations of real, potential and perceived conflict.

- It was noted that no mechanism currently exists to evaluate in an ongoing way the extent to which the policies (and ethics more generally) are uniformly applied, particularly with respect to interpretations, advice and disciplinary actions.

Options and Approaches for Discussion

The follow options and approaches for discussion reflect Toronto's high level of accomplishment in developing codes of conduct and conflict of interest policies, the design and implementation to date of the Toronto Public Service Strategy, and the stated intention of senior officials to continue to intensify their efforts in this area. Reflecting the literature, best practices from other jurisdictions, and input from interviews, this section includes two major approaches, relating to disclosure of interests and the creation of an ethics centre, as well as a number of secondary options and approaches.

Disclosure of Interests

As noted in the previous section, disclosure of interests is generally seen as the next major step forward that Toronto Council could take in terms of ethics related policies and practices. Consistent with the City of Toronto's status as one of the largest governments in North America, and with the full-time nature of Councillor positions, this confidential disclosure should be modeled after federal and provincial examples.

In this regard, the recommended approach is that Council adopt a policy that provides for confidential disclosure of financial assets and contingent liabilities for Council members to the proposed Integrity Commissioner, the responsibilities and powers of which would be modified accordingly. Also, it would be necessary to make corresponding changes to the City's proposal to the provincial government for special legislation to create the Office of the Integrity Commissioner.

In addition, it is recommended that a similar policy of confidential disclosure be adopted for the Chief Administrative Officer and Commissioners, in recognition of their influential positions and their demonstrated commitment to the highest standards of real and perceived integrity.

For elected officials, the proposed City Integrity Commissioner would be responsible for reviewing confidential disclosure forms on a scheduled basis and providing advice and guidance to Councillors with respect to areas of apparent, potential, or real conflict.

As part of maintaining the important distinction between administrative and elected officials, a designated official in an *ethics centre of excellence* to be established in the CAO's Office (see the next set of options with respect to *Continuing to Build an Ethical Culture*) would be responsible for reviewing the confidential disclosure forms of the CAO and Commissioners on a scheduled basis and providing advice and guidance with respect to areas of apparent, potential, or real conflict.

Continuing to Build an Ethical Organization

As noted earlier, the City has made considerable progress in its efforts to create a new, consolidated City culture based on high ethical and public service standards through the Toronto Public Service Initiative. To date, that Initiative has been based on best practice thinking and planning. The following approaches, also based on best practices in organizational development and Change Management are intended to further strengthen what is already a very positive approach.

It is recommended that the administration create an *ethics centre of excellence* in the organization that would have a mandate to develop a comprehensive ethics program for the City and would have ongoing responsibility for developing and leading the implementation of future strategies and plans to enhance ethical behaviour in the City.

The centre would be responsible for:

- Developing a comprehensive and leading edge ethics training and management program that would emphasize fundamental principles and practical/illustrative examples of ethic-related situations (e.g. conflict of interest, lobbying, procurement, etc.) that might present themselves depending on the department, and how these should be approached and resolved. The program would include a specific component dedicated to executive development, including relevant case studies, materials, and courses. The training would be customized to meet the working environments and responsibilities of staff in different parts of the organization (e.g. reflecting the different circumstances of those working in corporate vs. those in front-line service delivery). The program would also include a component directed at ensuring individual Councillors have

a clear, consistent, and up-to-date understanding of the role and values of the Toronto Public Service Initiative and its accomplishments.

- Ensuring that a review of conflict of interest policy becomes part of the performance management and appraisal system for all levels of the organization, in addition to management. This would include the requirement that all staff review the policy with their superiors on an annual basis as part of creating ongoing awareness and more regularized and open process to discuss possible conflicts.

- Ensuring that ethical language and key messages demonstrating the City's commitment to high standards of ethical behaviour are incorporated into all City policy and procedure documents and City communications more generally.

- Creating an *ethics hotline* that would allow confidential disclosure and discussion of conflict of interest and other ethics-related issues by employees. Advice would be given to the employee about whether they were in conflict, to whom notification should be made, and a suggested course of action. This impartial hotline would supplement and support rather than replace the current process of disclosure to a superior.

- Developing a regular, on-line ethics information/interpretation bulletin and discussion forum that would provide updates on ethics initiatives, provide interpretive information in the form of real-life case studies and best practices, and an opportunity to publicize and celebrate successes.

- Developing a user-friendly, plain-language staff guidebook that includes the fundamental principles, information on formal policies and procedures, interpretive guidance, and practical examples of conflict situations. Where appropriate, these would be tailored to the different needs of staff in various parts of the organization.

- Ongoing professional liaison with recognized external organizations such as the Canadian Centre of Ethics, as well as individual experts, as part of building a broader network of support and remaining current on both theory and practice.

- Developing an annual public service week, as a citywide focus of professional development and an opportunity to celebrate achievements, receive input from recognized experts, receive feedback on key issues or areas of interest, and communicate plans for the future.

In addition, as noted in the previous set of approaches dealing with disclosure of interests, a designated official in the *ethics centre of excellence* would be responsible for reviewing the confidential disclosure forms of Commissioners on a scheduled basis and providing giving advice and guidance with respect to areas of apparent, potential, or real conflict.

For the purposes of continuing to emphasize the importance of this direction and to drive change from the top, this centre would be part of the CAO's Office for the foreseeable future but ultimately would be a more formal part of the Human Resources function.

Secondary Options/Approaches

The following are a small number of secondary options and approaches that emerged from the review of the literature, best practices, and expert input:

- As part of the proposed citywide ethics management program, that Council and senior administrative officials meet regularly on an informal and private basis (i.e. not a formal Council meeting) to discuss ethics and code of conduct issues, including the use of case studies.

- That other policies in place or under development that have an impact on or implications for conflict of interest for elected officials (for example, office expenses for Councillors, the process for dealing with unsolicited proposals) be referenced or included in the Code of Conduct for elected officials.

- That the current Conflict of Interest policy for City employees be incorporated into a broader and more comprehensive code of conduct for the public service and that this include all policies in place or under development that have an impact on or implications for conflict of interest for employees be included, e.g. policies on employee participation, post-employment restrictions, procurement.

- That the language contained in the Code of Conduct for members of Council with respect to gifts and benefits be clarified and made more transparent and specific. Based on practices in place in other jurisdictions, a reasonable approach – and, again, one that would further enhance Toronto's leadership in this area – would be to the adopt language that has been previously proposed by City staff:

  > *"No member shall accept any gift or personal benefit exceeding $200.00 in value that normally accompanies the responsibilities of office and is received as an incident of protocol, custom, or social obligations. Nor shall any member accept any gift or personal benefit where the total value received directly or indirectly from one source in any twelve-month period exceeds $200.00. Any gift received over the $200.00 limit for which it would be an insult to the donor to refuse even after explanation of the City policy, would automatically become a gift to the City and the property of the City as a whole as opposed to any individual member."*

Toronto Computer Leasing Inquiry

Research Paper

MUNICIPAL GOVERNANCE

Volume 1: Overview of Approaches

November 2003

Table of Contents

Executive Summary

Introduction

The focus of Volume 1 on municipal governance is on:

- An overview of major different models of political governance at the municipal level and a discussion of whether and to what extent any one particular model is more effective than another.
- An overview of the major different models of senior administrative structure at the municipal level and a discussion of the relative effectiveness of the different approaches.
- An overview of the new Ontario *Municipal Act, 2001* (referred to as "the Act").

With this as the foundation, Volume 2 focuses on the particular governance issues and challenges currently faced by the City of Toronto, as well as options and approaches for discussion with respect to potential changes.

Research for Volumes 1 and 2 included over 1,400 pages of documents and interviews with 28 individuals including current and former municipal officials, provincial government officials, academics, representatives of provincial associations, and legal experts. Documentary resources included legislation, government reports and research/policy documents, public proceedings, correspondence, academic and other expert analysis/writings, opinion pieces, etc.

Political Governance Structures

The literature points to five conceptual models for political governance of municipalities which are usually characterized at the highest level in terms of the statutory powers vested in the Mayor. The five models are:

- Mayor-Council.
- Mayor-Cabinet.
- Board of Control.
- Committee-Council.
- Strong Council/Weak Mayor (also referred to as Council-Manager).

The two most common characterizations of the various models are *strong Mayor* and *weak Mayor*, referring to the statutory powers of the Mayor relative to Council and the administration.

The key distinguishing feature in this continuum of strong to weak models is in the apportionment of executive and legislative authority and accountability among elected officials. "Strong" generally means that the Mayor and/or executive body (Cabinet, Executive Committee, Board of Control, etc.) have more extensive executive authority for policy development, financial management, and program delivery that is independent of Council. *Weak* generally means that the nature and extent of executive authority flows from the Council.

What Makes One Political Governance Model Better than Another?

The literature does not point clearly to one political governance model as being superior to others. In fact, any or all of the models can provide for effective political governance if:

- Certain preconditions exist or can be created.
- The model can be implemented and/or modified in a way that is consistent with a particular jurisdiction's cultural context (including history/tradition, political culture, civic culture, etc.)
- Modifications to a particular model are geared to the actual obstacles – both real and perceived – that prevent a particular jurisdiction from achieving effective political governance.

These preconditions are:

- Strong political leadership.
- An effective Mayor/head of Council.
- Clear roles and responsibilities.
- Excellence in public service/confidence in the Public Service.
- Respect and professionalism.
- Reinforcing culture with embedded rewards and sanctions.

Not surprisingly, most of the preconditions relate to factors that are not particularly structural in nature – not whether the Mayor has "strong" or "weak" powers, not whether there is an executive committee, etc. Rather, they relate to the essential and less tangible elements of leadership, culture, values, and behaviour in both individual and collective terms. As often expressed by organizational experts, this suggests that with the right leadership, culture, values, and behaviour, any basic structure can be made to work. Also, in practice these preconditions are not discrete elements. There needs to be a high degree of interaction and integration between and among them.

Administrative Structures

Municipal Councils (particularly those in Ontario) often have wide legal latitude to establish the senior administrative structure of their government. In practice a relatively small number of core models have emerged:

- Chief Administrative Officer (also described as a Canadian approach to City Manager).
- City Manager (U.S.-style).
- Mayor as Chief Executive Officer.
- Commissioners/Board of Management.

The first three of these are, in effect, variations on the theme of a single accountable head of the administration, with a clear separation of policy and operational responsibilities. The fourth model is more diffuse in nature, both in terms of multiple points of accountability and less clarity with respect to policy and operational responsibilities.

Accordingly, three important distinguishing features among these various models are:

- The degree to which policy and administrative/operational authority are separate and distinct between the political and administrative levels, including whether this separation is delegated by the Council, or more statutorily based.
- Whether administrative/operational authority is formally concentrated in one versus several individuals.
- In the case of delegated authority, the extent to which a particular Council, in actual practice respects and adheres to delegated authority of the senior staff and conducts its interaction with staff at all levels accordingly.

With respect to the latter point, the factors that affect the practical (as opposed to formal) extent of delegation appear to include:

- Prevailing legal tradition and culture with respect to interpreting Council's power to delegate.
- The size and complexity of a municipality and the extent to which it is practical for Council to retain more "hands-on" operational control.
- The culture of risk taking and degree of public scrutiny within a particular municipality.
- The degree of trust a Council has in its administrative staff.
- Council's own view and understanding of its role.

Effectiveness of Different Administrative Structures

Any of the above models can and in various forms have been demonstrated to provide for effective governance. However, the cultural context of a particular municipality is the key factor in determining whether a particular model will be effective in a given situation, i.e. a model might be so inconsistent with the political and cultural tradition of a jurisdiction as to be unworkable.

In general, however, the research suggests that any model of administrative structure should be able to provide for the following:

- Greater operational efficiency and effectiveness, particularly when coupled with performance-based contracting.
- A specific focus of accountability and responsibility for the administrative performance of the municipality.
- A clear understanding the respective roles and responsibilities of politicians and administrative staff.

- Improved coordination and integration of municipal programs and activities.
- A relatively distinct separation of operations and policy, thereby enabling the political and bureaucratic components of municipal government to focus on their respective roles.

The Ontario *Municipal Act, 2001*

The province's *Municipal Act, 2001* enshrines a *weak Mayor/strong Council* model of municipal governance. The emphasis in the Act is on providing the basic ground rules. Within these basic rules, local Councils have considerable flexibility and authority to determine their own requirements.

The most important ground rule is that Council is the source/primary locus of almost all authority with relatively few exceptions, including all legislative authority. Council makes the decisions with respect to whether and to what extent to delegate this authority to others, including the Mayor, various standing or other committees, and the administrative staff. The statutory authority of the Mayor/head of Council is actually quite limited, with an emphasis on chairing Council meetings and performing largely ceremonial duties.

The following are the basic structural provisions of the Act related to governance:

- Each municipality will have a head of Council (Mayor). This individual is elected at large in lower tier municipalities. Upper tier municipalities have the option of appointing the head of Council from among the existing Council members.
- An elected Council will have a minimum of five members (including the head of Council).

- Council can be elected either by ward, at large, or in any combination of the two.
- Council must appoint a Clerk, focused primarily on recording resolutions, keeping records of decisions, etc.
- Council must also appoint a Treasurer, who, although not required to be an employee, is responsible for handling all of the financial affairs of the municipality "on behalf of" Council, as well as an external auditor.
- Council has the power to establish standing committees, including an executive committee. There is no guidance or direction in the Act with respect to number, configuration, mandate, etc. The general powers of Council to delegate its authority would apply to these committees.
- Although the Act sets out the roles and responsibilities of administrative staff, it does not prescribe a particular form of administrative structure (it does however, specifically allow for the appointment of a Chief Administrative Office at the Council's discretion.)

What's New about the Act?

From the provincial government's perspective, the new legislation was intended to reflect a new philosophy towards municipalities in Ontario and a new approach to defining their powers, with particular emphasis on:

- Less focus on explicit permission and more emphasis on general authority within the ten specific spheres of jurisdiction and enhanced natural person powers.
- Greater flexibility with respect to how municipalities are organized internally to deliver services.

Overall, the expert assessment of whether the Act in fact represents a significant new direction is mixed. There appear to be two general schools of thought that can be summarized as follows:

- That the Act actually does provide municipalities with more authority and flexibility. However, the Act is also very new and the culture of the previous, more prescriptive legislation is very ingrained among many municipal officials (including Councillors, municipal lawyers, and administrative staff). As such, it will take some time before the new Act is better understood/more fully implemented and its full potential is realized.

- That the new Act is not significantly different than the previous legislation in that it continues to be highly prescriptive in nature, and that municipalities continue to lack many of the key powers they require to manage effectively.

With respect to additional powers and greater flexibility to act, the conclusion reached by a number of observers is that the more prescriptive nature of the previous Act has resulted over time in a well-entrenched culture in the municipal sector that continues to focus on "if the Act doesn't explicitly say you can, assume that you can't". If this conclusion is true, it is clear that this relatively new piece of legislation:

- Needs time to be explored and tested, including court challenges.

- To be fully utilized may require a change in prevailing political, administrative, and legal/judicial perspectives and attitudes.

- Could, as has been suggested by others in the literature and in interviews, benefit from more detailed clarification from the province.

With respect to governance, the Act provides municipalities with a large measure of flexibility in how they organize and delegate authority, albeit within certain overall limitations. This means that Councils in Ontario already have the authority to replicate many of the features of the different political governance models. For example:

- A much stronger Mayor with more extensive delegated powers, an empowered executive committee to provide strategic leadership, etc.
- A Council with no committees that focuses on policy decision making and extensive empowerment of administrative staff.
- A Council that has dispersed its authority very broadly between and among all of the actors – Mayor, Council, Committees, and senior staff.

Again, the factors that determine which direction a Council will take depend largely on the Council itself.

- The culture and tradition of Council and the personal experience, knowledge, and views of Councillors.
- The relative value a Council places on streamlined Council decision making versus more participatory approaches.
- Whether Councillors are full-time or part-time and the number of personal staff for each Councillor.
- The strong emphasis in municipal government generally on very local matters, e.g. stop signs, garbage pickup, etc. and the extent to which the public understands the division of roles and responsibilities as set out in the Act and does not expect that their individual Ward Councillors will be able to instruct/give direction to staff, particularly on operational matters.
- The extent to which the desired delineation of roles and responsibilities has been articulated, discussed, and embedded in the operating culture.

- The level of trust that Council has in the administrative staff.
- The extent to which Councils are comfortable with stepping beyond traditional interpretations of the Act.
- The culture of the legal department in terms of narrow versus more expansive interpretations of the Act.

Part 1
Introduction

The focus of Volume 1 of this two-volume report on municipal governance is on effective municipal governance. We have chosen this two-volume format for the purpose of presenting the information, findings, and analysis in a more manageable format.

Focus of this Report

With this in mind, the Volume 1 includes the following:

- An overview of major different models of political governance at the municipal level, with an emphasis on the differences between the basic conceptual models as part of setting the stage for the wide range of variations that exist in practice.
- An overview of the major different models of senior administrative structure at the municipal level and the relationship with the political level.
- A discussion of whether and to what extent any one particular model is more effective than another, including a set of preconditions for effective municipal governance that we will argue should be viewed as transcending and applying across the different models.
- An overview of the new Ontario *Municipal Act, 2001* including descriptions of:
    - The basic governance provisions of the Act.
    - What is new about the Act compared to its predecessor.
    - What the provisions of the new Act mean for governance.

With this as the foundation, Volume 2 focuses on the particular governance issues and challenges currently faced by the City of Toronto, as well as options and approaches for potential changes to political and administrative governance at the City. Analysis and the options and approaches discussed in Volume 2 are based on the premise that changes to municipal governance structures for a particular jurisdiction should have, as their basis, an understanding of the real and/or perceived problems and opportunities that need to be addressed. We also attempt, to the extent possible within the limitations of our research, to put the various real and perceived governance problems/challenges for the City of Toronto in the context of problems and opportunities faced by other municipalities in an effort to establish the extent to which Toronto's issues are unique to the size, scope, and complexity of the City.

Research Approach

The preparation of Volumes 1 and 2 included reviews of over 1,400 pages of documents and interviewing 28 individuals including current and former municipal officials, provincial government officials, academics, representatives of provincial associations, and legal experts.

Documentary resources focused on publicly available material (either in print or electronic format), including legislation, government reports and research/policy documents, transcripts of public proceedings, correspondence, academic and other expert analysis/writings, opinion pieces, etc. Material was collected on a wide range of jurisdictions including: examples from across Canada, the U.S., Great Britain, Australia, and New Zealand. Sources for these documents included various departments/branches of municipal, provincial, and state governments, academics and researchers, citizen groups, associations representing municipal political and administrative officials, and the media.

Our interviews included provincial officials from the municipal policy field, current and former municipal public officials from various (primarily Ontario), jurisdictions, academics from Canada and the U.S, legal experts, and representatives from the Association of Municipalities of Ontario and the Association of Municipal Managers, Clerks and Treasurers.

Part 2

Overview of Political Governance Structures

The literature points to a relatively small number of basic conceptual or theoretical models for political governance of municipalities. These basic models set the stage for the wide range of variations that exist in practice across municipalities in Ontario, across Canada, and abroad. In this section of our paper, we provide an overview of the key differences between and among these different approaches.

The Strong-Weak Continuum

The discussion of political governance structures at the municipal level, as presented in the literature, focuses primarily on the power relationship between the Mayor, Council, and Council Committees. The latter include various Standing Committees that tend to correspond to broad policy and/or program areas of municipal administration as well as variations on what in Toronto are known as “Community Councils”

The literature includes a range of approaches which are usually characterized at the highest level in terms of the statutory powers vested in the Mayor. The two most common characterizations are “strong Mayor” and “weak Mayor”, referring to the statutory powers of the Mayor relative to Council and the administration.

Under these general types of municipalities, there is a relatively small number of models that appear to be common across most jurisdictions.

For the purposes of this section of our paper, our emphasis is on formal authority/roles and responsibilities. At this point, we are not attempting to articulate what are often less formal/more idiosyncratic qualities that make for effective municipal governance. For example, in a weak Mayor system it is possible for the Mayor to have considerable real but informal (as opposed to statutory or formally delegated by Council) power and influence by virtue of their personal leadership style and capacity, their ability to create political alliances, sheer force of personality, local political popularity, etc.

The key distinguishing feature in this continuum of strong to weak models is the apportionment of executive and legislative authority and accountability among elected officials. "Strong" generally means that the Mayor and/or executive body (Cabinet, Executive Committee, Board of Control, etc.) has extensive executive authority for policy development, financial management, and program delivery that is independent of Council. *Weak* generally means that the nature and extent of executive authority flows from the Council. For example:

- At the *Strong Mayor* end of the continuum, executive and legislative authority and accountability are statutorily separated. The former rests with an elected Mayor, essentially in the role of the city CEO. The latter rests with the Council, in the role of legislature.
- At the *Weak Mayor* end of the continuum, executive and legislative authority and accountability are dispersed/shared among all Council members. For all practical purposes, no one member has more executive authority than any other with Council exercising both its executive and legislative responsibilities collectively.

In between these two extremes, there are a number of variations which we will discuss in more detail in this volume. In some cases, these are in fact variations within variations. For example, within the *Strong Council/Weak Mayor* model, some municipalities establish various approaches to Council committees. These include:

- A standing executive committee.
- Other standing committees, typically along policy or program lines, e.g. public works, social services, etc.
- A Committee of the Whole whereby all of Council goes into committee-mode for certain types of business.
- No committees of any type.

With respect to the relationship between politicians and senior administrative staff, the political governance structure can in some cases predetermine at least in part, the structure of the relationship with the senior administrative staff. For example,

- Intrinsic to the *Mayor-Council* model (a form of strong Mayor model) is that senior administrative staff (but not necessarily using a CAO or City Manager approach) report directly to and take their executive direction from the Mayor.
- Intrinsic to the *Strong Council/Weak Mayor* model (a form of weak Mayor model) is that there is a senior administrative position (CAO or City Manager being the most common) through which Council delegates its administrative responsibilities.

Again, within these different models are variations. As will be demonstrated, Canadian municipal Councils in particular, generally have wide latitude with respect to how they wish to organize and relate to/govern the administration.

Five Models of Political Governance

In this section, we provide an overview of five different structural models of political governance, all of which fall somewhere along the continuum between "strong" and "weak" Mayor approaches. Also, it is important to note that these

models are conceptual starting points for discussion as opposed to rigid prescriptions. In practice, municipal structures, although generally fitting under one of these models, vary widely in the details, very often including elements from one or more models.

The five models are:

- Mayor-Council.
- Mayor-Cabinet.
- Board of Control.
- Committee-Council.
- Strong Council/Weak Mayor (also referred to as Council-Manager).

The descriptions that follow begin at the “strong” end of the continuum.

1. Mayor-Council

Under the Mayor-Council model, executive authority is vested in an elected-at-large Mayor, while legislative authority rests with an elected Council. Individual components of the model include:

Mayor

- The powers of the Mayor include:
    - Clear authority for providing executive direction to city departments, i.e. as chief executive officer of the city.
    - Appointment, discipline, and dismissal of senior administrative officials, including (if present) the City Manager.
    - Preparation and administration of the budget.

- In some jurisdictions, veto powers (which may be overridden) over Council decisions.

- In this model, the Mayor:
  - Is elected with a mandate separate from that of Council and is directly accountable to the electorate, rather than to Council.
  - Is generally expected to put forward a vision, strategy, and program for the City as part of the Mayor's mandate.
  - Has clear and more direct and focused executive authority for the delivery of city programs and services.
  - Does not sit as a member of the Council and is not entitled to vote on legislation.
  - Is expected to focus on city-wide and intergovernmental issues.

Council

- The Council is focused on passing legislation and holding the Mayor accountable for his/her executive decisions. This includes responsibility for:
  - Approval of the budget prepared by the Mayor.
  - Passage of bylaws and resolutions.
  - Adopting policy positions, either generated by the Council or as proposed by the Mayor.
  - Auditing the performance of the Mayor and municipal departments.

- In this model:
  - Council has a separate chair or speaker.

- In some jurisdictions, the chair/speaker is selected by Council from within its ranks. In other jurisdictions, the position is elected-at-large.

Other notable characteristics of this model include:

- It is in place in most of the large U.S. cities, e.g. New York, Chicago, Philadelphia, Indianapolis, etc.
- It usually includes the existence of political parties – the Mayor and Councillors run for office as members of political parties, with party blocks being formed within the Council.
- Consistent with U.S. political culture, it involves the politicization of the senior levels of the administration. Department heads serve at the pleasure of the Mayor and are typically replaced when a new Mayor is elected (although the incoming Mayor has the option to reappoint existing senior officials).

2. Mayor-Cabinet

Under the Mayor-Cabinet model, statutory executive authority rests with an elected-at-large Mayor and an appointed Cabinet. The model includes the following elements:

Mayor

- Is elected at large and does not sit as a member of Council.
- Has city-wide executive authority to implement policies and legislation and provides direction to city administrative departments.
- Is elected with a mandate separate from that of Council and is directly accountable to the electorate, rather than to Council.

- Is generally expected to put forward a vision, strategy, and program for the City as part of the Mayor's mandate.
- Appoints the members of the Cabinet from within the Council, including determination of:
    - Portfolio assignments for each Cabinet member.
    - Delegated authority to make executive decisions, provide direction to the administration, etc.
    - Whether to establish Cabinet committees, including members, mandate, authority, etc.
    - The development and implementation of Cabinet-driven processes to engage the wider community.

Cabinet

- Is responsible for:
    - Preparing the budget.
    - Drafting and submitting legislative proposals to Council for approval.
    - Proposing changes to city plans.
    - Managing the internal infrastructure of government, e.g. human resources, information and information technology, etc.
    - Building/property management.
    - Entering into some contracts (sometimes involving an upper limit on this contracting authority).

Council

- Is responsible for:

- Approving policies as proposed by the Cabinet.
- Approving the budget as proposed by the Cabinet.
- Auditing the performance of the Mayor and Cabinet through overview/scrutiny committees.
- Designing and implementing its own processes for engaging the wider community.

3. Board of Control

The Board of Control model is essential an elected executive committee with varying degrees and scope of executive authority. The extent to which a Board has independent decision making power (i.e. is *strong* vs. *weak*) varies depending on the jurisdiction and the legal basis for the Board's authority, i.e. powers/roles and responsibilities enshrined in state or provincial legislation as compared to delegated through a Council by-law.

Board

The Board of Control generally includes the following features:

- Membership of between two and six members (often referred to as Comptrollers) elected at large.
- Chaired by one of the members: in some cases, the chair is appointed by the Board itself. In others cases, it is an elected-at-large Mayor.
- Board of Control members sit as voting members of Council in some jurisdictions.
- Certain Board of Control decisions require ratification/approval by Council, i.e. the budget. Ratification often requires a "super-majority", i.e. a vote by at least two-thirds of Council to overturn a Board recommendation (where

Board of Control members sit on Council, this can in effect mean that an almost unanimous vote of non-Board of Control Councillors is required.

- Board responsibilities can vary considerably depending on the nature and extent of executive authority vested in the Board, including:
    - Managing the major administrative (HR, finance, I&IT, property management, etc.) and program delivery responsibilities of the City, including providing executive direction to senior administrative officials.
    - Policy development and in some cases, actual policy decision making (as opposed to making recommendations to Council).
    - Developing and in some cases deciding upon (as opposed to recommending to Council) policy.
    - Deciding on bids/tenders, sometimes up to a certain value, developing the budget for Council approval, managing the budget, and reporting to Council on financial matters.
    - Processes to engage citizens in providing input into city government (can be separate from processes that might be put in place by Council).

Council

Under the Board of Control model, the Council's scope of authority and responsibilities depends on the extent to which the Board's executive authority is established independently of the Council. To the extent that the Board has more independent executive authority, the Council generally becomes more reliant on the Board for policy direction. Responsibilities/activities include:

- Approving legislation/by-laws.
- Passing non-binding resolutions.

- Approving the budget.
- Monitoring the effectiveness of the Board of Control (through oversight/scrutiny committees).
- Engaging citizens in providing input into City government (can be separate from processes that might be put in place by the Board of Control).
- Providing advice/input to the Board of Control on policy development and program delivery (this does not necessarily mean that the Board of Control would be required to accept or even listen to that advice but rather than nothing would preclude a Council from providing advice).

4. Council-Committee

The Council-Committee model is a *weak* version of the Mayor-Cabinet model discussed above. This model emphasizes an executive committee, chaired by a Mayor and composed of Councillors, with the power to make recommendations to Council.

This model does not preclude the establishment of other more policy/program focused Standing Committees that would provide advice to Executive Committee through the Council.

Mayor

In this model, the Mayor is usually elected at large. His/her responsibilities include:

- Chairing Executive Committee meetings.
- Chairing Council meetings.

- Appointing at least some members of the Executive Committee.

Executive Committee

The extent to which an Executive Committee is a creature of the Council (in effect, whether it is considered to be *strong* or *weak*), depends on its level of independence as established either by provincial/state legislation or by Council by-law. Executive Committees with greater statutory independence would tend to function more along the lines of Boards of Control as discussed earlier. An executive committee established by Council is more likely to have fewer independent decision-making powers, with more emphasis on the power to recommend to Council.

Executive Committee members can be selected in a variety of ways:

- Appointed by the Mayor without reference to Council.
- Appointed by the Mayor subject to ratification by Council.
- Include the Chairs of various Standing Committees (which, depending on the jurisdiction, may have been appointed by the Mayor without reference to Council, recommended by the Mayor subject to the approval of Council, or appointed by Council.)
- Members elected at large, who may or may not sit as voting members of the Council, depending on the jurisdiction.
- A combination of the above including members elected at large, members appointed by the Mayor, and members appointed by Council.

Within these general parametres, Executive Committee responsibilities could include:

- Developing and recommending the overall strategic direction and plan for the City.

- Developing and recommending a budget to Council.
- Making recommendations to Council with respect to major policy decisions and legislation.
- Making recommendations to Council with respect to recruitment, dismissal, etc. of senior administrative staff.
- Making decisions with respect to the administrative infrastructure of City government, including HR, financial management, I&IT, etc.
- Providing day-to-day executive direction to senior administrative staff.

Council

Again within the general parametres discussed above, Council responsibilities could include:

- Passing legislation.
- Approving the budget as proposed by Executive Committee.
- Approving policies as recommended by Executive Committee.
- Appointing some or all Executive Committee members, other than the Mayor.
- Receiving the advice of Executive and other Standing Committees.
- Determining the processes by which Executive Committee would be required to engage Council and Standing Committees in the formulation of its recommendations to Council.
- Determining the extent to which powers/authority would be delegated to administrative staff.
- Monitoring the effectiveness of Executive Committee and other Standing Committees.

- Engaging the public in policy formulation, decision making, and evaluating effectiveness.

5. Strong Council-Weak Mayor

Also known as the “Council-Manager” model, this is the weakest of the different models discussed in this volume in that it involves all executive and legislative powers resting with full Council. It is also the most common Canadian model and, as will be discussed later in this volume, is enshrined in the Ontario *Municipal Act, 2001* as the basic legislative foundation for Ontario municipalities.

This model typically involves a Mayor elected at large or appointed by Council, and a Council elected at large or by ward, or in theory by a combination of the two.

Mayor

In this model, the only additional independent power given to the Mayor (as compared with any other Councillor) is the role of Chair/Head of Council. Other less tangible expectations may include:

- Providing leadership to the Council.
- Representing the municipality at official functions.
- Carrying out various procedural duties as head of Council.

This does not preclude Council, through by-law, from providing Mayors with additional powers, although as a fundamental principle of this model, these are powers to recommend to Council, as opposed to make final decisions. These can include powers to nominate committee members, to chair the selection process for senior administrative staff, etc.

Council

In this model, Council generally retains full executive and legislative authority and makes decisions about whether to delegate and the extent of that delegation. This authority generally includes the following:

- Decisions with respect to the establishment of Standing Committees and the extent of delegation to those Committees.
- Passing legislation, resolutions, policies, etc. typically in the form of recommendations from Standing Committees.
- Determining the process by which the budget will be developed, e.g. often in the form of a recommendation from a Standing Committee, and approving and/or modifying the budget.
- Decision making with respect to the appointment and potential dismissal of one or more members of the senior administrative staff.
- Determining the extent of the delegation of authority to administrative staff.
- Providing collective day-to-day direction to the staff through communication to the senior staff directly from Council or, as determined by Council, through the Mayor and/or Standing Committees.

Manager

As noted earlier, the Strong Council-Weak Mayor model is also sometimes known as the Council-Manager model. Generally, this model involves the appointment of a professional administrator (e.g. City Manager or Chief Administrative Officer). This individual is typically hired by the Council, with actual recruitment and recommendations often being made by a Committee of Council chaired by the Mayor.

Responsibility for administering the programs of the municipality, developing policy and other recommendations, and supervising and coordinating the staff is delegated to the Manager/CAO. As we will discuss in the next section of this report, dealing with the governance relationship between the political and senior administrative levels, actual levels of delegation can vary considerably from municipality to municipality. Also to be discussed is that while the research indicates the single City Manager/CAO is increasingly the norm for Ontario and Canadian municipalities, Councils generally have considerable legal latitude to adopt different approaches.

What Makes One Political Governance Model Better than Another?

First and foremost, it is important to be clear that in the previous discussion we are talking about *models* – theoretical constructs that provide a framework for understanding actual practice. From our research, it is abundantly apparent that actual practice varies considerably from municipality to municipality with some municipalities borrowing one or more features from one or more models. But at the same time, it is also apparent that even with this customization, most municipalities fall predominantly under one model or another.

Preconditions for Success

In an ideal world, the literature would point clearly to one political governance model as being superior to others. In reality, however, this is not the case. In fact, the opposite actually appears to be true – that any or all of the models discussed earlier (as standalone theoretical constructs or in a more mix-and-match format) can provide for effective political governance if:

- Certain preconditions exist or can be created.
- The model can be implemented/modified in a way that is consistent with a particular jurisdiction's cultural context (including history/tradition, political culture, civic culture, etc.)
- Modifications to a particular model are geared to the actual obstacles – both real and perceived – that prevent a particular jurisdiction from achieving effective political governance.

With respect to these three points, we offer the following comments:

- We are suggesting that for the most part, the preconditions for effective political governance are the same across all of the models. As will be discussed, strong political leadership and vision is a critical precondition for every model. In practice, however, the various models encompass somewhat different approaches/mechanisms for its achievement.

- The evidence indicates that a particular jurisdiction's cultural context (including history, political and legal tradition/culture, civic culture, etc.) both sets the stage for and is a critical on-going limitation on whether and to what extent other models or components of other models can be imported into a jurisdiction. In other words, although we believe it to be true that any of the models discussed earlier can provide for effective political governance, it is also true that not every model can be made to work within the cultural context of each jurisdiction. For example, most Canadians we interviewed expressed the view that while the U.S. model of Mayor as CEO has been proven to provide for strong political leadership and strategic direction in that country, it is completely incompatible with the Canadian/Ontario political culture. In a similar vein, Americans we spoke with were clear that the Westminster model of professional bureaucracy that dominates Canadian public administration,

although demonstrated to be effective in this country, would be incompatible with the U.S. political and public administration tradition.

- Our review of the literature and the results of our interviews suggest that the debates about municipal governance, at least in Ontario and including Toronto, tend to focus more on discussions of solutions and less on defining, prioritizing, and building consensus related to the actual problems to be addressed.

With the above points in mind, the important consideration becomes how best to establish the different preconditions in a particular jurisdiction given what are often very real limitations of culture, practice and behaviour. The latter are particularly important.

Preconditions for Effective Municipal Governance

As indicated above, we are suggesting that there are a limited number of preconditions for effective municipal government and that for most part, these preconditions cut across all of the major governance models. These preconditions are:

- Strong political leadership.
- An effective Mayor/head of Council.
- Clear roles and responsibilities.
- Excellence in the public service/confidence in the public service.
- Respect and professionalism.
- Reinforcing culture with embedded rewards and sanctions.

In this section, we describe each of these preconditions, drawing on our review of the literature and, in particular, from our interviews with current and former public servants, academics, and other experts.

At the outset, it is important to make the distinction between *preconditions* and *best practices*. For our purposes, *preconditions* are the key characteristics of municipalities that are high-functioning in terms of governance. *Best practices* are the more technical means of developing/reinforcing those characteristics – in many cases, involving a structure, tool, mechanism, or process. The latter could include such things as training programs, mentoring programs, performance management systems, etc.

Not surprisingly, most of the preconditions relate to factors that are not particularly structural in nature – not whether the Mayor has "strong" or "weak" powers, not whether there is an executive committee, etc, (although in practice, preconditions are often reinforced by these kinds of structural elements.)

Rather, these preconditions have at their core what we would define as essential and less tangible elements of leadership, culture, values, and behaviour in both individual and collective terms. As is often expressed by organizational experts, this suggests that with the right leadership, culture, values, and behaviour, any basic structure can be made to work.

Also, we want to draw attention to the fact that we have not included "adequate financial resources" in this discussion of preconditions. There can be no doubt that running an organization is generally made easier by the extent to which financial resources are available. There is also evidence to suggest that when resources are scarce and there is stiffer competition for these resources, decision making is often made more challenging given the greater need for increasingly difficult tradeoffs. However, the literature on governance is generally neutral on the issue of adequacy of financial resources. This means that

regardless of the policy and/or operational challenges presented by tight or limited financial resources, the essential components of effective governance do not change.

Finally, we want to highlight the fact that in practice, the proposed preconditions are not discrete elements. There is, and should be, a high degree of interaction and integration. We have, however, separated them out in this discussion in order to achieve greater clarity.

Precondition: **Strong Political Leadership**

Clear, consistent political leadership begins with a well-defined vision at the political level. With effective public consultation and high quality staff support in terms of process/methodologies, this vision is translated into an overarching strategic direction that is actively endorsed and promoted by the political level. This strategic direction sets the stage for and provides policy guidance to:

- Council as it holds staff accountable for achieving this direction in the implementation and ongoing execution of its policies.
- The staff as they develop and recommend more detailed policies and implementation plans to Council and in their own operational planning and decision making.

Precondition: **An Effective Mayor**

The capacity of the Mayor to provide effective leadership, regardless of the degree to which he/she has been vested with executive authority, is an absolutely essential precondition for effective municipal governance. This includes:

- A clear understanding of the appropriate roles and responsibilities of the Mayor relative to Council and of the Mayor/Council relative to the administrative staff.
- Having a clear vision and the capacity to articulate and build support for that vision among Council members and the public.
- Understanding and fulfilling their role relative to the administrative staff (e.g. in the Ontario model), as the political rather than administrative head.
- Respecting the role and advice of the administrative staff.
- Setting the tone/providing leadership for conduct, behaviour, and decorum at Council and for the administrative staff by demonstrating, promoting, and reinforcing ethical and professional behaviour.
- Being able to work effectively and cooperatively with Council, including the capacity to build coalitions among Council in support of policy directions.

Precondition: **Clear Roles and Responsibilities**

The evidence suggests that having clear roles and responsibilities between and among politicians and bureaucrats and ensuring that those roles and responsibilities are an ingrained part of the culture of a municipality (i.e. well understood, respected, reinforced, enforced, etc.) is an essential precondition for effective municipal governance. By this, we mean roles and responsibilities between and among:

- The Mayor and Council.
- The Mayor and the CAO.
- The CAO and other senior administrative staff.
- Council/Standing Committees and the CAO.

- Council/Standing Committees and other senior administrative staff.

Our research points to a number of features related to clear roles and responsibilities that would be found in a highly functioning municipality, including the following:

- *Definition:* roles and responsibilities are clearly defined and articulated in the formal language of by-laws but also in more practical or real-world descriptive language/rules of engagement.
- *Understanding:* all parties would have a common understanding of what is included in the various roles and responsibilities.
- *Buy-in:* all parties would actively endorse and support the definition.
- *Consistency:* the definition and understanding of roles and responsibilities would become a consistent part of the foundation for the culture of the organization and as a result would transcend successive Councils and senior administrative staff turnover.
- *Respected in practice:* roles and responsibilities would be respected in actual practice and reinforced

Precondition: Excellence in Public Service/Confidence in the Public Service

An effective public service that is respected and valued by the Mayor and Council including:

- A demonstrated high level of professional managerial competence.
- Clarity with respect to respective political and administrative responsibilities and, depending on the model, the political neutrality of the staff, with these expectations being an ingrained part of the organizational culture.

- The capacity to provide objective and legitimate advice.
- An embedded culture of demonstrated ethical behaviour.
- A strong tradition of municipal management and professional development.

Precondition: Respect and Professionalism

The existence of a high level of mutual regard and respect between and among the political and administrative staff. This would include clearly articulated and well understood expectations in terms of public and private behaviour, including the public treatment of administrative staff by Councillors and vice versa, which are reinforced and rewarded.

Precondition: Reinforcing Culture with Embedded Rewards and Sanctions

The existence of a system of rewards and sanctions that supports and reinforces the desired behaviour. Given that culture, including beliefs, values, and behaviour, is an important unpinning of the various preconditions, a system of rewards and sanctions that helps to define and reinforce the desired culture becomes very important. The elements of both good and bad behaviour would be clearly articulated and well understood at all levels in the organization, including politicians and administrative staff, and incorporated into the latter's formal performance management process.

Most importantly, this system would be consistently applied in practice, particularly with respect to sanctions for behaviour that is not consistent with the desired values, beliefs, and behaviours, e.g. the demonstrated reality that there

are negative consequences for Councillors and administrative staff who go beyond the accepted roles and responsibilities, who interfere with each other's responsibilities, act disrespectfully or unprofessionally, etc.

Part 3

Overview of Administrative Structures

As noted in the previous section, municipal Councils (including those in Ontario) often have wide legal latitude to establish the senior administrative structure of their government. In practice a relatively small number of core models have emerged:

- Chief Administrative Officer (also described as a Canadian model of City Manager).
- City Manager (U.S. model).
- Mayor as Chief Executive Officer.
- Commissioners/Board of Management.

Key Distinguishing Features

The first three of these models are, in effect, variations on the theme of a single accountable head of the administration, with a clear separation of policy and operational responsibilities. The fourth model is somewhat more diffuse in nature, both in terms of multiple points of accountability and less clarity with respect to policy and operational responsibilities.

With the exception of the *Mayor as Chief Executive Officer* model, the various approaches are consistent with the model of governance enshrined in the Ontario *Municipal Act, 2001*. Three other important distinguishing features among these various models are:

- The degree to which policy and administrative/operational authority are separated and distinct between the political and administrative levels,

including whether this separation is delegated by the Council, or more statutorily based.

- Whether administrative/operational authority is formally concentrated in one versus several individuals.
- In the case of delegated authority, the extent to which a particular Council, in actual practice, respects, adheres to, and reinforces the delegated authority of the senior staff and conducts its interaction with staff at all levels accordingly.

As we learned in our research, the third point is particularly important in the Canadian context where administrative/operational authority is usually delegated by Council. Our research indicates that notwithstanding what exists on paper in terms of roles and responsibilities, the practical reality can vary significantly from municipality to municipality. The factors that affect the practical (as opposed to formal) extent of delegation appear to include:

Legal Tradition and Culture re Interpretations

- The legal tradition and culture of a particular municipality can play a major role with respect to advice to Council on extent to which delegation is allowed under provincial/state municipal legislation. In Ontario, for example, there appears to be considerable variation between and among municipal legal counsel with respect to the level and extent of delegation to staff that is provided for under the *Municipal Act, 2001*. Some municipalities have adopted expansive interpretations that allow for extensive delegations, i.e. along the lines of "*if the Act does not prohibit it, then assume that action can be taken*". Other municipalities adopt narrower, more prescriptive approaches, i.e. "*if the Act does not explicitly permit it, then assume that action cannot be taken"*.

Size and Complexity

- In the course of our research, the view was expressed that the size and complexity of a municipality is less of a factor, compared to the issue of whether Councillors are full- or part-time and the extent of their own personal staff resources. A number of observers pointed to this factor, in combination with the strong emphasis in municipal government generally on very local matters, e.g. stop signs, garbage pickup, etc., as being more important in terms of determining whether and to what extent Councils are involved in administrative matters.
- It was suggested to us in our interviews that in the absence of clearly defined roles and responsibilities, individual Councilllors often are not even starting with the same understanding of what is meant by "administrative". Furthermore, the perception among Councillors is often that they are elected on ward-based operational issues as much or more than on citywide, more strategic considerations.

Culture of Risk Taking/Public Scrutiny

- The evidence suggests that Councils in some municipalities have a greater appetite for risk taking than others, with particular reference to adopting more rather than less expansive interpretations of what can be delegated to administrative staff. In some cases, this evolves over time as part of the culture through successive Councils. In other cases, it can reflect the propensity of a particular Council.
- It was also suggested to us in interviews that the degree of public scrutiny can also be a factor. For example, decision making in larger Ontario municipalities was frequently cited as being the subject of more extensive public and, in particular, media scrutiny. According to this view, a decision by Council to "push the envelope" with respect to delegations would more likely be the subject of legal or other challenges, compared to a similar decision made in a less high-profile municipality.

- As reported to us, the potential for these challenges to take place has resulted over time in a more cautious approach. It is also connected to what many perceive to be a greater likelihood that in the absence of a Council finding this greater legal clarity, the issue will be referred to the provincial level (e.g. where the municipality feels the *Municipal Act, 2001* is not clear on their power to act, a request will be made to the Province either for a legal opinion or for changes to the legislation to make the power more explicit.)

Trust in the Bureaucracy

- Our research indicates that trust in the professionalism and competence of the administrative staff and in particular the senior administrative staff is a major factor affecting both the legal and practical extent of delegation. Where this trust is absent or impaired, Council is considerably more likely to second guess staff decisions and/or decline to delegate any additional authority. In more extreme situations, Council may find itself taking back responsibility for decisions already delegated (either through formally rescinding delegations or less formally through the practice of more constant questioning and in some cases overturning of staff decisions).

Council's View/Understanding of its Role

- Council's own interpretation and/or understanding of its role in the management of the municipality is another major factor and here it is important to distinguish between the role as articulated on paper and in actual practice. The latter appears to be particularly important. As noted earlier, it was suggested to us that in the absence of clearly defined roles and responsibilities, individual Councilllors often are not even starting with the same understanding of what is meant by "administrative".
- The research indicates that some Councils, after consideration, formally take the view that it is appropriate for Council to be more closely involved

in operational/administrative decisions, with less delegation of decision making to staff. Other Councils adopt a more arms-length governance model focused more for example on strategic direction, policy making, and holding the administration accountable for effective delivery. In the former, there is likely to be less delegation of authority to the administration than in the latter.

- As reported to us, either approach can be made to work more or less successfully if roles, responsibilities, and expectations are very clear. The least desirable scenario, however, appears to be when a Council formally articulates one approach, i.e. extensive delegation of authority, but for various reasons (lack of trust in the staff, lack of understanding of or disagreement with what exists on paper, etc.) has a much more operational as opposed to policy focus.

Model Description

Chief Administrative Officer/City Manager (Canadian model)

The CAO model generally involves a single appointed officer as the head of the administration. CAOs are found in Canadian municipalities under a variety of names – including city administrator, commissioner, city manager, director general, and chief commissioner – and with a variety of powers and responsibilities.

In practice, the powers and responsibilities of CAOs can vary significantly from municipality to municipality. In Canada, provincial legislation tends to provide for the position only in general terms, but in some provinces such as Quebec and Nova Scotia, duties are specified in the statute.

In general terms, most CAOs operate under the control of the Council with responsibility for:

- Supervising and directing municipal affairs and employees.
- Executing Council policies.
- Advising the Council on matters within its control, including budget, strategic plans, policies, planning, etc.
- Inspecting and reporting on municipal works as Council requires.
- Responsibility for preparing for Council the estimate of revenue and expenditures annually or as Council requires.
- Preparing and awarding all contracts as Council prescribes.
- Carrying out other duties as prescribed by Council by-law or resolution.

This model does not normally attempt to enforce a complete separation between administration and policy, usually incorporating certain features designed to maintain the significance and prestige of the elected Council. For example:

- Council usually makes the final decision with respect to the recruitment of other senior staff.
- The CAO is not the sole conduit for contact between Council and the administration. Rather, Council usually has a direct relationship with at least the main department heads as well as the CAO/Manager, normally accomplished by the attendance of the department heads at standing committee meetings.

Most municipalities in Canada can now appoint a CAO under the general municipal legislation of their province.

This model is in place in over 170 Canadian cities, including the major cities, e.g. Vancouver, Edmonton, Calgary, Winnipeg, Saskatoon, Regina, Windsor, Toronto, Quebec City, Saint John, Halifax, and St. John's.

Model Description

City Manager (U.S. model)

The U.S. approach to City Manager is, in effect, a strengthened and more high profile CAO. As described by one U.S. city, this approach puts the City Manager more clearly in the role of CEO of the municipality, "similar to that of a private corporation where the stockholders elect a board of directors, which then hires a president to run the company."

In this model, all legislative power rests with the Council. Its responsibilities are:

- Policy making and passing ordinances.
- Appointing the city manager who assumes primary executive responsibility for city management.

In this model, the responsibilities of the Mayor are largely ceremonial and the Mayor and Council retain no administrative decision making responsibilities. These are fully delegated to the City Manager. There are usually no standing committees that provide direction to staff and there is not any regular Council contact with the administration except through the Manager. Some U.S. jurisdictions are very explicit in their Municipal Codes as to the direct relationship between Council and the City manager, for example:

> "…City Council or its members shall deal with city officers and employees who are subject to the direction and supervision of the manager solely through the manager, and neither the city Council nor its members shall give orders to any such officer or employee, publicly or privately."

With these roles in place, the City Manager typically has a large amount of autonomy as manager and operational policy maker. All administrative functions and decisions fall under this managerial role. This includes final decision making

with respect to senior staff. In policy formulation, managers are the main source of information on policy issues for the Council. The manager often shoulders the responsibility for developing policy ideas and alternatives.

The following are examples of specific City Manager responsibilities as per the U.S. approach. In these examples, one sees language that is similar to that of a Canadian-model CAO, but the context is one of greater administrative authority and autonomy, including:

- Ensuring that all laws and ordinances are enforced.
- Exercising control over all departments and, in accordance with civil service regulations, appointing, supervising, and removing department heads and subordinate employees of the city.
- Making such recommendations to the Council concerning the affairs of the city as may seem to him/her desirable.
- Keeping the Council advised of the financial conditions and future needs of the city.
- Preparing and submitting the annual budget to the Council.
- Preparing and submitting to the Council such reports as may be required by that body.
- Keeping the public informed, through reports to the Council, of the operations of the city government.

Model Description

Mayor as Chief Executive Officer

This model is the typical U.S. style strong Mayor, currently in place in most large U.S. cities. The system reflects the general U.S. model in place at the state and

federal levels, featuring a rigid separation of executive and legislative authority between the Mayor and Council.

Under such a system, the Mayor is, in effect, the chief executive officer of the city. Authority and accountability are centralized in the Mayor's office, quite often with complete control over the day-to-day operation of city government, as opposed to a system in which the city's finances and operation are the shared responsibility of the Mayor, Council, and municipal staff.

The Mayor has almost total administrative authority. S/he is typically not a member of the Council and therefore cannot vote on legislation except to break a tie. His/her responsibilities include:

- Heading the political and policymaking agenda.
- Preparing and administering the budget and making policy jointly with the Council.
- Vetoing legislation.
- Appointing and removing department heads and directing the organization of agency functions.

In some strong-Mayor cities, a CAO or City Manager is appointed by the Mayor to serve at the Mayor's pleasure to direct the day-to-day administration of government. The CAO is usually given extensive authority over program implementation, operational concerns, and budget formulation, as well as advisory roles in developing other policy recommendations.

The precise powers granted to the Mayor may vary from city to city. Philadelphia, which among major U.S. cities provides the Mayor with the most extensive authority, includes the following:

- Control over every service the city provides through his/her appointees, with only one appointment, the city solicitor, needing to be approved by Council, because the solicitor serves Council as well.
- The power to appoint the members of all of the many boards and commissions set up by the Home Rule Charter, including the school board.
- Control over all of the city's financial affairs, preparing the operating and capital budgets and estimating revenues.
- Veto power over all Council legislation, with a two-thirds vote of Council necessary to override his veto.

In other major cities, these powers are not quite so extensive. For example, in New York, the Mayor shares power with borough presidents, and in Chicago and Los Angeles, the Councils must approve all administrative appointments.

Model Description

Commissioners/Board of Management Model

In effect, this is a form of "multiple-CAO" model, involving the appointment of a limited number of commissioners who are delegated administrative responsibilities by Council. This model does not include a CAO or City Manager as the head of the administration.

As individuals, each commissioner is usually directly responsible for supervising and coordinating the activities of a number of municipal departments under his/her jurisdiction. Within their span of authority, their responsibilities are generally similar to those under the CAO model (see previous description of powers under ***CAO/City Manager – Canadian model***).

In addition, the commissioners may meet together as a Board of Management for the purposes of coordinating the municipality's activities and for determining how Council's more general (as opposed to program-specific) policy directions are to be carried out through the administrative structure. The head of Council (e.g. Mayor, Chair) is usually a member of this Board.

The commissioners also serve as resource persons for the various Standing Committees of Council, and actively participate in their discussions, but do not have the voting rights accorded to full members.

This model tends to be more popular in Western Canada. The former City of Toronto also had a Commissioner/Board of Management model in place.

Effectiveness of the Different Approaches

In terms assessing the different approaches, we believe it is important to consider both the structural strengths and weakness of the different models, as well as the cultural context within which the model would be intended to operate. By this, we mean that structurally a model might be able to achieve all of the outcomes that one might want in effective municipal governance. However, that model might be so inconsistent with the political and cultural tradition of a jurisdiction as to be unworkable in terms of the cultural transformation that would need to occur for successful implementation.

Effectiveness Outcomes

With respect to structural characteristics, the research points to a number of important outcomes that should be present, regardless of the option to be considered, including the following:

- Greater operational efficiency and effectiveness by providing for the presence of a professional administrator with a degree of expertise that would otherwise likely not be available, particularly when coupled with performance-based contracting.
- A specific focus of accountability and responsibility for the administrative performance of the municipality.
- A clear understanding the respective roles and responsibilities of politicians and administrative staff, including communications and other interactions between Council and staff.
- Improved coordination and integration of municipal programs and activities.
- A relatively distinct separation of operations and policy, thereby enabling the political and bureaucratic components of municipal government to focus on those matters

Structural/Cultural Issues

Based on our interviews with municipal practitioners and other experts, as well as our review of the literature, our sense is that the aforementioned outcomes can be achieved effectively with any of the models discussed earlier in this section. As discussed below, however, each model has structural and cultural issues/challenges that depending on the jurisdiction could impair effectiveness.

In reviewing these challenges, it is important to keep this cultural factor in mind. For example, with respect to the U.S.-style strong Mayor's power to appoint the senior public servants, the typical and often very strongly held Canadian view would be that this form of politicization of the bureaucracy makes for government that is more partisan and less in the public interest.

The typical U.S. response rejects this view and suggests that the Westminster model of a professional bureaucracy is less democratic/responsive to the will of the people by making it more difficult for politicians with strong mandates from the people to overcome bureaucratic resistance and implement their new directions. In other words, it is important when discussing the merits/limitations of each model, to be clear whether the concerns are inherent to the model or related to its cultural appropriateness for a particular jurisdiction.

Issues/Challenges

Chief Administrative Office/City Manager (Canadian model)

- As discussed in the literature and reported to us in interviews, this model is highly dependent on a strong, positive working relationship existing between the head of Council/Mayor and the CAO. This relationship needs to be based on mutual trust, respect, and above all a clear understanding (also shared more broadly by the rest of Council and the administrative staff) of respective roles and responsibilities.

- In the absence of these characteristics, a problematic relationship can arise between the CAO and the head of Council. The potential for a clash is significant if the head of Council has a strong personality and a determination to provide "hands-on" leadership, i.e. wants to exercise *administrative* leadership, as opposed to the *political* leadership role countenanced, for example, in the Ontario *Municipal Act, 2001*.

- Councillors are often inclined to view more powerful CAOs with suspicion and to be concerned that they will become too dominant. This mistrust can pose problems in terms of CAO effectiveness.

- Where standing committees exist, committee chairs and/or department heads may attempt to use these as a buffer or a means of blocking CAO initiatives.

- No matter how effectively a CAO system may work, the position provides administrative, not political, leadership and cannot be made to compensate for a lack of the latter.

Issues/Challenges

City Manager (U.S. model)

- While there is considerable potential for improved coordination in the organization of the Council-manager system, this model still faces the challenge of separating policy and administration in municipal government. In practice, it is not always a simple matter to identify in advance whether a particular issue is a routine administrative matter or has political implications.
- This model places more emphasis on the role and responsibility of the City Manager to ensure that Council receives the information and public input it needs to make effective policy (e.g. to avoid making policy "in a vacuum".)
- This system generally de-emphasizes a strong political leadership role for the Mayor and Council and emphasizes strong leadership for the municipality as a whole from the senior administrative level.
- The public focus of attention tends to be on the City Manager – often as a more conspicuous public figure than the members of Council, including the Mayor.
- In addition to producing friction and jealousies which frequently result in the dismissal of managers, this situation also leads to managers becoming publicly identified with particular viewpoints and policies. If, as a result, they become embroiled in political controversies, their role as administrative leaders is impaired.

Issues/Challenges

Mayor as Chief Executive Officer

- This form of centralized leadership puts an onus on the Mayor to reach out broadly across the City to ensure responsiveness to all interests, as opposed to those interests that supported the Mayor's election.
- The effectiveness and efficiency depends in large measure on good relations between the Mayor and Council. This may be weakened to the extent there is competition, distrust, and/or disagreement on major directions.
- Consistent with general practice/political culture in the U.S., this model usually involves the senior staff level(s) of the administration as political appointees.
- The power and authority granted to the Mayor would permit the person holding office to make policy and operational decisions based more on political considerations.
- If the Mayor lacks competency or fitness as a chief executive office, s/he cannot normally be removed until end of his/her term, or after an onerous, expensive, and divisive process.
- The Mayor would have an improved capability to isolate the Council by controlling staff information to Council, and by working outside of Council to build public support for his/her own agenda.

Issues/Challenges

Commissioners/Board of Management

- Under a Commissioner system, no one person is clearly in charge and it is often highly dependent on personalities for effective coordination and leadership. This situation can prove problematic in terms of establishing clear lines of responsibility and accountability.

- Conflicts over the division of responsibilities between and among Commissioners may be more likely given the usual attempt to group departments under broad functional areas each headed by an individual Commissioner.
- Employees may tend to focus primarily on their own departments, thereby ignoring the needs of other segments of the government.
- The head of Council's chairmanship of the Board often results in the blurring of political and administrative responsibilities and authority, and the ability of the Commissioners to manage and exercise administrative authority could be undermined. Furthermore, senior staff are on occasion put in the awkward position of having to overrule the head of Council/Mayor.
- The head of Council/Mayor's chairmanship of the Board of Management has frequently been a factor in high levels of conflict between Council and the Administration. This includes leading Councillors to question whether the Board's activities are being unduly influenced politically by the Mayor, e.g. uncertainty as to whether the Board's recommendations are politically or administratively generated and endorsed.

Part 4

Overview of the Ontario *Municipal Act, 2001*

The focus of this section is on the general legal foundations of municipal governance in the Province of Ontario, as set out in the Ontario *Municipal Act, 2001*. This Act was subject to a major review in the late 1990's and, as will be discussed, includes a number of changes in the areas of governance compared to earlier legislation.

Governance in the City of Toronto is further affected by additional provincial and municipal legislation (the *City of Toronto Act*, the *City of Toronto Act No.2*, and the City of Toronto Municipal Code). The *City of Toronto Act* includes a number of specific limitations on governance that go beyond the general provisions of the *Municipal Act, 2001*. As discussed at the outset of this volume, a more detailed discussion of governance specific to the City of Toronto (legal parametres and outstanding issues) is the subject of our second volume on municipal governance.

With the above in mind, this section includes the following, based on our review of the literature and key informant interviews:

- A brief description of the general governance provisions of the *Municipal Act, 2001* (with *Appendix A* providing more detail on the roles and duties as prescribed in the Act).
- A discussion of what is new in the *Municipal Act, 2001* compared to the previous legislation (including, in *Appendix B*, a description of new/noteworthy features originally published by the Ontario Ministry of Municipal Affairs.)
- A discussion of what the new Act means for municipal governance including how Councils organize, the real as opposed to statutory power

of the Mayor, and the appropriate division of roles and responsibilities between Council and staff.

Governance Provisions of the Act

Consistent with the history and culture of municipal affairs in Ontario, the province's *Municipal Act, 2001* enshrines a "weak Mayor/strong Council" model of municipal governance.

In general, the Act is a combination of prescriptiveness and flexibility. With respect to governance, the emphasis in the Act is on providing the basic ground rules. Within these basic rules, local Councils have considerable flexibility and authority to determine their own requirements.

The most important ground rule is that Council is the source/primary locus of almost all authority with relatively few exceptions, including all legislative authority. Council makes the decisions with respect to whether and to what extent to delegate this authority to others, including the Mayor, various standing or other committees, and the administrative staff. The statutory authority of the Mayor/head of Council is actually quite limited, with a strong emphasis on the responsibility to chair Council meetings. (Having said this, we will also discuss further on in this section how "weak" Mayors can actually be quite powerful and influential, notwithstanding this lack of statutory authority).

The following are the basic structural provisions of the Act related to governance (a more detailed summary of the roles and duties of the head of Council/Mayor, Council, and administrative staff is provided in *Appendix A)*:

- Each municipality will have a head of Council (Mayor). This individual is to be elected at large in lower tier municipalities. Upper tier municipalities have the option of appointing the head of Council from among the existing Council members.

- An elected Council will have a minimum of five members (including the head of Council).
- Council can be elected either by ward, at large, or in any combination of the two.
- Council must appoint a Clerk, focused primarily on recording resolutions, keeping records of decisions, etc.
- Council must also appoint a Treasurer, who, although not required to be an employee, is responsible for handing all of the financial affairs of the municipality "on behalf of" Council, as well as an external auditor.
- Councils have the power to establish standing committees, including an executive committee. There is no guidance or direction in the Act with respect to number, configuration, mandate, etc. The general powers of Council to delegate its authority would apply to these committees.
- Although the Act sets out the roles and responsibilities of administrative staff, it does not prescribe a particular form of administrative structure. It does however, specifically allow for the appointment of a Chief Administrative Officer at the Council's discretion.

What's New about the *Municipal Act, 2001*?

In *Appendix A*, we have included a description of what is new/noteworthy about the Act that was prepared and published by the Ontario Ministry of Municipal Affairs and Housing.

As indicated in that material, from the government's perspective the legislation is intended to reflect a new philosophy towards municipalities in Ontario and a new approach to defining their powers. The description points to a climate of greater flexibility and less prescriptiveness, with emphasis on at least two key areas:

- Less focus on explicit permission and more emphasis on general authority within the ten specific spheres of jurisdiction and enhanced natural person powers.
- Greater flexibility with respect to how municipalities are organized internally to deliver services.

It is not our intention here to provide a comprehensive assessment of the strengths and weaknesses of the new legislation. Our focus remains primarily on governance. However, we do want to provide some sense of whether and to what extent experts and practitioners in the area of municipal affairs do in fact see the new legislation as different in the ways articulated by the province. Also, we intend to highlight the extent to which those differences impact on governance and administrative structure.

Overall Assessment

Overall, the expert assessment of whether the Act in fact represents a significant new direction is mixed. There appear to be two general schools of thought that we would summarize as follows:

- That the Act actually does provide municipalities with more authority and flexibility. However, the Act is also very new and the culture of the previous, more prescriptive legislation is very ingrained among many municipal officials (including Councillors, municipal lawyers, and administrative staff). As such, it will take some time before the new Act is better understood and more fully implemented.
- That the new Act is not significantly different than the previous legislation in that it continues to be highly prescriptive in nature, and that municipalities continue to lack many of the key powers they require to manage effectively.

The challenge, of course, is how to make sense of this disparity of views, particularly with respect to governance.

One of our key informants suggested to us that an interesting framework for understanding the disparity lies in two views of local government in general. These views (expressed, for the purposes of discussion, at extreme ends of the spectrum) are as follows:

- *View A:* This view suggests that local government is/should be considered to be a government in the full western democratic/constitutional tradition. This includes the power to create laws, raise taxes, determine spending priorities, and engage in all of the activities necessary to meet its goals.
- *View B:* This view is more rigidly historical/legal in nature and takes the view that local governments are not intended to be governments in the full western democratic/constitutional sense. Rather they are bodies of citizens who have banded together to create services on a monopoly basis because it is the most efficient way to do it – in effect, public corporations whose job it is to arrange and deliver a relatively narrow range of services.

It was suggested to us that individuals who ascribe to *View A* may be more likely to see the Act as not significantly different or at best, a step in the right direction but still not fundamentally consistent with their view, while those more disposed to *View B*, would see it as a more significant change.

In terms of balance, there was definite tendency among practitioners in the municipal area (including current and former public servants, lawyers, and some academics) to view the Act as not significantly different compared to its predecessor. This was described in various ways including:

- The Act is not a move towards more independent status and does not include the kind of Charter/Home Rule status that has been afforded to

municipalities in some other jurisdictions, as has been the case with many U.S. cities and also Vancouver.

- The Act still includes extensive powers for the Minister of Municipal Affairs and Housing to step in and override municipal decisions.
- The Act does not include major changes in the overall scope of municipal power, even with the newly defined ten spheres of jurisdiction.
- The Act provides some more permission for Councils to act but overall is still a very prescriptive Act, whereby Councils have to be given express powers to act.
- The natural person powers conferred in the Act will not change how municipalities operate to any great extent and two key powers are missing – more general powers to raise revenues and power to create certain types of corporations.

Our sense from the interviews and our review of the debate is that the last point relating to the "missing" key powers is very central to concerns about the Act. In response to our question "what additional powers would municipalities want that are not available in the new Act?" most interviewees focused on revenue raising and creating corporations based on public-private partnerships (as opposed to strictly publicly owned corporations) as the two major areas.

An alternative and somewhat more positive viewpoint was expressed by a similar range of practitioners (albeit fewer of them). From this perspective, the new Act continues to be a generally prescriptive form of legislation, with municipalities still viewed fundamentally as creatures of the province as per the *Group B* view of local government, with a focus on local service delivery. As such, much of the Act continues to articulate various limitations on municipalities' capacity to take independent action.

With this overall caveat in mind, however, it was felt that the Act did include a number of changes that have been overshadowed by the *View A* emphasis on more independent status and taxing powers for municipalities. It was also suggested that these changes are significant but perhaps not yet fully understood within the municipal community. This was described for us as follows:

- The ten spheres of jurisdiction do not necessarily expand the scope of jurisdiction for municipalities beyond what was previously in place but, in combination with the application of natural person powers, the basis of municipal authority in the province is significantly changed.
- With these powers in place, the spheres of jurisdiction now become the general legal basis for municipal authority, not whether the legislation includes specific permissions. This represents a fundamental change of philosophy, the impact of which will not be felt immediately. However, this change means that within these spheres, municipalities generally will no longer be required to look for specific permission to act. As described to us by a municipal official: if the Act (or related Acts) does not specifically prohibit a municipality from taking action, the appropriate course is to apply the natural person powers and assume that the action can be taken. In other words, "*if it doesn't say you can't, assume that you can*" instead of the traditional "*if it doesn't say you can, assume that you can't*".
- The Act makes a clear statement that the role of the Councillor is to focus on the well-being of the municipality as a whole as opposed to the emphasis on Councillors as "ward bosses" more focused on ward-level operational/administrative matters that, as reported to us, exists in some municipalities.
- The Act sets very few limits on how Council may organize administratively and gives it the capacity to use staff more effectively and efficiently and to focus itself more on policy making.
- Consistent with the previous point, the Act has a clearer recognition of the role of Council to make policy and the role of the staff to advise on and

implement policy. This is seen as continuing and reinforcing a shift already underway in many municipalities from more hands-on "managing" Councils to "governing/policy" Councils.

It was interesting to note that in the 1998 draft of the new Act, a number of additional spheres of jurisdiction were proposed. As reported to us, these additional spheres became the subject of intense negotiations between the Ministry of Municipal Affairs and Housing, the municipalities, the business community, and other provincial Ministries. The central issue was whether and to what extent those additional spheres would have put municipalities much more in potential conflict with the interests of the provincial government. This concern was strongly expressed by the business community and other government departments. The proposed solution at the time was to give the Minister of Municipal Affairs and Housing significantly enhanced power to override provisions of the Act.

The issue was resolved in the 2001 legislation by removing the additional spheres of influence and at the same time removing the Minister's significant override powers. This does not mean, however, that the ten spheres of jurisdiction are "cast in stone" for all time. According to AMO officials, there is every possibility that these spheres could be expanded at a future date.

Those who felt the Act contained perhaps more change than is often recognized also suggested that culture and tradition are the major factors in whether and to what extent the impact of these changes is widely acknowledged. In support of this view, the following points were offered:

- The legislation is still very new, having coming into force in January 2003. The sections of the Act dealing with the expanded powers of Councils to act/natural person powers are not generally well understood and municipalities (perhaps particularly in an election year) have not had the time to consider what those changes might mean/how they could be used.

- Historically the courts have played a role in clarifying whether municipalities have accurately interpreted the *Municipal Act, 2001* and thinking along these lines is part of the Ontario municipal tradition. The sections of the Act dealing with expanded Council powers/spheres of jurisdiction will likely have to be taken up and tested by municipalities before they are embraced more broadly and before we know their full impact. This includes the possibility/probability (although no municipality wants to be the first to be challenged, let alone to lose a challenge) of court challenges, most likely from citizens and/or businesses.
- The legal tradition/culture of municipal affairs writ large in the Province of Ontario has been shaped by decades of prescriptive legislation. Councils, staff, and especially legal counsel have been conditioned to look for where the Act specifically says a municipality *can* take a particular action ("*if it doesn't' say you can, assume that you can't*"). The idea of the opposite being the case goes against that prevailing culture and will take time and demonstrated practical experience to change.
- It was suggested to us by a number of interviewees that from time to time, Councils can have a tendency to "hide" behind the view that the Act does not specifically say they can do something as a means of being able to avoid taking action and being able to blame the province for Council's failure to address an issue.
- The province generally refrains from commenting on legal opinions of municipal counsel or from offering legal opinions to municipalities with respect to whether a particular action would be permitted under the Act. At the same time, however, the long-standing practice over time in Ontario is that the provincial government does not step in to challenge municipal legal interpretations of the Act.

What does the Act mean for Governance?

How Councils Organize to Govern

As indicated earlier, the Act gives Councils broad latitude to organize their affairs in any way that they see fit. This includes any number of standing committees, whether policy/program, geographic, or a combination of the two.

In terms of the extent to which Councils can delegate authority to committees and/or staff, municipalities take their direction from the Act as well as common law principles. In both cases, the direction is fairly broad and provides latitude for interpretation.

The *Municipal Act, 2001* provides that Council may delegate to committees and/or staff any matters that are administrative in nature. While the Act does not specifically define "administrative", it does provide direction with respect to what is "non-administrative". The latter includes the power to:

- Pass by-laws.
- Adopt estimates.
- Levy, cancel, reduce or refund taxes.
- Appoint persons to and remove them from offices created by statute.

With respect to common law, two principles appear to be particularly relevant:

- Where express statutory authority exists for such a delegation (as in some of the explicit powers of delegation under the *Planning Act*.)
- Where the power to sub-delegate arises by necessary implication to effect the expressly stated statutory purpose of a municipality, or those

purposes which are compatible with the purposes and objectives of the enabling statute.

Based on our research, the first principle is generally thought to be clear. It makes references to other legislation, such as the *Planning Act*, that gives express authority to Councils to delegate authority for certain planning decisions to committees of Council and/or administrative staff.

However, the second point is less clear and becomes more problematic when viewed in combination with the lack of specificity in the Act with respect to what constitutes an *administrative* matter. In practice, there appears to be considerable variation across the province in terms of how this second principle is interpreted in the context of the *Municipal Act, 2001*. As reported to us, the culture of the legal department has much to do with determining this variation. For example, some municipalities have interpreted the legislation as allowing Council to delegate decisions about stop signs, speed bumps, loading zone designations, etc. to staff. Other municipalities maintain that these are decisions requiring by-laws and therefore can only be made by Council.

In a subsequent section of this part of our report – looking at how roles and responsibilities are divided in practice between Councils and their staff – we have included more discussion of this variation and the factors, beyond just legal interpretations, that affect this division.

In general, however, Councils can make their own determinations with respect to how much or how little to delegate and, just as importantly, whether to concentrate or disperse that delegation.

This last point about concentrating/focusing versus dispersing delegation is very significant in terms of approaches to/effectiveness of governance models. The

following is a sample list of the types of activities that a municipal Council might decide to delegate:

- Responsibility for developing the budget and recommending that budget to Council.
- Responsibility for developing and recommending the strategic plan to Council.
- Making recommendations to Council re corporate structure, corporate finance, corporate human resources, intergovernmental issues, corporate policy.
- Awarding all contracts.
- Coordinating Committee agendas and workplans.
- Supervising the CAO and senior staff/providing direction to the administration.
- Recommending appointments to agencies, boards, and commissions.
- Submitting proposed by-laws to Council.
- Authorizing the sale or disposition of land.
- Supervising legal services.
- Recommending the appointment of general managers/senior staff.

The *Municipal Act, 2001* allows for considerable variation in how different Councils can approach these activities. Depending on the approach, the result could be a totally different configuration/clarity of governance roles and responsibilities. For example:

- A Council could decide to keep decision making highly focused/streamlined on Council as policy maker and the CAO as advisor/implementer, for example:

- Not creating any Council committees or when a committee is required, using Council as “committee of the whole”.
- Providing direction to the administrative staff only through the CAO.
- Focusing on the role of the staff to make recommendations to Council with respect to budgets, strategic plans, policy, organization, etc.
- Maximizing the amount of actual decision making power to the staff, including awarding contracts, etc.
- Being clear that direction to the staff is provided by Council as a whole through the CAO, and giving the CAO the power to appoint senior staff, supervising legal services.

- A Council could decide to empower an executive committee as its intermediary with administrative staff and as the focus of staff advice and recommendations, e.g. by giving the executive committee the power to:
  - Make recommendations to Council with respect to the budget, strategic plans, policy, organization, etc.
  - Make recommendations to Council re the appointment of the CAO but giving the CAO the power to appoint other senior staff.
  - Provide direction to the senior staff on behalf of Council.
  - Award contracts.
  - Supervise legal services.

.

- A Council could decide to keep some basic responsibilities but broadly disperse recommending and decision making responsibilities to a large number of committees, as well as to senior staff. For example, Council could:

- Retain some activities for itself, e.g. providing direction to the CAO and/or individual department heads on cross-cutting matters, supervising legal services, awarding large contracts, appointing the CAO and other senior staff, etc.
- Give responsibility to various policy/program committees for providing direction to department heads on program specific matters, making recommendations on their part of the budget and strategic plan, proposing program-specific by-laws and appointments, etc.
- Give the CAO responsibility for coordinating the activities of the senior staff and ensuring that Council decisions are implemented.
- Give staff responsibility for smaller contract awards, operational decision making, etc.

As demonstrated above, one can progressively move from structurally simple, very streamlined approaches to much more complex/complicated structures and decision making processes.

The "Real" Power of the Head of Council/Mayor

While the governance model countenanced under the Ontario *Municipal Act, 2001* is one of "weak Mayor/strong Council", this does not mean the Mayor has to be powerless, other than for chairing Council meetings and signing bylaws. In fact, under the Ontario model, it is possible to have a very "strong" Mayor (albeit falling short of the statutory chief executive powers provided under the U.S. strong Mayor model).

A more powerful Mayor in the Ontario model can be achieved in two ways.

The first way is through the individual characteristics/capabilities of the Mayor her/himself. This includes their own:

- Leadership abilities and force of personality.
- Political will and ability to negotiate/build consensus and capacity to create coalitions within Council.
- The ability to communicate with the public.
- Political/public popularity.
- Understanding of the role of Mayor, Council, and the administrative staff, including their respect for the latter's professional role.
- Capacity to create a compelling vision for the City and to market that vision to the public and Council.
- Personal approach to building a positive Council culture, establishing and maintaining decorum and professional conduct, etc.

The most commonly referred to example in our interviews of a strong Mayor along these lines was Hazel McCallion of the City of Mississauga. Mayor McCallion is perceived to be very effective in all of the categories identified above and as a result is seen as being a very powerful Mayor, not withstanding the relatively weak powers conferred upon her by the *Municipal Act, 2001*.

The second way is by an explicit decision of Council that governance is made more effective by the Mayor having more powers than just those conferred by the Act, to the extent these additional powers can be conferred by Council through by-law. Most often, these are powers of recommendation as opposed to actual decision making. For example:

- The power to recommend:
    - The chairs of one or more committees.

    - Some or all of the members of one or more committees.
    - The appointment of the CAO/senior staff.
    - A budget and/or a strategic plan.
- The role of chair of an executive committee, with that committee being responsible for recommending the budget, strategic plan, and major policies to Council, supervising senior staff on behalf of Council, etc.

As noted above, these are powers that expand the influence of the Mayor, as opposed to the Mayor's independent/statutory powers. However, interviewees suggested that these kinds of powers, in combination with the kinds of more personal qualities detailed above can result in a very strong Mayor not withstanding his/her rather limited powers under the *Municipal Act, 2001*.

Roles and Responsibilities of Council and Staff

As suggested earlier, the Act is not highly explicit in terms of the details of the division of roles and responsibilities between Council and administrative staff. However, the description of Council and staff responsibilities in this regard is generally viewed as providing for a "governing vs. managing" split as follows using the language of the Act:

- Council's role to make decisions, with staff being responsible to provide advice.
- Council's responsibility to ensure that procedures are in place to implement its decisions, with staff being responsible for actual implementation.
- Council's power to delegate administrative responsibilities, with staff being responsible for performing those responsibilities.

Other than this high level terminology, further definition is not offered. To make matters more complicated, the literature and interviews indicate that this emphasis on Council as a policy making, rather than managing/operating body, is a direction that has been evolving in Ontario municipal affairs over time. However, the historical tradition in Ontario as presented in the literature and in interviews is one of more, rather than less, "hands-on" Councils, with a wide range of variations from municipality to municipality.

As described in the literature and in a number of interviews, the language of the new *Municipal Act, 2001* makes this direction much more explicit. The current literature on municipal governance generally points to this direction as providing for superior governance and as a best practice for municipalities to follow. There is evidence that a well-developed body of advice, training, and interpretation exists through organizations such as the Association of Municipalities of Ontario and Municipal World that would give more detailed guidance to municipalities in this respect.

At the end of the day, however, it is left to each Council to determine the extent to which they are prepared to define what they mean by policy making vs. managing, operating, implementing, etc. and whether and to what extent they are prepared to rely on staff advice in these areas. The literature and our interviews point to a number of factors – less related to the *Municipal Act, 2001* and more related to politics and culture – that influence municipalities in this regard, some of which have already been discussed:

- The culture and tradition of Council and the personal experience, knowledge, and views of Councillors with respect to the appropriate breakout of roles and responsibilities of politicians relative to the staff, including whether and to what extent a Mayor sees her/himself as the *administrative*, rather than more exclusively the *political* leader of the municipality.

- The relative value a Council places on streamlined Council decision making versus more participatory approaches.
- The reported strong emphasis in municipal government on very local matters, e.g. stop signs, garbage pickup, etc. and the extent to which the public understands the division of roles and responsibilities as set out in the Act. This include where the public expects that their individual Ward Councillors will be able to instruct/give direction to staff, particularly on operational matters.
- The extent to which the desired delineation of roles and responsibilities has been discussed and articulated in terms of practical, day-to-day behaviour and the extent to which this is supported/endorsed by Councillors and staff, and embedded in the operating culture of the municipality, including ongoing training and sanctions.
- The level of trust that Council has in the administrative staff and particularly in the senior administrative staff and its comfort level in terms of empowering staff.
- The extent to which Councils are comfortable with stepping beyond traditional interpretations of the Act, including the likely level of citizen/business/media scrutiny to which a Council feels its decision will be subject.
- The culture of the legal department in terms of narrow versus more expansive interpretations of the Act and its own views about how best to interpret the *Municipal Act, 2001*.

What about Super Majorities?

Super majorities – the practice of requiring more than a simple majority to overturn a recommendation to Council either from staff or a committee – have not generally been part of the Ontario municipal affairs landscape. The practice

was permitted until the mid-1970's specifically for the City of London's Board of Control (Council required a 2/3rd majority to overturn Board of Control recommendations). However, this power was eliminated at the request of London City Council. The Council had been opposed to this practice because it felt that it gave too much power to the Board and the resulting tension between Council and the Board was creating an increasingly dysfunctional relationship. However, London continues to have an elected-at-large Board of Control the recommendations of which require a simple majority on the part of Council to overturn. In actual practice, the bulk of Board recommendations are usually strongly supported in terms of votes by London City Council.

At present, the *Municipal Act, 2001* focuses on a simple majority approach to Council voting (50 percent plus one vote). This applies to all Council votes, including:

- Decisions that Council is not allowed, under the *Municipal Act, 2001* (or other Acts such as the City of Toronto Act, Planning Act, etc.) to delegate.
- Decisions that a Council could, in fact, delegate but for various reasons has chosen not to.

This would preclude a Council from taking incremental steps to streamline decision-making by deciding that a 2/3rds majority vote would be required to overturn the recommendation it receives from a committee or staff for matters that it could otherwise delegate but has chosen not to. It also places the focus of debate more squarely on the issue of the extent to which a Council is prepared to delegate decision making.

Other Limitations in the *Municipal Act, 2001*

Much of the popular debate with respect to municipal governance focuses on other limitations in the *Municipal Act, 2001* that we do not question make

planning, decision making, and managing at the municipal level more challenging. However, we would suggest that these are more properly viewed as public policy limitations rather than governance challenges. These limitations are primarily financial in nature and reflect a provincial policy decision to retain substantial control at the provincial level over taxation, particularly of the business community.

From this perspective, the basic elements of good governance (clear direction, clear roles and responsibilities, effective decision-making, etc.) are not contingent on, for example, whether an organization's funding is adequate to meet real or perceived needs. This would hold true regardless of whether that organization is a level of government, a non-profit agency, or a private sector corporation. In this category we would include:

- The requirement to have a balanced budget each year.
- Limits on municipal revenue generation to property taxes, user fees, and licence charges.
- The capacity to raise money only by way of debentures/short term debt.
- The ability to secure debt/use the underlying value of existing assets to finance new infrastructure.
- Limits on the capacity of municipalities to create the kind of corporations that would be necessary to facilitate public-private service delivery/infrastructure investment partnerships.

Part 5
Conclusion

In this paper, we have provided an overview of the major approaches to political governance and senior administrative structures, as described in the literature and based on interviews. We have attempted to provide factual information about each of these models, as well as analysis of whether and to what extent one model is better/more effective than another. Finally, we have provided an overview of the governance provisions of the new Ontario *Municipal Act, 2001*, including a discussion of what is new about this Act and how these new features affect governance.

The Models

As noted, the literature points to a relatively small number of basic conceptual or theoretical models for political governance of municipalities and for the structure of the relationship between the political level and senior administrative staff. These basic models set the stage for the wide range of variations that exist in practice across municipalities in Ontario, across Canada, and abroad.

The models for political governance are usually characterized at the highest level in terms of the statutory powers vested in the Mayor. The two most common characterizations are “strong Mayor” and “weak Mayor”, referring to the statutory powers of the Mayor relative to Council and the administration. The models for administrative structures involve variations on the theme of a single accountable head of the administration or small group of senior administrative officials with a more or less clear separation of policy and operational responsibilities.

Preconditions

In terms of whether one model is better/more effective than another, it is apparent from the literature and our interviews, that each of the models can provide for effective political governance if:

- Certain preconditions exist or can be created.
- The model can be implemented/adapted in a way that is consistent with a particular jurisdiction's cultural context (including history/tradition, political culture, civic culture, etc.)
- Adaptations are geared to the actual obstacles – both real and perceived – that prevent a particular jurisdiction from achieving effective political governance.

In this mix of factors, the preconditions are particularly important, including the following:

- Strong political leadership.
- An effective Mayor/head of Council.
- Clear roles and responsibilities.
- Excellence in public service/confidence in the public service.
- Respect and professionalism.
- Reinforcing culture with embedded rewards and sanctions.

Most of the preconditions have at their core what we have defined as the essential and less tangible elements of leadership, culture, values, and behaviour in both individual and collective terms. As often expressed by organizational experts, this suggests that with the right leadership, culture, values, and behaviour, any basic structure can be made to work.

The New Ontario *Municipal Act, 2001*

The *Municipal Act, 2001* provides for the basic elements of a Strong Council/Weak Mayor model of political governance across the province. The expert assessment of whether the Act in fact represents a significant new direction is mixed, with two predominant schools of thought:

- That the Act does provide municipalities with more authority and flexibility. However, the Act is also very new, the culture of the previous more prescriptive legislation is very ingrained among many municipal officials (including Councillors, municipal lawyers, and administrative staff), and it will take some time before the new Act is better understood.
- That the new Act is not significantly different than the previous legislation in that it continues to be highly prescriptive in nature, and that municipalities continue to lack many of the key powers they require to manage effectively.

All indications are that the new Act was intended by the provincial government to be a change in the general legal basis for municipal authority (through natural person powers and the ten spheres of jurisdiction). Whether and to what extent this change is significant continues to be vigorously debated. The conclusion reached by a number of observers is that the more prescriptive nature of the previous Act has resulted over time in a well-entrenched culture in the municipal sector that continues to focus on “if the Act doesn’t explicitly say you can, assume that you can’t”. If this conclusion is true, it is apparent that this relatively new piece of legislation needs time to be explored and tested and in order to be fully utilized may require a change in prevailing administrative and legal perspectives and attitudes.

With respect to governance, the Act provides municipalities with a large measure of flexibility with respect to how they organize and delegate authority, albeit within certain overall limitations. This means that Councils in Ontario already have the authority to replicate many of the features of the different models. For example:

- A Mayor with more extensive delegated powers, an empowered executive committee to provide strategic leadership, etc.
- A Council with no committees that focuses on policy decision making and extensive empowerment of administrative staff.
- A Council that has dispersed its authority very broadly between and among all of the actors – Mayor, Council, Committees, and senior staff.

Appendix A

Roles/Duties under the *Municipal Act, 2001*

The roles of the head of Council, Council, and administrative staff are defined at a very high level in the legislation.

Head of Council

Under the *Municipal Act, 2001*, Mayors/heads of Council of lower tier municipalities are required to be elected at large by a general vote. Upper tier municipalities have the option to appoint their head of Council from among the Council members.

The role of the head of Council is described in general terms under the *Municipal Act, 2001* as follows*:*

- To act as chief executive officer of the municipality.
- To preside over Council meetings.
- To provide leadership to the Council.
- To represent the municipality at official functions.
- To carry out the duties of the head of Council under this or any other Act.

In addition to the above *roles*, the legislation makes reference to two specific *duties*:

- Presiding over all meetings of Council; and
- Signing all by-laws, together with the City Clerk, passed at meetings at which the Mayor presided.

The specific powers provided to the head of Council including the following:

- Calling a special meeting of Council.
- Expelling any person for improper conduct at a meeting.
- Proclaiming a civic holiday for the purposes of requiring retail business closings.
- Acting as a commissioner for taking affidavits (as may any member of Council).
- Appointing guards with the powers of peace officers for public works and municipal buildings.
- Exercising the following in the case of an emergency:
    - Declare that an emergency exists in the municipality or in any part thereof;
    - Take such action and make such orders as he or she considers necessary and are not contrary to law to implement the emergency plan of the municipality and to protect property and the health, safety and welfare of the inhabitants of the emergency area; and
    - Declare that an emergency has terminated

The view is expressed in the literature that the job of head of Council is actually simpler under the new Act. The new Act does not talk about “duties”, but rather about “roles”. In addition, some duties from the former *Municipal Act* are not included in the new Act:

- The duty to be vigilant and active in causing the laws for the government of the municipality to be duly executed and obeyed.
- The duty to communicate information and recommend measures to improve the finances, health, security, cleanliness, comfort, and ornament of the municipality.

The role of head of Council/Mayor as chief executive officer is not spelled out in detail in the legislation but is viewed in the literature as relating to that individual's role to supervise the senior administrative staff. This is further clarified in the Act with respect to the discussion of roles of officers and employees and their accountability to Council, thus making it clearer that the Mayor's supervisory role is on behalf of Council (although not necessarily to the exclusion of Council or it's committees from providing direction to staff) and by implication that the Mayor and Council need to be closely connected in this regard.

Under the *Municipal Act, 2001,* Council may, by by-law or resolution, appoint another member of Council to act in the place of the Mayor when the Mayor is absent or refuses to act, or the office is vacant. In such cases, the Acting Mayor has all the powers and duties of the Mayor. Also, Council may, with the consent of the Mayor, appoint another member of Council to act in the place of the Mayor on any body of which the Mayor is a member ex officio (e.g. the Police Services Board in the case of Toronto).

Council

As defined at a high level in the *Municipal Act, 2001*, Council's role is the following:

- To represent the public and to consider the well-being and interests of the municipality.
- To develop and evaluate the policies and programs of the municipality.
- To determine which services the municipality provides.
- To ensure that administrative practices are in place to implement the decisions of Council.
- To maintain the financial integrity of the municipality.

- To carry out the duties of Council under the *Municipal Act, 2001* and other Acts.

Within Ontario's overall "weak Mayor/strong Council" model, almost all authority stems from the Council. As part of this, Councils have the general authority to determine how they will govern. This includes:

- Whether and to what extent to establish standing committees and the focus of those standing committees (policy/program, geography, etc.).
- The type of administrative structure to put in place (CAO, Commissioners, etc.) subject to the givens identified earlier. In their legislative role, Councillors are responsible for deliberating and establishing policies and by-laws in order to implement Council's decisions.
- The extent to which it will delegate its authority: either to the head of Council, various standing committees, or administrative staff, subject to the delegation provisions of the *Municipal Act, 2001* and other relevant pieces of legislation such as the *Planning Act*.

Role of the Administration

In broad terms, the Act establishes the following as the role of the Administrative officers and employees of the municipality:

- To implement Council's decisions and establish administrative practices and procedures to carry out Council's decisions.
- To undertake research and provide advice to Council on the policies and programs of the municipality.
- To carry out other duties required by the Act or any other duties assigned by the municipality.

As noted earlier, Councils have the option to appoint a Chief Administrative Officer with very general responsibilities defined in the Act as follows:

- Exercising general control and management of the affairs of the municipality for the purpose of ensuring the efficient and effective operation of the municipality.
- Performing such other duties as are assigned by the municipality.

Appendix B

Ministry of Municipal Affairs and Housing Description of the New *Municipal Act, 2001*

The New *Municipal Act, 2001*

A new *Municipal Act, 2001*, which went into effect on January 1, 2003, will be the cornerstone of a new, stronger provincial-municipal relationship.

Passed by the Legislature in December 2001, the new *Municipal Act, 2001* is modern and streamlined. It gives municipalities a broad new flexibility to deal with local circumstances, and to react quickly to local economic, environmental or social changes. The new Act is the product of extensive consultation and hard work with municipal and business groups to find the right balance between municipal flexibility and strong accountability to taxpayers.

The new *Municipal Act, 2001* includes a number of amendments on technical or operational matters that will improve the Act's clarity or its ability to meet its overall objectives.

The new *Municipal Act, 2001* also recognizes the importance of ongoing consultation with municipalities on matters of mutual interest. The Ministry has signed a new memorandum of understanding with the Association of Municipalities of Ontario with respect to consultation.

- Two specific provisions in the *Municipal Act, 2001* establish a new framework for provincial-municipal relations:
- Municipalities are acknowledged as responsible and accountable governments and their purposes are broadly defined

The new Act endorses the principle of ongoing consultation between the province and municipalities on matters of mutual interest. This has led to the development of a Memorandum of Understanding signed by the Minister of Municipal Affairs and Housing and the President of the Association of Municipalities of Ontario

A new approach

The old *Municipal Act, 2001* was a detailed, prescriptive statute that allowed municipalities to do only what was specifically set out in its provisions. Whenever municipalities wanted to undertake new activities, amendments were needed to provide for the change in roles.

The new *Municipal Act, 2001* gives municipalities greater flexibility to organize their affairs and deliver services. Among other benefits, the new Act:

- Enables municipalities to undertake new activities within their spheres of responsibility without the need for time-consuming legislative changes
- Is a more understandable and user-friendly statute, in which related matters are streamlined, up-dated and grouped together. Some 1,100 pages of legislation governing municipalities have been reduced to just over 300
- Consolidates in a single Act provisions from some 30 other pieces of legislation, including acts for individual regional municipalities

The change in approach from prescription to greater flexibility is largely accomplished through the use of three key concepts:

- Natural person powers
- Spheres of jurisdiction
- Governmental powers

Natural person powers

Natural person powers give Councils much the same authority and flexibility as individuals and corporations have to manage their organizational and administrative affairs. Generally, these powers will enable municipalities – without the need for specific legislative authority – to hire staff, enter into agreements and acquire land and equipment, etc. This single provision in the new Act replaces the numerous specific and prescriptive provisions about administrative matters found in the old Act.

Spheres of jurisdiction

Spheres of jurisdiction are general grants of authority in ten service delivery areas. The ten spheres are:

- Public utilities
- Waste management
- Highways (public roads), including parking and traffic on highways
- Transportation systems other than highways
- Culture, parks, recreation and heritage
- Drainage and flood control, except storm sewers
- Structures, including fences and signs
- Parking except on highways
- Animals
- Economic development services

The value of the spheres is that they:

- Encompass specific powers in the old Act falling under the above categories
- Enable new activities within the sphere, without the need for legislative change.

For matters falling under the spheres, municipal staff will not have to begin with specific legislative provisions as justification for Council's actions. In most instances, they will be able to point to the sphere as the basis for municipal authority.

Specific municipal powers

Not all service delivery powers are captured under the spheres of jurisdiction. Part III of the new Act is devoted to specific municipal powers falling into two main categories:

- **Specific powers associated with spheres**, dealing with process requirements and relationships between upper and lower-tier municipal governments. These include provisions for designating boundary roads, procedures for road closings, powers of entry, notices and fines.

- **Specific powers not associated with spheres**, including provisions in three topic areas – health, safety, well-being and protection of persons and property; nuisances; and the natural environment. Because of the potential for duplication between provincial and municipal governments and over-regulation of ratepayers and businesses, these areas were not designated as spheres in the new Act. However, the provisions have been substantially streamlined and modernized, compared to the manner in which they are set out in the old Act.

Many archaic provisions have been discontinued. Others have been transferred to more appropriate Acts –- for example, the fire provisions of the old Act will form part of the *Fire Protection and Prevention Act*, administered by the Ministry of Community Safety and Correctional Services.

Governmental powers

In the old Act, the provisions that entitle municipalities and local boards to act as law-making bodies are scattered throughout the statute. As with the natural person powers, many of these governmental powers - including authority for municipalities to regulate and prohibit, and to oblige individuals to take certain actions - are consolidated in the new Act.

Limits

Another feature of the new Act is its spelling out of explicit limits. The old Act is inherently limiting because the basic approach is to only enable municipalities to do what is specifically stated. The flexible approach of the new Act means that certain restrictions need to be set out explicitly. Some of the restrictions, reflecting current common-law and provincial government policy, are:

- Municipal by-laws cannot conflict with federal or provincial statutes;
- Spheres may be subject to procedural requirements and other limitations existing in other statutes;
- Under six of the spheres, municipalities are prohibited from regulating non-municipal systems;
- Municipalities in two-tier systems are prohibited from regulating activities of the other tier which are authorized under the spheres;
- Neither the spheres nor the natural person powers authorize municipalities to undertake certain corporate and financial actions such as

imposing taxes, fees or charges or incurring debts and making investments - municipal authority for those activities is set out elsewhere in the Act; and

- Municipalities can only exercise their powers inside their own boundaries, with some exceptions.

Finance matters

The new Act's treatment of the financial provisions remains detailed, although it has been streamlined and modernized.

Other new features

Several significant powers in the *Municipal Act, 2001* are entirely new. Most importantly:

- Municipalities will be able to establish corporations for municipal purposes, subject to regulation. This is intended to facilitate public-private partnerships for the delivery of services

- Municipalities will be able to collect tolls for vehicles using their roads, subject to regulation

- Councils will be able to establish and appoint municipal service boards to provide services under five spheres of jurisdiction - public utilities; waste management; transportation systems other than highways; culture, parks, recreation and heritage; and parking, except on highways - and in other service areas as prescribed by the Minister of Municipal Affairs and Housing. This will offer enhanced flexibility for administration and governance, including joint service provision by two or more municipalities.

Accountability

The increased municipal flexibility in the *Municipal Act, 2001* is balanced by a strong accountability framework, including existing and new requirements. The new Act makes municipalities more accountable to taxpayers for their hiring and purchasing practices. It imposes new requirements on municipalities with respect to regulating business and imposing user fees. It also requires municipalities to publicly disclose improvements in service delivery.

To keep the statute relevant and updated, the new Act requires review on a regular basis. The first review is to start by the end of 2007 and thereafter within five years of the end of the previous review.

Toronto Computer Leasing Inquiry

Research Paper

MUNICIPAL GOVERNANCE

Volume 2: City of Toronto Issues and Options/Approaches for Discussions

December 2003

Table of Contents

Executive Summary and Summary of Options/Approaches

Part 1: Introduction

This report focuses on governance issues and challenges currently faced by the City of Toronto as well as options and approaches for discussion related to potential changes to political and administrative governance, including:

- An overview of the governance provisions of the *City of Toronto Act, 1997* and the City of Toronto Municipal Code.
- A summary of the findings and options described in the City's own *Governance Review Discussion Paper* from April 2003.
- A description of current governance issues and challenges facing the City of Toronto.
- A set of options and approaches for discussion related to strengthening governance at the City of Toronto.

This report builds on the information presented in the Toronto Computer Leasing Inquiry Research Paper *Municipal Governance: Volume 1*, including:

- An overview of major different models of political governance and administrative structures at the municipal level.
- A discussion of the effectiveness of the different models.
- An overview of the governance provisions of the new Ontario *Municipal Act, 2001*.

The research for this report included over 1,400 pages of documents and interviews with 28 individuals including current and former municipal officials

including a number of former elected and non-officials, provincial government officials, academics, representatives of provincial associations, and legal experts. Documentary resources included legislation, government reports and research/policy documents, public proceedings, correspondence, academic and other expert analysis/writings, opinion pieces, etc.

Part 2: City of Toronto Acts & City of Toronto Municipal Code

City of Toronto Act, 1997

Under this legislation, the City of Toronto is subject to a number of limitations/special provisions that are not placed on Ontario municipalities in general, including:

- The Mayor of Toronto must be elected at large.
- Councillors are to be elected by wards, with the boundaries of the 44 wards prescribed in Regulations under the Act.
- Council does not have the power to make changes to basic elements of its own structure.

The Act authorizes Council to create:

- An Executive Committee.
- Any number of neighbourhood committees and Community Councils with certain limitations on boundaries and membership.

The Act specifies that any matter that can be delegated to Standing Committees, appointed committees, or to appointed officials (i.e. administrative staff) can be delegated to a Community Council. Council may also delegate to Community

Councils any of the functions of a Committee of Adjustment under the *Planning Act,* as well as management of recreational facilities.

City of Toronto Municipal Code

The Municipal Code sets out the next layer of municipal governance structures. This includes:

- Additional roles and responsibilities for the Mayor and other Councillors.
- The City's system of Committees.
- The agenda process.
- The high-level roles and responsibilities of elected officials and administrative staff.

As a general observation, the system set out in the Code is one that:

- Is decentralized in terms of a wide range opportunities for Councillors to participate through various Standing and other Committees that generally have recommending powers.
- Is centralized in terms of decision-making in that Council (as opposed to Standing Committees or Community Councils) retains decision-making authority for virtually all decisions that have not or cannot be delegated.
- Provides for a multiplicity of layers and points of interface between Council (as a whole and in the various committees) and the administrative staff.

Part 3: City of Toronto Governance Review Discussion Paper

This discussion paper is focused on raising issues and identifying options – it does not include a set of options and approaches for potential changes. The issues and options as presented are primarily:

- Whether and to what extent to create an executive committee and/or more empowered Mayor.
- Whether to change the configuration of Standing Committees and to give those Standing Committees more decision-making authority.
- Whether to change the configuration (number, boundaries) of Community Councils and to give those Councils more decision-making authority.
- Whether to streamline how business is introduced at Council and to establish the position of Speaker.

The paper, however, does not directly address key issues that have major implications for effective governance:

- It relies on current interpretations with respect to the extent to which Council can delegate decision-making authority or other activities.
- It focuses on the decision-making structures of Council and does not deal with the very significant governance issue of the appropriate division of roles and responsibilities between Council and administrative staff.
- It does not deal with the critical area of the culture of governance at the City of Toronto – the operating values that are reflected in individuals, both political and administrative.

The report identifies the following governance areas of concern based on interviews with Councillors and senior staff:

- Executive powers/an executive committee as a vehicle for improving coordination and integration of major policy and financial decisions.
- Standing Committee workload and unevenness in terms of degree of attention that issues receive.
- Changes in the number of Community Councils with the potential for enhanced decision-making.
- Potentially reducing the number of ad hoc committees, advisory committees, and advocate positions
- Concerns about effective agenda management and the lack of time to read and understand material before Council is asked to make a decision.

Key options presented in the paper include:

- Creating an Executive Committee.
- Potentially increasing or reducing the number of Standing Committees as well as the delegation of more decision-making to Standing Committees.
- Reducing Community Councils from four to six as well as potentially providing them with funding for discretionary services.
- Rationalizing/scaling back on the number of ad hoc, advisory and other committees.
- Changing the frequency of meetings or points of introducing new business as means of streamlining Council agenda.
- Potentially creating a speaker position.

Part 4: Toronto's Governance Issues

The following are the major issues identified through the research and interviews:

An Evolving Operating Culture: Since its inception, developing a new consolidated culture within the City has been a subject for discussion and of a number of initiatives. However, the consensus is that Toronto's operating culture has not yet fully matured.

The Transition Process: The Transition Team did not focus sufficiently on the administrative aspects of amalgamation. As a result, the intended turnkey operation was not in place from the outset and as such, the process of building and consolidating the new City is taking somewhat longer than otherwise would have been the case.

The City is Still New: There is a general sense that the City is still relatively new and that it is simply too early to tell to what extent governance issues are structural in nature or simply that insufficient time has passed to allow the City – both Council and administrative staff – to develop a clear and consistent approach to how they do business.

Emphasis on Personalities and Relationships: To be effective, the Ontario model of municipal governance relies strongly on personalities and relationships. In governance terms, individual legislators are more important at the municipal level compared, for example, to the federal or provincial level. It was suggested that this flexibility can put considerable additional strain on Councillors and administrative staff.

A Larger and More Complex City: Toronto is not like other municipalities by virtue of its very large Council, very large bureaucracy, and the higher volume of issues, including larger and more complex issues. It may be unrealistic to expect

that the standard model of governance in Ontario (council and policy committees) will work as well in this kind of setting.

Size of Council: A larger Council presents additional governance challenges for Council, the Mayor, and staff, e.g. harder to get consensus, more time consuming for the Mayor to exercise leadership/build coalitions, harder for the CAO and senior staff to build a trust relationship, etc. A smaller Council would make the City less representative and Councillor workload too demanding. The alternative would be to streamline and decentralize decision-making to a greater extent than has happened to date.

Strategic Focus: The research input was generally critical of Council with respect to strategic focus – not because quality strategic plans are not developed, but rather because Council is not seen as using these plans to drive subsequent policy, program, and budgetary decisions. The general sense is Toronto would benefit from citywide strategic planning and decision-making having a higher profile with Council and moving away from what many perceive to be an overly operational or ward-based focus on the part of Council.

Political Party Alignment: In Ontario, there is a strong attachment to the notion of a non-partisan Council as a central underpinning of good governance and good government for Ontario municipalities. The view is strongly expressed that most municipal decisions are very local and practical in nature and as such do not relate to party values/platforms. In the absence of party discipline, there is a greater onus on consensus building that in turn leads to better public policy.

Delegation of Authority: An aggressive and robust approach to delegation of authority emerges as an essential part of effective municipal governance, particularly for larger municipalities. The general perception is that Toronto City Council has been more inclined to see itself as responsible for managing the City and therefore less inclined overall to delegate to the staff and also has more time

to oversee staff. The situation is exacerbated by narrower legal interpretations relative to Council's powers to delegate either to Committees or to administrative staff. It is also believed that one of the consequences of the recent computer leasing matter will be further retrenchment by Council with respect to delegating both decisions and activities to staff, rather than strengthening its role and focus on approving policies and policy guidance for staff decision-making and more robust and risk-based mechanisms for holding the CAO accountable.

Clarity of Roles and Responsibilities: Having clarity relative to the respective roles and responsibilities of Council and administrative staff is arguably the most important aspect of effective municipal governance. This includes roles and responsibilities descriptions that are carefully thought through, well defined in operational terms, and that are embedded/reinforced in the operating culture of the municipality. Toronto is not seen at present as having a well-defined breakout of roles and responsibilities that are generally understood and/or accepted in both theory and practice. Observers generally perceive that the dividing line is blurred from both the political and administrative ends of the spectrum.

Relationships between Individual Staff and Councillors: At the municipal level in Ontario, there is much closer contact between public servants and individual legislators than is the case provincially or federally. With respect to Toronto, however, the general perception is that there is more *clientism* than would be considered healthy in a leading or *best practice* municipality. *Clientism* in this case apparently refers to public servants who are very politically inclined/who cultivate direct relationships with Councillors and vice versa.

An Executive Committee: Executive Committees are generally seen as useful for ensuring strong political leadership, direction, integration, etc. particularly with a large Council as per Toronto. However, they are viewed by some as having the potential to create more problems than they solve depending on whether an Executive Committee's authority is accepted by Council. The general view is that

past Toronto Councils have had difficulty with the notion of delegating at least a measure of political and strategic leadership to an Executive Committee, often including suggestions that such a measure would somehow be “anti-democratic” compared to the current situation. As such, it would be essential for an Executive Committee in Toronto to have a representative membership that balances the Mayor’s and Council’s interests and in doing so ensures democratic representation.

The CAO: The CAO model as the professional head of the public service is still relatively new to Ontario municipalities. Many Councils have not either understood or perhaps accepted what this means for their role. At the City of Toronto, the role of the CAO is articulated at a high level on paper, but the general view from the research is that the practical reality has been much more fluid and not consistent with the demands and requirements of such a large, complex organization.

Community Councils: Community Councils were originally envisioned in the *City of Toronto Act, 1997* as a tool to streamline Council decision-making and to allow the debate at Council to focus on more citywide and strategic considerations. However, the necessary delegation has not taken place. The prevailing view within the City was that this would weaken Council and generally weaken and fragment the overall effective management of the City. Externally, Community Councils are viewed by many as generally being responsible enough to make final decisions in many areas, although significant concerns exist with respect to discretionary service level decisions.

Respect and Decorum: A high standard of decorum in the relationship between and among Councillors and with the public service is critical to effective municipal governance, including a climate of courtesy, mutual trust, and respect. Toronto Council is generally recognized within the municipal sector for its demonstrated lack of respect between Councillors and, even more notably, with the public

service. Consistent with this recognition, Council is not viewed as having a clearly understood and/or enforced set of protocols or expectations with regard to what constitutes appropriate behaviour within Council or towards public servants.

Power of the Bureaucracy: An ongoing source of tension between municipal Councils and administrative staff is the perceived increase in the power of the bureaucracy relative to the power and influence of individual Councillors. In Toronto, this is exacerbated by the challenge of a large Council having to supervise the staff with "one voice". It was also suggested that the situation is further complicated by the need for greater clarity and consistency in terms of roles and responsibilities. A closely related issue is the widely perceived lack of confidence in the public service that is often demonstrated by individual Councillors and on occasion by Council as a whole. It was suggested that this would likely become more intense in the wake of the recent computer leasing matter but that it was firmly in place prior to these events. Some suggested that the "trust issue" is a screen for the more fundamental question of the respective roles and responsibilities of governors and managers.

Training and Orientation: Training and orientation for Councillors and staff is critical to good governance, particularly with respect to understanding in operational terms the respective roles and responsibilities and what constitutes appropriate behaviour. The general sense of Toronto is that efforts in this direction need to be intensified for both staff and Councillors, including substantive and thoughtful time set aside (as in a formal retreat setting) for Councillors to discuss and explore expectations with each other and with senior staff in a collegial format.

Special Operating Agencies: The view was expressed that a city of the size, scope, and complexity of Toronto, with its large Council, cannot be expected to govern strategically in the absence of these more operationally focused arms-length bodies. The challenge appears to be one of how to keep special

operating agencies accountable and responsive to policy direction from elected officials. There are many examples from other jurisdictions of accountability frameworks, memoranda of understanding, appointments processes, etc. that ensure appropriate accountability to elected officials.

Part 5: Options and Approaches for Discussion

An overall consensus emerges from the research that governance at the City of Toronto is currently operating at a less than optimal level. However, there is no similar consensus with respect to what action, if any, should be taken, i.e. whether these are simply growing pains that need to be endured or whether the problems can only be addressed through specific structural or other responses.

In general, there is a strongly held view among experts and practitioners that while the *strong council-weak mayor* model, as it currently exists in Ontario may not be perfect, no other approach is likely to be as successful because of the inherent nature of Councils, Councillors, and municipal politics in general in Ontario. According to this view, efforts to improve governance should focus first on ensuring that the right people are in place, with good relationships, and with clear roles and responsibilities, rather than on major structural or legislative/mandate changes.

This does not mean, however, that certain structural changes should not be considered as well. The literature on organizational effectiveness and change management notes that structural change is an important way that organizations send signals about new expectations and reinforce in an ongoing way how business will be conducted in the new world.

Intended Outcomes

The proposed changes generally focus on the following high-level outcomes for the City of Toronto:

- Strong political leadership of City Council and strong leadership of the administrative staff, including a strengthened strategic capacity for Council.
- Greater focus and descriptive clarity with respect to roles and responsibilities.
- An approach to governance that maximizes the benefits of having a large professional bureaucracy that is accountable to elected officials and that ensures that the responsibilities of Council/Councillors are manageable.
- A renewed public climate of respect and professionalism.
- Renewed and sustained efforts to build and stabilize the operating culture of the new City.

A New Deal for Cities

Much of the popular debate with respect to whether Toronto is or can be effectively run as a City continues to focus on the theme of a “new deal” for cities, i.e. that the City cannot be governed properly without adequate financial resources/greater independence from provincial policy decisions.

Access to and adequacy of revenue sources is noted as an important governing challenge and one that has faced virtually all public sector organizations for the past decade or more. For the purposes of this review, however, these challenges are more properly viewed as fiscal and public policy rather than governance challenges. The experts would say that the basic elements of good governance (clear direction, clear roles and responsibilities, effective decision-

making, etc.) are not contingent on, for example, whether an organization's funding is adequate to meet real or perceived needs.

Enhancing Democracy

During the research, it was suggested that measures to strengthen executive leadership, streamline decision-making, and make better use of delegation to staff would be positioned by critics as "less democratic". It is important, however, not to confuse the requirements of *good governance* with the fundamentals of *good government*. The former is about direction, clear roles and responsibilities, and efficient and effective decision-making. The latter is more broadly defined, including effective public engagement, consultation, and input.

In terms of good governance, the options and approaches that follow reflect the view that Toronto with its size and 44-member Council requires something more than "everyone and no one in charge". In terms of good government, these options and approaches do not set any limits on Council's capacity to engage the public in consultation and meaningful input into decision-making. However, effective public consultation/engagement mechanisms need to be well structured, manageable and appropriate in terms of the role of elected officials, and make effective use of the administration.

1. Roles and Responsibilities

It is recommended that:

- A review of current roles and responsibilities be undertaken with a view to:
    - Developing a shared understanding of the issue at the political and administrative levels.

    - More clearly defining and realigning the respective roles and responsibilities.
- This definition and realignment be at a high level (for example, the kind of language that might be appropriate for a by-law) and also in very descriptive/operational terms.
- This more situational/operational understanding becomes a part of the ongoing training and development of Councillors and administrative staff.
- The CAO be held accountable for ensuring compliance with the new expectations on the part of administrative staff.
- The Mayor be given the lead within Council for ensuring that the operating values of Council are consistent with the new expectations.
- Future governance reviews by the City include issues associated with clarity in roles and responsibilities.

2. Delegation

It is recommended that:

- There be greater clarity and consistency in terms of a common understanding across municipalities of the extent to which different types of decisions and activities can be delegated.
- The municipal community, with Toronto in a major leadership role, undertake a comparative review of delegation interpretations with a view to creating a common operating standard that would guide and inform (as opposed to prescribe) local Councils.
- In light of this review, Council ask the CAO to:
    - Provide advice with respect to changes that could be made in existing delegation to further streamline decision-making and enhance Council strategic focus.

- Institute robust and risk-based reporting/accountability mechanisms so that Council can be assured that decisions and actions delegated to staff are executed in a manner that is consistent with Council direction as set out in policy and strategic directions.

3. Executive Committee

It is recommended that:

- An Executive Committee be established with a mandate to provide coordination and integration to Council's decision-making, to lead the development of Council's strategic agenda, and provide oversight on behalf of Council with respect to its implementation.
- Executive Committee have the authority and responsibility to review and revise Standing Committee and Community Council recommendations in certain types of situations, e.g. major citywide/strategic/financial implications, etc.
- Executive Committee have the responsibility to assist the CAO and senior staff in managing the ongoing interface and boundaries between Council and the administration, including that roles and responsibilities are respected in practice, ensuring high standards of behaviour and decorum, and ensuring that the CAO and the public service are non-partisan and professional.

4. The Mayor

It is recommended that the Mayor's capacity to *influence* decision-making rather than *make* decisions be expanded. This would be accomplished through:

- The Mayor as chair of a more empowered Executive Committee.

- Continuing with the Mayor (or their designate) as Chair of the Striking Committee with the responsibility for recommending Striking Committee members to Council.
- Continuing with the expectation that the Mayor (or designate) will function as head of Council.
- As per the options and approaches dealing with roles and responsibilities, charging the Mayor with responsibility for ensuring that the operating values of Council, its Committees, and individual Councillors are consistent with the new expectations.

5. The CAO

It is recommended that:

- Council confirm the role of the CAO as having clear and unequivocal responsibility and accountability for the overall management of the administration and that this clear and unequivocal authority receive special attention within the more general review of roles and responsibilities recommended earlier.
- This more extensive description be embedded in the professional development training of the public service and Council.
- Consistent with this authority, the CAO be given the responsibility to hire, dismiss, promote and otherwise deal with senior staff.

6. Standing Committees

Most of the options and approaches with respect to Standing Committees are in effect consequences of others, as follows.

- As a consequence of creating the Executive Committee, the Policy and Finance, Administration, and Budget Advisory Committees would no

longer be required although subcommittees of Executive Committee may be required depending on workload and the extent of delegation.

- Standing Committee Chairs would be members of the Executive Committee.
- In certain circumstances (already described under the previous section dealing with Executive Committee), the Executive Committee could review and revise Standing Committee recommendations before proceeding to Council.

Based on the reviews recommended earlier with respect to roles and responsibilities and delegation of authority, each Committee would have consistent operating approaches with respect to:

- The extent of delegation and the types of matters/activities that are delegated.
- The respective roles and responsibilities of Committee members and administrative staff.
- Matters that are of strategic and/or financial significance and that should be referred to Executive Committee.

7. Special Committees

It is recommended that:

- The Striking Committee would have an additional responsibility to recommend the other (non-Standing Committee chair) members of Executive Committee, as well as the Standing Committee Chairs.
- The Budget Advisory Committee would no longer be necessary in light of the newly mandated Executive Committee, although Executive Committee could decide to create a budget subcommittee depending on workload pressures/extent of delegation.

8. Community Councils

We support the recent Board of Trade recommendations with respect to Community Councils including the following:

- Community Councils should be aligned with service delivery areas and reduced in number from six to four.
- Council should look to delegate additional decision-making to Community Councils and that these decisions should not need secondary approval of the Council.
- Community Councils should take on a proactive policy role within their Community Council area.
- Community Councils should focus on building better civic engagement.
- Community Councils also should not make decisions in matters that cross boundaries.

With respect to delegated decision-making, it is also recommended that additional delegation to Community Council take place based on the results of the reviews of roles and responsibilities and delegation already recommended in this report.

It is recommended that Executive Committee have an oversight role with respect to Community Councils as part of ensuring consistency and integration with respect to financial and strategic directions.

9. Ad Hoc, Special and Other Committees, Advocates, etc.

It is recommended that:

- Council substantially rationalize and reduce these kinds of special purpose bodies.
- The purpose/intent of these special purpose bodies be realigned within the existing Committee structure and/or assigned to administrative staff.
- The future creation of new special purpose bodies should include a clear understanding of why the matter cannot be addressed either through an existing Committee structure or the administrative staff and emphasize the establishment of time-limited bodies.

10. Special Operating Agencies

In support of future efforts directed at alternative service delivery, it is recommended that Toronto conduct a review of effective accountability mechanisms related to alternative service delivery in place in other jurisdictions with a view to identifying best practices that could be used to inform and shape future City actions.

Part 1
Introduction

The focus of this second and final volume on municipal governance is governance issues and challenges currently faced by the City of Toronto as well as options and approaches for discussion with respect to potential changes to its political and administrative governance.

In addition to this Introduction, the report is presented in four sections:

- An overview of the governance provisions of the *City of Toronto Act*, 1997 and the governance provisions of the City of Toronto Municipal Code.
- A summary of the findings and options described in the City's own *Governance Review Discussion Paper* from April 2003.
- A description of current governance issues and challenges facing the City of Toronto, including factors that are unique to the City as well as common across many municipalities, drawn from the interviews that were conducted during the research phase.
- Flowing from the description of issues and challenges, a set of options and approaches for discussion related to strengthening governance at the City of Toronto.

This report builds on the information presented *Volume 1*, including

- An overview of major different models of political governance at the municipal level.
- An overview of the major different models of senior administrative structure at the municipal level and the relationship with the political level.

- A discussion of whether and to what extent any one particular model is more effective than another.
- An overview of the governance provisions of the new Ontario *Municipal Act, 2001*.

Research Approach

The preparation of the reports on governance included reviewing over 1,400 pages of documents and interviewing 28 individuals. These included provincial officials from the municipal policy field, current and former municipal public officials from various (primarily Ontario) jurisdictions, including some former elected officials, academics from Canada and the U.S, legal experts, representatives from the Association of Municipalities of Ontario and the Association of Municipal Managers, Clerks and Treasurers.

Documentary resources focused on publicly available material (either in print or electronic format), including legislation, government reports and research/policy documents, public proceedings, correspondence, academic and other expert analysis/writings, opinion pieces, etc.

Documentary material was collected on a wide range of jurisdictions including: examples from across Canada, the U.S., Great Britain, Australia, and New Zealand. Sources for these documents included various departments/branches of municipal, provincial, and state governments, academics and researchers, citizen groups, associations representing municipal political and administrative officials, and the media.

Part 2
City of Toronto Act
City of Toronto Municipal Code

City of Toronto Act, 1997

Additional governance provisions affecting the City of Toronto are included in the *City of Toronto Act, 1997*.

Under this legislation, the City of Toronto is subject to a number of limitations/special provisions that are not placed on municipalities in general in Ontario. In some cases, the limitations are fairly fundamental, i.e. Council's general power to reorganize itself. In other cases, they appear to signal a preference for a particular approach to governance, i.e. an empowered executive committee and Community Councils with delegated authority.

Included in the limitations within the Act are the following:

- Councillors are to be elected by wards, with the boundaries of the 44 wards prescribed in Regulations under the Act.
- Council does not have the power to make changes to basic elements of its own structure (within the normal confines of the *Municipal Act, 2001*) including:
    - The number of Councillors.
    - The number and boundaries of Wards.
    - The method of electing councillors (at large vs. by ward).

The Act does not restrict Council's ability to establish Standing Committees and specifically authorizes Council to create:

- An Executive Committee, without defining its powers/scope (an Executive Committee as another form of Standing Committee is already provided for under the *Municipal Act, 2001*).
- Any number of neighbourhood committees and Community Councils with the following limitations:
    - Community Councils are considered to be committees of Council for all purposes.
    - All urban areas of Toronto must be included.
    - Ward boundaries cannot be divided among neighbourhood committees/Community Councils.
    - Only City Councillors may be members of Community Councils.

In terms of delegation to these Committees, the Act specifies that any matter that can be delegated to Standing Committees, appointed Committees, or to appointed officials (i.e. administrative staff) can be delegated to a Community Council.

In addition, Council may delegate to Community Councils any of the functions of a Committee of Adjustment under the *Planning Act*, as well as management of recreational facilities, including incurring expenses as per approved budgets. The Act also provides that Council is obliged to pass bylaws as recommended by Community Councils if they relate to a function assigned to the Community Council and if the recommended by-law does not exceed allocated funds.

City of Toronto Municipal Code

As described by the City, the City of Toronto Municipal Code is a plain-language compendium of bylaws arranged in chapters by subject, along with comments and references intended to make it easier to see the current status of a bylaw and any recent amendments. The Code includes the various by-laws that relate to governance structures, powers, and roles and responsibilities.

The following is a summary of the key governance components of the Municipal Code of the City of Toronto. This material draws on information presented in the City of Toronto *Council Governance Review Discussion Paper* (April 2003).

The Municipal Code sets out the next layer of municipal governance structures. This includes:

- Additional roles and responsibilities for the Mayor and other Councillors.
- The City's system of Committees.
- The agenda process.
- The respective roles and responsibilities of elected officials and administrative staff.

As a general observation, the system set out in the Code is one that:

- Is decentralized in terms of a wide range of opportunities for Councillors to participate in various Standing and other Committees that primarily have recommending powers.
- Is centralized in that Council (as opposed to Standing Committees or Community Councils) retains decision-making authority for virtually all decisions that have not or cannot be delegated.

- Provides for a multiplicity of layers and points of interface between Council (as a whole and in the various committees) and the administrative staff.

Additional Powers of the Mayor

Under the Toronto Municipal Code, City Council has established the following duties of the Mayor, in addition to the various responsibilities under the *Municipal Act*:

- The Mayor is a member of all committees and is entitled to one vote.
- The Mayor chairs the Policy and Finance Committee, the Striking Committee and the Nominating Committee.

However, the Mayor may designate the Deputy Mayor as chair of the Policy and Finance and Striking Committees, and any other member of Council to chair the Nominating Committee. The Mayor recommends to Council the membership of the Striking Committee.

Under the Toronto Municipal Code, City Council has established the duties of the Deputy Mayor as:

- A member who is not the chair of any Standing Committee or Community Council, appointed by Council by-law as Deputy Mayor to assist the Mayor and act from time to time in the place and stead of the Mayor when the Mayor is absent from the City, or is absent through illness, or the office of the Mayor is vacant, and while so acting, such member has, and may exercise, all the rights, powers and authority of the Mayor, save and except the by-right-of-office powers of the Mayor as a member of a Community Council.

As described by the City, Councillors play both a legislative role and a constituency role. In their constituency role, Councillors are responsible for consulting with the constituents they represent through the electoral system, and for ensuring that all sides of an issue are considered in the decision-making process. Councillor work encompasses issues that are of citywide significance as well as ward based and local neighbourhood issues. To carry out this multifaceted role effectively Councillors serve on various components of the committee system. A typical Councillor's workload includes:

- Chair or member of a Standing Committee.
- Chair or member of a Community Council.
- Chair or member of an average of fifteen additional committees and boards such as sub-committees.
- Special committees, ad hoc committees, advisory committees, task forces, boards of management, and program operating boards.

Standing Committees

The current system of committees includes the following:

- Six standing policy committees of Council.
- Six (and now, with changes passed in the fall of 2003, four) geographic Standing Committees in the form of Community Councils.
- Five special purpose committees: Striking Committee, Nominating Committee, Audit Committee, Budget Advisory Committee, and Ethics Steering Committee.
- A variety of ad hoc and advisory committees.
- Advocates: individual Councillors with responsibility for advocating to Council on certain issues, e.g. children and youth, disability, diversity, etc.

The Code sets out the general duties of Standing Committees as follows:

- Provide direction, set priorities and ensure co-ordination among related policies, programs and services.
- Provide a forum for public participation and for detailed discussion of the City's decision-making.
- Make policy recommendations to Council and recommend priorities within the Committee's budget envelope.
- Consider reports from the corporate administration on implementation of program and policy decisions within the Committee's areas of responsibility.
- Promote accountability and interaction with Council on the part of agencies, boards and commissions of the City.

The Municipal Code also sets out Standing Committee authority for making awards within the procurement process for contracts between $2.5 and $5.0 million, where the award is based on lowest price.

Standing Committees are expected to operate within the following underlying principles:

- Each Standing Committee shall report to Council.
- Every Councillor shall sit on one Standing Committee.
- The Mayor is a member of every Committee and when present, is entitled to vote.
- Each Standing Committee is composed of eight members plus the Mayor, except the Policy and Finance Committee, which has 10 members including the Mayor.

- Only members of Council may serve as members of Standing Committees.
- Membership on Standing Committees is rotated every 18 months (i.e., every half-term) unless otherwise specified.
- No member is to chair the same Standing Committee or Community Council in both half-terms except the Mayor.

The general areas of responsibilities for each Committee are presented in *Appendix A*.

Sub-Committees

Standing Committees have a number of subcommittees that can be either to address a time-limited matter or to provide ongoing advice on more detailed matters. Subcommittees report through their respective Standing Committees. Examples include: Personnel Sub-Committee of the Administration Committee, the Grants Sub-committee of the Policy and Finance Committee.

Community Councils

Community Councils are authorized as an option for the City under the *City of Toronto Act, 1997*.

The intention of the Act was to create local vehicles to which Council could delegate decision-making authority for local issues and in doing so, allow Council as a whole to focus on citywide matters. The Act describes the potential functions of the Councils as follows:

- Functions in connection with local planning matters that the *Planning Act* allows the Council to delegate to a committee of Council, an appointed committee or an appointed official.
- The functions of a committee of adjustment under the *Planning Act*.
- The management of one or more recreation facilities located in the area served by the Community Council.

In 1998, the City established six Community Councils. This was recently changed to four in the fall of 2003.

The City describes the duties and authorities as different from those of the policy Standing Committees in that they consider the City's business of a local nature at the community level, and provide a forum for local input into Council decision-making. Their responsibilities generally include making recommendations to City Council on local planning and development matters, as well as neighbourhood matters including traffic plans, parking regulations and exemptions to certain City bylaws (e.g. sign, fence, ravine and tree bylaws). Each Community Council includes several electoral wards and between 300,000 to 600,000 residents.

Each member of Council serves on the Community Council that incorporates his or her ward. The Mayor is a voting member of all Community Councils.

The *City of Toronto Act,* 1997, prescribes certain basic rules that must be followed by Community Councils:

- All of the City must be represented by Community Councils
- A ward may not be represented partly by one and partly by another Community Council.
- Only Council members may be members of a Community Council.
- Each Community Council is a committee of City Council for all purposes

- The chair of a Community Council is elected by that Council's members and in the event of a tie, the chair is to be chosen by lot.

Council has established Community Councils to be recommending rather than decision-making bodies, with the recommending powers primarily related to community-specific matters. They also have a significant community consultation role.

Their neighbourhood-specific recommending powers include:

- Recommendations on neighbourhood matters that require by-laws, e.g. exemptions re fences, signs, ravines, etc.
- Hearing deputations on staff decisions related to construction permits, billings related to snow removal, clearing debris, cutting long grass, etc.
- Nominating citizens to sit on community panels under the Committee of Adjustment panels and recreational facility boards.
- Recommendations to Council on City-initiated official plan and zoning by-law amendments that are not of a citywide nature and on other planning applications that are not of a citywide nature.
- Recommendations to Council on the acquisition or sale of property of local interest valued up to $500,000.
- Recommendations to Council on city planning policy and research matters that are of not of citywide interest.

On citywide matters, Councils' powers are limited to:

- Considering and making recommendations to the Planning and Transportation Committee on reports from the Commissioner of Urban Development Services on planning applications that are of citywide interest.

With respect to consultation, Community Councils have the power to:

- Involve citizens in neighbourhood issues, identify of recreational needs, monitor community well-being, and report to Council on how well neighbourhood needs are being met.
- Convene community meetings to inform the public of planning applications that are of citywide interest and to hear deputations at community meetings.

Special Committees

In addition to the policy and geographic committees, the City has five special committees that meet on an ongoing basis as required or as determined by the Chair, including:

Striking Committee:

- Makes recommendations to Council on the appointment of the Deputy Mayor, Committee appointments, appointments to agencies, boards and commissions, and the schedule of meetings for Council and its committees.
- Up to seven members recommended by the Mayor and is chaired by the Mayor or Deputy Mayor at the Mayor's discretion.

Nominating Committee:

- Makes recommendations to Council on the appointment of citizens to committees and agencies, boards and commissions.
- Up to eight members of Council, including the Mayor or the Mayor's designate as chair.

Audit Committee:

- Considers the annual external audit of the City's financial statements, including reports from the Auditor General.
- Recommends the appointment of the Auditor General and the external auditors.
- Membership cannot include a Standing Committee chair, Community Council chair or a member of the Budget Advisory Committee.

Budget Advisory Committee:

- Reports to the Policy and Finance Committee.
- Assists the Policy and Finance Committee by co-ordinating the preparation of the capital and operating estimates.
- Duration of the Budget Advisory Committee is limited to the annual budget process.
- Seven members including two from the Policy and Finance Committee and one member each from the other Standing Committees.
- Chair must be a Policy and Finance Committee member.

Ethics Steering Committee:

- Reports to the Administration Committee with respect to policy recommendations and protocols to deal with complaints.
- Reports directly to Council on any recommendation to engage an external investigation of a formal complaint involving non-compliance with the Code of Conduct.
- Responsible for ensuring that policy matters in the Code of Conduct are adequate as guidelines for member conduct, and for establishing new policies.

- Ensures that Council has a process to deal with alleged non-compliance with the Code of Conduct.
- Up to five members, including Mayor or the Deputy Mayor or the Mayor's designate as chair, the Chair of the Administration Committee and the Chair of the Personnel Sub-committee.

Other Committees

From time to time, Council establishes other ad hoc committees, task forces, reference groups, etc. These can be time limited or ongoing in nature. Their membership is open to all members of Council and is not limited to the members of the Standing Committee through which they report. Some of these bodies, such as advisory committees, can include citizens. Examples include the Film Liaison Industry Committee and the Toronto Cycling Committee.

Part 3
City of Toronto Governance Review
Discussion Paper

In this section, we provide a summary of the issues and analysis put forward in the City of Toronto Governance Review Discussion Paper. This Discussion Paper represents the third review since 1998, the latest in an ongoing process of regular reviews mandated by Council.

General Comments on the Discussion Paper

The paper provides an excellent overview of the current governance system in place at the City and attempts to focus the debate on a number of the key governance challenges currently facing the City.

The paper is raises issues and identifies options – it does not include a set of formal recommendations. The issues and options as presented are focused primarily on:

- Whether and to what extent to create an empowered executive committee and/or more empowered Mayor.
- Whether to change the configuration of Standing Committees and to give those Standing Committees more decision-making authority.
- Whether to change the configuration (number, boundaries) of Community Councils and to give those Councils more decision-making authority.
- Whether to streamline how business is introduced at Council and whether to establish the position of Speaker.

The paper, however, does not address what we would suggest are key areas that have major implications for effective governance:

- It relies on current City of Toronto interpretations with respect to the extent to which Council can delegate decision-making authority. The general position is that any further delegation by Council beyond the power to recommend as per what currently exists would require provincial enabling legislation. As indicated in *Volume 1* on Governance, the City is viewed to an extent within the larger municipal community and also internally as being conservative in this regard and generally unwilling to consider more aggressive interpretations of its delegation powers that might exist in other municipalities.
- The paper focuses on the decision-making structures of Council, i.e. primarily on the role and function of committees. It does not deal directly with the central and significant governance issue of the appropriate division of roles and responsibilities between Council and administrative staff. As will be discussed in Part 4 of this volume, this issue was identified in the research as a major governance challenge for the City.
- Consistent with its focus on decision-making structures, the paper does not deal with the culture of governance at the City of Toronto – the operating values that are reflected in individuals, both political and administrative. The literature on governance is clear that understanding the importance of culture, and defining and shaping operating values is critical to effective governance. As will be discussed in Part 4, culture emerged from our research as a major governance challenge for the City.

Eight Principles of Good Governance

The paper is framed by a set of eight principles that could be viewed as being more about *good government* than *effective governance* as we define and explore it in this paper:

- *Participation:* Participation by both men and women is a key cornerstone of good governance. Participation can be either direct or through legitimate intermediate institutions or representatives. Participation must be informed, organized and should take into account a society's diversity.

- *Rule of Law:* Good governance requires fair legal frameworks that are enforced impartially and requires the full protection of human rights.

- *Transparency:* Transparency means that decisions taken and enforced are undertaken in a manner that follows rules and regulations. It means that information is freely and directly accessible to those who will be affected by such decisions and their enforcement and that enough information is provided in an understandable form.

- *Responsiveness:* Good governance requires that institutions and processes try to serve all stakeholders within a reasonable timeframe.

- *Consensus oriented:* There are many views in any given society. Good governance requires mediation of different interests to reach a broad consensus on what is in the best interest of the whole community and how this can be achieved.

- *Equity and Inclusiveness:* A society's well being depends on ensuring that all members feel they have a stake in it, do not feel excluded, and have opportunities to improve or maintain their wellbeing.

- *Effectiveness and Efficiency:* Good governance means that processes and institutions produce results that meet the needs of society while making the best use of resources at their disposal.

- *Accountability:* Accountability is a key requirement of good governance. Organizations must be accountable to the public and to their institutional stakeholders. In general, an organization or institution is accountable to those who will be affected by its decisions or actions. Accountability cannot be enforced without transparency and the rule of law.

The key questions for discussion were:

- How does the City of Toronto's current governance system measure up against these principles?
- Which principles should be given emphasis in any future governance system?

Issues Raised in Consultation

In preparing the report, City staff conducted a series of interviews and consultations with Councillors and senior staff with a view to identifying issues and areas of concern. The following is a summary of the findings:

Executive powers/Executive Committee

- Considerable interest in ways in which Council could improve the co-ordination of its policy priorities and effectively integrate major policy decisions and their financial implications.

- Support for a more empowered Executive Committee is offset by concerns about more power for a subset of Councillors on that Committee and less power and influence on decision-making for individual Councillors.
- Concern that corporate matters are currently split between the Policy and Finance Committee and Administration Committee.

Standing Committees

- Overall satisfaction with the Standing Committees.
- Concerns expressed about imbalanced workload between Committees and unevenness between Committees in terms of degree of attention that issues receive.

Community Councils

- General agreement on reducing the number of Community Councils to four and on aligning the boundaries of Community Councils and service districts where appropriate.
- Potential possibility of providing Community Councils with funding to make discretionary changes to service levels.

Ad hoc committees, advisory committees, and advocate positions

- General concern about the proliferation of ad hoc committees, advisory committees, and the advocate positions currently held by some members of Council, and their roles within the overall governance structure.
- Recognition that Council needs flexibility to create special committees but at the same time needs to ensure the integrity of the Standing Committees and their capacity to deal with issues.

The council-committee meeting cycle and process

- Lack of time to read and understand material prior to making decisions.
- Need for improved document management.
- Profusion of walk-ons and late items at Standing Committees.
- Proliferation of notices of motion at Council.
- Potential for changing the frequency of meetings or the entry point for new business in the Council cycle.
- Need for improved agenda management, and the application of parliamentary mechanisms such as a speaker position.

Statistical Profile

The governance discussion paper contains some very interesting statistics (based on 2002 activities) on the type and volume of agenda-related activity.

- 45 percent of Council agenda items come from Standing Committees, 55 percent from Community Councils.
- 76 percent of these matters were adopted without debate.
- 24 percent were held for debate. Of this 24 percent, slightly more than half (13 percent) were considered to be urgent, i.e. required a decision before the end of the meeting.
- Of this 24 percent, slightly less than half (11 percent) were amended.
- Of the amended items, 32 percent were from Community Councils. The remaining 63 percent were from Standing Committees, and 5 percent were from other Committees.

- Although Community Council items accounted for more than half of all agenda items, only 10 percent of all Community Council items (207 items or 6 percent of the total agenda items) were held for debate.
- Of these 207 items, 124 were held by the ward Councillor, 45 by another member of the Community Council, and 38 by a Councillor from another area of the City.

Options

As noted earlier, this paper is focused on raising issues and identifying options. The following is a high-level summary of the key options:

Executive Committee Mandate

- A basic reconfiguring of the Policy and Finance Committee into an Executive Committee with no change in mandate.
- Combining the Policy and Finance Committee mandate with corporate resources issues (e.g. from Administration Committee) including human resources, labour relations, property management, certain financial and legal matters, information and information technology, and program reviews.
- In addition to the above, responsibility for reviewing, vetting, and setting priorities among major new policy issues or policy changes with significant financial impact coming forward through the committee process.
- The potential for a requirement of a 2/3^{rds} majority of Council to change or overturn an Executive Committee recommendation (identified as requiring provincial enabling legislation).

Executive Committee Composition Options

- Mayor as chair plus Standing Committee and/or Community Council chairs.
- As above, but a further number of appointees from within Council.
- Mayor as Chair, Standing Committee chairs, TTC Chair, and an elected member from the Toronto Police Services Board.
- Mayor as Chair, Council appoints all other members.

Standing Committee Structure and Mandate

Options for establishing different policy clusters for Standing Committees include:

- Breaking out existing Standing Committee policy clusters into separate Committees with a single policy focus (i.e. creating additional single-policy area focused Committees).
- Recombining policy clusters to create fewer Standing Committees (i.e. four or five rather than the current six).
- Delegating final decision-making on policy issues to Standing Committees (identified as requiring provincial enabling legislation).
- Delegating more contract award decisions to Standing Committees.

Community Council Options

- Reduce from six to four Community Councils (subsequently approved by Council).
- Provide Community Councils with funding for discretionary services, e.g. leaf collection, parks and recreation user fees, snow clearing, frequency of yard waste collections, etc. (identified as requiring provincial enabling legislation).

Ad hoc Committees, Advisory Committees, and Advocates Options

- Make no change to the current practice of establishing these kinds of bodies.
- Significantly scale back or eliminate certain committees and fold issues under the appropriate Standing Committee.
- Adopt a more formal structure for these kinds of committees, including a standard schedule of committees, guiding principles for their creation, procedural rules, etc.

Council-Committee Meeting Cycle and Decision-making Process

- Changing the frequency of meetings, i.e. meeting every two weeks instead of monthly and dealing with half of the monthly agenda at each meeting.
- Introducing new business at full Council and only referring items requiring debate or public input to the Committee process, thereby dealing more efficiently with routine matters.
- The creation of a speaker position (identified as potentially requiring provincial enabling legislation).

Part 4
Toronto's Governance Issues

Introduction

The following summary of governance issues is based on interviews conducted during the research phase. It represents a summary of the comments under major themes or headings. In preparing this summary, however, we have tried to remain as true as possible to the different comments, a task made easier by the fact that there was a reasonably high level of consistency in the views expressed.

The themes under which the feedback has been captured are set out for the purposes of clarity and ease of presentation as discrete elements. In reality, the issues are much more integrated and interrelated, as evidenced in the overlap in some of the findings.

Finally, we want to say a word about the tone of the feedback that relates to the research methodology. The focus on inquiry was very much on where are the problem areas in terms of governance, why these are problems for the new City, and what should be done to improve the situation. By definition, this results in answers that tend to emphasize shortcomings. It is important to note, however, that almost universally participants in the research noted that outstanding governance issues aside, and notwithstanding the inevitable confusion and disruption of any major amalgamation, the new City had achieved significant accomplishments in a relatively short time. This included bringing together the amalgamating organizations, laying the foundations of a new administration, developing strategic plans and new directions, and most importantly for its citizens, continuing to deliver services effectively to the new City throughout the process.

Issues Description

An Evolving Operating Culture

Over time, cities develop their own culture and operating values that can carry over from Council to Council and administration to administration. Since the City's inception, developing a new consolidated culture has been a focus of discussion and a number of new initiatives. However, the consensus is that Toronto's operating culture has not yet fully matured. The general perception is that:

- To varying degrees, members of Council and administrative staff carried over the operating values of their former municipalities, particularly their views with respect to "hands-on" versus governing Councils, and the extent of delegation to administrative staff (i.e. "that's not the way we did it at my old city".)
- In the early stages, the development of the new City was hampered by political and administrative opposition to amalgamation in many parts of the new City and resulted perhaps unintentionally in a mixed level of support for efforts to build the new organization.
- The challenge of forging a new culture is made more complex by infusions over time of new Councillors. Each of these comes with their own experience in serving on boards in terms of what constitutes appropriate board member behaviour, the appropriate division of roles and responsibilities between board members and staff, and the appropriate extent of delegation to staff that is required for effective governance and good management.
- Council and the senior administration has yet to fully come together as one in terms of its own operating values and behavioural expectations/definitions and, in particular, the most appropriate way to

operationalize the respective roles and responsibilities of Council and the administration.

In light of these factors, the general consensus is that although progress has been made, it will take a continued and, relative to the past, more concerted/organized effort, possibly over several terms of Council for an effective City operating culture to fully emerge.

The Transition Process

The original mandate of the Transition Team was to produce a turnkey operation that included the harmonization of systems, culture, policies, practices, etc. – in effect achieving the administrative merger of the former municipalities. The result would have been that the new Council assumed power supported by integrated systems, policies, and administration.

However, the general view is that Transition Team did not focus sufficiently on the administrative aspects of amalgamation. As a result, the intended turnkey operation was not in place from the outset and as such, the process of building and consolidating the new City is taking somewhat longer than otherwise would have been the case.

The City is Still New

Consistently throughout the research process, we were cautioned that the City is still relatively new and that it is simply too early to tell:

- To what extent governance issues are structural in nature (e.g. shortcoming that are inherent in Ontario's *strong council-weak mayor* model).

- Or simply that insufficient time has passed to allow the City – both Council and administrative staff – to develop a clear and consistent approach to how they do business.

Some interviewees suggested that implementing change of this magnitude needs to be viewed as an eight to ten year process – a view that is strongly supported by the literature on Change Management.

Furthermore, it was suggested that the effectiveness of the current governance model should not be seen in terms of success or failure. The original analysis of governance done under the Transition Team highlighted that it would unrealistic to expect the new governance structure to be "right" the first time out and that Council's governance structure and underlying values would need to evolve over time.

With respect to the workability of the *strong council-weak mayor* model for a City of Toronto's size, scope, and complexity, a number of those interviewed suggested that it would be easier to make the case for special governance powers or structures currently not contemplated under the *Municipal Act 2001* (for example, an strong mayor or executive committee/board of control with more independent executive authority) if it was clearer that the City had already pushed to the limit what they could already do under the Act.

Emphasis on Personalities and Relationships

As described to us, it is important to appreciate that one of the central strengths and weaknesses of the Ontario model of municipal governance, relative to other more centralized models such as the U.S.-style strong mayor model, is its reliance on personalities and relationships for good governance.

As noted by many, this means that when the right people are in key positions of responsibility the system works very well. However, when the wrong people are in place – e.g. a fractured council, a Mayor that wants to be the administrative as well as political leader of the City, administrative staff that are too political, etc. – the model functions much less effectively.

It was suggested to us that individual views, values, and characteristics become even more important at the municipal level relative, for example, to the federal or provincial level. Compared to these more senior levels of government, municipalities have a tradition (enshrined in the *Municipal Act, 2001*) of much more flexibility/less prescriptiveness with respect to defining and redefining their approach to governance, including such things as the appropriate division of responsibilities between Council and the administration. In terms of governance, it was suggested that this less prescriptive approach and the variations that can result between and among different Councils, can put considerable additional strain on Councillors and administrative staff.

A Larger and More Complex City

Virtually all of those interviewed stressed that Toronto is not like other municipalities by virtue of its size and complexity. As suggested to us, this size and complexity has three important dimensions that need to be considered in any discussion of governance:

- It has a very large Council.
- It has very large bureaucracy.
- It has to deal with a higher volume of issues and more large and complex issues than most Ontario municipalities.

For some, it is simply too early to tell whether Council's governance challenges are related to the *strong council-weak mayor model* or to the continuing evolution of the City. Others noted that most cities of comparable size and scope (let alone much smaller provincial or state governments) are governed with considerably more emphasis on streamlined executive leadership and strong delegation to staff. As such, it was suggested that it may be unrealistic to expect that the standard model of governance in Ontario will work as well in this kind of setting.

Size of Council

As noted above, it is difficult to see the size of Council as a neutral factor in effective governance of the City. As reported to us, the evidence to date is that it is considerably more difficult to achieve effective governance with a 44 member Council compared to a Council of ten or twelve. This view is strongly supported by the professional literature on governance.

The large Council means it is much harder and more time consuming for the Mayor to exercise the kind of leadership that the Ontario model envisions: to forge individual relationships, to build coalitions and consensus, to exercise leadership in terms of decorum and behaviour, to champion the appropriate division of roles and responsibilities between Council and the administration, etc. It places similar additional demands on the CAO and senior staff, e.g. harder to build trust and close working relationships, more difficult and time consuming to manage the interface between Council/Councillors and other staff, more Committees to support, etc.

The obvious solution discussed in the interviews would be to downsize Council. However, it was generally felt that Council could not be reduced in size without

making the City less representative and without the constituency workload on individual Councillors becoming too overwhelming.

Rather than downsize Council, the answer suggested by many, again drawing on the experience of other municipalities of comparable size, scope, and complexity, appeared to be in stronger executive leadership both politically and in the administration. This would include streamlining and delegating decision-making to a greater extent than has taken place to date, including reducing the volume and types of decisions that go through Council. The general consensus appears to be that Toronto has not streamlined the decision-making process sufficiently and is not taking appropriate advantage of the capacity of the administration. This includes not having exercised the option to create an executive committee that could provide for more strategic leadership, integration of effort, and focus for decision-making, or maximizing delegation to the Community Councils and/or the staff.

Strategic Focus

Interviewees were generally critical of Council with respect to strategic focus – not because quality strategic plans are not developed, but rather because Council is not seen as using these plans to drive subsequent policy, program, and budgetary decisions.

As suggested to us and as referenced in the literature, strategic plans present a challenge to governing bodies, whether municipal or otherwise, because they require decisions to be made within the context of the strategic plan. This requires discipline, which in turn forces orderly thinking with respect to problem identification, options developments, and decisions required.

The general sense appears to be that governance in Toronto would benefit from citywide strategic planning and decision-making having a higher profile with Council, particularly given the size, scope, and complexity of the City and its issues. This would require a move away from what many perceive to be an overly operational or ward-based focus on the part of Councillors.

At the same time, the view is widely held that a strong ward focus for Councillors, while perhaps inconsistent with the primary role of Council as expressed in the *Municipal Act, 2001* to represent the City as a whole, is firmly entrenched in the realities of municipal politics – what some referred to as a more U.S. style "ward boss" approach.

The consensus, however, appears to be that the issues that are often of most interest to Councillors and their constituents are very local – Is the grass cut in parks? Do the swings work? Has the garbage been picked up? As suggested to us more than once, individual Councillors do not generally get elected on strategic issues or good governance.

A general perception of Toronto Council (although by no means unique to the City) is that Councillors generally want to (and feel they need to in order to respond to constituent concerns) be able to intervene with staff to ensure that their ward-specific issues are addressed and in some cases to make the operational or administrative decisions themselves. It was also suggested that this pressure to intervene and to become more involved in operational or administrative decisions inevitably becomes more intense when Councillors are full time with significant staff resources.

A number of those interviewed pointed to the two-tier system in Ontario or the elected-at-large *Board of Control* model currently in place in London, Ontario as vehicles for rebalancing these strategic and ward-based concerns. The consensus appears to be that elected-at-large upper tier Councils are generally

better able to maintain their strategic and big-picture focus in the absence of having ward constituents. This allows lower tier Councillors to focus appropriately on ward specific issues and concerns.

Finally, it was suggested that it is important to recognize that there are limits on how strategic a municipality can be without potentially coming into conflict with the provincial interest. Given Toronto's size, scope, and complexity, there is greater potential for conflict with the provincial interest than with smaller municipalities and therefore an even greater requirement for close working relationships between the two.

Political Party Alignment

As suggested to us, most other municipal jurisdictions of comparable size outside of Canada have moved to formal political alignment as part of the governing structure. In these jurisdictions, non-partisan governance models are generally found in smaller cities.

Within the Ontario municipal community, however, there is a strong attachment to the notion of a non-partisan Council as a central underpinning of good governance and good government for Ontario municipalities. The view is strongly expressed that:

- Most municipal decisions are very local and practical in nature and as such do not relate to party values/platforms.
- The non-partisan nature of Council places a much greater onus on the Mayor and other leaders within Council to achieve consensus and build coalitions on issues and concerns.
- This consensus model, similar to a minority government at the federal or provincial level, results in better public policy, although the process by

which that policy is made may appear publicly to be less organized/more chaotic.

While party politics and ideology may not be completely absent from municipal politics in Ontario, practitioners in the municipal sector stress that the predominant trend remains essentially non-partisan. For example, most Mayors and Councils – Toronto included – seek a balance of Councillors in key positions such as Standing Committee chairs. There is also much more political fluidity in terms of voting across ideological lines.

Finally, the prevailing view is that the Ontario public consistently expects its municipal politicians to remain generally non-partisan. The historic experience is that candidates that become overtly political in a party sense do not do well at the polls.

Delegation of Authority

As suggested by our interviews, there are two relevant aspects of delegation of authority:

- The extent to which Council is comfortable defining and delegating both decisions and activities.
- The more fundamental question of which matters and decisions can Council delegate under the *Municipal Act, 2001*.

The interviews confirm the importance of an aggressive and robust approach to delegation of authority as an essential part of effective municipal governance, particularly for larger municipalities. This is strongly supported in the literature on governance, particularly for organizations where the Board (or Council) is clearly

in the strategic direction setting and policy-making/governing role, comparable to what is in place for Ontario municipalities under the *Municipal Act, 2001*.

As noted in the interviews, however, (and confirmed in the literature) the Ontario municipal tradition (albeit with generally much smaller municipalities and Councils) has been one of more *hands-on* Councils, and more blurring with respect to appropriate roles and responsibilities of elected officials and staff.

It was suggested that over the past decade this *hands-on* tradition has been changing gradually, particularly with the increasing utilization of Chief Administrative Officers and professionalization of municipal bureaucracies. As a result, Councils have generally been increasing the extent of their delegation. At the same time, however, there is a perception that the increasing prevalence of full time Councillors with staff resources may be reversing that progress. The suggestion was made that full time Councillors are more likely to want to retain more administrative and operational decisions for themselves, compared to a municipality with part time Councillors.

The general perception from our research is that Toronto City Council falls into this latter category and perhaps exacerbated by its full time Councillor status:

- Has been more inclined to see itself as responsible for managing the City and therefore less inclined overall to delegate to the staff.
- Has had more time to oversee or become involved in what in other municipalities (both relative to other Ontario municipalities and comparable large, complex governments) might be otherwise delegated to staff.

As reported to us, the situation is exacerbated by the fact that Toronto's legal interpretations have historically been narrower in terms of Council's powers to

delegate either to Committees or administrative staff under the *Municipal Act, 2001* or previous legislation.

Toronto is not necessarily unique is this regard. The literature on governance and the interviews emphasizes that this is one of the most difficult challenges faced by Councils and boards of directors alike. In addition, as noted in *Volume 1*, the new *Municipal Act, 2001* attempts to depart from the previous "if it doesn't say you can do it, you can't do it" approach, and towards a more permissive approach. Many of those interviewed commented on the general difficulty that some municipalities are having adapting to this approach. The consensus, however, is that Toronto's legal interpretations are often at the more extreme end of the spectrum and this has resulted in more limited delegation to the staff and Committees than many other cities, including some of the former municipalities.

Also as suggested to us by a number of those interviewed, Toronto's perceived legal conservatism is fuelled by the generally higher level of public scrutiny that exists as a consequence of the attention paid to municipal affairs by the major Toronto media and concerns within Council with regard to potential legal challenges. These challenges would be primarily private in nature (individual citizens or businesses) given that the province does not have a history of challenging municipal interpretations. In fact, it was suggested to us that it is actually easier for the province to consider changes to the *Municipal Act, 2001* if municipalities have pushed their interpretive boundaries and lost Court challenges.

Finally, there is a consistent view that in the wake of the computer leasing issue, Council's overall confidence in the professional capacity of the administration as a whole has been diminished, notwithstanding the general view that the computer leasing situation does not reflect the general standard of professionalism in the City's public service. It was reported to us that this has

already been experienced by staff and has led to a decrease in morale, a loss of confidence, and in some areas, a lessened ability to take appropriate risks.

It is believed that one of the consequences of this will be the likelihood that the new Council will retrench with respect to delegating both decisions and activities to staff. This could manifest itself as:

- Reinforcing a strong existing tendency, a greater reluctance to extend delegations and less willingness to rely on the staff to make decisions and carry out activities without direct reference to Council.
- A greater tendency for Council as whole, Committees, and individual Councillors to more directly oversee or become involved in administrative matters and/or decision-making.
- A greater likelihood by the staff to become risk averse and to refer matters to Council that could and should otherwise have been dealt with by staff.

A number of those we interviewed suggested that this would be an understandable reaction, but unfortunate in terms of the evolution of governance at the City from two perspectives:

- First, there is the widely held view that Council and Councillors are already overburdened in terms time and capacity in the range and volume of policy and more operational decisions they make and the activities in which they engage.
- Second, one of the perceived overarching challenges facing Toronto Council is the need to continue evolving towards governing rather than managing. This continued evolution would require Council to:
    - Strengthen its role and focus on approving policies and policy guidance for staff decision-making.
    - Strengthen its emphasis on holding staff accountable for implementing decisions, including a new emphasis on more robust

and risk-based mechanisms for holding the CAO accountable for making decisions and carrying out operations in accordance with policy direction.

Clarity of Roles and Responsibilities

As indicated in the literature and in interviews, having clarity relative to the respective roles and responsibilities of Council and administrative staff is arguably the most important aspect of effective municipal governance. This includes roles and responsibilities descriptions that are carefully thought through, well defined in operational terms, and embedded/reinforced in the operating culture of the municipality.

As noted earlier, the historical tradition among Ontario municipalities has been towards Councils defining their roles in very *hands-on* terms. This is often facilitated in municipalities by descriptions of roles and responsibilities that are kept at a high level as opposed to being more detailed and descriptive.

The general consensus from the research is that Toronto's dividing line is blurred from both the political and administrative ends of the spectrum. The City at present does not have a well defined breakout of roles and responsibilities that reflects an appropriate balance of roles and responsibilities between *governors* and *managers* and that is generally understood and/or accepted in both theory and practice, i.e. is agreement about how these should be operationalized.

Part of the reason given for this is that each of the former municipalities was different in terms of their own experience with respect to what was appropriate or worked best. There is a sense that since its inception, Toronto Council has not focused sufficiently on the need for greater clarity and has not included this important governance issue in its own periodic reviews of governance.

A number of those interviewed suggested that in their view many members of Council either do not understand the governing vs. managing distinction (or least how to operationalize it in a large complex organization) or not withstanding the experience of other jurisdictions, simply disagree with it and view it as somehow "undemocratic".

That this would be the case is consistent with a general finding in the literature on governance – that the act of *governing* is fundamentally at odds with most people's day-to-day personal and professional experience, with the latter emphasizing "doing", "operating", and "managing". While most individuals appreciate the distinction in theory, it is often very difficult – particularly without a concerted, sustained, and organized discussion – to realize what this means in operational terms and, more importantly, to "walk the talk" on a daily basis .

Consistent with best practices in Change Management, experts in this area suggest that the step of describing roles and responsibilities in operational terms is a critical part of getting buy-in and support for changes in operating values. It has also been suggested it is important for Council, administrative staff, and even the media to monitor actual practice on an ongoing basis as part of ensuring that the desired values are taking root.

At the same time, we were cautioned that it is not realistic or appropriate to expect a water-tight, prescriptive division. It should, however, be firm and clear to all, e.g. consistently understood in both theory and operational practice, and supported by Council and the staff.

Relationships between Individual Staff and Councillors

Many of those we interviewed noted that at the municipal level in Ontario there is much closer contact between public servants and individual legislators that, for

example, at the provincial or federal level. This is more pronounced in the absence of a ministerial model similar to what exists at the provincial or federal level or even the typical U.S. *strong mayor* governance model.

With respect to Toronto, however, the general perception is that there is more *clientism* than would be considered healthy in a leading or *best practice* municipality. *Clientism* in this case apparently refers to public servants who are very politically inclined/who cultivate direct relationships with Councillors and vice versa.

The general view among those we spoke with is that staff in any municipality should refrain from lobbying individual Councillors to support their recommendations and that staff should be discouraged from giving attention to individual Councillors in exchange for their support at Council.

In Toronto, part of the issue relates to the fact that staff and Councillors from the former municipalities brought their own practices and relationships with them and that it has taken time for new and consistent operating practices and relationships to emerge. In general, however, the City (and as interviewees were quick to point out, many other Ontario municipalities as well) is generally not viewed as having a clearly articulated set of protocols or expectations that are understood, respected, and enforced.

An Executive Committee

The *City of Toronto Act* envisioned an empowered Executive Committee and this kind of Committee was originally discussed by Council at the outset of the new City. As reported to us, there was concern at that time that this kind of Committee, including the requirement that Standing Committee reports would go

through the Executive Committee, would give the Mayor too much power and detract overly from the primacy of Council.

Based on our interviews, the general view about the effectiveness of Executive Committees is mixed:

- Some were of the opinion that that Executive Committees have the potential to create more problems than they solve and lead inevitably to a dysfunctional tension between the Committee and Council, again with the administrative staff caught in the middle.
- Others felt that Executive Committees are useful and appropriate mechanisms for ensuring strong political leadership, clear direction, and more focused strategic and streamlined decision-making.
- All agreed that to make an Executive Committee work, however, it is essential for Council to have trust and confidence in the Committee and for Council and the Committee to have a good working relationship.
- The general view with respect to Toronto is that past Councils would likely have had considerable difficulty with the notion of delegating political and strategic leadership to an Executive Committee. It was suggested to us that some Councillors have typically positioned proposals for an Executive Committee as “anti-democratic” when in fact the real issue was individual Councillors’ lack of willingness to accept the need for more effective governance.
- Many of those interviewed felt that the large size of Council and the imperative of a more strategic, citywide focus make a legitimate and demonstrated effective governance structure such as an Executive Committee inevitable and that any resulting tension within Council would simply need to be managed.

On the issue of a provincially mandated Committee, the input was contradictory. On the one hand, it was generally felt that a provincially mandated Committee

would not be accepted and would fail to achieve the desired outcome. On the other hand, most of those we spoke with expressed doubt that Toronto Council (or most any Council for that matter) would be willing on its own to delegate meaningful responsibility to an Executive Committee.

It was suggested to us that as part of increasing the likelihood of success, it would be important to avoid an Executive Committee being seen as an elite group that was disconnected from Council. It was felt that this perception could be offset by a formal framework for individual councillors and Standing and other committees to have meaningful input into Executive Committee deliberations.

One suggested way to do this would be to be clear that Executive Committee's deliberations on strategy, budget, etc. are informed broadly by individual Councillors and the Standing and other Committees. This would ensure respect for the democratic process in that individual Councillors and Committees would have many opportunities to bring forward citizen concerns in the initial rounds of debate and discussion, as well as more direct citizen input from various external consultation mechanisms. Furthermore, full Council approval of Executive Committee recommendations would be required.

The CAO

As noted elsewhere, the model of the CAO as the professional head of the public service is still relatively new to Ontario municipalities and has been emerging gradually over the past 10 years. It was suggested in our interviews, that many Councils have not either understood or perhaps accepted what this means for their role.

According to practitioners and the literature on municipal governance, the CAO's relationship with Council is as important as his/her relationship with the Mayor.

However, in the *strong council-weak mayor* model, the CAO has to walk a fine line. Both the Council and Mayor want to feel that the CAO is responsive to their direction and leadership. Being seen as "the mayor's person" or as the person of a group of Councillors is generally seen as fatal for CAOs in Ontario.

A closely related issue is the relationship of the Mayor and Council/Councillors with senior staff. Councillors and the Mayor have to respect the role of the CAO in terms of their dealings with and direction to the senior staff. This has to include support for the CAO in reinforcing the appropriate reporting relationships. At the City of Toronto, the role of the CAO is articulated at a high level on paper. However, the general view from our research is that this lacks the necessary level of detail and precision and that the practical reality has been much more fluid and perhaps not consistent with the demands and requirements of such a large, complex organization.

The feedback consistently suggests that the reporting relationship between Council and the CAO has been affected in the past by relationships between Council/Committees and other senior staff that that may have tended to undermine the CAO's authority. Depending on the Council and/or Mayor, the CAO risks becoming relegated to the role of coordinator, rather than leader in the absence of more extensive definition and discipline in this regard.

In addition, most experts offered views on whether the Mayor should be appointing the CAO and having more direct control over the administration, as per the U.S. *strong mayor* model. The major concern appears to be that this inevitably leads to politicization of the bureaucracy and that the public interest is best served by a professional, as opposed to partisan bureaucracy.

Having said this, many of those we spoke with noted that it is already a trend in parts of Ontario that when the Mayor changes, the senior staff frequently change as well. It was suggested, however, that this turnover is more often related to

tensions that arise over differences in style or views about respective roles and responsibilities.

In addition, the prevailing view appears that a hybrid model whereby Council appointed the senior administrator(s), but those administrators reported to the Mayor, has a higher potential for dysfunctionality with the administrative staff caught in the middle.

Community Councils

As with an Executive Committee, Community Councils were originally envisioned in the *City of Toronto Act* as a tool to streamline Council decision-making and to allow the debate at Council to focus on more citywide and strategic considerations.

The original thinking appears to be that empowered Community Councils would allow Toronto to have something more like a two-tiered government – an upper tier (Council as a whole and Standing Committees) focused on strategic, citywide issues/policy and a lower tier focused on local issues.

However, the necessary delegation to achieve the original intent has not taken place. As reported to us, the prevailing view of previous Councils as well as some members of the senior staff was that this would weaken Council and generally weaken and fragment the overall effective management of the City.

As indicated in our interviews, the sense continues to exist that empowering Community Councils would tend to perpetuate issues of turf protection for the former municipalities and in doing so work against the integration of the new City. It was felt, however, this should be substantially offset somewhat by the Council's

decision earlier this year to reduce the number of Community Councils and to set boundaries that cut across the former municipalities.

The prevailing view from our research is that Toronto's Community Councils have proven to be responsible enough to make final decisions in many areas. As pointed out to us on a number of occasions, the overwhelming majority of Community Council recommendations are already accepted without debate by Council. In addition, if Council felt it was necessary, they could define certain "exceptional circumstances" criteria that would allow them to override a Community Council's decision, e.g. decisions that have budgetary implications, that would result in inappropriately differential service levels that are inconsistent with City strategic direction or other policies, etc.

The prevailing view was also that Community Councils could be used more effectively as vehicles to engage the public in local and citywide policy and service delivery debates and as part of the performance feedback loop for Council and the City as a whole.

A major part of the empowerment debate has been whether to give Community Councils some spending powers and staff. This is somewhat different than allowing them to make local decisions on behalf of Council such as fence variances or the placement of stop signs. Among those we spoke with, there was a general sense that with budgets and staff for Community Councils there could be a greater risk of creating "cities within a city", protecting turf and "pet projects", and potentially creating different levels of service across the City.

Respect and Decorum

Most interviewees highlighted the importance of a high standard of decorum in the relationship between and among Councillors and between Council and the

public service as critical to effective governance. The latter was viewed as particularly important in establishing an overall climate of courtesy, mutual trust, and respect. In the absence of these elements, staff morale and effectiveness can be negatively affected.

As indicated in the research, this climate is even more important for staff at the municipal level of government compared to their federal or provincial counterparts. Relative to the latter, municipal staff are required to play a more direct and public role in policy development. Furthermore, they do so without having the kind of ministerial protection that exists at the provincial and federal level.

A common viewpoint expressed during the research phase, however, was that Toronto Council is generally recognized within the municipal sector for its demonstrated lack of respect between Councillors and, even more notably, with the public service. Consistent with this recognition, Council is not viewed as having a clearly understood and/or enforced set of protocols or expectations with regard to what constitutes appropriate behaviour within Council or towards public servants.

Interviewees pointed to public and behind that scenes behaviour that, as suggested to us, would not be tolerated in many other municipalities. Abusive and disrespectful behaviour and use of language towards Councillors and staff in private and public meetings was described as “common”. It was also suggested that this is increasingly a factor in recruitment and retention and is something that engenders a corresponding lack of respect among public servants towards their political masters.

Power of the Bureaucracy

As noted in the literature and confirmed in a number of interviews, an ongoing source of tension between municipal Councils and administrative staff is a perceived increase in the power of the bureaucracy relative to the power and influence of individual Councillors.

As suggested to us, there are a number of factors that contribute to this perception:

- Under provincial legislation, Councillors are generally required to exercise their authority over the bureaucracy as a collective rather than as individuals. This is considerably more challenging for elected officials than the system of Cabinet/ministerial responsibility that exists provincially or federally.
- Staff at the municipal level have significantly more public power/influence than their provincial or federal counterparts, in that staff recommendations to Council are made publicly and debated publicly (as opposed to confidentially through a Cabinet process). Furthermore, staff are asked to speak to and often to defend their recommendations publicly (particularly where this role is not actively filled by the Mayor and/or Standing Committee chairs).
- From time to time, municipal staff are perceived as taking advantage of this public power and the fact that Council has to provide direction collectively, to either "push through" an unpopular decision or to prevent Council from taking a decision that is not supported by the staff, for example, by making the issue overly complex.
- Municipal staff often become perceived as "too powerful" when there is a lack of political leadership or weak/dysfunctional Council. In those situations, the staff are more likely to step in to fill the perceived leadership void, which in turn can lead to tension with Council. If a new,

more effective Council enters the picture it can be difficult for the staff to revert to a more balanced role.

Specific to Toronto, the perceived power of the bureaucracy is magnified by the large size of Council and the challenge of "speaking with one voice". Relative to the considerable size and capacity of the bureaucracy, this can leave Councillors feeling overmatched. It was also suggested that the situation is further complicated by the current lack of clarity and consistency in terms of roles and responsibilities.

A closely related issue is that of trust in the bureaucracy. Many of those we interviewed suggested that the actions of individual Councillors and sometimes of Council as a whole would seem to indicate a fundamental lack of trust in the competency and professionalism of the bureaucracy. This is viewed as being particularly pronounced in this City relative to other municipalities – in many cases, an apparent holdover of operating values from the former municipalities.

The general expectation is that this lack of trust has and will continue to become more intense in the wake of the recent computer leasing issue. We were cautioned, however, that in Toronto the "trust issue" is often a screen for the more fundamental debate about the respective roles and responsibilities of governors and managers – again the issue of lack of clarity and consistency in terms of definitions and shared understanding. In the view of a number of observers, the issue has also been used to protect the preferred status quo with respect to delegation.

Training and Orientation

In the view of most of those interviewed, and as confirmed in the literature, training and orientation for Councillors and staff – including joint opportunity to

meet and discuss – is critical, particularly with respect to understanding in operational terms respective roles and responsibilities and what constitutes appropriate behaviour.

As suggested to us, the best practice in this area would be to have clearly articulated roles and responsibilities, expectations for decorum, etc. that are embedded in the ongoing training and development of Councillors and staff, including the following:

- Describing expectations in situational/operational terms as part of providing guidance, promoting a common understanding, and ensuring increased awareness.
- Substantive and thoughtful time set aside (as in a formal retreat setting) for Councillors to discuss and explore the expectations with each other and with senior staff in a collegial format.
- Similar ongoing opportunities for the staff to meet to discuss and explore expectations with an emphasis on what constitutes appropriate behaviour, how to fulfil role and responsibilities in operational terms, etc.

From the interviews, the general sense is that efforts in this direction are already underway for the administrative staff and need to be intensified, extended throughout the organization, and sustained over time. It was suggested to us that similar intensified and sustained efforts would be required for Council as well, particularly given the general perception that new and returning Councillors are thrust into actual decision-making without having a more thoughtful individual and – perhaps more importantly – collective opportunity to discuss and explore their expectations of each other and the staff.

Special Operating Agencies

The issue of special operating agencies came up in the course of the research, given the recent Council debates with respect to the creation of a Water Board. It was suggested to us that the issue became politicized in the context of the provincial and municipal elections and that this political dimension overshadowed a more thoughtful and rational discussion of pros and cons.

In terms of expert opinion, views on the appropriateness and effectiveness of special operating agencies were decidedly mixed.

Some experts pointed out that special operating agencies have over several decades been demonstrated in many other jurisdictions to be an essential part of improving and streamlining service delivery and avoiding political and senior staff temptations to intervene/micromanage at the operational level. A number of these experts expressed the additional view that the Council of a city of the size, scope, and complexity of Toronto simply cannot be expected to govern strategically in the absence of these more operationally arms-length bodies.

Other experts expressed significant concern that as sometimes instituted, special operating agencies become increasingly independent and less accountable to elected officials. In the municipal context, the “one voice” model of Council adds further complexity to the challenge of effectively giving direction to agencies, compared to the provincial or federal system that relies more heavily on direct ministerial and/or Cabinet accountability.

The challenge, therefore, appears to be one of how to keep special operating agencies accountable and responsive to policy direction from a 44 member Council. The general sense from the interviews was that there are many examples from other jurisdictions of accountability frameworks, memoranda of understanding, appointments processes, etc. that ensure the special operating

agencies do remain accountable to elected officials and operate within the policy and fiscal parametres set by those officials.

Part 5
Options and Approaches for Discussion

Introduction

From our perspective, the opportunity to identify potential changes to the governance structure of the City of Toronto is not to be taken lightly or without careful consideration. Within the overall provincial policy framework, Toronto and all Ontario municipalities are very much unique individual entities with their own cultures, personalities, values, structures, etc. Consistent with this individualism, there is no shortage of opinion – much of it very strongly or even emotionally held – with respect to what is fitting and proper for municipal governance in general or more specifically for a particular municipality. As indicated by the research, Toronto is certainly no exception in this regard.

In this context, the starting point for these options and approaches is the results of the research process, including the interview phase. As presented in the previous section, a consensus emerges that governance at the City of Toronto is currently operating at a less than optimal level. This consensus includes general agreement on most of the specific issues or challenges that the City is facing and that need to be addressed

The more difficult challenge, however, is what to do about it. In addition to a consensus on the issues and challenge, the research generally indicates that there is a high level of awareness with respect to the various options that are available to Council to address those issues. However – and most importantly for our purposes – there is no similar consensus with respect to what action, if any, should be taken.

In this introduction, we want to take the opportunity to explore this lack of consensus/mix of views in more detail. If we were to characterize it in one overarching sentence, it would be that while there is consensus about the governance problems, experts are not clear on whether these are simply growing pains that need to be endured or whether the problems can only be addressed through specific structural or other responses. Along these lines, we would highlight the following mix of points from the input:

- The City's governance model was intended to be evolutionary in nature. It would be a mistake to assume that the original structure is the best suited for all time.
- The City is still very new and it will take more time for the structures and culture of governance to fully emerge and stabilize.
- Toronto is a large City: a large Council, a large bureaucracy, very extensive service delivery responsibilities, and large complex issues. As with other large, complex municipalities, it is reasonable to assume that it may have special governance requirements compared to other smaller communities/councils.
- Well-run municipalities in the Ontario model seem to be less about structure and more about clarity of mandate and good relationships between and among the players. When a city has good people that can work together and that understand their respective roles, the result is good governance regardless of structure, process, etc.
- Structural changes for Toronto that depart from the Ontario norm run the risk of failure unless Council as a whole and individual Councillors understand, accept, and actively support the need for change and the proposed solutions.

From our perspective, the latter two points deserve special attention because they reflect a strongly held view about governance within the municipal

community that we need to remain very respectful of in identifying options and approaches for change.

In essence, this view as reported to us is an argument against fundamental or more radical change. It says that while the *strong council-weak mayor* model as it currently exists in Ontario may not be perfect, no other approach is likely to be as successful in effect because of the inherent nature of Councils, Councillors, and municipal politics in general in Ontario, including the following:

- Most Councillors have a strong personal preference for the "everyone is equal" principle and a strong distaste for anything that is perceived to put a limit on their individual power and influence (for example, characterizing an empowered Executive Committee or a more executive-style Mayor as "less democratic" not withstanding demonstrated need or the experience of other jurisdictions).
- Any structural solution that has at its core an attempt to change the role of Councillors (e.g. more focused on strategic consideration, less emphasis on "ward-boss" behaviour, etc.) will be doomed to fail because Councillors themselves are unlikely to accept the change.
- Even if Councillors agree and support the need for certain types of changes, (e.g. more emphasis on citywide representation and less on ward issues) their constituents will not accept this change and they will not be re-elected.

According to this view, efforts to improve governance should focus first on ensuring that the right people are in place, with good relationships, and with clear roles and responsibilities, rather than on major structural or legislative/mandate changes.

Our purpose in highlighting these various themes from the research is to be able to say at the outset that we do not disagree with the general sentiments expressed above and in particular that:

- Governance for any organization and especially new organizations should be seen as evolutionary.
- It is very important to be careful that proposed solutions do not create new and potentially worse problems.
- Change efforts are almost certain to be ineffective unless the various players in the organization agree on the need to change and what that change should be.

This does not mean, however, that certain structural changes should not be considered.

The literature on organizational effectiveness and change management clearly emphasizes that successful change depends first and foremost on people and creating the right operating environment in which people can be effective. The best practice in this area involves:

- Defining why people need to change how they do their business.
- Helping people to understand the urgency of the need for change.
- Describing what that new business and operating style will look like in future.
- Articulating how individual behaviour needs to change accordingly.

However, more structural changes are also seen as an important part of the change process. Changes such as new organizations, new reporting relationships, new mandates, etc. are important ways that organizations send signals about new expectations and reinforce in an ongoing way how business will be conducted in the new world.

What the Options and Approaches are intended to Achieve

Before moving on to the actual options and approaches, it is important to be clear about what they would be intended to achieve. For this, we refer back to the discussion of "preconditions for effective municipal governance" that were discussed in Part 2 of *Municipal Governance Volume 1*. Those preconditions were:

- Strong Political Leadership
- An Effective Mayor
- Clear Roles and Responsibilities
- Excellence in Public Service/Confidence in the Public Service
- Respect and Professionalism
- Reinforcing Culture with Embedded Rewards and Sanctions

With these preconditions as a guide and also reflecting the input received during the research, the following are high-level outcomes we are suggesting should be the focus of changes to governance:

- Strong political leadership of City Council and strong leadership of the administrative staff with a view to providing clear direction to the staff,
- Clear reporting relationships, ensuring integration and coordination across program areas, and ensuring consistency with strategic direction.
- A strengthened strategic capacity for Council that emphasizes the primary role of Council and Councillors as articulated in the *Municipal Act, 2001* to represent the City as a whole, including the capacity to set strategic direction, make decisions within that strategic context, and effectively hold others accountable for implementing and achieving Council's policy intent.
- Greater focus and descriptive clarity with respect to roles and responsibilities and what is meant by Council's role to govern, set policy,

and hold the administration accountable for delivery compared to the administrative staff's non-partisan role to advise, implement, and manage on an ongoing basis.

- An approach to governance that maximizes the benefits of having a large professional bureaucracy and ensures that the responsibilities of Council and Councillors are manageable.
- A renewed public climate of respect and professionalism within Council and between Council and the administrative staff that emphasizes and reinforces high standards of decorum and mutual regard.
- Renewed and sustained efforts to build and stabilize the operating culture of the new City for both Council and administrative staff in a way that supports and reinforces the how business is to be conducted.

A New Deal for Cities

Much of the popular debate with respect to whether Toronto is or can be effectively run as a City continues to focus on the theme of a "new deal" for cities. Much of this new deal is actually related to financial issues and financial authority and in particular whether cities should have greater financial autonomy – in essence, more power to raise revenues/taxes without provincial scrutiny and oversight.

A central theme in this debate is that the City cannot be governed properly without adequate financial resources and that in this regard the City needs to be less dependent on provincial policy decisions. A related theme, most recently expressed by the Board of Trade in its September 2003 report on governance, is that Council needs to demonstrate its ability to govern effectively before it can "take on new power or manage new mechanisms of generating revenues."

In *Municipal Governance Volume 1*, access to and adequacy of revenue sources is noted as an important governing challenge and one that has faced virtually all public sector organizations for the past decade or more. Furthermore, we do not question that inadequate financial resources make planning, decision-making, and managing at the municipal level more challenging. For the purposes of our review, however, these challenges are more properly viewed as fiscal and public policy realities rather than governance challenges.

As expressed by the University of Ottawa's Centre on Governance, governance is about:

> *… the processes by which human organizations, whether private, public or civic, steer themselves. The study of governance involves:*
>
> - *Examining the distribution of rights, obligations and power that underpin organizations;*
> - *Understanding the patterns of coordination that support an organization's diverse activities and that sustain its coherence;*
> - *Exploring the sources of an organization's dysfunction or lack of fit with its environment that may result in lacklustre performance;*
> - *Establishing benchmarks, building tools, and sharing knowledge to help organizations renew themselves when their governance system demonstrates a need for repair.*

From this perspective, the basic elements of good governance (clear direction, clear roles and responsibilities, effective decision-making, etc.) are not contingent on, for example, whether an organization's funding is adequate to meet real or perceived needs. Furthermore, based on the research and interviews, it is apparent that governance as defined above is an issue for the City as an organization, apart from challenges related to financial matters. It is not unreasonable to assume that the City's governance challenges, as depicted in

this report, would not be resolved through additional revenue generating powers or more independent constitutional status.

Enhancing Democracy

Throughout our interviews, we were cautioned that any options that strengthen executive leadership within Council, to streamline decision-making at the Committee level, and to make better use of delegation to staff would run the risk of being positioned as "less democratic". This would include a perceived diminishing of the role of individual Councillors and somehow limiting opportunities for the public to have input.

Our response has typically been that it is important not to confuse the requirements of *good governance* in any democratic institution with the fundamentals of *good government*. We would suggest that the two concepts are closely related but not the same. The former is about providing direction, establishing clear roles and responsibilities for both governors and managers, and having structures and processes that result in efficient and effective decision-making. The latter is usually much more broadly defined, and includes the need for effective public engagement, consultation, and input into policy and decision-making.

In terms of good governance, the options and approaches that follow reflect the view that a City as large and complex as Toronto with a Council of this size, requires something more than, as a number of interviewees suggested to us, "everyone and no one in charge".

In terms of good government, however, the options should not be seen as any form of limit on Council's capacity to engage the public in consultation and to ensure meaningful public input into decision-making. The research indicates that

leading jurisdictions at all levels of government and regardless of their governance model invest considerable time, energy, and resources to ensure meaningful public input to and involvement in policy development and decision-making. This includes elected officials and administrative staff in traditional face-to-face consultation mechanisms and more recent and increasingly effective electronic methods. Others such as the Toronto Board of Trade have suggested that the City of Toronto can be strengthened by having more effective public consultation/engagement mechanisms. We do not disagree. We would suggest, however, that these efforts need to be well structured, manageable and appropriate in terms of the role of elected officials, and make effective use of the administration. In our view, nothing recommended below would limit this from taking place.

1. Roles and Responsibilities

The literature on governance in general and also specific to municipal governance makes it clear that clarity in roles and responsibilities is the most common and difficult challenge for organizations, municipal or otherwise, to deal with.

George Cuff, municipal governance expert, writes that “the single issue of role clarity has dominated all others as the greatest source of discontent among those elected to govern and those appointed to manage and/or deliver services.”

The research for this paper indicates that roles and responsibilities between Council and the administrative staff at the City of Toronto are not as clearly drawn, understood, and respected in practice as they should be and that as a result, optimal governance of the City on the part of both Council and the administrative staff may not be in place.

With this in mind, our discussion of options and approaches focuses on ensuring that respective roles and responsibilities are clearly articulated, well understood, accepted and supported, reinforced through rewards and sanctions, and ultimately embedded in the operating culture of the City.

Accordingly, a review of current roles and responsibilities could be undertaken with a view to:

- Developing a shared understanding at the political and administrative levels of the current situation and the problems that this creates for effective governance.
- More clearly defining and realigning the respective roles and responsibilities to ensure that Council and Councillors are focused on their collective role to govern and that administrative staff are clear in their non-partisan role to advise, implement, and manage.

This definition and realignment should be at a high level (for example, the kind of language that might be appropriate for a by-law) and also in very descriptive/operational terms. The purpose of the latter is consistent with best practices in Change Management – not as an attempt to prescribe every situation but rather to provide ongoing interpretive guidance to both Councillors and staff.

As part of embedding this realignment of roles and responsibilities, this more situational/operational understanding could become a part of the ongoing training and development of Councillors and administrative staff and that success be measured by the extent to which it becomes “standard operating procedure”.

Also as part of the embedding process, the following options could be considered:

- That the CAO be held accountable for ensuring compliance with the new expectations on the part of administrative staff, including building these expectations into the City's performance management/contracting system.
- That the Mayor have the lead within Council for ensuring that the operating values of Council as a whole, it's Committees, and individual Councillors are consistent with the new expectations.

Finally, we support the policy already instituted by Council of regularly reviewing its governance structure (the April 2003 staff discussion paper on governance represents the third such effort since the new City was established). However, as noted earlier, clarity in roles and responsibilities – a critical component of good governance – has not been included in past reviews and consideration should be given to their routine inclusion in the future.

2. Delegation

The options and approaches in this area deal with two important themes:

- The benefit of having greater clarity and consistency between and among municipalities with respect to the extent to which different types of decisions and activities can be delegated under the *Municipal Act, 2001*.
- Ensuring that the City of Toronto's approach to delegation optimizes its effectiveness and efficiency and maximizes the benefits of having a large, professional and accountable bureaucracy.

On the theme of the types of matters and decisions can be delegated by municipalities, the *Municipal Act, 2001* provides only general guidance to municipalities with respect to what can and cannot be delegated. Traditionally,

each municipality has had considerable flexibility to interpret this power at an operational level. The research indicates that the line between what can and cannot be delegated is often drawn differently from municipality to municipality. As indicated earlier in this volume, Toronto is seen as being among the more conservative municipalities in this regard.

Our sense is that effective and efficient municipal governance across the province is not well served by this variation in interpretation. Governance would be made more effective and efficient – and transparent for citizens – by having greater clarity and consistency in this area, in effect by creating a common operating standard of interpretation that would provide guidance to all municipalities.

It is important to be clear, however, that we are not suggesting a common standard with respect to the matters and decisions that municipalities ultimately decide to delegate. It is entirely appropriate that each Council make delegations that reflect its own unique local circumstances. However, the same degree of flexibility with respect to interpreting the law is not necessary or perhaps not in the public interest.

For leadership on this issue, we would look to the municipal community itself as the place where the expertise, experience, and breadth/depth of understanding of common approaches exists to create this operating standard.

Accordingly, the municipal community – for example, the Association of Municipalities of Ontario and the Ontario Association of Municipal Managers, Clerks and Treasurers, in consultation with their members – could undertake a comparative review of delegation interpretations with a view to creating a common operating standard of interpretation that would guide and inform (as opposed to prescribe) decisions by local Councils. It will be important that this operating standard be defined on a practical level that provides citizens,

administrative staff, the legal community, and Councillors, both new and experienced alike, with a common understanding of what is acceptable under the Act.

Ideally, the City of Toronto would play a major leadership role in this review. If, however, the review is not likely to take place in a timely manner or, in fact, at all, we believe there is a compelling case for Toronto to proceed on its own, including that:

- Effective governance requires elected officials to have the capacity (time, energy, administrative supports, lack of other distractions, etc.) to establish and retain their focus on governing, e.g. setting strategic direction, determining policies, and holding the administration accountable for delivery.
- The size, scope, and complexity of the strategic and policy challenges faced by the City of Toronto – whether it is public infrastructure, poverty, health and safety, economic development, etc. – means that Council has to take maximum advantage of its powers to delegate both decisions and activities if it is going to effectively engage on these challenges.
- The size and professional capacity of its administration provides the City of Toronto with opportunities to maximize efficiency and effectiveness through delegation of decisions and activities that may not be available to smaller municipalities.

Based on this review, Council would be in a position to ask the CAO to provide advice with respect to changes that could be made in existing delegations and to do so with the following general (as opposed to prescriptive) guiding principles:

- That the philosophical (as opposed to strictly legal) starting point for delegation should be not which decisions and matters/activities can Council let go to other levels, but rather which of these are essential,

either for legal reasons or reasons related to financial, strategic, or other essential areas of risk, for Council to retain.

- That decisions, activities, or other matters to be delegated should be delegated to the lowest possible level in the organization, commensurate with risk. This would mean that where Council has the option of delegating an administrative matter either to a Committee or to administrative staff, in general delegation should go to staff, unless there is a compelling reason not to do so.

The CAO and Council could also institute and place greater emphasis on robust and risk-based reporting/accountability mechanisms so that Council can be assured that decisions and actions delegated to staff are executed in a manner that is consistent with Council direction as set out in policy and strategic directions.

3. Executive Committee

Strong political leadership is essential to an effectively governed municipality. This is both an individual and shared responsibility of Council. It is also part of the Mayor's responsibility. However, the consensus of opinion during the research phase was that this is clearly a challenge for Toronto City Council. As was suggested, this challenge is in part personality-driven. It also reflects the relative newness of the City and the fact that a stable operating culture is still evolving.

At present, effective governance at City Council is made more difficult by the sheer size of of Council and the challenge of 44 individuals speaking with one voice with a clear vision and strategic focus, particularly in the absence of mechanisms such as political parties and party whips.

Given the importance of strong political leadership, and based on the experience of other very large municipalities (let alone other provinces or states that are considerably smaller in size, scope, and complexity) we join others such as the Board of Trade in recommending what in reality would be a small step in this direction for Toronto in the creation of a modestly empowered Executive Committee that is still firmly within the Ontario/Canadian municipal tradition.

Mandate and Responsibilities

The high-level mandate of the Executive Committee would be to provide coordination and integration to Council's decision-making, to lead the development of Council's strategic agenda, and to provide oversight on behalf of Council with respect to its implementation. Within this overall mandate, Executive Committee's primary responsibilities would include much of what was formerly under the Policy and Finance and Administration Committees, as well as the Budget Advisory Committee, including responsibility for:

- Developing and recommending the strategic plan and budget.
- Monitoring and reporting publicly on progress against the strategic plan and budget.
- Policy leadership for corporate matters such as financial policy and planning, human resource and labour relations policy and strategy, corporate physical assets, litigation and legal matters, and information technology.
- Responsibility for identifying and addressing matters that cut across policy and program areas.
- Responsibility for recruiting and recommending to Council the hiring, dismissal or other matters, such as performance appraisal, related to the tenure of the CAO.
- Policy leadership for cross-municipality/intergovernmental matters.

- Accountability oversight of the CAO and administration with respect to adherence to policy and strategic direction.

These responsibilities are particularly important in terms of achieving ongoing strategic integration within the City. In order to achieve this integration in theory as well as practice, we would suggest that Executive Committee requires an authority that is more than moral suasion but still falls far short of independent statutory decision-making authority.

As such, we would suggest that Executive Committee have the authority and responsibility to review and revise Standing Committee and Community Council recommendations that:

- Have major financial, strategic, or citywide implications.
- Are not consistent with the City's strategic or fiscal direction or the broader health and well-being of the City.
- Raise significant issues with respect to integration with other policy and program priorities.

In deciding how and when to exercise this responsibility, Executive Committee would be guided by a set of clearly articulated criteria.

In addition, Executive Committee could have the responsibility to assist the CAO and senior management team in managing the ongoing interface and boundaries between Council and the administration. By this we mean:

- Ensuring that appropriate roles and responsibilities are respected in practice, e.g. Council, Committees, and individual Councillors remain focused on the strategy/policy level rather than more operational or administrative matters and vice versa for the public service.

- Defining and enforcing high standards of behaviour and decorum on the part of Councillors, reflecting at all times the need for respect and professionalism in their dealings with the public service.
- Ensuring that the CAO and the public service are non-partisan and professional in the exercise of their duties and respectful of the role of elected officials.

Membership

There are many different approaches to determining the membership of the Executive Committee. The most important consideration is the need for an appropriate balance between the Mayor and Council. By this we mean that the Committee has to be an effective vehicle for the Mayor to define and drive the implementation of the City's strategic direction. At the same time, the Committee can only function effectively if it has the confidence of Council.

With this need for balance in mind, we would suggest that an odd-numbered Executive Committee be made up of:

- The Mayor.
- The Chairs of the Standing Committees.
- A small number of additional Councillors, e.g. four.

In terms of managing its workload, we would suggest that the Executive Committee, as with any Standing Committee, would have the power to establish sub-committees as it sees fit. Furthermore, we would not limit the membership of those sub-committees only to Executive Committee members but rather, at Executive Committee's discretion, that they be open to all members of Council. As well, Executive Committee should look to the CAO to provide extensive support in this regard.

In terms of selection process, we appreciate that the current Striking Committee process is intended to achieve that essential balance between leadership on the part of the Mayor and confidence in the Committee process on the part of Council. As such, we are not recommending a change to the current Striking Committee configuration whereby:

- The Mayor or his designate chairs the Striking Committee and recommends the members of that Committee to Council.
- The Striking Committee recommends the Standing Committee Chairs and members for Council's approval (in this we would include the members of Executive Committee).

Why not elected-at-large Executive Committee members?

In the interview the process, the suggestion was frequently made that sustained strategic focus and drive for an Executive Committee drawn from Council will be difficult to achieve primarily because of:

- The considerable workload/time pressures on Councillors as part of Standing Committees, Community Councils, and their other responsibilities.
- The apparently inevitable local/ward based pressures on individual Councillors.

Frankly, the arguments in favour of an elected-at-large Executive Committee were very compelling. As with other two-tiered systems in place, it has the considerable advantage of clearly separating out strategic/citywide focus from ward-based issues and election pressures. At the same time, however, the research does not clearly indicate that such a radical step is necessary for the City at this time from two perspectives:

- There is much truth in the view that the City is relatively new and that a stable governance culture is still emerging.

- There is no reason to believe at this stage that with the appropriate supporting structures such as an Executive Committee as recommended above, a strong vision and sustained strategic direction cannot come from within Council.

If, however, the recommended approach does not achieve a strong vision and sustained strategic direction, consideration could be given at that time to an elected-at-large approach.

Why not a 2/3rds majority?

This question also arose continually during our research. Again, the primary consideration is one of achieving an appropriate balance between leadership provided by the Mayor and the Executive Committee on the one hand, and Council's confidence in the Committee on the other hand. In our view, retaining the simple majority approach puts considerable constructive onus on the Mayor, Executive Committee, Standing and other Committees, and Council as a whole to work out consensus based positions.

As reported to us, the reality in London Ontario, which formerly required a 2/3rds majority of Council to overturn Board of Control recommendations, was that the Board in practice had appropriate regard for Council's concerns as it developed its recommendations. As a result, the vast majority of its recommendations were strongly supported by Council.

We would not identified a change at this time to the current "50 percent + 1" voting standard. Over time, however, if the recommendations of Executive Committee are continually overturned in favour of less strategic/more parochial decisions, a 2/3rds majority to overturn should be considered.

4. The Mayor

Overall, we do not see the need at this time for major changes to the powers of the Mayor. As many others have quite rightly pointed out, Ontario's *strong council-weak mayor* model has produced many very strong mayors over the years that have been able to effectively establish visions and strategic directions for their cities.

As such, we are not recommending additional independent decision-making powers be vested in the Mayor, such as the power to appoint the CAO or Standing Committee chairs without regard to Council.

At the same time, however, we recognize that providing leadership to a Council of 44 without more independent decision-making powers is much more challenging than would be the case for a Council of ten. In light of this, we are suggesting that the Mayor's capacity to *influence* decision-making rather than *make* decisions his or herself be expanded. This would be accomplished through:

- The Mayor as chair of a more empowered Executive Committee.
- Continuing with the Mayor (or their designate) as Chair of the Striking Committee with the responsibility for recommending Striking Committee members to Council.
- Continuing with the expectation that the Mayor (or a designate) will function as head of Council.
- As per the discussion of roles and responsibilities, charging the Mayor with responsibility for ensuring that the operating values of Council, its Committees, and individual Councillors are consistent with the new expectations.

Mayor as head of Council

In the course of the research, the issue of a separate Speaker for Council was raised a number of times, primarily as a vehicle for strengthening the management of Council agendas and decorum within Council meetings. This is a common practice in many large municipalities, particularly in the U.S., where the Mayor does not have a role in Council and is the City CEO, i.e. where the administration is directly and solely accountable to the Mayor. It is also a standard feature of provincial and federal legislatures.

However, there are important key differences that we would suggest make an independent speaker less appropriate for Toronto.

The most important of these is the fact that the Mayor is not – and, would not be under the options already discussed – the CEO of the City, i.e. would not have extensive independent executive authority and responsibilities outside of Council. Rather, the Mayor's power would still come primarily from his/her ability to directly influence Council decisions. In this regard, the statutory role of head of Council is a very important vehicle for exercising this influence. This includes influence over the agenda, the tone and nature of debate, and decorum.

Finally, we would suggest that one should not overemphasize the importance of the Speaker in ensuring effective agenda management and decorum in provincial and federal legislatures. In reality, it is less the speaker and more the political party system of leaders, whips/party discipline, and house leaders that at the end of the day determines whether agendas are well managed or members behave appropriately. In the absence of this kind of formal party structure at City Council, we believe that the Mayor would be more effective and influential than a neutral Speaker.

5. The CAO

To paraphrase from noted governance expert John Carver: no single relationship in a municipality is as important as that between the Council and its CAO. Based on the research, it does not appear that this central truth is always well or fully appreciated at the City of Toronto.

The role of the CAO as the head of the public service and as the focus of Council decision-making may be clearly – if somewhat briefly – stated in the Toronto Municipal Code. As described to us by a number of interviewees, however, it is less precise and considerably more fluid in practice. The evidence suggests that Council to date has not invested the CAO with the kind of clear and unequivocal responsibility and accountability for the overall management of the administration that is required in an organization of the size, scope, and complexity of Toronto. Furthermore, the reporting relationship between Council and the CAO is frequently offset by relationships between Council/Committees and other senior staff that can tend to undermine the CAO's responsibility. Depending on the Council and/or Mayor, the CAO risks becoming relegated to being more of a coordinator, than a leader in the absence of more extensive definition.

In terms of guidance on this front, we look more to the relatively well-developed and defined U.S.-style City Manager model, as described in *Volume 1*, rather than the more recent, evolving, and somewhat less precise CAO concept in Ontario. (Having said this, it does not matter what the title is, but rather whether the role is right and more importantly whether that role is accepted and supported).

Options and approaches for discussion include that:

- Council confirm the role of the CAO as having clear and unequivocal responsibility and accountability for the overall management of the administration.
- This clear and unequivocal authority receive special attention within the more general review of roles and responsibilities recommended earlier, with a view to providing a more extensive description of how this authority should be operationalized between and among the CAO, department heads, and Council.
- This more extensive description be embedded in the professional development curriculum of the public service and in ongoing staff and Council training and performance assessments.
- Consistent with this authority, the CAO be given the responsibility to hire, dismiss, promote and otherwise deal with senior staff, including department heads.

6. Standing Committees

Most of the options and approaches for discussion related to Standing Committees are in effect consequences of others already identified.

The key structural changes are as follows:

- As a consequence of creating the Executive Committee, the Policy and Finance, Administration, and Budget Advisory Committees would no longer be required, although subcommittees of Executive Committee may be required depending on workload and the extent of delegation.
- Standing Committee Chairs would be members of the Executive Committee.

- In certain circumstances (already described under the previous discussion of the Executive Committee), the Executive Committee would be in a position to review and revise Standing Committee recommendations before proceeding to Council.

We anticipate that other changes to Standing Committees would fall out of our earlier discussion with respect to conducting reviews of delegation of authority and roles and responsibilities. Based on these reviews, we would expect each Committee to have consistent operating approaches with respect to:

- The extent of delegation and the types of matters and activities that are delegated to Standing Committees, Community Councils, and/or administrative staff.
- The respective roles and responsibilities of Committees and administrative staff including the primary role of Standing Committees to recommend policies to Council and feed into more strategic, Council-wide discussions, versus providing direction to City staff on the delivery of programs and services.
- What constitutes a matter of strategic and/or financial significance that should be directed to Executive Committee prior to going to full Council.

7. Special Committees

For the most part we are not recommending changes to the various Special Committees, with two exceptions:

- The Striking Committee would now have an additional responsibility to recommend the additional (non-Standing Committee chair) members of Executive Committee, as well as the Standing Committee Chairs.

- The Budget Advisory Committee would no longer be necessary in light of the newly mandated Executive Committee. This does not mean that Executive Committee would be precluded from creating sub-committees

8. Community Councils

The primary issue with respect to Community Councils, well articulated in the City's April 2003 governance discussion paper and elsewhere, is that they have yet to achieve their intended purpose of streamlining Council decision-making and allowing Council and Standing Committees to be more focused on citywide and strategic considerations.

In this regard, we find ourselves in general agreement with the Board of Trade recommendations with respect to Community Councils as follows:

- Community Councils should be aligned with service delivery areas of the City of Toronto as per Council's July 2003 decision to reduce the number of Community Councils from six to four.
- They should be comprised of elected councillors from the wards bounded by the Community Council area, with a Chair elected from within.
- Council should look to delegate more decision-making to Community Councils.
- Decisions taken by the Community Councils in their areas of responsibility should not need secondary approval of the Council. However, if necessary, an appeals process for citizens should be instituted.
- Community Councils should take on a proactive policy role within their Community Council area to provide input to the City's policy development and to be more actively involved with citizens by working closely with neighbourhood groups and actively soliciting of citizen input.

- Community Councils should focus on building better civic engagement within their geographic areas and through this engagement to inform Council of emerging issues.
- Community Councils also should not make decisions in matters that cross one or more of the four geographic boundaries, even if it relates to a matter for which they have decision-making authority.

We also agree with the Board of Trade Task Force that Community Councils should not have responsibility for service delivery, as this is the explicit domain of the City's service delivery departments and their associated Standing Committees. However, Community Councils should inform service departments – here we would add, in the form of formal reports made to Council through the appropriate Standing Committee, and on to the CAO – of issues related to the quality of service delivery within their boundaries.

Implicit in the Task Force's recommendations is a balance for Community Councils between their role to make local decisions within City policies, and a renewed emphasis on Community Councils as a major vehicle for citizen engagement. We have one caveat with respect to this balance: that the local decision-making power of Community Councils needs to be established in the context of the proposed reviews of delegation and roles and responsibilities recommended earlier in this report. Ideally, this would mean that some decisions that have already been contemplated publicly for delegation to Community Councils could actually be delegated to the administrative staff, with the appropriate accountability mechanisms in place.

This caveat is important because the reality, as reported to us, is that Councillor workload already prevents them from being effective in all of their various roles and with all of their various committee duties. Additional delegation to Standing Committees or Community Councils redistributes but does not change the overall workload demands on Councillors. Furthermore, the Community Council

recommendations with respect to civic engagement create greater rather than fewer potential workload expectations for Councillors.

All of this suggests that unless all layers of Council, including Standing Committees and Community Councils, find more opportunities to assign additional activities or delegate decisions to administrative staff, the desired streamlining and more strategic focus will be more difficult to achieve.

Finally, we would suggest that the Executive Committee have an oversight role with respect to Community Councils. This is intended in no way to diminish the recommended authority of Community Council to make decisions but rather to ensure, as has already been recommended with respect to Standing Committees, consistency and integration with respect to financial and strategic directions.

9. Ad Hoc, Special and Other Committees, Advocates, etc.

The options and approaches for discussion in this area relate primarily to the need for clear roles and responsibilities, maximum delegation of activities and decisions, the importance of Council having time to focus on strategic, citywide issues, and a more manageable workload for Councillors and administrative staff.

As reported in the City's discussion paper on governance, there is concern about the proliferation of these kinds of instruments both in terms of workload and ensuring the integrity of the mandates of the Standing Committees and their capacity to deal with issues.

The point on integrity of mandate is particularly common in the literature on governance. Generally, the more committees that exist, the more likelihood there is

for overlap, duplication of effort, and lack of clarity, either between and among bodies of Council or between Council and the administration.

The real challenge for Council, as with any board of governors dealing with its own finite resources, is one of discipline -- to refrain from the temptation to create more committees, beyond the Standing Committees and Community Councils, than is absolutely necessary and to ensure that Committees that are created are there to assist Council in fulfilling its own role, as opposed to the role of the staff.

Accordingly, options and approaches for discussion include that:

- Council make the difficult decision to substantially rationalize and reduce these kinds of special purpose bodies.
- To the extent possible, the purpose and intent of these special purpose bodies be realigned within the existing Committee structure and/or to assign the activity to administrative staff – in short, to find other alternatives to achieving the intended result without creating additional committees.
- In future, the creation of any new special purpose bodies should include a clear understanding of why the matter cannot be addressed either through an existing Committee structure or through actions that might be requested of administrative staff.
- To the extent possible, a principle in the creation of new special purpose bodies of Council should be a focus on bodies or activities that are time-limited. Wherever bodies are recommended that are other than time-limited, it should raise in Council's collective mind the question of whether the matter should not be assigned either to an existing body or to the staff.
- To the extent that many of these committees are vehicles for public consultation and engagement, Council should consider other more structured and regularized consultation mechanisms, including by necessity greater reliance on staff in this regard.

10. Special Operating Agencies

The experience of other large and complex organizations suggests that day-to-day pressures and operational considerations often tend to dominate the time, attention, and resources of elected officials and the senior staff. As noted earlier, there is a general sense that it will be increasingly difficult for Council to effectively govern a City the size, scope and complexity of Toronto without additional reference to alternative service delivery mechanisms such as special operating agencies.

In light of this reality, it is recommended that Toronto conduct a review of effective accountability mechanisms related to alternative service delivery in place in other jurisdictions with a view to identifying best practices that could be used to inform and shape future City actions in this regard.

Appendix A

Standing Committee Areas of Responsibility

Policy and Finance Committee:

- Financial priority setting.
- Capital and operating estimates.
- The corporate strategic plan.
- Corporate intergovernmental and international activities.
- Annual budgets of the City's Agencies, Boards and Commissions (ABCs).
- Tax policies.
- Matters cutting across different Departments and ABCs.

Administration Committee:

- Human resources, labour relations, occupational health and safety, access, equity and human rights.
- Information technology and corporate communications
- Purchasing policies and fleet management
- Acquisition and disposal of City property
- Administrative matters of the Treasurer, Solicitor and Clerk
- Administration of the Provincial Offences courts

Planning and Transportation Committee:

- The Official Plan and citywide planning policy and research
- City-initiated planning applications of Citywide interest

- Transportation policies and plans
- Building permit policies
- Changes to key infrastructure, transportation, public transit and open space systems and publicly-owned lands affecting the entire City of Toronto
- Municipal property standards and licensing

Economic Development and Parks Committee:

- Economic growth and promotion
- Tourism
- Arts, culture and heritage
- Parks and recreation policies and operations

Works Committee:

- Water supply, waste water, sanitary and storm water systems
- Solid waste control and use of road allowance
- Road and traffic operations

Community Services Committee:

- Social development policies and community grants
- Housing and homelessness, child care, social assistance and employment programs, emergency shelter and assistance, seniors' services
- Fire and ambulance services, emergency planning and communications.

Toronto Computer Leasing Inquiry

Research Paper

LOBBYIST REGISTRATION

Volume 1: Comparative Overview

November 2003

Table of Contents

Part 1
Introduction

Overview

Volume1 is the first of three volumes on Lobbyist Registration. This report focuses on the legal definitions, structures, and reporting requirements of lobbyist registration programs in Canada and the United States.

The purpose of this first volume is to provide a comparative overview of the nature of lobbying and lobbyist registration programs, including the wide variety of approaches that exist.

Drawing on the research, we also examined the various approaches to lobbyist registration in the context of the unique structural and cultural elements of the Canadian and U.S. systems of government. Based on this examination, we developed an analytical framework that looked at possible correlations between different approaches to lobbyist registration and key features of different systems of government.

Volume 1 also lays the groundwork for the second and third reports:

- Volume 2 is more qualitative/analytical in nature. Drawing on interviews with experts, including academics, public servants, and practitioners, we highlight and discuss the various issues associated with lobbyist registration, with particularly emphasis on relative and comparative effectiveness.
- Volume 3 focuses more specifically on the City of Toronto, including a discussion of current and previous City policies, the specific lobbying environment and issues related to lobbying at the City, and options and

approaches for discussion related to potential changes to enhance the City's current proposal for a lobbyist registry.

Scope

This volume focuses primarily on lobbyist registration programs in place in the following jurisdictions:

- Canada: Ontario, British Columbia, Nova Scotia and the Government of Canada.
- United States: All 50 states and the U.S. Government as well as selected municipalities.

The focus on the above jurisdictions reflects the fact that lobbyist registration is a primarily North American phenomenon. Other major Western/Commonwealth nations do not appear to have similar traditions of lobbying or at least have not implemented lobbyist registration systems. Having said that, there are two important caveats to note:

- The European Parliament recently implemented a minimalist form of lobbyist registration. Given the very limited nature of this approach, we have addressed it in the form of an Appendix (*see Appendix I*) rather than as an integrated part of our analysis.
- There is a body of evidence to suggest that other jurisdictions are thinking about how to move beyond traditional lobbying or special interest approaches to public consultation. This early thinking includes potential next-generation approaches to *e-government* that could potentially render lobbyist registration systems redundant. Britain, for example, is developing a process of Internet-based public consultation that emphasizes transparent on-line discussion of competing positions and views on a standing set of issues. While the purpose appears to be consistent with at least one of the purposes of a lobbyist registration

system (greater transparency in the process of engagement with government), the approach is obviously quite different from the typical North American lobbyist registry.

Also, this volume does not include any discussion of the current approach to lobbyist registration at the City of Toronto given that we will be dealing with the specifics of the Toronto situation in our third volume in this series on lobbyist registration, including City proposals to strengthen their current requirements.

Structure of the Report

Volume I has five sections:

1. Introduction, including the scope and structure of the report and the research approach.

2. A definitional overview, including a discussion of what lobbying is and is not and the various definitions that jurisdictions have in place.

3. A discussion of the U.S. system of lobbyist registration, including detailed information on registration requirements.

4. A discussion of the various Canadian approaches to lobbyist registration.

5. Our attempt, as noted above, to develop a high-level analytical framework with respect to the applicability of different components of lobbyist registration in different systems of government.

These five sections are following by various appendices.

Our Research Approach

In the preparation of the three volumes on lobbyist registration, we reviewed over 1,200 pages of documents and conducted 29 key informant interviews.

Documentary resources focused on publicly available material (either in print or electronic format), including legislation, annual reports, hearing transcripts, correspondence, handbooks, newsletters, opinion pieces, speeches, policy statements, and research reports, etc. Sources for these documents included various departments/branches of governments, research and advocacy/watchdog organizations, citizen groups, industry associations, academic organizations, and the media.

Our key informant interviews included current and former public officials in selected Canadian and U.S. jurisdictions, practitioners/lobbyists, researchers/academics, municipal provincial associations, and ethics advocates.

Part 2
Definitions

This section deals with various definitions:

- What is lobbying?
- Is lobbying a legitimate activity?
- What does lobbying look like when it happens?
- What are the different types of lobbyists?
- Who are public office holders for the purpose of lobbying?
- Who is not considered to be a lobbyist?
- What is not considered to be lobbying?

We begin with these definitions because there are many popular conceptions (or misconceptions) as to what constitutes lobbying in both its legal and illegal contexts. Therefore, it is important to have a common, up-front understanding of what various jurisdictions mean by “legal lobbying” before delving into the details of the various registration systems.

What is Lobbying?

In the U.S. federal government, individual states, and a smaller number of municipalities, as well as in four Canadian jurisdictions, lobbying (as opposed to types of lobbyists) is defined in relatively consistent terms, although with differences in scope as will be discussed.

U.S. Examples

The following are examples from U.S. jurisdictions:

- Influencing or attempting to influence legislative action or non-action through oral or written communication or attempting to obtain the goodwill of a member or employee of the Legislature. (*State of Florida*).
- Communicating by any means, or paying others to communicate by any means, with any legislative official for the purpose of influencing any legislative action. (*State of Illinois*)
- Communicating with a public official for the purpose of influencing the passage, defeat, amendment, or postponement of legislative or executive action. (*State of Utah*)
- An attempt by a paid lobbyist to communicate with a public office holder in any attempt to influence the passage or defeat of any local law, ordinance or regulation by a municipality or subdivision thereof or adoption or rejection of any rule or regulation having the force and effect of local law, ordinance or regulation or any rate making proceeding by any municipality or subdivision thereof. (*New York State definition of lobbying at the municipal level)*
- Attempts by paid lobbyists to influence public officials, with influence meaning promoting, supporting, opposing or seeking to modify or delay any action on municipal legislation by any means, including but not limited to providing or using persuasion, information, statistics, analyses or studies. (*City of Los Angeles)*

It is important to note that much of the emphasis in the U.S. is clearly on the legislative process. As will be discussed in more detail in Part 4 of this report, this is a reflection of the much greater emphasis on governing through legislation in the U.S. compared to Canada and a generally much more central and high profile role for individual legislators.

Also, in the U.S. form of government, the executive and legislative branches are very separate. Most states have lobbyist registration systems that deal with both branches of government (e.g. Utah). Others, such as New Hampshire, deal only with the State Legislature. Still others have separate policies in place for each branch. This will be discussed in more detail in Part 3 of this volume, dealing specifically with the U.S. model.

Canadian Jurisdictions

The following are examples of Canadian definitions. There are some obvious differences that will be noted.

- As will be discussed in Parts 3 and 4 of this volume, legislation plays a much more dominant role in U.S. governance compared to Canada, where more executive authority and flexibility is vested in Cabinet and Ministers (e.g. Minister's orders, regulations, orders in council, etc.). This can be seen through a comparison of the volume of legislation in New York State and Ontario over a 12-month period in 2002. During that time, the New York State legislature dealt with 19,000 pieces of legislation compared to a figure of less than 300 for Ontario.
- In Canadian jurisdictions, our system of government integrates the legislative and executive branches with the public service as an extension of the executive. As such, lobbyist registration systems apply to each of these. There are, of course, variations within the different systems. These are discussed in more detail in Part 4 of this volume.
- In the absence of such a strong focus on the legislative process in Canada, and also as a reflection of our integration of the executive and the legislature, the scope of the Canadian definition of lobbying goes well beyond legislatures and the development of legislation. It also covers the executive, the legislature, and government departments, and appears to

deal with a broader range of government decision-making, e.g. policy and program decisions, grants, contracting, etc.

Similar to the situation between the U.S. federal government and individual states, Ontario, B.C., Nova Scotia and the Canadian government have very similar definitions.

Ontario

Lobbying occurs when a paid lobbyist communicates with a public office holder in an attempt to influence:

- The development of any legislative proposal by any member of the Legislative Assembly.
- The introduction, passage, defeat or amendment of any bill or resolution.
- The making or amendment of any regulation.
- The development, amendment or termination of any policy or program.
- Any decision about privatization or outsourcing.
- The awarding of any grant, contribution or other financial benefit by or on behalf of the Crown.
- The awarding of any contract (consultant lobbyists only).
- The arrangement of meetings between a public office holder and any other person (consultant lobbyists only).

British Columbia

Lobbying occurs when a paid lobbyist communicates with a public office holder in an attempt to influence:

- The development of any legislative proposal.
- The introduction, passage, defeat, or amendment of any bill or resolution that is before the Legislative Assembly.
- The making or amendment of any regulation.
- The development or amendment of any government policy or program.
- The awarding of any contract, grant, contribution or other financial benefit by or on behalf of the government of British Columbia
- The arranging of a meeting between a public office holder and any other person (consultant lobbyists only).

Nova Scotia

Under the *Lobbyists Registration Act*, lobbying means to communicate with a public servant in an attempt to influence:

- The development of a legislative proposal.
- The introduction, passage, defeat or amendment of a bill or resolution.
- The making or amendment of a regulation.
- The development, amendment or termination of a policy or program.
- A decision about privatization or outsourcing.
- The awarding of a grant, contribution or other financial benefit by or on behalf of the government.
- The awarding of a contract by or on behalf of the government for consultant lobbyists only.
- The arrangement of a meeting between a public servant and another person

Government of Canada

[*Please note: the following definitions represent the current status of federal requirements. Changes to the federal Lobbyists Registration Act were passed earlier this year (Bill C-15) but have yet to be enacted. In our discussions with federal officials, we were unable to obtain information about when promulgation might take place, but it is expected to do so once regulations have been changed. A description of the changes is provided in Appendix II.*

Lobbying involves communication by individuals who are paid to attempt to influence government decisions through its public office holders. This includes arranging meetings with public office holders, attempting to influence legislative proposals, bills or resolutions, regulations, policies, programs, awards of grants or contributions or other financial benefits, award of contracts.

Is Lobbying a Legitimate Activity?

In general, the research answers this in the affirmative.

Most if not all U.S. and all Canadian jurisdictions have made some form of statement in principle expressing the view that lobbying is a legitimate form of expression and a recognized part of the public policy development process.

U.S. Jurisdictions

Lobbying in the U.S. is very political in a recognized and transparent sense. In many cases, lobbyists see themselves as policy makers that are playing important and active roles alongside legislators and executives. One expression

of this view is the fact that registered lobbyists often have special access privileges, including access to government buildings after hours.

Many U.S. jurisdictions have formal statements indicating lobbying is a recognized and legitimate part of the public policy development process. This is supported strongly in the literature (both academic and otherwise) in that lobbying is viewed in the U.S. as not only legitimate, but something that is:

- Universally viewed as guaranteed as per the First Amendment of the U.S. Constitution with respect to free speech and the right of citizens to petition their government for the redress of grievances.
- An important and encouraged part of the process and of government's role to understand and balance competing interests (as a Rutgers academic phrased it: lobbyists are an inextricable "part of the system of representation".)
- Essential to the democratic process where federal and state legislators have little or no staff or money to carry out research on issues and where lobbyists can help to clarify positions for the public official.

The following are some examples of these statements:

State of Florida

The Legislature finds that the operation of open and responsible government requires the fullest opportunity to be afforded to the people to petition their government for the redress of grievances and to express freely their opinions on legislative actions. Further, the Legislature finds that preservation of the integrity of the governmental decision making process is essential to the continued functioning of an open government.

State of New York Municipal Lobby Registration

> The legislature hereby declares that the operation of responsible democratic government requires that the fullest opportunity be afforded to the people to petition their government for the redress of grievances and to express freely to appropriate officials their opinions on legislation and governmental operations; and that, to preserve and maintain the integrity of the governmental decision-making process in this state, it is necessary that the identity, expenditures and activities of persons and organizations retained, employed or designated to influence … be publicly and regularly disclosed.

Canadian Jurisdictions

Compared to the U.S., Canada does not have a similar constitutional basis for establishing the legitimacy of lobbying. Instead, the Canadian federal government has established a set of principles that sets the tone for Ontario and more recently for B.C. and Nova Scotia.

As will be seen below, the federal principles (not dissimilar to the U.S. general approach) attempt to strike a balance between lobbying as a legitimate activity, and the importance of transparency in government.

- Free and open access to government is an important matter of public interest.
- Lobbying public office holders is a legitimate activity.
- It is desirable that public office holders and the public be able to know who is attempting to influence government.
- The system for the registration of paid lobbyists should not impede free and open access to government.

What does Lobbying look Like?

The conventional view is often that lobbying involves some form of questionable interaction with government. This typically would include arm-twisting, providing gifts and favours, quiet back room meetings, favourable decision in exchange for campaign contributions, using friends of politicians to get meetings that would not otherwise have been granted without the lobbyist's intervention, etc.

However, as will be discussed in this section of our report, many writers and commentators in Canada and the U.S. from academics to industry representatives, stress a more neutral or "professional" approach. This is not to suggest that the above archetypal negative behaviours do not exist in the U.S. or Canada, but rather that Lobbyist Registries are, for the most part, about regulating *legal* activities. In effect, they capture what is considered "legal" lobbying. In that sense, they are not generally intended to prevent illegal or unethical behaviour on the part of the lobbyists or public officials.

In most jurisdictions, illegal or unethical behaviour is generally dealt with through other pieces of legislation or administrative policy. These, for example, include conflict of interest policies and legislation governing public officials, whistle blowing policies and legislation, components of procurement policies dealing with conflict of interest or inappropriate behaviour on the part of bidders and their lobbyists, campaign financing legislation, etc.

Examples of Lobbying in its Ideal Form

The literature indicates that there is something akin to an "ideal" form of lobbying that is positioned for the most part as a form of strategic or tactical intelligence for organizations that want to be effective in their dealings with government.

Below, we provide two representative excerpts that articulate this ideal role (*other examples are provided in Appendix III*). The first excerpt is from a U.S. non-profit association that provides advice to other non-profits on how to lobby effectively. The second excerpt is from a major Canadian government relations firm. Embedded in these examples (and in the additional examples in *Appendix III*) are some key "national" differences worth noting:

- The significant emphasis in the U.S. system of government (relative to the Canadian system) on specific pieces of legislation and the role of individual legislators in that process and therefore the primary focus of lobbying in the U.S.

- The emphasis in the U.S. on direct contact between lobbyists and elected officials and their staff as an appropriate and desirable form of interaction and a core component of the culture of government.

- The lack of emphasis in the Canadian examples on lobbyists having direct contact with public officials other than in a background/information gathering/sharing information context.

It is important to note that each of these examples stresses the role of the lobbyist as a strategist/advisor who is knowledgeable about how government works in practice as opposed to theory, e.g. decision-making processes, culture, current political priorities, relative priority of issues, alternative viewpoints, etc. All three examples come from the perspective that government decision-making

processes are not generally transparent or easily understood by “outsiders” and that the reality of the process differs considerably from the published theory.

Most professional government relations or lobbying firms (consultant lobbyists) characterize their service offerings very much along the “ideal” lines – with the primary role of the lobbyist as strategist/advisor in the background. However, it is also important to note that there is no information or analysis that we have been able to identify through our literature search or in discussion with experts and public officials with respect to whether and to what extent the reality of lobbying conforms to this ideal.

In addition, over time, large lobbying firms in Canada have moved in the direction of providing a broader range of public relations and communications services, of which government relations (lobbying) is only one offering. At the same time, firms that were primarily communications focused have added government relations practices. In both cases, the broader range of services often includes:

- Marketing and other forms of consumer-oriented communication.
- Corporate communications.
- Crisis/issues management.
- Public opinion and social research.
- Internet services.
- Media monitoring.

Observers suggest that this horizontal integration has happened as firms attempted to capture a larger slice of their clients’ communications requirements. The thinking has been that by providing a “full service” suite to clients, one is less likely to face competition from one or more consulting firms working for the same client. In addition, Canadian firms have been faced with the business reality that lobbying in the Canadian context has been and will likely continue to be a much more limited activity compared to the U.S. Their businesses become more sustainable/profitable through this diversification of services.

Finally, we want to make a distinction between the activities of lobbyist consultants, as opposed to organization lobbyists (commercial or non-profit).

As one might expect, Canadian government relations firms (consultant lobbyists) do not generally advertise that they have “special access” to decision makers or that they can “get a meeting” with a politician or civil servant that a client organization could not otherwise get themselves.

To an extent, this is borne out in the experience of senior public servants. Using Ontario as an example, our interviews suggest that senior public servants are rarely approached directly by consultant lobbyists. However, this may not be the case with respect to political officials and their staff. There are no studies available in this regard.

However, there is some anecdotal evidence to suggest that there appears is a somewhat greater emphasis on the part of Canadian government relations/consultant lobbyist firms on recruiting former political staff, as opposed to civil servants. The inference one could draw is that at a minimum, “political intelligence gathering” (as distinct from more blatant “getting a meeting” or “directly arguing on behalf of clients”) is an important part of consultant lobbyist services.

The same thing, however, is not necessarily true of organization lobbyists. Generally, these organizations have as part of their mandate to deal directly with government officials at the bureaucratic and political level. That means that the employee lobbyists within these organizations are not intended to be “background strategists” but rather are paid to be in regular contact with government officials on their organization’s issues of interest.

Excerpt #1

The Legislative Process and Your Lobbyist

From the Non-profit Lobbying Guide by Bob Smucker

Published by The Independent Sector, 1999

It is important to have a volunteer or staff person in your organization who knows the basics of how your legislature works, because you will need that information to know how to target your efforts. For example, you may be trying to block legislation averse to your group, help support pending legislation backed by your organization, or arrange the introduction of legislation vital to your group. In the typical legislature, to achieve any of these aims, you will have to gain the support of the committee designated to consider your issue. It follows that you will need to know something about the composition of that committee. For example, if you are seeking to have legislation introduced, it is usually possible to recruit a committee member to introduce your bill. But you won't want just any member. You will want a person of influence, and that usually means a senior committee member whose party is in the majority and therefore controls the committee.

It is incidentally helpful to know that many decisions on legislation are often made in a last-minute frenzy as legislators prepare to adjourn for the legislative session. The lobbyist (whether a volunteer or a paid staff member) who is following your issue in the legislature should have enough understanding of how the legislative process works so that your group can make the right move at the right place and time (for example, knowing whether to support or oppose an amendment that suddenly comes up).

Your lobbyist needs to recognize, for example, whether this is the last chance to modify your bill or if you still have a reasonable chance for the

changes you want in the other house of the legislature. A lobbyist who knows (among other things) the best legislator to introduce your bill and how and when decisions are made in your legislature is referred to as an inside lobbyist.

Having a seasoned insider available to your organization can save you enormous time and effort. Perhaps volunteers or staff people bring such experience to your group from their work with other nonprofits. If not, such groups as the League of Women Voters can help your group develop an understanding of how your legislature really works. Former legislators or those currently in office can also be very helpful. Nationally, the Advocacy Institute, INDEPENDENT SECTOR, and Charity Lobbying in the Public Interest, among other organizations, can provide how-to information about lobbying by nonprofits.

To get started, your lobbyist needs to know or be able to learn quickly the following things:

- *The basics about the legislative process and the key committee members or other legislators who have either jurisdiction or influence over your legislation and can affect its movement;*
- *The details of the bill you are supporting and why its provisions are important to the legislators' constituents and to your organization; and*
- *The organizational structure of your group and how it communicates with its grassroots.*

More important, the person who will be your lobbyist should have strong skills in interpersonal relations. A prospective lobbyist for your group may bring great understanding of government, its processes, and its key members, but if the relationship skills are absent, don't give him or her the

job. This candidate will lack the most fundamental attribute of a good nonprofit lobbyist. It would be better to take on a person who has no lobbying experience but has demonstrated interpersonal skills and the ability to organize.

Most such persons can be taught to lobby, but chances are that you will not be able to change the performance of the person who brings understanding of the process but lacks sound interpersonal skills.

You will be tempted to take the person who lacks the relationship skills but has the knowledge, especially if he or she is articulate. If you do, however, over time you will probably find yourself following after the lobbyist at the state capitol and trying to mend relationships.

Worse yet, word won't get back to you about your lobbyist because of people's natural reluctance to pass along negative information; you will just find that your lobbyist is having difficulty gaining access. Again, if you have to make the choice, go with the relationship and organizing skills. The principal responsibility of your organization's lobbyist is to work effectively for enactment of your group's legislation. The success or failure of your legislation depends considerably on how well your lobbyist can orchestrate the movement of your bill through the legislature and on how effective he or she is in mobilizing your grassroots. Both tasks require an understanding of the legislative process. More important, the movement of your legislation requires that you recruit a strong member of the legislature to take the lead on your measure.

Excerpt #2
Government Relations Consulting Services Description
From GPC Government Policy Consultants, Ottawa, Canada 2003

The Cornerstones of Effective Government Relations

Effective advocacy depends on reliable information, insightful strategic advice and timely, decisive intervention. It also means never losing sight of our client's business imperatives. GPC applies a proactive approach to public affairs that allows clients to stay close to developments within government and to intervene effectively on the issues that impact their commercial success.

Issue Monitoring

Issue monitoring demands far more than simply reading newspapers, following legislative debates or staying current with the published sources that policy makers read for information on issues. It demands a proactive and comprehensive approach.

GPC monitors issues through ongoing contact and information exchange with the officials, politicians, political advisors and other decision makers - as well as interest groups - who are relevant to a client's commercial interests. This approach ensures that our clients remain aware of the evolving climate of opinion within government on their priority issues and are the first to know about emerging threats or opportunities.

Issue monitoring activity begins the critical process of helping our clients to develop positive working relationships with the decision-makers close to their issues. In this way, it serves as the basis for effective advocacy.

Analysis

Having established a regular flow of timely, reliable and relevant information through proactive issue monitoring, GPC provides ongoing analysis of events, helping our clients to understand them in their appropriate political and policy contexts. By identifying and assessing developments in terms of their impact on the client's short or long-term business goals, this analysis enables clients to short-circuit unwanted surprises before they can develop into problems.

Strategic Advice

Strategic advice is at the heart of GPC's value to clients. Drawing upon unrivalled experience, judgement and sectoral knowledge, our consultants provide ongoing strategic advice that is relentlessly focused on the client's needs. In this way, GPC ensures that our insight and expertise always add value to our client's business.

Advocacy/Lobbying

Clients are their own best advocates when they have the information they need to intervene on key issues early in their development.

Through daily contact with key decision-makers, GPC is positioned to provide political intelligence and advice on an ongoing basis. This process enables our clients to be well positioned to influence emerging demands, changing priorities and new policies - long before problems arise.

Ongoing contact with government serves another important purpose: it enables our consultants to keep decision-makers informed about our client's requirements, while providing a channel for officials and political advisors to pass on their views.

In those instances where a client needs to intervene in the process, GPC supports these efforts by conducting preparatory briefings with government advisors, preparing clients for meetings, and undertaking any required follow up. In addition, GPC develops targeted advocacy materials for clients including letters, position papers, fact sheets, advocacy brochures, briefing documents, as well as formal submissions to government.

What are the Different Types of Lobbyists?

U.S. Jurisdictions

U.S. jurisdictions are for the most part consistent in who they define as lobbyists. The U.S. approach focuses on two tiers of definitions: employers of lobbyists and the individual lobbyists themselves.

The following definition, from the State of Indiana, is typical of this approach:

- *Employer lobbyists:* organizations, associations, corporations, partnerships, firms, or individuals that compensate another to perform lobbying services on behalf of the employer lobbyist.
- *Compensated lobbyist:* an individual, organization, association, corporation, partnership or firm that receives compensation for lobbying services render on behalf of a client.

A variation on this theme exists in the City of Los Angeles, which distinguishes "consultant lobbyists" from "in-house lobbyists". Los Angeles defines four categories of lobbyist:

- *Lobbying firms:* a commercial entity that receives payment to lobby on behalf of one or more municipal lobbying clients must be registered.

- *Lobbyists within lobbying firms:* employees, partners, shareholders, etc. of lobbying firms that are engaged in lobbying.
- *Independent lobbyists:* sole-practitioner lobbyists who receive payments to lobby on behalf of one or more municipal lobbying clients must register both as a lobbyist and as a "lobbying firm."
- *In-house lobbyists:* employees of organizations who are paid by their employer to provide lobbying services on behalf of the organization.

In Los Angeles, employers of in-house lobbyists are not required to register. However, clients of lobbying firms that are actively engaged in lobbying on the client's behalf are required to register.

In the "employer" category, most U.S. jurisdictions do not set up separate categories of lobbyists for commercial/for-profit organization, vs. not-for-profits.

As demonstrated above, U.S. jurisdictions are generally quite specific that a key defining component is compensation. As such, volunteers are excluded from being considered lobbyists. Further more, many, but not all, jurisdictions include a specific minimum threshold of compensation for a lobbyist below which registration as a lobbyist is not required. The following are some examples:

- **U.S. federal government:** The exemption threshold is $5,000 in lobbying income (for consultant lobbyists) for a particular client or $20,000 in expenses for an organization whose employees engage in lobbying.

- **State of Washington:** Individuals engaged in a total of four days of lobbying in a three-month period or incurring less than $25 in expenditures on behalf of or for public officials are exempt from registration.

- **State of Indiana:** Exempted individual must not receive any compensation or incur any expenses for or on behalf of public officials.

- **City of Los Angeles:** Individuals that receive no compensation and incur only reasonable travel expenses are exempt from registration. Individuals that receive compensation must make at least one contact with government officials per quarter and receive at least $4000 for their efforts to be subject to registration.

- **State of Michigan:** To be eligible for registration a lobbyist must make expenditures in excess of $1,875.00 dollars to lobby a number of public officials, or in excess of $475.00 dollars to lobby a single public official, during any 12-month period.

- **State of Massachusetts:** To be eligible for registration, a lobbyist must not spend more than fifty (50) hours or earn less than five thousand dollars ($5000) for lobbying efforts during a 6-month reporting period.

Canadian Jurisdictions

In Canada, the federal government, Ontario, British Columbia, and Nova Scotia use consistent definitions of who is considered a lobbyist. Three categories of lobbyist have been specified.

As illustrated below, the primary distinction is between “consultant lobbyists” and “in-house” lobbyists. The former category focuses on external consultants hired by organizations (commercial or otherwise) to provide lobbying services. The latter category focused on employees of organizations that include significant amounts of lobbying as part of the job responsibilities.

Within this second category, there are two sub-categories:

- Commercial organizations – in effect, business interests of all types.
- Other types of organization – including provincial/industry associations, non-profit organizations, charities, etc.

The following definition, for illustrative purposes, is taken from Ontario:

- Consultant lobbyists are paid to lobby on behalf of a client, e.g. government relations consultants, lawyers, accountants or other professionals who provide lobbying services for their clients;
- In-house lobbyists employed by persons (including corporations) and partnerships that carry on commercial activities for financial gain;
- In-house lobbyists employed by non-commercial organizations such as advocacy groups and industry, professional and charitable organizations.

In the case of in-house lobbyists (whether for commercial or non-commercial organizations), all four Canadian jurisdictions qualify their definition. To qualify as an in-house lobbyist, the employee in question must dedicate a minimum of 20 percent of their time to active lobbying activities, (as opposed to prepare research reports, etc.)

One of the very recent amendments to the federal legislation has refined the time threshold even further. With the changes in Bill C-15, there will soon be a requirement that if employees collectively or individually spend more than 20% of their time on lobbying, then the commercial entity must register (this means that the company must register, in addition to naming its senior officers, and any employees than spend any time lobbying).

All four Canadian jurisdictions also require the senior executives of non-commercial organizations engaged in lobbying through their employees to also

be registered. The same registration requirement does not apply for the senior executives of commercial organizations with in-house employee lobbyists (the exception is the federal government as mentioned above).

Consistent with the above, Canadian jurisdictions exempt unpaid volunteers from registration. However, there is no minimum compensation threshold below which an individual is not required to register.

Who are Public Office Holders?

Most jurisdictions also include definitions of who is considered to be a public office holder, i.e. would not be considered to be lobbyist, for the purposes of being clear with respect to who can be lobbied.

U.S. Jurisdictions

Federal Government

Public officials are defined as the President, the Vice President, a Member of Congress, or any other specific federal officer or employee, including certain high-ranking members of the uniformed service.

Indiana

Public officials include:

- Members of the general assembly, or any employee or paid consultant of the general assembly, or an agency of the general assembly.

- Employees of the state or federal government or a political subdivision of either of those governments.

Utah

Public officials are a) members of the Legislature, b) individuals elected to positions in the executive branch, or c) individuals appointed to or employed within the executive branch if they make policy, purchasing, or contracting decisions, if they draft legislation or make rules, if they determine rates or fees, or if they make adjudicative decisions.

New York State Legislated Municipal Requirements

Municipal officers and employees, including an officer or employee of a municipal entity, whether paid or unpaid, including members of any administrative board, commission, or other agency thereof and in the case of a county, shall be deemed to also include any officer or employee paid from county funds. No person shall be deemed to be a municipal officer or employee solely by reason of being a volunteer fireman or civil defence volunteer, except a fire chief or assistant fire chief.

City of Los Angeles

Any elected or appointed City officer, member, employee or consultant (who qualifies as a public official within the meaning of the *Political Reform Act*) of any agency, who, as part of his or her official duties, participates in the consideration of any municipal legislation other than in a purely clerical, secretarial or ministerial capacity.

Canadian Jurisdictions

In Canada, the definitions are very similar across jurisdictions, focusing on elected officials and their staff, government appointees and employees, including agencies, boards, and commissions, and the military/police.

Government of Canada

A public office holder is defined broadly as *"any officer or employee of Her Majesty in right of Canada."* This includes:

- Members of the Senate or the House of Commons (Senators, Members of Parliament, Ministers) and their staffs.
- Persons appointed to office by a Minister of the Crown or the Governor in Council.
- An officer director or employee of any federal board, commission or other tribunal.
- Members of the Canadian Armed Forces.
- Members of the Royal Canadian Mounted Police.
- Employees of federal departments.

Ontario

A public office holder is broadly defined and includes:

- Cabinet Ministers, Members of Provincial Parliament and their staff.
- Virtually all public servants unless otherwise exempted by regulation.

- Officers, directors and employees of provincial government agencies, boards and Commissions (this does not include broader public sector entities such as hospitals, universities and local government institutions).
- Persons appointed to office by Order-in-Council.
- A member of the Ontario Provincial Police.

British Columbia

A public office holder is broadly defined and includes:

- Cabinet Ministers, Members of the Legislative Assembly and their staffs
- Virtually all public servants
- Persons appointed to office by Order-in-Council or by a Minister
- An officer, director or employee of any government corporation as defined in the *Financial Administration Act*

Nova Scotia

A public servant, referred to in the Act as a public office holder, includes:

- An MLS, official, or servant of the House of Assembly and their staff;
- Officers, directors, and employees of Nova Scotia government departments, agencies, boards, and commissions;
- A person appointed by the Cabinet or a Minister to any office or body;
- An officer or employee of the government, or employee of an officer or Minister not otherwise specified.

Ontario and B.C. specifically note that the following are not considered to be public office holders:

- Judges
- Justices of the Peace
- Officers of the Legislative Assembly (for example, the Ombudsman, the Information and Privacy Commissioner)

Nova Scotia adds further to this list by including the following:

- Members, officers, and employees of a municipal council or village commission, and members, officers and employees of a school board
- Offices, directors, or employees of the Nova Scotia School Boards Association

Who is not considered a Lobbyist?

U.S. Jurisdictions

U.S. jurisdictions include a variety of specific exemptions from this list of those considered to be lobbyists. In general, these focus (as indicated in the State of Florida example below) on elected and appointed public officials (politicians and employees/civil servants), as well as the judiciary.

As indicated below, the U.S. federal government includes specific exemptions for foreign governments and non-business foreign entities, as well as churches and religious organizations.

It is important to note, however, that U.S. models generally anticipate the possibility that public officials may from time to time engage in lobbying on behalf of their agency. In these cases, the public officials, including agency employees, are required to register as lobbyists.

State of Florida

- Member of the Legislature
- Employee of the Legislature
- A Judge who is acting in their official capacity
- A State officer holding elective office or an officer of a political subdivision of the state holding elective office and who is acting in an official capacity.
- Persons appearing as witnesses for the purpose of providing information at the written request of a committee chair, subcommittee or legislative delegation.
- Persons employed by any executive, judicial, quasi-judicial department of the state or community college of the state that make a personal appearance before the House of Representatives or Senate.

U.S. Federal Government

- Any agent of a foreign government, foreign political party, or other foreign entity not organized for business.
- Any group of governments acting together as an international organization such as the World Bank.
- A church, its integrated auxiliary, convention or association of churches or religious orders, if directly contacting government officials, as opposed to hiring an outside firm.
- A professional association of elected officials who are exempted from registration as lobbyists.

City of Chicago

The City of Chicago includes a number of specific legal exemptions:

- Journalists with periodicals, newspapers, media, in the ordinary course of conducting their business.
- Officials of the City of Chicago, or of any other unit of government, who appear in their official capacities before any City agency for the purpose of explaining the effect of any legislative or administrative matter pending before such body.
- Persons who participate in drafting Municipal Code or other ordinance revisions at the request of the City.
- Persons who testify publicly before the City Council, a committee or other subdivision of the City Council, or any City agency, department, board or commission.

Again, one sees Chicago's inclusion of City officials in their official capacities for the purposes of explaining legislative or administrative matters. This is consistent with the general expectation in U.S. jurisdictions that employees of agencies of government may from time to time engage in lobbying on behalf of their agencies.

Canadian Jurisdictions

The Government of Canada, Ontario, British Columbia, and Nova Scotia have consistent definitions of who is not considered a lobbyist. The following are the exclusions when they are acting in their official capacities.

- Members of the legislature of a province or territory or their staffs.
- Employees of provincial and territorial governments.

- Members of local or municipal governments or their staffs.
- Employees of local or municipal governments.
- Members of the council of a band as defined in subsection 2 (1) of the *Indian Act* or of the council of an Indian band established by an Act of Parliament, or their staffs.
- Diplomatic agents, consular officers, or official representatives in Canada of foreign governments.
- Officials of a specialized agency of the United Nations or officials of any other international organization granted privileges and immunities by Parliament.

The federal government does not have provisions that would require public servants “lobbying” on behalf of their agencies or departments to be registered as lobbyists. It does, however, provide that if any of the above public officials or their organizations hires third party consultants to lobby, these consultant lobbyists would be subject to the registration requirements.

What is not considered to be Lobbying?

U.S. Jurisdictions

There is a variety of approaches in the U.S. as to what is not considered to be lobbying. The following is a representative selection of examples, with the general focus on attempts to influence decisions from regular citizen interaction with government officials as part of the normal course of business:

U.S. Federal Government

- Any communications contact that is required by subpoena, civil investigative demand, or otherwise compelled by statute, regulations, or other action of the Congress or an agency, including communications required by a Federal agency contract, grant, loan, permit, or licence.
- Communication that is limited to routine information gathering questions and where there is not an attempt to influence an official covered by the lobbying legislation.

City of Los Angeles

- Any request for advice or for an interpretation of laws, regulations or policies, or a direct response to an enforcement proceeding with the City Ethics Commission.
- Any ministerial action - action that involves no discretion by a City official or employee.
- A proceeding before the Civil Service Commission or the Employee Relations Board.
- Any action relating to the establishment, administration, or interpretation of a memorandum of understanding between a City agency and a recognized employee organization.
- Preparation or compilation of any radius map, vicinity map, plot plan, site plan, property owners or tenants list, photographs of property, proof of ownership or copy of lease, or neighbor signatures required to be submitted to the City Planning Department.

City of Chicago

Chicago provides a fairly comprehensive set of practical examples as to what it does not consider to be lobbying:

- A restaurant owner who applies to the Department of Revenue for food and liquor licenses.
- An accountant who responds to a Department of Revenue request to produce his client's business records for purposes of a tax audit.
- A supplier of goods who responds to an RFP (a Request for Proposals).
- A homeowner who submits an application for a building permit.
- An attorney who appears before the Department of Administrative Hearings on behalf of a client to contest a notice of violation.
- An officer of a not-for-profit corporation who meets with a representative of a City department to learn how to apply for a City grant.
- An individual who calls the Department of Zoning to inquire whether a particular business activity is authorized at a specific location.
- A property owner who testifies before the City Council Committee on Zoning against a proposed building project in his neighborhood.
- A lawyer, architect or other representative of a building developer who testifies before the Chicago Plan Commission in support of a proposed development, and who is identified as testifying on behalf of the developer.
- A constituent who calls her alderman to request an additional stop sign on her block.
- A group of developers who, at the invitation of a department head or alderman, tours a neighborhood.

- An engineering consulting firm that seeks from City employees a status report on a client's project or license application.
- An attorney who files a notice of appearance in a case in which the City is a codefendant.
- An attorney representing the City's adversary in litigation who comes to the Law Department to try to work out a compromise and reach a settlement.
- An attorney who represents a client before the Zoning Board of Appeals.
- A consultant hired by a manufacturer who assists the company in responding to an RFP (Request for Proposals). (The consultant receives a fee if the company's proposal is accepted.)
- A property owner who, on her own behalf, calls the Department of Planning and Development to urge the creation of a TIF (Tax Increment Financing district) in her area.
- A citizen who calls on behalf of her mother to make an inquiry about a notice her mother received about a building violation.
- A lawyer who calls on behalf of a client to seek information about a notice the client received about a food preparation violation.
- A lawyer who files a client's application for a liquor license and asks office staff some questions about the procedures and timing.
- A citizen who, on behalf of a neighborhood group, speaks to a meeting of the Community Development Commission, and urges that it adopt a particular plan for the neighborhood. The citizen states her name and identifies the neighborhood group she represents.
- A citizen who urges an alderman to do something to create more parking in the ward. The citizen is a member of a neighborhood group

seeking more parking, but was not asked by the organization to act on its behalf.

- Constituents who meet with their alderman to oppose a halfway house in the neighborhood; the constituents are in the process of forming an informal organization for this purpose.

Canadian Jurisdictions

The Government of Canada, Ontario and B.C. take similar approaches to what is not considered to be lobbying. The following are the core elements (the as yet to be promulgated changes to the federal legislation do not include any modifications):

- Public proceedings before parliamentary committees or other federal bodies.
- Submissions to a public official with respect to the enforcement, interpretation, or application of a law or regulation by that official.
- Submissions in direct response to written requests from the federal/provincial government for advice or comment.
- General requests for information.

Nova Scotia adds:

- A submission to an MLA on behalf of a constituent about a personal matter.
- Communication by a trade union regarding administration or negotiation of a collective agreement.
- Communication by a trade union related to representation of a member or former member who is or was employed in the public service.

- A submission by a barrister of the Supreme Court of Nova Scotia regarding drafting of a legislative proposal.

Part 3

Lobbyist Registration in the U.S.

In this section of our report, we address the following topics:

- The size of the lobbying industry.
- The constitutional basis for Lobbying in the U.S.
- The tradition of lobbying as an accepted and encouraged part of the political process, particularly in lieu of staff.
- The emphasis in the U.S. political system on legislators and legislation in the process of governing.
- The historical origins of lobbyist regulation.
- The emphasis on financial disclosure.
- A description of the various structural elements of current lobbyist registration programs in the federal government and individual states.

Size of the Lobbying Industry

According to the Centre for Public Integrity, in 2002 there were more than 42,000 lobbyists (of all types) registered at the state and federal levels in the U.S, with approximately 26,000 of those located in Washington. As the Centre notes, this works out to roughly six lobbyists per legislator (including all federal and state legislators).

The total value of lobbying directed at officials in 39 of 50 states during 2002 is estimated to be the in range of $750 million (U.S.) covering primarily perks for public officials, but also some consultant fees and lobbyist salaries and other direct lobbying-related expenses. (The Centre for Public Integrity noted to us in

an interview that the figure is accurate in the sense of the total of what is reported, but that states vary considerably in their reporting practices and that $750 million does not represent a “real” total for all 39 states in all categories of expenses, i.e. there is considerably more money that is unaccounted for.

For the same period, lobbying efforts – again, primarily perks for public offices holders – directed at the federal Congress are estimated to have totalled a minimum of $1.6 billion or a total of $3 million per federal legislator.

Constitutional Basis for Lobbying

It is generally accepted that the term “lobbying” first originated in the U.S. and had become a fixture of the American political lexicon by the 1830s, although historians suggest that the activity that became known at this time as lobbying appears to have been a component of American political life for decades before that.

It is also generally accepted that lobbying has a constitutional basis in the U.S. under the First Amendment, which protects the right of any person or group to “petition the government for a redress of grievances”. The concept as reflected in the First Amendment reflects two important early perspectives in American politics:

- One of the major concerns of the American colonists in pre-revolutionary America – the perceived lack of responsiveness of the British Parliamentary system to local concerns and that the process of governing did not facilitate direct representation of popular concerns.
- The express view of the original framers of the Constitution that the role of government in a pluralistic society is to play a broker role that establishes compromises among competing interests and that having a large number

of diverse interest groups would prevent any single group from dominating.

An Accepted and Encouraged Part of the Process

These constitutional notions are cited by academics as having prepared the ground in the U.S. culturally not just for the acceptance of lobbying as a legitimate form of citizen interaction with government, but also for the view, widely cited in the literature, that lobbying is an important and valued part of the public policy process in the United States.

This acceptance and even proactive support for lobbying as a legitimate part of the public policy process is widely discussed in the literature with the view being expressed that many Americans actually welcome the role of special interests in pressuring politicians as This is consistent with the views of the original framers of the Constitution, that on issues of interest to individual Americans, interest groups are seen as an appropriate link to government and that competing interests will balance out each other.

Another oft-expressed factor is the view that Americans (again relative to Canadian or European jurisdictions) have a more pronounced distrust of government and see a strong interest group system as part of a system of checks and balances.

Two additional aspect of the U.S. approach to government that contributes to the prevalence of lobbying and the widely held view that it is an important and legitimate part of the public policy process are:

- The fact that some states have only part-time legislators within limited time to focus on public policy issues in depth.
- The relatively small size of the bureaucracy that is in place to support legislators (keeping in mind that government departments in the U.S.

model report directly to the Executive Branch and, depending on the political orientation of the President/Governor, can be see as the “enemy” by one or both parts of the Legislative Branch).

Observers, including academics and watchdog organizations, point to these factors as contributing to what is seen as a legitimate reliance by legislators on external lobbying efforts to conduct research and provide them with advice on various pieces of legislation.

Emphasis on Legislation

One of the most obvious features of the U.S. model of lobbyist registration – particularly in comparison to the Canadian system – is its strong emphasis on legislation and the legislative process. Again, the reason for this goes back to the structure of the U.S. system of government, including the separation of the Legislative and Executive Branches of government and the emphasis on checks and balances.

In its original Constitutional conception, the Legislative Branch (House and Senate) is responsible for making laws and the Executive Branch (President/Governor and government departments) is responsible for their execution. The original framers of the Constitution saw the law-making power of the Legislature as essential, including their democratic notion that legislation could and should be initiated by any individual member of the Legislative Branch. They also saw the Legislature as an important check on potential abuses of power by the Executive. In effect, the Executive would be constrained to follow the will of the people, as expressed by the Legislative Branch in terms of policy direction and even how policies would be executed.

Over time, however, this relatively simple notion of individually active legislators as part of a legislative check on executive power has become increasingly

complex in its actual workings. One factor has been the evolution of the U.S. from a minimalist-government/small, agrarian nation to its current day more interventionist government/large-scale size, scope, and complexity. Another factor has been the rise of modern ideologically based political parties and, as a result, periodic increases in tension between one or both parts of the Legislative Branch and the Executive. As part of this, legislation often has as its focus a perceived need by legislators to be very prescriptive in terms of what the Executive and, through it, the various departments of government can and cannot do, including detailed allocations of funding.

The result in the present day is an emphasis on government-by-legislation that is almost unthinkable in the Canadian context. The Centre for Public Integrity estimates that between the federal government and the various states, over 100,000 pieces of legislation are initiated every year, with over 40,000 of these finding their way into law (29,000 of these at the State level). This figures does not include the various regulations that government departments, under the Executive, have been authorized to make by legislatures.

In Canada, by way of contrast, with our Parliamentary system of integrated Legislature and Executive, we find generally a much greater emphasis on broader and more flexible powers and latitude vested in the Executive (Premier and Ministers) to make policy, regulations, and/or take administrative actions.

One result of this is much less emphasis on actual legislation in the process of governing. For example, since January 2001, the Canadian House of Commons and Senate combined, introduced a total of 702 pieces of legislation. Of these, 94 actually receive Royal Assent. The Ontario Legislature, during the year 2002-2003, witnessed the introduction of 270 pieces of legislation, including 26 private member bills. Of these, 45 reached the third reading stage during the year and 15 were wholly or in part proclaimed.

The Historical Origins of Regulation

The origins of lobby registration in the U.S. combine both the gradual evolution of reform and ethics movements in American political life, and public policy responses to specific scandals or issues of concern.

The history of 18th and 19th century politics in the U.S. is full of documented examples – some high profile public incidents – of what would now be considered to be highly undesirable, unethical, or even illegal activities. These include kickbacks, bribes, arm-twisting, exchanging favours, campaign contributions in exchange for favourable decisions, etc. The following are some documented examples:

- During the First Congress (1798), a U.S. senator recorded in his diary that New York merchants had employed "treats, dinners, attentions" to delay passage of a piece of legislation.
- In 1833, renowned U.S. Senator Daniel Webster wrote bluntly to a bank president that if the bank wished him to oppose a particular application against the bank, then they should forward "the usual retainer".
- In 1872, an investigation revealed that congressional representatives received railroad stock in return for their support of railroad legislation.

During the latter part of the 19th century, historians note a significant increase in the amount and sophistication of lobbying and the increasing influence of what today would be called "consultant" lobbyists. This corresponds with a dramatically increased scope of federal legislative and government activity following the U.S. Civil War and the increasing complexity of pressures on the federal government. It was during this time, that congressional representatives started to become more dependent on the information and analysis that lobbyists and lobbying organizations could provide, in the absence of professional

research staff. During this period, historians note strong documentary evidence that money spent lobbying did significantly improve the chances of a favourable result.

Interestingly, historians have noted that many of the lobbying techniques of the latter 19th century would be easily recognizable today: writing speeches, preparing analysis, developing arguments in favour of a client's position or against an opposing position, gathering political intelligence through personal contacts with key public officials, and preparing/conducting grass roots campaigns. At the time, however, these were relatively new techniques, often used very indiscreetly and increasingly by former members of Congress. All of these factors combined to gradually heighten public concern.

The early 20th century saw the rise of the Reform Movement, directed at political and business corruption, including overpowering political machines at all levels of government and the influence of huge "trusts" such as Standard Oil and U.S. Steel. Lobbying was increasingly coming under fire even from the media and also from within government, although it is interesting to note that the concern of some legislators was not corrupt practices in the sense of bribes (not wishing to impugn the character of their fellow legislators), etc. but rather that lobbyists would systematically misrepresent the facts in an efforts to sway congressional opinion.

It was around this time that some and very limited efforts to regulate lobbying were enacted at the federal level. In 1919, Congress prohibited any lobbying efforts with appropriated (government) funds. However, the primary focus of reform was on breaking the power of political machines and the large trusts, and putting in place core ethics policies related to bribery, fraud, secret campaign funding, and coercion, and by the 1920's, campaign financing and disclosure requirements. Typical reforms included the introduction of secret ballots, allowing voters to petition state legislatures to consider a bill, introducing

referenda, allowing voters to have an elected official recalled or removed from office, and introducing direct primaries, whereby voters selected candidates for public office rather than party bosses.

Through the 20's and 30's attempts to introduce federal lobbyist registration legislation failed for lack of agreement between the House and Senate, while regular lobbying scandals continued to erupt.

Finally, after some particularly notorious scandals in the mid to late 1930's, Congress enacted its first lobbyist registration requirements, although limited to an industry sector-by-sector approach. Around this time, a number of states also began to introduce lobbyist disclosure requirements.

In 1946, Congress passed the Federal *Regulation of Lobbying Act*. The Act demonstrates the extent to which financial disclosure "follow the money" is an ingrained component of U.S. lobbyist registration. The Act required lobbyists to register not only their name and address with the Secretary of the Senate and the Clerk of the House, but also their salary expenses, including to whom and for what purpose. The Act also included a requirement to file quarterly reports on funds and for lobbyists to keep detailed accounts of campaign contributions.

Over the next several decades, through to the 1960's, however, the federal government and various states brought in legislative requirements. These were not so much anchored in ongoing reform debates, but more often in response to specific local circumstances.

For example, the Federal *Regulation of Lobbying Act* of 1946 attempted to control corruption and bribery in the practice of lobbying. California introduced its first legislation requiring disclosure of lobbyists and their financial lobbying activities in 1947. The legislation was a response to public outcry related to one

particular, very powerful lobbyist who dominated the political landscape in California for many years and by 1947, had become notorious in the public mind.

The 1970s marked the next era of the development of lobbyist legislation. Historians point to the general emergence during that time of heightened public concern about and interest in ethics in government. This included growing pressure on government for ethics-related legislation and programs, including conflict of interest rules, campaign financing, and lobbyist registration. In California, for example, the *Political Reform Act* was passed in 1974. This Act established the Fair Political Practices Commission in that State that continues today to deliver California's lobbyist registration program.

During the 70's, however, Watergate scandal is noted as marking the next major watershed in the U.S. ethics debate. Academics have suggested that in the wake of this scandal, the American public began to assume and accept as a given that there were problems with government. In light of increasing public pressure, the response of many legislatures was to put even further emphasis on ethics regulations in order "to be seen to be" addressing the issues. The result by 2003 is that the U.S. federal government, all 50 states, and many major U.S. cities have lobbyist regulation systems in place and that, depending on the jurisdiction, have undergone periodic reforms since the 1970's.

Some academics note that the move towards more ethical policies and practices was also, in part, a response to what has been described as the general revitalization of state legislatures during the 1970's and 80's. This revitalization has been characterized as a form of "professionalization" as part of which legislators increased the time spent on their tasks, established or expanded their staffs, streamlined procedures, enlarged their facilities, and put more focus on their ethics, including finances (e.g. campaign finances, gifts, etc.) and conflicts of interest. Academics point to a correlation between professional legislatures,

and in particular those with significant staff resources, as having made the most aggressive efforts to regulate lobbyists.

Academics, historians, and political observers also point during the past 25 years to the dramatic rise of political action committees (PACs) as having fundamentally changed the lobbying landscape in the U.S. through their (legal) efforts to funnel campaign contributions to candidates. Critics have charged that the high cost of running for office, particularly for federal seats, has made candidates and incumbents increasingly captive of external fundraisers.

Follow the Money: A Major Theme in the U.S. Model

Given the large number of jurisdictions involved (federal government, 50 states, and various large municipalities) there is a wide variation in the detailed policies, practices, and requirements of lobbyist registration across jurisdictions. However, the basic tenets of lobbyist registration are, for the most part, consistent and can be reduced to a few very basic and simple questions that are commonly asked in most, if not all jurisdictions:

- Who is doing the lobbying?
- What is being lobbied?
- How much money is being spent?

The basic questions of "who is doing the lobbying" and "what is being lobbied" are generally the same for both Canada and the U.S. (see Part 4 of this volume re the Structure of Lobbyist Registration in Canada). However, the dramatic emphasis on how much money is being spent by lobbyists in the U.S. represents a major difference between the U.S. and Canadian model of lobbyist registration.

This difference has, at its roots, a fundamentally different public ethic and public policy approach to campaign financing. At the risk of oversimplification, according to the non-profit Center for Public Integrity this translates into the generally held view that *money could lead to influence* and therefore it is very important, with respect to lobbyist registration, to know how much money (in campaign contributions but also in "perks", e.g. gifts, gratuities, dinners, golf games, trips, etc.) is changing hands.

This point to be made here is not that *using money in an effort to influence* is seen as somehow inappropriate with respect to public decision-making. Rather, it appears to be an accepted and, in some quarters, valued part of the U.S. approach.

This is not to say that U.S. citizens are not concerned about the relationship between money and political influence, particularly given the high cost of running for political office at all levels of government. The "soft money" debate that has been evident in the U.S. over the past several years is one indication of this concern.

However, to date, U.S. legislators, particularly at the federal level, have not demonstrated a willingness to significant modify their approach. For example, rather than putting in place the kind of strict campaign financing limits that we have in Canada (*see Appendix IV for a comparison of U.S. and Canadian federal approaches*), the U.S. model in general emphasizes the role of the individual legislator to make ethical decisions, within a system of checks and balances.

The four most important checks on unethical behaviour appear to be:

- Public disclosure of financial contributions and perks (i.e. direct spending on public officials by lobbyists).
- Some limits in most, but not all jurisdictions (the latter including the U.S. federal government) on various, but not all, forms of campaign

contributions and on the annual value of gifts and other perks that may be received by public officials.

- The belief/expectation that, not withstanding what are often by Canadian standards, extremely large financial contributions (i.e. attempts to influence using money), elected officials have an obligation to balance competing “special interests” in a responsible manner and for the most part “will do the right thing”.
- The fact that the U.S. system of government has what is viewed as a by-design or “built-in” check on undue influence by special interest groups in the separation of the Legislative and the Executive branches of government and the sub-division within the Legislative branch of the lower and upper houses, i.e. House of Representatives/State Legislature and the Senate.

The reality is that the cost for candidates to participate in elections is significantly higher in the U.S. compared to Canada and the literature notes that lobbyists/lobby organizations in the U.S. are viewed as playing a major role in raising funds for political campaigns.

The following are some of the highlights of the dramatic differences in size and scale between the Canadian and U.S. federal government that illustrate the relative importance of fundraising in the two systems (again, *see Appendix IV for a more fulsome comparison*):

- Jean Chrétien’s legal campaign expense limit in the 2000 General Election was calculated to be $61,925. His actual expenses were $60,000.

- The top 10 presidential candidates in 1999-2000 collectively raised over $600 million for the 2000 federal election. President Bush raised $193 million. Al Gore raised $133 million.

- Toronto MP Judi Sgro's (for example) legal expense limit in the 2000 General Election was calculated to be $59,500. Her actual expenses were $44,230.

- The top fundraising candidate for a seat in the House of Representatives for the 1999-2000 for the 2000 U.S. federal election raised $39 million. The 10th highest fundraising candidate raised almost $4 million.

- The total campaign expenditures by all 12 federally registered political parties during the 2000 Canadian federal election were $35 million.

- Reported campaign expenses for all candidates for the U.S. federal House, Senate, and Presidency in the 1996 federal election, totalled $1 billion.

Who administers the Registration Process?

Administration/oversight of lobbyist registries in the U.S. comes in a variety of formats. The most common of these is an independent or outside body to regulate lobbying and, usually, other ethics policies. This often takes the form of a state or municipal ethics commission, sometimes as an appointed individual or a board of appointed commissioners. Other common approaches are to provide for the registry as a branch of a government department, e.g. within the Office of the Secretary of State, or provided by the Office of the City Clerk.

At the state level, 26 states designate independent or outside bodies to regulate legislative lobbying. Of the remainder, 18 states provide the function administratively through the office of the Secretary of State and six provide it

through the administrative offices of the Legislature itself. Three states designate separate agencies to regulate lobbying of the executive branch.

Role of the Registrar

Given the number of jurisdictions (federal, state, municipal) in the U.S. that have lobbyist registration systems in place, there is considerable variation in the detailed and individualized roles and responsibilities of registrars. Having said that, our analysis of a representative sampling of jurisdictions, indicates that there appears to be a consistent core of responsibilities. These core responsibilities include:

- Providing for some form of public education of lobbyists (and in some cases, the general public) with respect to legal requirements.
- Providing forms and other documents, including instruction manuals and advisory opinions.
- Maintaining a public access registry database.
- Publishing an annual directory of lobbyists.
- Preparing an annual report to the Legislature/Council.
- Developing and implementing administrative rules.
  Regularly reviewing monetary thresholds
- Auditing registrations and reports submitted by lobbyists
- Investigating complaints and in some jurisdictions, conducting hearings.
- Providing warning of non-compliance.
- Assessing fines.

Elements of Registration

Our research identified that there is significant variation from state-to-state with respect to many of the elements of registration. In our view – and as supported by other third party research – there is no consistent pattern or approach across the 50 states, the federal government, and various municipalities, beyond a core of commonly required elements.

Given the number of jurisdictions in the U.S. that have lobbyist registries in place, it was not possible within the scope of our study to conduct an exhaustive jurisdiction-by-jurisdiction comparison of the elements of registration. We would also argue that this level of analysis for so many jurisdictions would not be of particular value to Inquiry Counsel.

For the purposes of this section of Volume 1, we were fortunate to have access to a recently completed (July 2003) state-by-state analysis of lobbyist registries conducted by the Center for Public Integrity, a non-profit, Washington-based government watchdog organization. This study – apparently the first effort of its kind in the U.S. or Canada – paints a more aggregate picture of the U.S. experience and from this material; we were in a position to follow-up with individual jurisdictions to obtain clarification or actual examples. In our discussions with them, officials from the Center for Public Integrity stood behind the results of their study, but with important caveats related to:

- The difficultly of drawing direct comparisons on a state-by-state basis given the plethora of variations (as stated to us “the apples to apples” challenge.)
- The lack of completeness of the data available from various jurisdictions.
- The large number of “hidden” loopholes – some more significant than others – that the Center found in each state’s legislation.

Core and Variable Elements

For the purposes of registration, most states require the same kind of "tombstone data", including the following:

- Lobbyist's name, title, address
- Lobby firm and address
- Client name and business address

As noted earlier, however, beyond these core elements there is a wide variation in requirements, again with an overwhelming focus on financial disclosure. The following are the major variations:

Scope

- 27 states do not include executive branch lobbyists (the Governor and state departments) in their legislation, choosing to focus only on lobbying of the legislature.

Filing Timeframe

- 20 states require lobbyists to register before beginning lobbying activities.
- 17 states require registration within 1 to 5 days of beginning lobbying activities.
- The federal government requires registration within 45 days of beginning lobbying activities.

Lobbying Subject Matter

- 27 states require lobbyists to disclosure the broad subject matter of their lobbying, with the focus generally being on pieces of legislation.
- Of these 27 states, 16 require the exact bill numbers to be listed.

- The remaining 23 states do not require any disclosure of subject matter.
- Only five states require lobbyists to disclose whether they are opposed or in favour of a specific piece of legislation. No other details of their position are required, e.g. which sections of the legislation are of specific interest, the rationale for the position, etc.

Campaign Contributions

- 48 states allow lobbyists to make campaign contributions to legislators, either during the election season or at any time during the legislative cycle.
- Only 11 states require lobbyists to disclose campaign contributions as part of their spending reports.
- In most states, these contributions are not counted as "lobbying expenses" and are not captured in financial reporting requirements.

Reporting Fees and Salaries

- 32 states do not require individual lobbyists to report fees.
- 27 states do not require employers to report the salaries of in-house lobbyists.

Expenditure Reporting

- 12 states provide for monthly expense reporting.
- Seven states provide for quarterly expense reporting.
- 25 states and the federal government provide for twice-annual reporting.
- Only five states had what would be considered to be low (e.g. annual) reporting requirements.

- Only three states do not require individual lobbyists to file spending activity reports. In these states, the onus is on the companies/organizations that employ lobbyists to report spending.
- 30 states require lobbyists to disclose the identity of the client on whose behalf the expenditure was made. Seven states do not have this requirement. Information on the remaining 13 states was not available.
- 36 states require lobbyists to disclose the identity of the public officials who received a gift or other expenditure. 35 of those also require the disclosure of the date an itemized expenditure was made. 33 require a description of the itemized expenditure.
- 27 states and the federal government require lobbyists to list the bill number that an itemized expenditure relates to, on their spending reports.
- 27 states require lobbyists to report spending on household members of public officials.

Gift Giving

- Nine states prevent lobbyists from giving gifts to legislators. 22 states limit the value of the gift to a specific amount and require disclosure of those gifts.
- The federal government limits gifts to public officials to $100 but does not require disclosure.
- Other states often use the phrase “of value” in preventing the giving of gifts to individual legislators without a concrete definition of what this means, which in turn leads to what are often viewed as significant loopholes.

Reporting

- 18 oversight agencies and the federal government do not provide overall spending totals for all lobbying activity that takes place in their state.

- Only four states provide some overall spending totals broken down by what industries lobbyists are representing.
- Only 10 states itemize all lobbyist expenses for ease of public access. 27 states provide details above a certain financial threshold. 12 states and the federal government have no detailed reporting requirements.

Enforcement

- 45 states have statutory penalties for late or incomplete filing of registration information. 46 states have statutory penalties for late or incomplete filing of spending reports.
- Only 13 states perform any mandatory review or audit of lobby filings.
- Oversight agencies in 14 states, as well as the federal government, lack the statutory authority to audit lobby filings.
- Only 11 state agencies publish lists of delinquent lobby filers.
- In the past year, 31 oversight agencies have levied fines on lobbyists for late filing. 33 agencies have levied penalties during the same period for incomplete spending reports.

Electronic Access

- On-line registration is enabled in 10 states. On-line lobbyist reporting is enabled in 14 states and the federal government.
- 21 states and the federal government provide a searchable on-line database of registration information. 9 states provide the public with a downloadable files/database of registration information.
- 16 states provide a searchable, on-line database of spending reports. Five states provide the public with downloadable files/database of spending reports.

Training

- 13 states and the federal government provide training to lobbyists about how to file reports.
- No statistical information is available with respect to how many jurisdictions provide lobbyists with training about what constitutes lobbying, ethical practices, etc.
- According to the Center for Public Integrity, a number of states have this kind of program in place and prefer this kind of activity/expenditure to traditional enforcement.
- Some jurisdictions include mandatory training (often in the form of an information session) as part of the registration requirements. A small number require that training to be repeated periodically.

Miscellaneous

- *Photos:* 11 states require lobbyists to submit photos along with their registration.
- *Cooling Off Periods:* 14 states do not have “cooling” off periods – in effect, a mandated break in the time between a legislator leaving office and becoming a lobbyist.
- *Business Ties:* In 21 states, lobbyists are required to disclose any direct business ties they might have with public officials.

Part 4
Lobbyist Registration in Canada

Size of the Lobbying Industry

Given that Canadian jurisdictions do not track lobbyist fees and expenses, there is not accurate way to estimate the value of lobbying efforts in Canada. However, the numbers of active lobbyists registered in each jurisdictions confirms the conventional view that legal lobbying in Canada, even taking population differences into account, is on a different scale than in the U.S. The following is a breakout of each Canadian jurisdiction:

- In 2002, the Government of Canada's lobbyist registry included a total of 1,442 lobbyists of all types. Approximately 60 percent (858) of these registrants were consultant lobbyists. In-house non-profit lobbyists totalled 233, and in-house corporate lobbyists totalled 351. This compares, as noted earlier in our report, to an estimated 26,000 federal U.S. lobbyists.
- Ontario during the same period had a total of 765 active lobbyists. Of these 28 percent (212) were consultant lobbyists, 82 (11 percent) were in-house corporate lobbyists, and 471 (61 percent) were in-house non-profit consultants.
- B.C. current has a total of 126 active lobbyists in its registry. Of these, 41 percent (52) are consultant lobbyists, 16 percent (20) are in-house corporate lobbyists, and 42 percent (54) are in-house non-profit lobbyists.
- Nova Scotia currently has a total of 65 active lobbyists in its registry.

Origins

As was the case in the U.S., lobbyist registration programs in Canada can be seen as a stage in the evolution and implementation of ethics policies and programs in government. As with the U.S., they take their place and are intended to work in conjunction with other initiatives such as conflict of interest rules, procurement policies, campaign financing requirements, etc. and part of a larger grouping of ethics policies.

Modern-day ethics initiatives began to emerge in Canada in the early 1970's. Again, similar to the U.S., the progress towards lobbyist registration and other ethics policies was a combination of an evolving public focus on ethics in government, and a response to specific incidents or "scandals".

Lobbyist registries are a relatively recent phenomenon in Canada. Following a decade and half of federal ethics efforts focused primarily on strengthening and broadening conflict of interest policies, the first federal lobbyist legislation was passed in 1988. Ontario passed its own legislation in 1999. B.C. and Nova Scotia's legislation came into force in the fall of 2002. Similar to developments in many other areas of public policy, the provincial approaches generally followed the pattern established earlier in the federal model. To our knowledge, no municipality in Canada has a comparable system of lobbyist registration in place.

A particular driving force in Canada in favour of lobbyist registries, according to observers, has been the need for positive public positioning of governments (regardless of political party). Generally, this has a few dimensions:

- The rise in the 1980's of a more U.S. style lobbying industry in Canada: This is not to say that lobbying was non-existent in Canada prior to this period. Indeed, Canada has its own historical tradition of lobbying at the provincial and federal levels and its own share of historical and more

contemporary scandals. However, by the 1980s, a more high profile and professional "government relations" industry was being established.

- Defensive responses by government as part of a move towards more alternative services delivery models, including contracting-out and/or privatization: By the 1980s and 1990s, governments were becoming more interested in downsizing, contracting out, and privatization. Anticipating more intensive advocacy from the private sector, lobbyist registries were put in place as part of an effort to assure the public that processes would be fair and transparent (for example, the federal government in the 1980's and Ontario in the later 1990's.)
- Proactive political reactions to perceived ethics problems in previous governments: There is evidence to suggest that in some cases, government action to strengthen existing legislation or put legislation in place for the first time (for example, federal Liberal Red Book commitments to strengthen the *Lobbyists Registration Act*, or the B.C. legislation) was part of an overall effort to position a previous administration as "ethically challenged" and to emphasize the new government's self-described commitment to ethics and transparency.

Overall Focus of the Canadian Model

We have made reference to a "Canadian model" in the title of this section because Ontario, B.C. and Nova Scotia have generally consistent approaches. In fact, each of these provinces has modeled its system after the federal model. Ontario introduced its legislation in 1998 and B.C. and Nova Scotia followed in 2002. The earliest legislation on lobbying was enacted by the federal government in 1989 and amended in 1995. As noted earlier in this volume, the federal *Lobbyist Registration Act* has recently been reviewed by a Parliamentary

Committee and more amendments are pending as a result of the passage of Bill C-15 (see *Appendix II*).

Unlike some U.S. jurisdictions, the Canadian model does not attempt to use a lobbyist registry to fix financial limits to gifts and hospitality to public officials, or campaign contributions. Canadian jurisdictions use other vehicles for establishing these kinds of limits, e.g. executive order policies or directives, conflict of interest guidelines, campaign financing/elections protocol, procurement policies related to bidding on government contracts.

Notwithstanding the preponderance of similarities, there are a few significant differences that should be noted:

- B.C.'s system of registration is more focused on MLAs and Cabinet Ministers than Ontario or the federal government. For example, B.C. requires that lobbyists indicate the names of MLAs, Cabinet Ministers, and their staff that will be lobbied.

- Ontario requires only that lobbyists indicate whether MPPs or their staff will be lobbied. A similar disclosure is not required for Cabinet Ministers and their staff. Information about whether a lobbyist intends to contact an MPP is not made available on the public-access website.

- The federal government currently requires neither whether an MP/Senator/Cabinet Minister (or their staff) will be lobbied nor the names of those individuals. Lobbyists are, however, required to report which department(s) will be lobbied.

- No jurisdictions require lobbyists to indicate whether or which civil servants will be lobbied. In the case of B.C., however, this is a relatively recent exclusion. When the B.C. legislation was put in place in October

2002 there was a provision requiring lobbyists to indicate the names of individual public officials they were "contacting or attempting to contact". Based on their initial experience, however, it was felt that this stipulation would prove too onerous for lobbyists since they had only ten days to register after initiating an "undertaking" and might need to contact many people in government. A recent amendment to the legislation was put into effect in July 2003 that removes the requirement to "name names" of civil servants, although there is still a requirement that the MLA or Cabinet Minister be specified.

- Nova Scotia officials noted to us in interviews that their approach places an onus on public servants as well as on lobbyists to ensure that those engaged in lobbying activities are registered. Through a Secretary of Cabinet directive, public servants are required to ensure that if they are being lobbied that the lobbyist has registered for those undertakings.

- Only the federal government includes a formal Lobbyist Code of Conduct as part of legislation and a legal obligation on the part of lobbyists to adhere to that Code.

Who Administers the Registration Process?

Ontario

The Lobbyist Register is administered by the Lobbyist Registration Office under the auspices of the Integrity Commissioner. The Integrity Commissioner is a Parliamentary Officer and is appointed by Order-in-Council.

British Columbia

The Lobbyist Register is administered by the Office of the Registrar, a component of the Office of the Information and Privacy Commissioner.

Nova Scotia

The Registry of Lobbyists is administered by the Nova Scotia Municipal Relations Office. The Registrar is responsible for the registration of Joint Stock Companies and of Lobbyists. There is no other governing body beyond the Registrar.

Government of Canada

The Lobbyists Registration Branch is located within Industry Canada, a line ministry/department of the Government of Canada, but functions under the authority of the federal Ethics Commissioner.

Role of the Registrar

The role of the Ontario Registrar appears to be fairly consistent across Canadian jurisdictions, including the following activities:

- Administering the lobbyist registration process.
- Clarifying information on a registration form or other submitted documents.
- Identifying omissions and inconsistencies and communicating with the lobbyist to ensure correction, or to request supplementary information.
- Providing advice and information about the registration system to lobbyists, public office holders, the public and other groups, e.g. the media.

- Submitting annual reports to the Legislative Assembly.
- Ensuring public accessibility to the information contained in the lobbyists registry.
- Removing a registration from the registry when the consultant lobbyist has failed to confirm that the return is still valid.
- Removing a registration from the registry when the consultant lobbyist or in-house commercial lobbyist has terminated the registered activities and not removed the registration from the registry.

Code of Conduct

As noted earlier, only the federal government includes a formal Lobbyist Code of Conduct as part of its lobbyist registration legislation, including a legal obligation on the part of lobbyists to adhere to that Code.

According to the Office of the Ethics Counsellor, the purpose of the Code of Conduct is to establish "*mandatory standards of conduct for all lobbyists communicating with federal public office holders and forms a counterpart to the obligations that federal officials must honour in their codes of conduct when they interact with the public and with lobbyists*."

The full text of the Code of Conduct is provided in *Appendix V*. It includes sections dealing with

- Principles (integrity, honesty, openness, professionalism)
- Rules (transparency, confidentiality, conflict of interest)

Ontario, B.C., and Nova Scotia have chosen to not put similar Codes in place. The reasons for this vary from province to province, but some consistent themes emerged from our interviews including views that:

- Establishing a lobby registry was sufficient to promote transparency in government.
- Adding a Code of Conduct at the same time as putting a lobby registry in place might make it appear that the lobby industry needed to be "cleaned up" and that lobbying was not a legitimate activity.
- Most lobbyists are members of professional associations that already have codes of conduct in place. As such, a separate code enshrined in legislation would not be necessary.

Web-Based Access

All four jurisdictions allow for on-line registration and maintain a web-based, publicly accessible database of current and former registrations. There are only relatively minor differences in terms of the accessibility/completeness of the information that is available, i.e. how easy it is for citizens to find out who is lobbying which departments and on what issues) and carry out relevant searches of the database.

All four jurisdictions allow for on-line information requests and searches according to the following criteria:

- Type of lobbyist.
- Name and organization/firm of lobbyist.
- Date of registration.

The following are variations on the above:

- B.C., Nova Scotia, and federal government, but not Ontario, also allow for searches by government department.
- B.C. is the only jurisdiction that allows for searches by MLA/Cabinet Minister.
- B.C. and Ontario gathers more information from lobbyists than is publicly accessible through the website. B.C. collects, but does not make electronically available, whether the organization that a lobbyist is working for also receives government funding. Ontario collects, but does not make electronically available whether a lobbyist intends to contact MPPs and/or their staff.
- The federal government is the only jurisdiction that allows for searches by City.
- Nova Scotia is the only jurisdiction that does not allow for searching according to the name of the senior executive of a lobbying organization.

In general, we would suggest that current accessibility appears to be based on a somewhat limited notion of transparency in the public decision making process – that citizens have a right to the details of each individual registration, but is limited in terms of more aggregate or trend-line information related to public decisions to be influenced.

One example of this kind of more aggregate information would be a citizen who is interested in the issue of privatization in any one of the four Canadian jurisdictions and specifically any companies that might have lobbied to purchase one or more government facilities. Simply put, it would be very difficult in the Canadian context, for a citizen to make that determination.

In some cases, there are technological limitations to what is made available on websites. In B.C. for example, registry officials we interviewed indicated that the

software developed for the registry has underperformed and not met the intended requirements. The expectation was that thorough searches could be made based on the information gathered from the lobbyist. The reality has been that some of the information has been captured, but not all.

On-line searches in these jurisdictions require that the individual making the search already have fairly specific information about a particular lobbyist or organization. It also requires that the individual making the search use the same terminology used by the Lobbyist to describe the government initiative. For example, a search for “long term care” would not also find results related to “seniors health” or “community access centres”. Searches cannot be conducted by issue (for example, a list of consultants who are lobbying the Ontario government on Hydro One privatization) or by client (which companies are lobbying the B.C. government for timber licences). And, as noted above, only B.C. allows for searches by MLA/Cabinet Minister.

To acquire the kind of broader information envisioned in our example above, an individual would have to review the details of each individual registration and perform their own tabulation of results.

Having said this, our observation is that the “lobbying subject matter” requirements in each Canadian jurisdiction are quite broad and generic, e.g. ”electricity restructuring policy” or “forest policy” as opposed to “interest in purchasing generating facility x” or “interest in timber licences located in this part of the province”.

As such, the information on each individual registration would be too broad to actually allow citizens to identify what the subject matter or interest/lobbying position is at a more specific level (as per the Hydro One and timber licence examples in the preceding paragraph).

Public Education/Training

Public education and training is not generally a component of lobbyist registration programs in Canada. All four Canadian jurisdictions issued media releases initially to the lobbying community to explain the intent and purpose of the registries and the obligations of the lobbyist. They also make explanatory information, typically in the form of a "handbook" available in downloadable format via the Internet that outlines the components of the program, and includes definitions, reporting requirements, and frequently asked questions.

Registry officials also note that they are available to field questions from the lobbying community. The most frequently asked questions relate to whether an individual is engaged in a lobbying activity as per the statutory definitions.

In our interviews, officials from Canadian lobbyist registries indicated that since the inception of the registries, there has not been demand for further education/training and therefore they do not feel the need to run the kinds of ongoing workshops or seminars that are offered by their counterparts in the U.S. In addition, the Canadian systems are generally seen as significantly less complex than the U.S. systems, specifically with reference to financial disclosure and therefore there is a sense that in-depth training is not required.

Advisory Opinions/Interpretive Bulletins

Advisory opinions and interpretive bulletins are formal communications from Lobbyist Registries to lobbyists and the public – typically in the form of a document posted on the registry website – that provides an official interpretation, most often based on a "real-life" question.

Since its inception in 1999, the Ontario Registry has not posted written advisory opinions or interpretive bulletins. The same is true B.C. and Nova Scotia, although this may be attributable to the relative newness of the program in those provinces. Nova Scotia's requirements make formal mention of the Registry's responsibility to issue bulletins about the enforcement, interpretation or application of the Act or its regulations. Registry officials anticipate that this will be included in their first annual report.

Since 1994, the federal government has posted four interpretive/advisory bulletins, dealing with:

- Definition of "significant part of the duties".
- Definition of "funding by government".
- Definition of "arrangement of meetings".
- Application of the Act to outside chairs and members of Boards of Directors.

All jurisdictions provide interpretations and guidance over the phone upon request.

Enforcement

Canadian Lobbyists Registrars generally do not have investigative powers through legislation. Therefore, there is no legal basis for a Registrar to ensure compliance, but rather the onus is placed on the lobbyist to register. The Registrar can request clarification or ask for more information, but cannot undertake a full inquiry.

The general practice, as reported to us by registry officials, is that any "exploratory action" would typically be in response to complaints received.

At the federal level, while the Lobbyist Registrar does not have investigatory powers, the Ethics Counsellor, who has the statutory responsibility for the enforcement of the Lobbyists' Code of Conduct, has the full powers of an Inquiry Judge. This means that where the Ethics Counsellor believes on reasonable grounds that a person has breached the Code, an investigation will be carried out. Once the investigation is complete, the Ethics Counsellor presents a report to Parliament and, if appropriate, may call upon the RCMP to initiate a separate investigation (When Bill-C15 is promulgated, this referral to the RCMP will become a mandatory requirement).

All jurisdictions have clear penalties for non-compliance for non-compliance including fines of up to $25,000.

The Ontario, B.C., and Nova Scotia legislation is specific about the nature of potential offences, including the following:

- Conducting lobbying activities as defined in the Act and you do not file a return within the time frames set out in the Act.
- Not providing the required information in a return as stated in the legislation.
- Failing to provide the Lobbyists Registrar, as set out in the Act, with changes to a return, new information or clarification of information requested by the Lobbyists Registrar.
- Making false or misleading statements.

Other variations include:

- The federal government, Ontario and Nova Scotia also specify that it is an offence to knowingly place a public office holder in a position of real or potential conflict of interest.

- The federal lobbyist register posts its own complaints proceedings reports (three to date) on specific complaints against individual lobbyists/organization alleged to be in violation of the Act.

Since its inception, the Ontario Registry has received only four complaints: three from other lobbyists and one from a member of the public. In each case, Registry officials contacted the subject of the allegation and without disclosing the specific nature of the complaint, reminded them of the obligations under the Act. The result was three new registrations, and in the case of the fourth complaint, the individual withdrew from the activity that prompted the complaint.

Given the newness of the programs in B.C. and Nova Scotia (legislation promulgated in the fall of 2002 in both provinces), provincial officials believe it is still early to assess the need for enforcement. In B.C., for example, no complaints (and therefore, no follow-up action) have been received to date. Officials in both provinces suggested to us, however, that their ability to enforce is relatively limited without some form of specific statutory power and additional allocation of staff.

Annual Reporting

Annual reporting is undertaken by the Government of Canada and Ontario. B.C. and Nova Scotia intend to produce annual reports once their programs are fully operational and all of the necessary regulations are in place.

Government of Canada

Since 1994, Industry Canada has produced separate annual reports for the Lobbyist Registration program. In addition to the typical annual report

information about mandate, budget, organization, etc. the report includes statistical summaries of:

- Total number of active lobbyists by type.
- Number of new registration/terminations that year by type of lobbyist.
- Number of information request, compliance, and technology assistance calls received.
- Number of registrations by broad subject matter, e.g. environment, health, international trade, etc.
- Number of registrations by department of interest.

Ontario

The Ontario Lobbyist Registry has produced annual reports since 1999. In addition to typical annual report information about mandate, organization, etc. the reports provide statistical summary information, similar to what is provided in the federal annual report. In addition to the types of statistics provided in the federal report, Ontario also provides the:

- Number of active consultant lobbying firms (as opposed to individual lobbyists).
- Number of active organizations (commercial and non-profit) that employ lobbyists.

What has to be disclosed?

On the following pages are three tables that indicate the disclosure requirements for the three types of lobbyists generally defined in Canada (Consultant lobbyists, In-house corporate, In-house organization).

Across all four jurisdictions, registration must take place within 10 days of beginning a new lobbying undertaking and registration must be terminated within 30 days of the end of a registered lobbying undertaking.

For Consultant Lobbyists

Of the three types of lobbyists, consultant lobbyists have the largest number of reporting requirements, many of which are related to the identity of the client.

To be disclosed	***Ont.***	***B.C.***	***N.S.***	***Can.***
Lobbyist's name, title, address	Yes	Yes	Yes	Yes
Lobby firm and address	Yes	Yes	Yes	Yes
Client name and business address	Yes	Yes	Yes	Yes
Name of the principle representative of the client	Yes	No	No	Yes
Name and address of anyone who controls the client's activities	Yes	Yes	Yes	Yes
Name and address of the client's parent corporation and subsidiaries that would benefit from the lobbying	Yes	Yes	No	Yes
If a coalition, the names and addresses of members	Yes	Yes	Yes	Yes
Date when lobbying commenced	No	Yes	No	No
Subject matter including the specific legislation, bill, resolution, regulation	Yes	Yes	Yes	Yes
Name of each department lobbied	Yes	Yes	Yes	Yes
Source /amount of any government funding received by the client	Yes	Yes	Yes	Yes
Whether lobbyist compensation is in the form of a contingency or success payment	Yes	No	Yes	Yes
Communications techniques used, including grass roots lobbying	Yes	No	Yes	Yes
Whether an MP/MPP/MLA/Senator (including staff) is to be lobbied.	Yes	Yes	Yes	No
Whether a Cabinet Minister (including staff) is to be lobbied	No	Yes	No	No
Name of MPP/MLA or Cabinet Minister (including staff) to be lobbied	No	Yes	No	No

For In-House (Organization) Lobbyists

To be disclosed	*Ont.*	*B.C.*	*N.S.*	*Can.*
Name and position title of the senior officer	Yes	Yes	Yes	Yes
Name and business address of the organization	Yes	Yes	Yes	Yes
Names of employees who lobby including, as applicable, the senior officer	Yes	Yes	Yes	Yes
General description of the organization's business or activities	Yes	No	Yes	Yes
General description of the organization's membership	Yes	Yes	Yes	Yes
Subject matters including the specific legislative proposals, bills or resolutions, regulations	Yes	Yes	Yes	Yes
Policies, programs, grants or contributions or other financial benefits sought	Yes	Yes	Yes	Yes
Name of each department or other governmental institution lobbied	No	Yes	Yes	Yes
Source and amount of any government funding received by the organization	Yes	Yes	Yes	Yes
Communication techniques used, including grassroots lobbying.	Yes	Yes	Yes	Yes
Whether an MPP/MLA (including staff) is to be lobbied.	Yes	Yes	No	No
Whether a Cabinet Minister (including staff) is to be lobbied	No	Yes	No	No
Name of MPP/MLA or Cabinet Minister (including staff) to be lobbied	No	Yes	No	No

For In-House (Corporate) Lobbyists

To be disclosed	***Ont.***	***B.C.***	***N.S.***	***Can.***
The in-house lobbyist's name and business address	Yes	Yes	Yes	Yes
Employer's name and business address	Yes	Yes	Yes	Yes
If the client is a corporation, the name and business address of each subsidiary of the corporation that has a direct interest in the outcome of the in-house	Yes	Yes	Yes	Yes
A summary description of the employer's business or activities;	Yes	No	Yes	Yes
The financial year of the employer, if applicable;	Yes	Yes	Yes	No
The source and amount of any government funding received by the employer	Yes	Yes	Yes	Yes
The name of any non-government entity or organization which, in the fiscal year prior to the date of filing a registration, provided $750 or more to the employer in support of the lobbying activity	Yes	No	Yes	No
The subject matter of the lobbying: proposal, bill, resolution, regulation, etc.,	Yes	Yes	Yes	Yes
The name of any ministry, agency, board or commission that will be lobbied	Yes	No	Yes	Yes
Communication techniques used including grass-roots lobbying	Yes	Yes	Yes	Yes
Whether an MPP/MLA (including staff) is to be lobbied.	Yes	Yes	No	No
Whether a Cabinet Minister (including staff) is to be lobbied	No	Yes	No	No
Name of MPP/MLA or Cabinet Minister (including staff) to be lobbied	No	Yes	No	No

Part 5
Analytical Framework

As evidenced throughout this report, there are obvious and significant differences between Canada and U.S. jurisdictions with respect to:

- Prevalence of/extent to which lobbying takes place as part of the regular course of government decision making.
- Scope and extensiveness of reporting requirements, including the major emphasis in the U.S. on financial disclosure.

As is often the case, it is easy to come up with a quick *cultural stereotype* conclusion about why these differences exist. For example, is it something about the nature of Canadians and our culture versus that of Americans that leads to the different approaches, e.g. Canadians are more ethical, less likely to attempt to bribe public officials, more respectful of government process, etc.

Our research leads to the conclusion that it is, in fact, differences in how each country structures its government and related decision-making processes have much to do with the prevalence of lobbying in each jurisdiction and the extensiveness of lobbyist regulation.

The following section includes what admittedly are very high-level descriptions of what we believe to be key differences in government structure and process between the two countries that are relevant to a discussion of lobbyist registration. Following this section, and based on these descriptions, we suggest that consideration of these key structural differences may provide some insight into whether and to what extent the various aspects of different approaches to lobbyist registration might be applicable in the Canadian municipal context.

It is important to note that we are not suggesting at this stage that this represents a formula for lobbyist registration in the City of Toronto. As discussed earlier in this report, lobbyist registration is only one – and as we discuss in Volume 2, not necessarily the most effective – of a more fulsome set of ethics related policies that have been implemented by Canadian and U.S. jurisdictions. Rather, we are suggesting that these factors should be considered in any discussion of potential changes to lobbyist registration in Toronto (see Volume 3).

Key Structural Differences

Relationship between Legislative and Executive Branches

Canada

In the Canadian parliamentary tradition, the executive and legislative branches are integrated with the Executive (Premier and Cabinet) sitting in the legislature. The Executive requires a majority in the legislature in order to govern. Appointments, perks, and other special powers of the members of the legislature from the governing party are determined by the Executive. This provides the Executive with considerable power over the actions of legislators from the governing party.

With a Cabinet-style Executive, it also means that practically speaking, decision-making on most government issues – whether policy decisions, legislative proposals, regulations, etc – focuses on relatively few individuals. For example: at the political level, this might (but not always, depending on the issue) include variations of the following, the Premier and one or more of his key advisors, one or a handful of key ministers, full Cabinet on occasion, and, perhaps, their senior

advisors and a relatively small number of senior bureaucrats (one or at most a handful of Deputy Ministers, Assistant Deputy Ministers, and Directors).

United States

In the U.S. system of government, the Legislative and Executive branches (including government departments as part of the Executive Branch) are completely separate, which forms the basis for the American system of checks and balances. The Executive Branch does not require a majority in the legislative branch in order to govern, but is limited in scope to legislation passed by the Legislative Branch. Appointments, perks, and special powers of the members of the legislature are not determined by the Executive. As a result, the formal power of the Executive over the actions of individual legislators is much diminished compared to Canada.

Party System

Canada

The Canadian parliamentary model is a “strong party” system. Individual legislators are not generally free to vote according to their own dictates, but are required for the most part to vote along party lines as determined by the Executive (Prime Minister/Premier and Cabinet). The Canadian Parliamentary system has well developed structures, processes, and conventions in place (e.g. Party Whips) to reinforce this approach.

United States

Although it has only two political parties, the U.S. system has been described as a "weak" party system compared to the Canadian parliamentary model. In the absence of the requirement that the Executive have a majority in the legislature in order to govern, the notion of "party discipline" is not as rigidly enforced and as a result individual legislators are much freer to vote for their local interests or individual conscience, within broad political party parametres. As academics and observers have pointed out, this positions each individual legislator to be an independent actor to a much greater extent than in the Canadian Parliamentary approach.

Importance of Legislation and Individual Legislators

Canada

In the Canadian parliamentary system, legislation continues to provide the basis for government's legal powers. However, with the integration of the Legislative and Executive branches, legislation does not play the same central role that it does in the U.S. Legislation in the Canadian tradition is generally less prescriptive than in the U.S. model and allows the Executive to govern effectively through greater emphasis on vehicles such as policy decisions, regulations, and Orders-in-Council as authorized by legislation.

An example of this is in budget setting. The Executive develops and introduces the budget, relying on its majority in the legislature to ensure its passage. The budget includes line-by-line allocations, but again, these are usually proposed by the Executive and accepted (at least in majority Parliaments) without significant revision by the Legislature. In practice, it is primarily the Opposition parties

(usually a minority in Canadian legislatures) that view themselves as a check on the Executive.

United States

In the U.S. system, as evidenced by volume, there is a much greater emphasis on legislation as the basis of public decision-making. In part, this is a reflection of the much more focused role of Legislatures as a check and balance to Executive power. This is particularly true when the dominant party in the legislature is different than that of the Executive. With respect to budget development, for example, the Legislative Branch, including individual legislators and Committees, often play extremely active and influential roles. The budget process can be long, protracted and extremely public, with detailed negotiations taking place between and among individual legislators, between the House and Senate, as well between legislators and the Executive.

Campaign Financing

Canada

In terms of limits on political *donations* from individuals and corporations (as opposed to third party/"soft money"), approaches in Canada and the U.S. are not that far apart. (*See Appendix IV for a more detailed description of the different approaches to campaign financing*.)

However, the significant differentiators are:

- The capacity to raise "third party" or "soft" money in the U.S.
- The different approach to limiting political *expenses*, i.e. the maximum a politician is legally allowed to spend to be elected.

The latter point is particularly important. In Canada, these limits are prescribed by law and relative to the U.S. are set at very low levels. The simple reality is that, relative to the U.S., it is not as expensive to run as a candidate in Canadian elections and as a result:

- Candidates in Canadian elections are much less dependent on external organizations to create large "war chests".
- There is much less scope/opportunity for lobbyists and lobby organizations to use political contributions as a means to influence decision-making.

United States

In the U.S., particularly at the federal level, there are few limits in place and those that are in place are at significantly higher levels than in Canada. This means that fundraising in the U.S. context – and therefore the opportunity for lobbyists and lobbyist organizations to use fundraising as part of their efforts to influence decision-making – is a much more important part of the political process and there are countless studies demonstrating the high cost of becoming a candidate.

Size and Scope of Bureaucracy

Canada

The Canadian Parliamentary model is supported by the existence of what, relative to the U.S. on a per capita basis, is a large, professional bureaucracy. This bureaucracy is in place to support the Executive Branch in the formulation of public policy and the development of legislation, as well as the delivery of government services. The presence of this larger bureaucracy ensures that the Prime Minister/Premier and Cabinet – and through them, indirectly the individual legislators from the governing party – have access to wide ranging and

comprehensive public policy analysis that, in the ideal, would look at all sides of an issue, including an understanding of the full range of competing views.

This analysis is intended to be objective in nature (the notion of “best advice”) consistent with the principle that the public service is largely independent of political influence. For example, senior public servants, although appointed by the Prime Minister/Premier, are typically, (although always with exceptions) drawn from within the professional bureaucracy.

United States

In the U.S., the Executive and Legislative Branches are in a very different situation. While the Legislative Branch has historically had much higher profile role in the development of legislation in the U.S. compared to Canada, this Branch typically has a very small staff complement, including either personal staff of individual legislators or more formal research departments. As a result, U.S. legislators have always been much more reliant on information, analysis, and advice from sources outside government. This is so much the case that lobbying is viewed, again as noted earlier, as an essential part of the public policy development process.

In the U.S. model, government departments are accountable to the Executive Branch and generally do not provide ongoing policy development, research, analysis, etc. support to the Legislature. In addition, while federal departments by necessity can be quite large, state bureaucracies are often much smaller.

A 1999 Executive Resource Group study of the policy function in North American and Commonwealth countries, confirmed that individual states often have what would be considered in the Canadian model to be very minimalist government departments. These departments often view their role as facilitating, brokering, and negotiating public policy debates among external, third party interests (e.g.

lobbyist organizations) as opposed to the more developed capacity we have in Canada to define public policy issues, provide more comprehensive, neutral analysis, and to manage public policy consultation.

An Emerging Pattern

The above discussion of key structural differences begins to suggest the two following patterns:

Lobbying will be more pervasive and extensive in jurisdictions that have:

- A more diffuse (e.g. “checks and balances”) decision-making process (in “real” as opposed to “theoretical” terms”) that involves larger numbers of elected officials in a more public setting.
- Separation of the Legislative and Executive Branches of government and, in particular, the absence of a strong Executive presence or dominant Executive leadership in the Legislative Branch, supported by a clear majority of legislators.
- A weak party system that does not include strong party discipline and rigidly enforced voting blocks.
- Independent (as opposed to party-aligned) legislators with real or perceived equal status and a strong individual role in the legislative process.
- High financial cost to run for public office, in conjunction with few or no limits on campaign related expenses.
- Limited staff/bureaucracies without a well-developed capacity to provide objective research, analysis and advice, managed public consultation, etc.

Lobbyist registries in these kinds of jurisdictions will likely have a strong focus on financial disclosure.

Lobbying will be less pervasive in jurisdictions that have:

- A decision making process that is less diffuse and less public and that involves fewer numbers of more senior elected officials.
- Strong Executive Branch leadership/dominance in the Legislature (as in the Canadian parliamentary/Cabinet model).
- A strong party system that includes more rigid party discipline and enforced voting blocks as per the wishes of the Executive (e.g. Premier and Cabinet).
- A diminished role for individual legislators with a more limited individual capacity to influence the legislative process.
- Low financial cost to run for public office and significant limitations on campaign expenses.
- The presence of an extensive and trusted professional bureaucracy that can provide substantive, objective research, analysis and advice, as well as effectively manage public consultation across the full range of government issues and stakeholders.

Lobbyist registries in these kinds of jurisdictions will likely:

- Not have a strong focus on financial disclosure.
- Be in a position to rely more heavily on the bureaucracy to manage public consultation in a professional and open/transparency manner.

What might this mean for Ontario Municipalities?

Based on our separate research work on municipal governance, we have considered the structure of municipalities in light of the two patterns described above. At this stage (and potential subject to further refinement), we would suggest that Ontario municipalities fall somewhere in between the U.S. and Canadian parliamentary tradition.

By extension, this potentially means that neither approach would be wholly appropriate to an Ontario municipal setting (assuming that a lobbyist registry would be a useful and effective tool at the municipal level). Also, as noted elsewhere, is remains essential to view lobbyist registration programs as part of a larger package of ethics policies and practices.

At a very high level, we would describe the typical Ontario municipality as having a mix of structural characteristics – some of which would tend to encourage more lobbying along the lines of the U.S. model, and some of which that would mitigate against lobbying. The following illustrates this point:

- Structural characteristics that would tend to encourage more lobbying:
    - A more diffuse decision-making process (in both real and theoretical terms) that involves involving larger numbers of elected officials in a very public setting.
    - No elected Executive Branch of municipal government with statutory powers to lead/dominate decision making at the Council level.
    - An emphasis on substantial or at least equal powers, roles and responsibilities, and profiles for individual elected officials.

- The absence of a party-based system with party discipline and rigidly enforced voting blocks, in favour of a system, by design, of an ongoing series of what, according to observers, are usually political unaligned and constantly shifting coalitions.

- Structural characteristics of Ontario municipalities that would tend to mitigate against lobbying:

  - Low financial cost to run for public office and significant limitations on campaign expenses, thereby reducing the need for candidates to be dependent on large amounts of third-party/lobbyist-related campaign financing.

  - The presence of an extensive and trusted professional bureaucracy that can provide substantive, objective research, analysis and advice, as well as effectively manage public consultation across the full range of government issues and stakeholders.

While we are hesitant at this stage to offer firm conclusions with respect to anything that might resemble a “template” for Ontario municipalities, the above analysis suggests that:

- Municipalities in Ontario might legitimately be expected to be the subject of more of what we would call “legal lobbying” than would a provincial or federal legislature.
- The size and capacity of the bureaucracy, as well as the relatively low cost of running for municipal office are important mitigating factors.
- With respect to the bureaucracy, its capacity to mitigate the need for lobbying appears to be directly dependent on the extent to which it is trusted by Council and that Council is comfortable delegating

responsibility for public consultation and for the analysis, synthesis, and integration of competing positions from external organizations.

- It is apparent from our research on municipal governance that this form of delegation from Council to the staff often does not take place in Ontario to the extent that would be required for the bureaucracy to function as a check on lobbing. This appears to happen most often because of either:
    - A lack of trust in the bureaucracy based on real or perceived demonstrated performance.
    - The historical tradition or culture of the municipality has always been that politicians as opposed to bureaucrats will directly manage public consultations.

Appendix I

Lobbying in the Europe Union

This section of Volume 1 provides an overview of lobbying in the European Union.

As noted elsewhere, lobbying is widely viewed as an American phenomenon that has spread to other countries in the past 20 years as part of the increasing globalization of the economy and the spread into other countries of U.S. based economic interests.

This is consistent with the European experience.

Lobbyist registration in the EC is extremely limited in scope compared to the U.S. states and federal government and those Canadian jurisdictions that have registration systems in place. At present, only the European Parliament, among all of the EU institutions, has this very limited system in place. As such, the European system has not been the subject of much of our attention in this review.

The Rise of Lobbying in the European Community

The rise of lobbying (described in some places as a lobbying “boom”) in the European Community (EC) corresponds with at least two developments. We should point out that these developments are related but not in a direct cause and effect manner:

- Changes in European legislation in the mid-80’s as result of the creation of a single market and new responsibilities for the EU, including regulatory responsibilities, corresponding with general recognition of the increasing

importance of the European Community (EC) as a source of legislation and of funding. As a result, interest groups began to take a much greater interest in the role of EC public policy development and decision-making.

- At the same time, American lobbying/government relations firms began to establish operations in Brussels and various European capitals as part of a concerted effort to expand their businesses into the European markets.

This American incursion and, in particular, the style of American lobbying was not well received by the Europeans as reported in the literature and in first hand accounts by practitioners. The response was a modification of the approach/style of these firms to fit in much more with the structure and culture of the European policy development process. American firms entering into Europe were followed in the early 1990's by a number of Canadian examples.

A Different Political and Bureaucratic Culture

Writers point to a different culture in Europe with respect to lobbying, where the term has traditionally viewed much more pejoratively as implying inappropriate behaviour or as one writer put it, a "particularly American vice". In context of the European Union, the term lobbyist is reported as not generally being used, but rather reference is made to "special interests".

Academics have noted that lobbying in the European Union context does not have concept of individual rights to petition government as part of its origins. Rather, it arose out of the establishment and continuing evolution of an extensive system of public discussion/consultation mechanisms that have been put in place to engage these interests in what, relative to the American experience, is a more structured and managed approach to public policy development.

Current State of Lobbying

Not surprising, the literature generally points to a significantly lower incidence of lobbying activities in Brussels compared to Washington. At the same time, in absence of the kind of registry systems that are in place in U.S. and some Canadian jurisdictions, it is difficult to quantify the extent. A 1998 study commissioned by the City of Brussels is reported to have identified 6,635 people potentially engaged in activities that would meet a typical U.S. or Canadian definition of lobbying, including interest groups, consulting firms, law firms, diplomatic missions, etc. Other studies have estimated a range of 3,000 to 10,000 individuals.

There is some evidence to suggest that the extent of lobbying in the EU is cyclical, depending on the issues of the day. Observers report that lobbying activity in the EU boomed in the early 1990's when the much of the current European economic integration was negotiated and U.S. firms were concerned about an economic "fortress Europe" emerging. Others have suggested that the general presence in Brussels of U.S. lobbyists, whether in-house staff of U.S. based multinationals, or U.S. based consultant lobbyists has diminished somewhat. Having said that, a 1998 study found that 25% of all corporate Public Affairs offices (which would typically include government relations/lobbying-type activities) are American and that largest numbers of lobbyist consultant firms was shared by the U.S. and the U.K.

Other observers have noted that by the end of the 1990's, there was a "sharp increase" in the political activities of multinationals in Europe and that with the maturation of the EU over time, there has been increasing evidence of "privileged access" for individual and association lobbyists.

Registration

Since 1996, the European Parliament has required individuals wanting regular entry to government buildings "with a view to supplying information to Members within the framework of their parliamentary mandate in their own interests or those of third parties" to obtain passes. The passes are valid for one year.

As of May 1999, 2,300 persons had registered/received passes. Of these, 300 were staff persons of Members of the European Parliament. (Apparently, each MEP is allowed to have up to two official assistants and is required to register every additional person that works for them).

There are no requirements for lobbyists to file reports of any type and as such, it is impossible to gauge the extent of activity, amounts of money expended, departments contacted, etc. Since 1997, Members of the European Parliament (MEP) have been required to report on their extracurricular employment and financial support received from external sources, including corporations. The registration information exists only in paper format (in multiple binders), can only be reviewed in person at a single location in Brussels, is not electronically searchable, and cannot be photocopied. One researcher reported that the MEP disclosures are very often incomplete or blank.

Similar registration provisions have not been put in place for the other major EU institutions – the European Commission or the Council of Ministers.

A Reflection of Different Values

Again, however, the literature stresses that in the EC public policy development process, there is much greater emphasis on the more structured and managed

consultation processes as the formally recognized main channel of efforts to influence decision-making, with the bureaucracy as the initial point of contact.

The operating principles in this system are viewed as focusing on the development of consensus, multi-lateral approaches, etc., as opposed to majority-rule. This compares to the US model where one-off approaches to individual legislators as the first point of contact that are recognized as appropriate and where there is more systematic emphasis on being adversarial (competing interests, competition between the legislature and the executive, state-federal conflict).

One academic study reported the comments of an American manufacturing executive on this essential difference of individual vs. managed/group process:

> *"There is no accepted right of a company to be active [as an individual lobbying entity]…It's much more important to have influence in business groups because that's who they listen to."*

This is not to say that outside interests are not important to the EC. The literature notes more like the U.S. than Canada, the European Commission, as an example, has a relatively small bureaucracy (16,000 persons – likened by one writer as comparable to the bureaucracy of a large European city) and that as a result, organizations such as the European Parliament have a very significant reliance on information provided by outside organizations.

As reported by academics, these types of public consultation mechanisms are not only part of the traditional public policy process in Europe, they also serve as a vehicle to manage the proliferation of lobbyists, focus their activities, in general decrease the cost of interacting with the proliferation of groups. Some academics have suggested that the EU bureaucracy manages the structure of these various mechanisms to ensure a balance of interests and at times to blunt

particularly strong interests. U.S. observers note that Americans often interpret that this as a lack of flexibility in the policy development process results in lengthy decision-making processes.

Another important difference between the EU and the US is the distance between the EU and the local issues and individual citizens of each European country. This means that the traditional U.S. lobbyist focus on grass roots lobbying and on the lobbyist role in campaign financing are generally not applicable. As reported by a number of writers, this was part of the early learning curve of U.S. lobbying firms upon first arrival in Brussels – in effect, absorbing the reality that a lobbyist's emphasis at the EU is more effectively placed on information provision and effective participation in the more formal and bureaucratically managed public policy development system.

Potential for Future Changes

According to the Corporate Europe Observatory, a Dutch-based advocacy group that monitors the influence of corporations on European public policy making, there are no plans underway to make system in place for the European Parliament more rigorous or apply to the other EU institutions. The response of Parliamentary officials has been the concern that more regulatory requirements would discourage interaction with external organizations and that the Parliament's preference would be for some form of self-regulation.

Appendix II

Changes to the *Lobbyists Registration Act* (Bill C-15)

History

Parliament originally enacted the *Lobbyists Registration Act* ("the Act") in 1989. Extensive revisions were made and an amended Act came into force in 1996. The revised legislation called for a Parliamentary review of the Act after four years. Subject to this requirement, the House of Commons Standing Committee on Industry, Science and Technology conducted a comprehensive review between March and May 2001

As a result of the Standing Committees recommendations and debates in the House, further amendments were made to the Act in the form of Bill C-15. The Bill received Royal Assent in June 2003, but will not be promulgated until corresponding regulation changes have been completed. Federal officials were not in a position to disclose publicly the anticipated timeframe for completion.

The key amendments have been summarized below:

Broadening the Definition of Lobbying

Legal considerations in the mid 1990s resulted in a change in the new legislation to alter the definition of lobbying from "attempts to influence" public office holders with respect to legislation, regulations, policy changes, grants, contracts, etc. to a much broader "undertake to communicate" with public office holders for these same purposes.

According to interviews, the legal considerations involved an individual engaged in lobbying activities who had chosen not to register and was subsequently investigated by the Ethics Counsellor. When the Crown attempted to prosecute on the basis of the current (pre-Bill C15) definition of lobbying, the Crown could not find a legislative basis to prosecute because the language “attempt to influence “ was considered to be too vague. Interestingly, the argument has been put forward by lobbyist watchdogs in the past that if “attempt to influence” was interpreted in the same way that the Criminal Code deals with “influence pedaling”, all lobbyists on the registry would be engaging in illegal activity.

The Senate included one exception to the new provision with respect to “undertake to communicate” – situations where a lobbyist is simply calling for general information. In these cases, the lobbyist does not have to register the contact. However, the Senate indicated that this exemption should be monitored closely.

Our research for Volume 2 on lobbyist registration indicates that this direction of the federal government – that of broadening the definition of what constitutes lobbying – runs counter to the definitions in other jurisdictions, as well as concerns expressed by a number of academics/experts and other observers.

These concerns generally relate to what is already felt to be too broad a definition of lobbying (e.g. capturing too many of what are often legitimate organizations attempting to engage government on their issues of concern, including many corporate and non-profit organization’s employee “lobbyists”). Concerns have also been expressed that the kind of “bad behaviour” that governments should be concerned about does not generally take place within the confines of registered lobby activity, i.e. registries focus their activities on “legal lobbying”. Registry violations are less about catching archetypal bribery or arm-twisting, and more about failure to adhere to reporting content and timeframe requirements.

In response to our questions, federal lobbyist registry officials indicated that they anticipated a significant increase in the number of registrations that will be required with the new definition. However, they would not provide a more quantified estimate of the expected increase. They also indicated that they were currently upgrading their information technology to handle the increase in volume.

Harmonization of Registration Process for In-House Lobbyists (Corporate) and In-House Lobbyists (Organizations)

At present, the registration process for officers and employees of businesses is different from that for officers and employees of non-profit organizations.

Employees of corporations who spend 20 percent or more of their time lobbying for their employer are required to register. Conversely, the senior officer of a non-profit organization must register when one or more employees lobby as part of their jobs and the total amount of time spent lobbying by all employees is equivalent to 20 percent of the time of one employee (a form of full time equivalent calculation).

The Standing Committee felt that this created an unfair playing field that potentially benefited “for profit” businesses as compared to “not for profit” organizations. For example: if a “not for profit” had five employees spending 4 percent of their time (collectively 20 percent of an FTE) on lobbying activities, that organization would have to register. Conversely, unless an individual employee of a corporation was spending 20 percent of his/her time on lobbying they would not be required to register. This meant that many large companies could sidestep registration, through the use of more than one lobbyist employee, with total individual lobbying below 20 percent of their time.

The changes in Bill C-15 will create a level playing field with respect to what is known as “collectivization of time”. Employees – whether for-profit or non-profit – will be required to register if collectively or individually they spend more than 20 percent of time engaged in lobbying.

An additional, levelling change is the requirement that the senior officers of the company (e.g. President, Vice President, Chief Executive Officer) whose employees are engaged in lobbying must also be registered.

Recording of a Contact when initiated by a Public Official

Previously, if you received a written request from a public official, the lobbyist did not have to register as they had not initiated the contact. This created a situation where not all lobbying activities were captured by the registry.

With the changes in Bill C-15, the lobbyist has to register regardless of who initiates the contact.

Providing Information on Previous Employment with the Federal Government

As a way to ensure transparency with respect to former public servants who are now engaged in lobbying, Bill C-15 will require that lobbyists report where they have worked previously in the federal government or its agencies as part of the registration process.

Reporting Requirements

With the changes with Bill C-15, regardless of the type of lobbyist, all individuals are required to report semi annually.

Appendix III

Examples of Lobbying Activities

For the purposes of further illustration, the following are some additional examples drawn from Canadian and U.S. sources that give a sense of what lobbying looks like. The examples include:

- An additional example from another Canadian government relations firm.
- Additional examples from the Non-profit Guide to Lobbying.
- Information from the City of Los Angeles.

The Los Angeles examples illustrate two things worth noting:

- The importance of the financial threshold in determining what constitutes lobbying.
- The fact that an architect making an application to the City for a zoning change on behalf of a client would be considered to be a lobbyist (again, depending on the financial threshold).

The federal examples (from the Non-profit Guide to Lobbying) has a slightly different emphasis – differentiating activities that would be lobbying from those that would not be lobbying, but still has a very practical focus.

From Hillwatch Inc. Ottawa, Canada 2003

Legislative Lobbying: Need Help?

If your industry or group has an interest in a Parliamentary hearing, or the more ambitious goal of influencing the direction of a particular piece of legislation, then you have good reason to seek expert assistance. The

legislative process has particular characteristics that call for special skills and experience.

First, the process can be prolonged. It can take years for a departmental legislative proposal to make it through the Cabinet system and the various legislative stages of House of Commons and the Senate before finally receiving Royal Assent. After this legislative marathon, a six-month to one-year process is consumed in the detailed preparation of the departmental regulations. It takes persistence, patience, and experience to ensure your interests are put forward every step of the way.

Second, the process is arcane, subject to its own rules and culture. The way in which legislation develops and moves through the central agencies of government is not particularly transparent. The House of Commons and Senate operate on the basis of unique norms and rules that in some instances go back centuries. It is important to understand the culture and know the rules.

Third, the legislative process has a very public face. The process takes so long that any legitimate interest has the chance to organize public opposition against your position. You may have convinced government officials of the eminent good sense of your position but are you prepared for the give and take of public battle? Do you have champions in the system and strong public supporters? Do you know who will oppose your interests? Can you handle press inquiries and a vehement attack on your interests and your motives? Do you understand the Commons and Senate committees' public hearing process?

Fourth, once draft legislation or a policy issue enters the Parliamentary agenda, it becomes, by definition, a political issue. Political considerations drive a government's agenda and the interests of individual Members of Parliament. On any given issue, the political parties tend to

line up for and against. This can make your group an ill-prepared contestant in someone else's game show.

Here are some of the things you should expect a good legislative lobbyist to do for you:

- *Create a two-tracked strategy, one for the public service and one for Parliament;*
- *Help you understand the detailed nuances of the relevant bureaucratic and political processes;*
- *Identify possible supporters and opponents and, if necessary, pull together a coalition of interests;*
- *Research your arguments with a particular focus on what government and parliament has already said and done on the issue;*
- *Give objective, tough advice on the strengths and weaknesses of your position;*
- *Suggest innovative solutions with some political and policy appeal;*
- *Develop a bipartisan approach and coordinate meetings with officials, the Committee Chair, key Members of Parliament, and political staff;*
- *Arrange for your organization to appear before a House or Senate Committee;*
- *Draft letters, briefs, opening statements for Committee appearances and prepare Qs and As;*
- *Ensure your material is properly translated and distributed to the Members, Senators, the Clerk, and key Parliamentary Researchers;*

- *Attend Committee hearings to track supporters and opponent presentations and determine the biases and interests of individual committee members;*
- *Ensure you are thoroughly prepared, help you craft your oral message and run you through rehearsals before a Parliamentary Committee appearance;*
- *Coordinate the proper follow-up activities to any Committee appearance;*
- *Prepare suggested wording and technical amendments for the clause by clause stage of legislation;*
- *Help your group convey its interests in any detailed regulatory negotiation.*

Bottom-line: A good legislative lobbyist helps you hang in and hang on every step of the way to allow you to present your case in the best possible light and with the greatest possible, positive impact.

From the City of Los Angeles Lobbying Handbook

Example 1:

Flora Carbon, a lobbyist for the Coalition for Clean Air ("CCA"), is lobbying the state and the City of Los Angeles to enact legislation requiring at least two individuals in every vehicle during rush hour. During the first calendar quarter, she spends 30 percent of her time lobbying the state, and 70 percent lobbying the City. For this period, Flora is entitled to receive $10,000 from the CCA for attempting to influence the outcome of this proposal. For purposes of the City's lobbyist registration threshold, Flora determines that she earned $3,000 for lobbying the state and $7,000 for lobbying the City during the quarter. Though Flora earns this compensation during the first quarter, she

does not receive payment from the CCA until the second calendar quarter. The CCA is Flora's only client. Since Flora is entitled to receive $4,000 or more for lobbying the City during the first calendar quarter, she is required to register during the first quarter as a lobbyist with the City Ethics Commission. Flora should also contact the Fair Political Practices Commission about the state's lobbying regulations as they may apply to her regarding her lobbying of state decision-makers.

Example 2:

Stone Forest is an architect employed by Brick & Mortar Associates. As part of his job, he has appeared before the City Planning Commission to seek approval of various zoning changes for his firm's clients. In preparation for his appearances, he has performed research, written reports and communicated with department staff. His monthly salary is set at $5,000 and he does not receive bonuses or any other form of compensation. To determine if he qualifies and must register as a lobbyist, Stone must keep track of the time spent and the compensation earned for performing these lobbying activities. Stone determines that 25 percent of his time is spent performing lobbying activities to influence the outcome of the proposed zoning changes. Therefore, $1,250 of his monthly salary counts toward his lobbyist registration threshold. Earning only $3,750 during the calendar quarter for his lobbying activities, Stone does not qualify as a lobbyist since he does not meet the $4,000 compensation threshold.

From the Non-Profit Lobbying Guide

The following are practical examples of lobbying (and also examples that would not be considered to be lobbying) under the U.S. federal lobbying legislation.

Example #1

Issue

A mental health association has a position in support of legislation to provide a range of community services for homeless persons who are mentally ill. It provided information on the legislation, and the association's support for it, in the association's legislative alert to its members, as well as in its Annual Report and several other documents sent to its members. The information did not include a request that the readers of the publications contact their legislators in support of the legislation, nor did it give any legislator's name and address or provide a tear off petition to be mailed to a legislator.

Answer

The activity is not lobbying. The organization can refer to legislation, including the group's position on it, in its communication to its members, and that activity does not constitute lobbying, so long as the association does not ask its members to contact legislators in support of the measure, or give any legislator's name and address or provide a tear off petition to be mailed to a legislator.

Example 2

Issue

The same mental health group mentioned above provided information on the legislation and its position on it in a letter to members of the state legislature. The letter did not ask the legislators to support the legislation.

Answer

The activity is lobbying. By mentioning the legislation to legislators and the organization's position on it, the mental health group engaged in lobbying.

Example #3

Issue

An environmental organization focusing on safe drinking water was invited in writing by a committee of Congress to testify on legislation being considered by the Committee. The group's Board Chairperson testified and stated opposition to the legislation, maintaining that the measure would weaken the current law safeguarding drinking water.

Answer

The testimony was not lobbying because the Committee had invited the group in writing to testify. If the organization had requested to testify, or had been asked to testify by a single legislator instead of the Committee, the testimony would have been lobbying.

Example #4

Issue

An association providing disaster relief conducts exhaustive nonpartisan research on methods to respond more rapidly and effectively when disaster strikes. The research concludes that disaster relief legislation currently being considered by the state assembly should be supported. The organization distributed the research broadly to its members and

makes it available to the public. The research includes a full and fair exposition of the pertinent facts to permit the audience to form an independent opinion.

Answer

The research is not considered a lobbying expenditure even through it takes a position in support of the disaster relief legislation. The fact that the association's research included a full and fair exposition of the facts, made the material generally available, and did not include a direct call for the readers to take action, provides the basis for the research to be considered a non-lobbying expenditure.

Example #5

Issue

An education association that receives federal funds sends a letter to all members of Congress opposing legislation that would curtail the lobbying rights of nonprofits that receive federal funds.

Answer

The letter is not a lobbying expenditure because it is a "self-defense" activity. Lobbying legislators (but not the general public) on matters that may affect the organization's own existence, powers, tax exempt status, or the deduction of charitable contributions to it, do not count as direct lobbying expenditures. However, had the education association taken an ad in the newspaper calling on readers to oppose the legislation it would count as a lobbying expenditure. While self-defense lobbying activities do

not count as direct lobbying expenditures, that exception does not extend to grassroots legislative activities such as the newspaper ad.

Example #6

Issue

Volunteers with a statewide arts organization urge the organization's members from throughout the state to march on the capitol in support of arts funding. Four hundred members spend two days, at their own expense, meeting with legislators and the governor. Members planned and conducted the march, and used their own funds for promotional materials, getting the word out on the march, briefing sheets and all other activities related to the march. The arts organization spent no money on the march.

Answer

The march is not lobbying. Lobbying takes place only when there is an expenditure of a nonprofit's money on an activity that constitutes lobbying. If the arts organization had spent any funds urging its members to participate in our march, those amounts would have been considered lobbying expenditures.

Appendix IV

Canada and U.S. Election Financing Comparison

Canada

Election Expense Limits

- All candidates have a maximum election expenses limit based on the number of registered voters on the preliminary voters list of each riding.
- This does not include elections for leader of a party. These are governed privately by rules put in place by each party, although the federal government recently announced its intention to require more transparency in this area as well.

Donations

- All donations over $200 have to be reported with name and address of contributor. If a numbered company, must include name of CEO/president.
- Political parties must report on the financial activities of any trust funds established for use in an election.
- For donations up to $200, a tax credit of 75% if offered. Maximum credit of $500 per calendar year.
- Excess funds (in excess of what is spent, consistent with the limit noted above) raised must be transferred to the national Party or the local riding association. In the 2000 Canadian general election, the Liberal Party transferred a total of $2.9 million. The Alliance transferred a total of $2.9 million as well. Total federal transfers for all parties federally in the 2000 election were $7 million.

Third Party Advertising

- Third party advertising is limited to $3,000 per riding or $150,000 nationally by individuals or groups to oppose or promote a political candidate, party or leader. A minimum third party expenditure of $500 is necessary before federal filing is required.
- A total of 50 organizations and individuals registered as third party advertisers for the 2000 election.
- A sampling of 10 of those 50 organizations and individuals revealed that of the 10, the Canadian Medical Association and C.U.P.E. were highest at $62,000 and $146,000 respectively. The remaining eight samples ranged from $800 to 10,000, with the average being $5,200.

Transparency

- Statistics for individuals and parties and third party advertising are reported on-line by Elections Canada. Examples include:

    - Jean Chrétien's legal campaign expense limit in the 2000 General Election was calculated to be $61,925. His actual expenses were $60,000.

    - Paul Martin's legal expense limit in the 2000 General Election was calculated to be $67,900. His actual expenses were $51,161.

    - Judi Sgro's (Toronto MPP) legal expense limit in the 2000 General Election was calculated to be $59,500. Her actual expenses were $44,230.

- Total political contributions by BCE Inc. (as an example) to all parties were $5,000.

- The top 10 contributors to the Liberal Party of Canada in the 2000 General Election were actually local Liberal riding associations. The average contribution was about $50,000.

- The top individual contribution to the Liberal Party was $27,000

- The top private corporation donor to the Liberal Party was a company called *Coinamatic* with a donation of $25,000

- The total expenditure by all 12 federally registered political parties during the 2000 federal election was $35 million. Of this $12.5 million was spent by the Liberals, $9.6 million by the Alliance, and $9 million by the PCs.

- Total value of all political contributions from all sources to all individual candidates of all 12 registered federal parties in the 2000 election: $42 million. Total actual expenses: $37 million.

- *Importance of corporate contributions:* Corporate sponsorship of political parties in Canada may not be at the level that most Canadians would expect it to be. A recent Compass poll of Canadian CEOs revealed that half gave donations or worked for companies that did. The primary reason for giving was ideological rather than expectations of gain. Most said donations were motivated by the desire to support competent politicians, back the party process, support ethical politicians or support free enterprise. Using donations to support the corporations' business affairs or networking objectives was a less important benefit. Most CEO respondents did not perceive much corporate benefit from providing

political donations. In fact, more were likely to see it as a greater risk due to public or media backlash against unfair or improper influence.

- *Importance of contributions from Associations:* The evidence suggests that contributions from associations are not significant factors for federal political parties. For example, during the 2000 election year, the Federal Liberals collected over $20 million in contributions. Businesses provided 59% of that total, individual donors another 34%, and associations only 5.6% or about $1.1 million. However, 81% of those Association donations actually came from related provincial and constituency Liberal associations.

- In Canada, the national party organizations are partially subsidized by provincial or constituency associations who raise funds locally and then transfer monies to the national organization. This pattern holds across all the major parties. For example, in 2000, the Bloc Quebecois raised $195,000 from Associations but $166,000 of that came in a single donation from the Parti Quebecois. Party associations routinely dominate the list of top 100 donors to any the major parties whether the Liberal, Alliance, Bloc or Conservatives. The exception is the NDP, which is reported to rely more heavily on Unions.

U.S. Federal

Election Expense Limits

President

- The FEC sets limits on Presidential campaign expenses during the actual presidential campaign itself and period immediately preceding the campaign, once each of the two national parties has selected their official nominee. In 1996, the limit per candidate was set at $100 million. Additionally, each party was allowed to spend a further $12 million on their candidate of choice.
- These limits are calculated based on the voting age population of the various states.
- Of the $100 million per candidate, $62 million was provided directly by the U.S. Treasury to be used by each candidate during the official election campaign. During that time, Presidential candidates are not allowed to use outside/other sources of campaign funds.
- There are no upper limits on Presidential campaign expenses of the two official candidates outside the actual presidential campaign itself and the period immediate preceding the campaign, i.e. once the conventions are over and each party has selected their official candidate

Senate and House

- There are no upper limits on the total expenditure allowed.

Donations

For individuals

- $2000 limit per election to a federal candidate. Each primary, run-off, and general election counts as a separate election.
- $5000 limit per year to a Political Action Committee or State Party Committee
- $20,000 limit per year to a national party committee
- $25,000 limit total per calendar year of all the above.
- Cash in any amount over $100 is prohibited

For Corporations and Labour Organizations

- Although corporations and labour organizations may not make contributions or expenditures in connection with federal elections, they may establish PACs.

For PACs (Political Action Committees)

- There is no limit on total contributions.
- $5000 to each candidate, $25,000 to each national party, $10,000 to state and local party committees.

Soft money

- Individuals and corporations may make unlimited donations to political parties that can be used. Those political parties may, in turn, make unlimited donations to individual candidates (so called “soft money” and the topic of much debate in the U.S.).
- While soft money cannot be used to explicitly endorse federal candidates, the concern is that it can be spent on television commercials, get-out-the-

vote efforts and other activities that are clearly designed to influence presidential and congressional races.

- In the 1996 federal election cycle, the two national parties raised $262 million in “soft money”.

Transparency

Campaign contributions and expenses are reported on-line by the Federal Elections Commission, including enforcement action and audit reports.

Examples:

- Total campaign expenses for all candidates for the House, Senate, and Presidency in the 1996 federal election, totalled $1 billion.

- Top 10 presidential candidates in 1999-2000 collectively raised over $600 million for the 2000 federal election. President Bush raised $193 million. Al Gore raised $133 million.

- The top fundraising candidate for a seat in the 550+ House of Representatives for the 1999-2000 for the 2000 U.S. federal election raised $39 million. The 10th highest fundraising candidate raised almost $4 million.

- The top fundraising candidate for a seat in the Senate (100 seats available) raised $63 million. The 10th highest raised $9.1 million. Total funds raised by the top 10 senatorial candidates for 1999-2000: $230 million.

- In the second quarter of 2003/04, President Bush raised $35 million in campaign contributions. As reported in the national media, $33 million of this was raised at one single event.

Appendix V
Government of Canada Lobbyists' Code of Conduct

Preamble

The *Lobbyists' Code of Conduct* is founded on four concepts stated in the *Lobbyists Registration Act*:

- Free and open access to government is an important matter of public interest.
- Lobbying public office holders is a legitimate activity;
- It is desirable that public office holders and the public be able to know who is attempting to influence government; and
- A system for the registration of paid lobbyists should not impede free and open access to government.

The *Lobbyists' Code of Conduct* is an important initiative for promoting public trust in the integrity of government decision-making. The trust that Canadians place in public office holders to make decisions in the public interest is vital to a free and democratic society.

To this end, public office holders, when they deal with the public and with lobbyists, are required to honour the standards set out for them in their own codes of conduct. For their part, lobbyists communicating with public office holders must also abide by standards of conduct, which are set out below. Together, these codes play an important role in safeguarding the public interest in the integrity of government decision-making.

Principles

Integrity and Honesty

Lobbyists should conduct with integrity and honesty all relations with public office holders, clients, employers, the public and other lobbyists.

Openness

Lobbyists should, at all times, be open and frank about their lobbying activities, while respecting confidentiality.

Professionalism

Lobbyists should observe the highest professional and ethical standards. In particular, lobbyists should conform fully with not only the letter but the spirit of the *Lobbyists' Code of Conduct* as well as all the relevant laws, including the *Lobbyists Registration Act* and its regulations.

Rules

Transparency

1. **Identity and purpose**

   Lobbyists shall, when making a representation to a public office holder, disclose the identity of the person or organization on whose behalf the representation is made, as well as the reasons for the approach.

2. **Accurate information**

   Lobbyists shall provide information that is accurate and factual to public office holders. Moreover, lobbyists shall not knowingly mislead anyone and shall use proper care to avoid doing so inadvertently.

3. Disclosure of obligations

Lobbyists shall indicate to their client, employer or organization their obligations under the *Lobbyists Registration Act*, and their obligation to adhere to the *Lobbyists' Code of Conduct*.

Confidentiality

4. Confidential information

Lobbyists shall not divulge confidential information unless they have obtained the informed consent of their client, employer or organization, or disclosure is required by law.

5. Insider information

Lobbyists shall not use any confidential or other insider information obtained in the course of their lobbying activities to the disadvantage of their client, employer or organization.

Conflict of interest

6. Competing interests

Lobbyists shall not represent conflicting or competing interests without the informed consent of those whose interests are involved.

7. Disclosure

Consultant lobbyists shall advise public office holders that they have informed their clients of any actual, potential or apparent conflict of interest, and obtained the informed consent of each client concerned before proceeding or continuing with the undertaking.

8. Improper influence

Lobbyists shall not place public office holders in a conflict of interest by proposing or undertaking any action that would constitute an improper influence on a public office holder.

Toronto Computer Leasing Inquiry

Research Paper

LOBBYIST REGISTRATION

Volume 2:

Effectiveness and Best Practices

November 2003

Table of Contents

Executive Summary

Part 1: Introduction

This volume builds on the base of information and analysis presented in *Volume 1* – a comparative overview of lobbyist registries in Canadian and U.S. jurisdictions. Its overall focus is on assessing the effectiveness of lobbyist registries.

This volume draws on interviews with 29 individuals, including academics and other experts, lobbyists, lobbyist registry officials from a number of large U.S. municipalities, other provincial, federal, and municipal public servants, and associations representing Ontario municipal officials. Interviews have been supplemented by available secondary material – academic papers, monographs, articles, etc.

Part 2: Lobbyist Registry Outcomes

In this section, we identify the various outcomes that are in place for lobbyist registries. For the purposes of this study, outcome is defined as *the impact, difference, change, or benefit to be obtained*.

The common thread is a real or perceived problem with respect to public confidence in government and a desire to restore, enhance, or forestall a decline in this confidence. However, lobbyist registries in their implementation (as opposed to in their original political/rhetorical inception) are often somewhat

muted in terms of outcomes and expectations, avoiding direct reference to enhancing public confidence. In setting up registries, most governments did not want to suggest that lobbying was a problem but only wanted to make sure that the public had access to information about who was lobbying.

Most lobbyist registries have multiple outcomes, including the following:

- Greater transparency.
- A better-informed and/or engaged public.
- Restored public confidence in government.
- Improved ethical behaviour.
- Moderating the extent of lobbying.
- Enhancing the legitimacy and/or professionalism of Lobbying.
- *Following the Money*, i.e. tracking financial contributions from special interests against decisions made by public office holders.

Part 3: Assessing Outcomes Effectiveness

In this section, we assess the effectiveness of lobbyist registries against each of the outcomes identified in Part 2.

Transparency for its own sake

In this section, we pose five key questions related to transparency, lobbying, accountability, and the public interest:

- Who is attempting to influence government decision-making?
- Which government decision makers are the subject of the influencing efforts?
- Which decisions are the subjects of the influence attempt?
- Was the attempt to influence successful?

- Was the decision in the public interest?

Lobbyist registries cannot be expected to answer all five questions but are of limited value if they do not provide the answer to at least the first three questions. Most registries do not go much beyond the first question: *who is attempting to influence government decision making?* The information on the subject matter of the lobbying is usually at such a high level as to be of little practical value.

A Better Informed/Engaged Public

Most experts, practitioners, and advocates consistently express the view that the use of registries by individual citizens or citizens' groups is quite limited. Little or no information/analysis exists with respect to whether those relatively few members of the public who have accessed registries found the information to be useful/informative and for what purpose.

Restored Public Confidence

Academics, observers, and registry officials note that rather than resulting in increased public confidence in public office holders and decision-making in government, lobbyist registries have actually had the opposite effect. This is at least in part a result of the public receiving most of its information about lobbying from the media, political campaigns, and external watchdog/advocacy groups. The messages are often in the form of suggestions of "shady dealings" with the simple fact of who is lobbying for whom often presented in a way that leaves the public with the impression of inappropriate or unethical activity.

Improved Ethical Behaviour

Many if not most lobbyist registries maintain that their program was not intended to result in improved ethical behaviour, notwithstanding evidence that concerns

about ethical behaviour were behind the creation of most registries. Our research found that:

- Many governments did not feel that in establishing a registry they were making statements that ethical behaviour needed to be enhanced.
- Registry officials perceive that general awareness of what constitutes ethical behaviour was heightened as a result of the lobbyist registry.
- Other public servants noted that they did not see the registry as a relevant factor in public policy development or influencing behaviour. Public servants were already generally aware of who was behind major lobbying efforts and of the positions that were being advocated.

Moderating the Extent of Lobbying

The research suggests that lobbyist registries have not (nor were they usually intended to) moderated the extent of lobbying. Rather, much of what they have captured was pre-existing and generally legitimate contact between outside interests (individual companies, industry associations, non-profit organizations, etc.) and governments. The number of active lobbyists in most jurisdictions continues to increase.

Enhancing the Legitimacy/Professionalism of Lobbying

Lobbyist registration has been successful in elevating the industry, at least in the minds of public office holders if not the general public, with most registries making an up-front public statement that lobbying is a legitimate and, in some cases, valued activity. The government relations industry is one of the strongest advocates of registration. The industry generally feels that registration has been "good for business" in that potential clients no longer need to "feel embarrassed" about hiring a lobbyist.

Following the Money, *i.e. tracking financial contributions from special interests against decisions made by public office holders.*

This outcome would tend to apply in the U.S. rather than in Canada, given the comparatively different approaches to campaign financing and election expenses. The primary point of reports on *following the money* is less about the need for more lobbyist registration, and more about the perceived need for campaign financing reform. Recommendations tend to be for more financial disclosure as part of putting additional pressure on politicians to enact campaign financing reforms.

Part 4: Lobbyist Registry Best Practices

The focus of this section is on how lobbyist registries might be made more effective.

Lobbyist registries tend to be positioned by government as part of a *suite* of ethics related policies and accountability mechanisms that historically have resulted in higher standards of ethical behaviour in government. However, there is no evidence to indicate that, as most commonly constituted, registries have been a critical part of achieving that result. The research suggests that other components of the *suite* are likely more important in terms of achieving positive outcomes.

The starting point for more effective registries lies in what the registry is expected to achieve. Two related and overarching outcomes are suggested:

- Enhancing public confidence in government decision making by giving citizens better tools to hold public office holders accountable for making

decisions in the public interest (from this research, this is clearly the "original intent" behind most if not all lobbyist registries).

- Assisting the public to better understand the nature of the public policy debate and the complexity of the issues, as part of their own determination of whether and how to become more engaged.

These outcomes involve an important shift in registry design:

- Beyond the current competitive/strategic utility for lobbyists themselves and beyond the media "gossip", i.e. which organization has hired which lobbyist and the inevitable negative speculation about inappropriate influence.
- Towards the issues at stake in lobbying and promoting a more transparent and substantive debate of those issues.

Key Design Best Practice #1: Increased Disclosure of Subject Matter

The purpose of increased disclosure of this nature is to shift the public attention from the identity of the lobbyists and their clients, towards the actual decisions that lobbyists are attempting to influence. The research indicates that subject matter disclosure for most registries is at a high level and does not give the public the information it would need to be able to correlate lobbying efforts to actual decisions by public office holders or to better enable them to become more directly engaged.

Key Design Best Practice #2: Disclosure of Public Office Holders

The purpose of disclosing which public office holders are/will be/have been the subject of lobbying is intended to complement the greater disclosure requirements related to lobbying subject matter. The goal is to give the public more of the kind the information it would need to evaluate whether public office

holders have inappropriate relationships with/are being inappropriately influenced by lobbyists.

Other Best Practices

Analytical Capacity

Registries should include the data and technology capacity for the public to search and analyze the on-line data at both the specific individual level and with regard to identifying meaningful aggregate trends.

Enforceable Code of Conduct

Lobbyist registry legislation should include an enforceable Code of Conduct for lobbyists similar to what is contained as part of the Government of Canada's *Lobbyist Registration Act*.

Adequate Resources

The research and interviews with public officials reinforce that the effectiveness of registries is very dependent on the level of human and technology resourcing that is available. Jurisdictions that are serious about making their registries effective and useful for the public need to allocate sufficient resources for these purposes.

Education and Communication

Best practices include advisory/interpretive bulletins, publishing complaints and the results of investigation/enforcement activities, mandatory training for lobbyists and public office holders, and public educational material

Independent Oversight Body

Independent oversight bodies responsible for lobbyist registries should have the mandate and resources to monitor and review registrations, investigate

complaints and take enforcement actions, conduct training and education for staff and lobbyists alike, and prepare value-added reports for the public.

Enforcement

Registries should have the resources and powers to effectively enforce registry provisions, including but not limited to ensuring compliance with the various disclosure requirements.

Actively Engage Public Office Holders

The best practice in this area is that public office holders would actively use the registry as part of the public policy development process and as part of maintaining high awareness of the importance of ethical behaviour.

Be Clear that Lawyers are Included

Registration requirements should be clear up front that lawyers who engage in lobbying would be required to register that activity and that they would be required to register.

Include Procurement and Sales People

The definition of lobbying should encompass procurement related activities broadly defined, including sales people contacting public office holders as part of their sales and marketing related activities.

Value-added Reporting to the Public

As a best practice, registries should be expected to provide the public with *value-added*, as well as statistical reports, including the following:

- The most active consultant lobbyists and lobbying organizations.
- Which issues, decisions, by-laws, zoning applications, etc. were the subject of the most intensive lobbying activity.

- Some explanatory information that would help the public to better understand the issue that was the focus of the lobbying.
- Which departments, units within departments, and individual public office holders were the subjects of the most intensive lobbying.

Program Evaluation

Design and development of a new lobbyist register should include and incorporate the elements that will be necessary for ongoing program/effectiveness evaluation. These elements include a clear description of the intended outcomes, and the capacity/requirement that the necessary data and information be collected, analyzed, and reported.

Identify Lobbyist's Other Relationship with Decision Makers

Lobbyist registration should identify where the lobbyist and/or client organization/employer receive funding direct from government as well as identify whether the lobbyist is directly providing consulting services to government departments/public office holders.

Part 5: Conclusion

How lobbyist registries perform in terms of restoring, enhancing, or forestalling declines in public confidence in government is the most important test of effectiveness and, ultimately, of whether the expenditure of public resources to create a registry was worthwhile. The research and expert opinion indicates that lobbyist registries do not perform well in many key areas and that as currently constituted may not be worth the expenditure of public resources, particularly relative to other arguably more effective policies and practices, e.g. conflict of interest, codes of conduct, procurement rules, more comprehensive efforts to instil values/create an operating culture of high ethical standards, etc..

One particularly key area is related to disclosure of the actual decisions that lobbyists/lobbying organizations are attempting to influence. We are suggesting that future iterations of lobbyist registries need to shift the focus from *who is lobbying* and *which client* to the substantive subject matter of the lobbying and which decision is being sought – in effect, addressing the first three of the five key questions identified on page 11 of this volume:

- Who is attempting to influence government decision-making?
- Which government decision makers are the focuses of the influencing efforts?
- Which decisions are the subjects of the influence attempt?

To date, we cannot point to a jurisdiction that has moved to this next logical stage of evolution in lobbyist registry design. If, however, a jurisdiction is determined to put a registry in place, focusing on the substantive issues at stake provides for a greater likelihood that the registry will have a demonstrable and beneficial impact.

Part 1
Introduction

We are pleased to submit this, our second volume on lobbyist registration. This volume is intended to build on the base of information and analysis that we presented in *Volume 1* – a comparative overview of lobbyist registries in Canadian and U.S. jurisdictions.

Focus and Structure

The overall focus of this volume is on assessing the effectiveness of lobbyist registries. We have adopted an *outcomes-based* approach whereby we attempt, in three different parts to:

- Articulate the various outcomes that registries are (explicitly and/or implicitly) intended to achieve (*Part 2*).
- Provide an analysis/assessment of how effective registries are at achieving these various outcomes (*Part 3*).
- Provide a set of *best practices* – in effect, enhancements to the standard model of registry – that in our view and as supported by the research and views of experts, etc. would result in a more effective registry (*Part 4*).

In preparing this volume, we drew on analysis and views expressed in interviews and informal surveys with a total of 29 individuals including academics, lobbyists, lobbyist registry officials at the federal, state/provincial, and municipal level, other provincial municipal public servants, and representatives from the Association of Municipalities of Ontario and the Association of Municipal Managers, Clerks, and Treasurers. Wherever possible, the analysis and views have been

supplemented by available secondary material – academic papers, monographs, articles, etc. – containing various evaluative viewpoints.

A Word about Program Evaluation

It is important to note at the outset that we were not able to locate, nor are we or our key informants aware of, any studies conducted by government or other organizations that attempt to formally evaluate the effectiveness of lobbyist registration systems using a professional program evaluation methodology.

Part 2
Lobbyist Registry Outcomes

What do we mean by *Outcome*?

The answer to this question begins with defining what we mean by *outcome*. Governance expert John Carver provides a succinct definition that we summarize as follows: *the impact, difference, change, or benefit to be obtained*.

With this definition in mind, the answer to the central line of inquiry for this volume – whether and/or to what extent lobbyist registries are effective – depends, therefore, on what *outcome(s)* registries were intended to achieve.

Do the origins of lobbyist registries point to a specific overarching outcome?

The answer to this question is clearly *yes*. As we indicated in *Volume 1*, the origins of lobbyist registration are varied in the specific instances but a number of consistent general themes are evident from the research:

- In the U.S. in particular, as part of an overall trend since the early 1970's towards professionalization of legislatures including, with in the post-Watergate period, a renewed emphasis on ethics-related policies and programs as a vehicle for dealing with what was then widely acknowledged to be a lack of public trust in the integrity of government decision making.
- In both Canada and the U.S., as a political response to a public scandal or series of scandals (often involving a previous government), with the

emphasis being on creating the public perception that appropriate corrective action has been taken.

- In both Canada and the U.S., as a “pre-emptive” move by governments that are interested in alternative service delivery including privatization. In these cases lobbyist registries are proactive attempts to assure the public that the appropriate safeguards are in place.

The common thread running through each of the themes identified above is obviously a real or perceived problem with respect to public confidence in government and a desire to restore, enhance, or forestall a decline in this confidence. One might expect, therefore, that statements emphasizing this outcome would be commonplace in how lobbyist registries communicate their value to the public.

However, this is not the case. In fact, in their actual implementation, lobbyist registries are often somewhat muted in terms of their intended outcomes.

The Canadian federal government is a case in point. According to federal officials, the current lobbyist registry is a direct outgrowth of a 1993 Liberal Redbook promise to deal with the fact that Canadians were “concerned and distrustful about the role of lobbyists.” Quite understandably, a citizen might take this to mean that a major self-defined role for the federal lobbyist registry is to alleviate public concerns and restore public trust.

However, the federal lobbyist registry (as is the case with other registries) is apparently careful to avoid addressing this issue head on. The registry makes it clear that its focus is *transparency* and, more than that, a kind of *neutral* transparency whereby:

- Lobbying is viewed as a legitimate part of the public process.
- The public has a right to know who is lobbying.

- Registration is not intended to impede access by paid lobbyists to government officials.

This general approach was reinforced in our interviews. As often described to us, various governments, in establishing registries, did not want to suggest that lobbying was a problem or that behaviour related to lobbying needed to change. Instead, they wanted only to make sure that the public had access to information about who was lobbying (not who was being lobbied or what decision was to be influenced) and are careful to point out that their legislation does not impose any limits on what constitutes lobbying.

In light of the above, citizens might well ask the question: *if lobbying does not pose a problem in terms of the integrity of government decision making, why would I need to know who is lobbying?*

This is not to suggest that this notion of transparency with respect to who is lobbying, is not a legitimate outcome. However, as we suggest in this volume, it is a rather limited outcome. Furthermore, the research indicates that it is not an outcome that the public makes use of to any extent, judging by what many registry officials and advocacy groups feel (in the absence of any formal evaluation) is a widespread lack of public interest in the data contained in most lobbyist registries.

Is there more than one legitimate outcome?

The answer to this question is a clear *yes*. In fact, most lobbyist registries have multiple outcomes that are both formal and informal. In some cases, explicit and more implicit outcomes are present at the same time (as in the federal Canadian example, related to transparency of registry information and the Liberal Party's Redbook promise with respect to restoring confidence). In still other cases, the

outcome depends on the perspective of the stakeholder, i.e. their view of what the lobbyist registry was intended to "fix" in the first place.

From our perspective, this last point is particularly important. As we attempt to demonstrate in this section, the lack of up-front clarity in outcomes often means that governments, ethics advocacy groups, lobbyists, and, we would argue, the general public, often have different expectations. These expectations reflect their own underlying definitions of the problem to be solved and results that lobbyist registries are intended to achieve.

Examples of Outcomes

In the remainder of this first part of this Volume, we attempt to describe the various outcomes, formal or informal/explicit or implied, that might be expected from having a lobbyist registry. As will be seen, these outcomes are not necessarily mutually exclusive, with any or all of them coming into play at different times and from different stakeholder perspectives. Keep in mind that our intention in this section is to be descriptive. In Part 3, we offer an analysis of whether and to what extent lobbyist registries are successful in achieving these outcomes.

Outcome: Transparency for its Own Sake

- Lobbyist registries are sometimes positioned as part of a general move towards greater transparency in government. Along these lines, the outcome of the lobbyist registry would be increased public transparency most often with respect to the question of who is lobbying public office holders (as per the Canadian federal government example cited earlier).
- In this sense, the registry would be somewhat less focused on "regulating" or in any way moderating/changing behaviour, but would more likely be a

specific institutional example of the general principle of the public's "right to know".

Outcome: **A Better Informed/Engaged Public**

- The outcome in this case would be a general public that is better informed with respect to whatever information is made more transparent via the registry. For example, in Canada the primary focus is on who is doing the lobbying. In the U.S., the emphasis is on who is doing the lobbying and how much they are spending. Just exactly what the public is expected to do with this more transparent information is not usually stated up front. In theory, potential and progressively more *engaged* uses by members of the public could include:
    - A better, but relatively basic understanding of the relationships between public office holders and external interests.
    - Using the information about these relationships to hold public office holders accountable for making decisions that are in the public interest, as opposed to responding more narrowly to special interest pressures.
    - Using the information to trigger or support their own involvement in the public policy process on a particular issue. For example, on a controversial local issue such as a proposal to put in a new dam that is being opposed by the local citizens, using the Register to find out whether and to what extent proponents of the dam have hired lobbyists to influence key decision makers.

Outcome: **Restored Public Confidence**

- The outcome in this case is that by providing the public with more transparent information about ongoing contact between government

officials and external interests, public confidence in the integrity of government decision making would be increased.

Outcome: **Improved Ethical Behaviour**

- The outcome in this case would be an overall increase in the level and extent/pervasiveness of ethical behaviour in the relationship between lobbyists and public office holders as a result of requiring lobbyists to register. The obvious underlying assumption for this outcome is that there is a need for improved behaviour in this area. Accordingly, successful achievement of this outcome might be measured in a number of ways:
    - A general (but more short term) heightening of awareness of the importance of ethical behaviour that might be expected to result from the public debate that accompanies the introduction of a lobbyist registry.
    - Ongoing (as opposed to short term) general awareness of the importance of ethical behaviour on the part of lobbyists and public office holders by virtue of ongoing registration, training, enforcement, regular reporting and analysis of the data by registry officials, and, in the case of public office holders, mandatory registry monitoring activities.
    - Fewer instances of unethical behaviour by lobbyists and public office holders, e.g. providing public office holders with misleading information, putting public office holders in positions of real or perceived conflicts of interest, etc.

Outcome: **Moderating the Extent of Lobbying**

- The outcome in this case is that the establishment of a lobbyist registry would result in a general “cooling out” or lessening of lobbying activity.

- The underlying problem statement related to this outcome is that there is too much lobbying going on or at least too much of the wrong kind of lobbying. If individuals and organizations were required to register as lobbyists, a significant number of them would simply stop lobbying.

Outcome: **Enhancing the Legitimacy/Professionalism of Lobbying**

- The outcome in this case is that having a lobbyist registry in place would provide additional legitimacy to lobbying and enhance the general level of professionalism among practitioners, including consultant lobbyists – the traditional "hired guns".
- The intention is that the image of lobbyists in the public mind will change from traditional negative stereotypes to one where lobbyists are viewed as a more accepted/established part of the public policy process.

Outcome: **Following the Money**

- The outcome in this case would be that by providing the public with access to information about gifts/other perks and campaign contributions from external interests, the public will be able to *follow the money* – in effect, to hold legislators accountable for having made the "right decision", as opposed to a decision that was "purchased" by special interests.
- Note: this outcome would tend to apply in the U.S. and not in Canada, given the different approaches in these jurisdictions to regulating campaign financing and election expenses.

Part 3
Assessing Outcomes Effectiveness

In this section, we review each of the outcomes discussed in Part 2. The intention, drawing on the interviews and literature review, is to provide an assessment of whether lobbyist registries are successful in achieving the intended outcome(s) and to identify specific issues or concerns/strengths and weaknesses associated with each outcome.

Assessment: Transparency for its own sake

Across all jurisdictions, transparency – and in many instances, what would appear to be "transparency for its own sake" – is an important foundation principle for lobbyist registration.

On one level, it is easy to say that virtually all registries achieve their intended result with respect to transparency. By this we mean that each jurisdiction has made a policy decision about what information to collect, whether/how to make it accessible to the public, and how much of their own analysis/interpretation of the data to make publicly available.

However, transparency, as demonstrated in our *Volume 1*, comes in many shapes and sizes along a continuum from *less* to *more*.

To begin to make sense of the array of possibilities, one must start by asking what is the purpose of the transparency. Here, we would suggest that from a citizen's perspective there are five key questions related to transparency, lobbying, accountability, and the public interest:

- Who is attempting to influence government decision-making?
- Which government decision makers are the focus of the influencing efforts?
- Which decisions are the subjects of the influence attempt?
- Was the attempt to influence successful?
- Was the decision in the public interest?

We are not suggesting that a lobbyist registry system can or should provide citizens with the answers to all five of these key questions. However, we would suggest that a lobbyist registry that does not provide citizens with information that answers at least the first three questions may be of very limited value to citizens.

From our review, it is apparent that many registries – and in particular, registries in the Canadian model – do not really provide much in the way of helpful information, except with respect to the first question – *who is attempting to influence government decision making?* For the most part, answering this first question is in fact their explicit focus.

As discussed earlier, the Canadian federal registry is very clear on this count. The purpose of that registry is stated in the *Guide to Registration*:

> *To ensure that the general public and public office holders know who is attempting to influence the government's decisions.*

Very clearly this approach, while transparent, is not the same thing as *which decision makers are being lobbied?* Or, more importantly, *what decision does the lobbyist want?*

Although Canadian registries do ask some questions related to which decision makers and which decisions, we found that these were most often at such a high

level as to be of little practical value. For example, with minor variations depending on the registry:

- One can find out which government departments were lobbied but not which areas within those departments or which public office holders were approached (e.g. the department of health, but not the information technology division of that department, or the Chief Information Officer.)
- One can find out whether MPPs or members of their political staff were lobbied but not which ones (with the exception of British Columbia).
- One cannot find out whether and which Cabinet Ministers or members of their political staff were lobbied (with the exception again of British Columbia).
- One can find out whether a lobbyist is interested in a particular piece of legislation or regulation but not which section and what the lobbyist's position is on that section.
- One can find out generally which policy or program area is the focus of the lobbying, but little or no information about the specific policy or program issue(s) at stake, let alone the lobbyist's position on that issue or the actual decision the lobbyist wants.

To summarize, the research confirms that knowing who is doing the lobbying and the high-level subject matter of their lobbying is without question a form of transparency. However, it is not necessarily one that is useful or most relevant in terms of the five key questions we identified earlier.

Assessment: **A Better Informed/Engaged Public**

From our interviews and research, there is no solid evidence to suggest that the public accesses the information contained in registries on a regular basis or for meaningful purposes.

Experts, practitioners, and advocates alike (the latter being quite blunt in their obvious dismay and frustration) were generally very specific that the public use of registries (most often as measured by overall website “hits”, without attempting to separate out hits from public servants, lobbyists, the general public, media, etc.) is usually quite limited.

Furthermore, little or no information/analysis exists with respect to whether those relatively few members of the public who have accessed registries found the information to be useful/informative and for what purpose.

In our interviews, we also asked whether, in the absence of individual citizens using registries, citizens’ groups (e.g. local volunteer or grass roots organizations that might be interested in a specific issue, such as a proposal for a new highway) *mined* the registry to find out whether their opponents were using “high-priced lobbyists” or making major campaign contributions in an effort to get a favourable decision.

The most common answer was that this kind of access and analysis by community/advocacy groups does not happen to any great extent. Registry officials from at least one Canadian jurisdiction confirmed that the design of their registry was never intended to facilitate this kind of *mining* or more aggregate analysis. Rather, as discussed earlier in this section, the information on the Registry website focused primarily on who was doing the lobbying, and less on who was being lobbied/what decision was being sought.

Not surprisingly, the above findings begged the question for us: if the public is not using this information, who is? We address this question in more detail in *Appendix A*.

Assessment: **Restored Public Confidence**

Academics, observers, and registry officials alike (albeit primarily from the U.S.) have noted that rather than resulting in increased public confidence in public office holders and decision-making in government, lobbyist registries have actually had the opposite effect over the years. As American academics have suggested, this has happened notwithstanding the fact that significant professionalization of legislators/legislatures has occurred during the past few decades and that legislators in general "are more representative, responsible, independent, capable than ever before".

As reported to us in interviews and as presented in the literature, this phenomenon has two different facets:

- As noted earlier, the fact that the public for the most part does not appear to access or use (or, as the Washington-based Centre for Public Integrity puts it, even seem to care about) the information in lobbyist registries.
- In the absence of direct contact with registry data, the public receives its information largely from the media, political campaigns, and external watchdog/advocacy groups.

The messages the public receives from the media are more often in stories containing suggestions of "shady dealings", with a typical story being short on content, and long on negative inferences. For example, the basic information in most registries could demonstrate that "Company X" has hired a formed congressional staffer or minister's staff member to lobby on their general area of interest. There is no more specific information available about the specific issue and whether "Company X" is for or against, or merely monitoring developments. However, the simple fact of *who is lobbying for whom* is often presented in such a way as to leave the public with the impression that inappropriate or unethical activity is taking place.

The messages the public receives from political campaigns appear to be similar in nature. In the U.S., lobby registries have been linked to the rising incidence, in the words of one academic, of "*parties and candidates accusing each other of violations, and the accusations carrying into the day-to-day legislative process."* The result is predictably a negative one: "*The ensuing breakdown in trust and diminution of civility among members leads to lack of consensus and unresponsive gridlock that, in turn, perpetuates the public's distrust.*"

Assessment: Improved Ethical Behaviour

As discussed earlier, many if not most lobbyist registries actually maintain that their program is not intended to result in improved ethical behaviour. Not surprisingly, therefore, the evidence with respect to the impact of lobbyist registries on behaviour is somewhat limited or mixed at best.

The historical origins of lobbyist registries (and other ethics-related policies and programs), as described by academics, does clearly confirm that improved ethical behaviour was part of the original intent.

As discussed in *Research Paper #1*, the introduction of what were in effect "suites" of ethics policies in the early 1970's is viewed as having had a positive impact on ethical behaviour in government, particularly where these policies were previously weak or non-existent. Academics note that that the introduction of conflict of interest rules, campaign financing legislation, integrity commissioners/boards of ethics, procurement policies, gift bans, and lobbyist registries were part of a larger movement afoot at that time to professionalize legislatures and were also a response to growing public concern, particularly in the post-Watergate period, with respect to ethics in government.

Academics also note that as a consequence of these various ethics related policies and programs:

- Public office holders generally experienced a heightened awareness of the importance of ethical behaviour in public decision-making.
- Individual behaviours (both internal and external to government) improved markedly.
- These gains have for the most part been sustained over the decades.

Having said that, the academic analysis does not distinguish whether and to what extent lobbyist registries was a critical component of the suite or the extent to which the apparent professionalization would have taken place in their absence.

When we asked this of registry officials, we received a variety of responses:

- Many of the registry officials we spoke with reiterated that their governments in establishing registries (as distinct from the political rhetoric that preceded the establishment of the registry) were not making statements that ethical behaviour by lobbyists or public office holders needed to be enhanced or that their registry was intended to achieve this result.
- Notwithstanding this caveat, many registry officials held the view that awareness of the importance of ethical behaviour was generally heightened as a result of their lobbyist registry having been in place, although stopping short of suggesting that overall behaviour changed as a result. They often pointed to the number of inquiries they received from lobbyists asking for clarification of the rules as evidence of that heightened awareness.
- Although a number of registries include a prohibition against putting public office holders in a real or potential conflict of interest or providing them with false or misleading information, there were few examples of investigation/enforcement actions in this regard and registry officials often noted that they had insufficient resources in this area in any event.

The real test for us, however, was in the views of public office holders themselves as to whether the lobbyist registry had an overall positive impact on ethical behaviour. Again, an unclear picture emerges.

- In Chicago, it was pointed out to us that public officials are required by policy to use the registry and actively confirmed that individuals lobbying them are registered. However, there was no clear answer with respect to a positive impact on ethical behaviour. Also, it was suggested that City officials, as part of the normal course of doing their jobs, already have a good awareness of who is lobbying which public office holders, and what they want.
- Closer to home, as noted elsewhere, we conducted an informal survey of senior public servants in a major Canadian jurisdiction. The results indicated that the public servants did not see the registry as a relevant factor in the public policy development process, let alone as something that would influence their or their staff's behaviour in any way.

Assessment: **Moderating the Extent of Lobbying**

From the research and our interviews, there is no evidence to suggest one way or the other that the implementation of lobbyist registries has had, or was intended to have, any impact on the pervasiveness/extent of lobbying that takes place in a given jurisdiction.

While Registry officials suggest that implementation of a lobbyist registry usually results, at least for an initial time period, in greater awareness of lobbying by both lobbyists and public office holders (as measured, for example, by the number of calls they receive in the start-up phase asking for clarification and/or interpretations), they also note that, year to year, the number of registered lobbyists active in most jurisdictions continues to increase.

This correlates with analysis prepared by U.S. ethics advocacy groups at both the State and municipal levels indicating – in distinctly alarmist terms in terms of a perceived "imminent threat to democracy" – that lobbying continues to grow at a healthy (or unhealthy, depending on your perspective) pace in most jurisdictions. This includes:

- The number of lobbyists in absolute numbers and also relative to the number of legislators.
- The amount of money spent on hiring lobbyists.
- The amount of money that lobbyists spend on public office holders.
- The amount of money lobbyists contribute to campaign coffers.

It is important to point out that this analysis does not mean that in the absence of lobbyist registration, growth rates might not actually have been higher, but rather there is no evidence one way or the other.

Our own impression, based on the cumulative evidence, is that lobbyist registries for the most part have not moderated the extent of lobbying. Rather, much of what they have captured was pre-existing and generally legitimate contact between outside interests (individual companies, industry associations, non-profit organizations, etc.) and governments.

Academics and practitioners alike are quick to point out that registries do not capture – and were not intended to capture – the kinds of stereotypical unethical or even illegal behaviour that often typifies lobbying in the public mind. Furthermore, as we will discuss in the next sub-section (re the outcome of *Enhancing the Legitimacy/Professionalism of Lobbying*) registration in Canada has actually improved business for consultant lobbyists.

Assessment: Enhancing the Legitimacy/Professionalism of Lobbying

Our research indicates that, in fact, lobbyist registration has been successful in elevating the industry, at least in the minds of public office holders if not the general public. It is important, however, to be clear about the type of lobbyist to which this outcome appears most to relate.

In fact, most in-house lobbyists (corporate or non-profit) are employees of legitimate businesses, non-profit organizations and commercial and non-profit associations. Prior to the implementation of lobbyist registries, these types of "lobbyists" were generally already viewed as legitimate both by the public and public office holders in their interactions with government. Examples could include: the director of public affairs for a major petrochemical company, a senior legal counsel in charge of regulatory affairs for a transportation firm, the CEO of a provincial association of manufacturers, the executive director of the provincial association representing children's aid societies, etc.

Rather, it may be that third party consultant lobbyists (government relations consultants) – the so-called "hired guns" – are among the primary beneficiaries of enhanced status. It is not surprising, therefore, that the government relations industry itself – encompassing both consultant and organization lobbyists – is one of the strongest advocates in favour of registration.

As confirmed in our interviews, the government relations industry does feel that its legitimacy and professionalism has been positively enhanced as a result of registration. Registration has, in fact, been "good for business" in at least two important ways:

- That potential clients no longer need to "feel embarrassed" about hiring a lobbyist.
- The registry provides extremely useful competitive and strategic information for lobbyists, including:

- Who their competition's clients are.
- Which competing interests have hired lobbyists, who those lobbyists are, their political stripe, and their degree of "political connectedness".

Furthermore, registry officials in a number of Canadian jurisdictions where the size of the lobbyist community was felt to be relatively small, pointed out that lobbyists themselves, through their own monitoring of competitors' registrations, were a very effective means of ensuring compliance.

The government relations industry's perceptions were echoed by a number of registry officials and also reflected in the fact that most registries make an upfront public statement that lobbying is a legitimate activity, with some going on to suggest that it makes a valuable or important contribution. More than one official noted that in establishing a registry in their province, the government purposely did not want to suggest that something was wrong with lobbying, but rather just to focus on greater transparency as principle of good government.

Our research included an interesting perspective on this phenomenon from two political staff members who suggested that political parties tend not to want to be too tough on consultant lobbyists because very many of them are former associates and colleagues and that government relations consulting is a common career path out of government. It was suggested to us that these views hold true for both governing and opposition parties.

Our inquiries in this area led to a related question: *if the focus of enhanced legitimacy is primarily on consultant lobbyists/government relations consultants, just how effective and influential are they?* We deal with this question in *Appendix B*.

Assessment: **Following the Money**

As discussed in more detail in *Volume 1*, this outcome would tend to apply in the U.S. rather than in Canada, given the comparatively different approaches to campaign financing and election expenses.

As noted earlier, the American public does not generally access registry information about campaign contributions or gifts/perks from lobbyists. This means that for the most part, ethics advocacy groups (such as the Centre for Public Integrity that we referred to in *Volume 1*) and the media are among those external groups most interested in *following the money* in the form of periodic (as opposed to regular) reports on who are the most highly paid lobbyists or which legislators accepted the most gifts/other perks or financial contributions. The most frequent reporters of this kind of information are actually the various internal ethics commissions, many of which publish annual or semi-annual reports identifying the top paid lobbyists and/or the legislators that accepted the most in contributions, gifts, etc. from lobbyists.

Experts and advocates alike, however, have noted the central issue here is not really lobbyist registration, but rather effective conflict of interest policies (in the case of gifts and other perks) and the much larger and, in American politics, more complex issue of campaign financing. The primary point of reports by ethics advocates on *following the money* is less about the need for more lobbyist registration, and more about the perceived need for campaign financing reform. To the extent that ethics advocates such as the Centre for Public Integrity are advocating for changes to lobbyist registration systems, those recommendations tend to be for more financial disclosure as part of putting additional pressure on politicians to enact campaign financing reforms.

Part 4
Lobbyist Registry Best Practices

Introduction

The focus of this section of our paper is on how lobbyist registries might be made more effective. To this end, we provide a description of the various best practices that if implemented, would have this effect.

We begin this section with three conclusions that set the stage for the discussion of best practices:

- The analysis presented in the previous section points to the fact that as currently constituted, lobbyist registries in and of themselves are not very effective in terms of achieving either the overarching goal of enhancing public confidence in government or the various more specific stated or un-stated outcomes.

- We do not want to suggest or leave the impression that we believe making lobbyist registries more effective is about focusing on bad behaviour. As discussed earlier, much of the activity now legally defined as lobbying is actually long-standing and legitimate interaction between public office holders and outside organizations. Furthermore, a leading best practice in terms of *good government* appears to be in the direction of creating more (and more transparent) ways for this interaction to take place. Also, the evidence suggests that third party consultant lobbyists (again, the stereotypical “hired guns”) do provide value and, although one can always point to exceptions, conduct themselves according to the rules.

- Lobbyist registries, particularly in the Canadian context, are more in the realm of providing guidance and structure to support/reinforce good behaviour. There is no evidence to suggest that they can root out or *catch* bad behaviour. Having said that, there is an increased pressure on governments, particularly in the U.S., from ethics advocacy groups and the media for more prescriptive regulation, notwithstanding the apparent reality that, as many observers suggested, "you can't regulate ethical behaviour". Recognition of the fact that lobbyist registries are not effective tools for stopping bad behaviour is widely shared among registry officials, public office holders, lobbyists, and academics. Professor Alan Rosenthal, a widely recognized U.S. expert on ethics in government cautions against the simplistic remedy of laying on more rules:

  "What we're doing by overlegislating ethics is trying to get the bad guys, but we're never going to get the bad guys, because they are very good at being bad. What we succeed in doing is making life increasingly miserable and fraught with danger for the good guys."

Having reached these conclusions, we were faced with two important questions:

- Why implement a lobbyist registry in the first place?
- If a jurisdiction is going ahead with a lobbyist registry, what would it take to make a registry more effective?

Why implement a registry in the first place?

Based on our research and interviews with experts and practitioners alike, the answer to the first question is that lobbyist registries appear to be more often about *window dressing* than *good government*. In practice, the establishment of a registry is frequently an (sometimes pre-emptive, sometimes post-facto)

attempt to create the public appearance of having solved a problem, rather than a concerted, meaningful effort to enhance public confidence in government decision making.

Many registries – including most Canadian registries – are relatively minimalist in terms of disclosure requirements, level of transparency, application of technology related to accessibility, and allocation of resources. This minimalism seems to correlate well with what appear to be relatively minimalist government expectations for their actual impact on behaviour.

Although lobbyist registries tend to be positioned by government as part of a *suite* of ethics related policies and tools that historically have resulted in higher standards of ethical behaviour in government, there is no evidence to indicate that, as most commonly constituted, registries have been a critical part of achieving that result.

Furthermore, the literature as well as expert and practitioner opinions suggest that other components of the *suite* are likely more important in terms of achieving positive outcomes. These include:

- Implementing and enforcing rigorous conflict of interest/code of ethics, procurement policies, and campaign financing rules that plainly define what constitutes good and bad behaviour and includes robust sanctions.
- Ensuring that the organizational culture – the values, beliefs, accepted behaviours, reward systems, etc. – reflects the desired standard of ethical behaviour.

This, in turn, leads to the conclusion that if public resources are scarce, perhaps they would be better spent first in support of these arguable more effective policies and accountability mechanisms, and on building a culture that supports and reinforces the desired behaviour.

What would it take to make a registry more effective?

Notwithstanding our conclusion that lobbyist registries are not as vital and effective as they are often thought to be, the experience of other jurisdictions, as well as the literature and expert/practitioner opinion, point to a number of best practices as part of improving this effectiveness.

The starting point, however, lies in what the registry is expected to achieve ("*be clear about outcomes*" – our first design principle, as discussed in the next section under **Design Principles**). For the purposes of discussion, we want to suggest two related and overarching outcomes as the underpinning of more effective program design. These are:

- Enhancing public confidence in government decision making by giving citizens better tools to hold public office holders accountable for decisions in the public interest.
- Assisting the public to better understand the nature of the public policy debate and the complexity of the issues, as part of their own determination of whether and how to become more engaged.

We begin with what we mean by *enhancing public confidence in government decision making* and *holding public office holders accountable for decisions in the public interest*. What we do not mean is using a registry to root out bad lobbying. Instead, we mean shifting the focus of the registry:

- Beyond the current competitive/strategic utility for lobbyists themselves and beyond the media "gossip", e.g. which organization has hired which lobbyist and the inevitable negative speculation about inappropriate influence.

- Towards the issues at stake in lobbying and promoting a more transparent and substantive debate of those issues.

This is consistent with the five key questions related to transparency, lobbying, accountability, and the public interest that we identified earlier:

- Who is attempting to influence government decision-making?
- Which government decision makers are the focuses of the influencing efforts?
- Which decisions are the subjects of the influence attempt?
- Was the attempt to influence successful?
- Was the decision in the public interest?

In short, disclosure that is focused less on the *who* and more on the *what* – the actual issues that lobbyists are interested in and the decisions that they want public office holders to make.

From our perspective, this is the kind of information that would better enable citizens (and their proxies in the media, advocacy groups, and others) to make more informed decisions about whether public office holders are making decisions in the public interest, or simply responding to lobbyist pressures. (We are not suggesting for a moment that the vast majority of public office holders do not operate with integrity. Rather, our focus is on the capacity of the public to make their own assessment of this fact.)

This more substantive information about the public policy debate would also position the public (and the media among others) to have a better understanding of the issues at stake and, in particularly, the increasingly complex nature of the challenges facing governments at all levels. Furthermore, as noted earlier, it would allow citizens to make more informed decisions about whether and how to become more involved in the public policy process.

In saying this, we are not naïve enough to believe that simply making this kind of more substantive information available means automatically that more citizens or public office holders will make use of lobbyist registries. Nor are we naïve enough to believe that the only thing preventing more substantive and complex public policy debate is that lack of public access to more complex information. In truth, complexity is often a *tough sell* in politics – politicians, the public, and the media frequently prefer simple problem statements and simple solutions.

Furthermore, although registry officials and other public servants in many of the jurisdictions we contacted confirmed that this greater emphasis on substantive disclosure should make lobbyist registries more effective and should be pursued as a matter of public policy, this shift in disclosure represents a major departure from the standard approach in most jurisdictions.

At present we cannot point to a jurisdiction that has moved to what we would argue is this next logical stage of evolution in lobbyist registry design. Rather, our point is simply this – a lobbyist registry focused on *who is lobbying* does not appear to be an effective vehicle for instilling confidence in public office holders and can actually diminish rather than enhance that confidence. If, however, a jurisdiction is determined to put a registry in place, focusing on the substantive issues at stake provides for a greater likelihood that this expenditure of scarce public resources will have a demonstrable and beneficial impact.

With this in mind, describing best practices is the focus of the remainder of this section of *Volume 2*. The descriptions are presented in three parts:

- A brief set of design principles that can be used to guide registry program design.
- The two *key design best practices* that we believe would bring a more substantive focus to lobbyist registries.

- A larger number of secondary, but still important, best practices that would further support improved effectiveness.

Before we delve into these various design principles and best practices in more detail, we want to offer one final caveat: our discussion does not dwell to any great extent on what is arguably the central design feature of most U.S. registries – that of *following the money*. This decision reflects the very different reality in Canada with respect to campaign finance and expense rules and the fact that much of what exists in U.S. registries in this regard is essentially not applicable/relevant to the Canadian political context.

This does not mean that we have completely disregarded the considerable U.S. experience with lobbyist registries. There are various operational best practices, (e.g. education and communication, value-added reporting, etc.) from U.S. jurisdictions that are worth considering in the Canadian context and have been included below.

Design Principles

In identifying best practices for this section of Volume 2, we drew on a small number of design principles that we felt could also be useful for designers of registries. These principles, however, are not intended to be absolute: the application of judgement related to the specific jurisdictional context is still required.

- *Lobbying is a legitimate part of the public policy process:* Lobbyist registry design should reflect the reality that much of what is covered by the legal definition of lobbying is legitimate and useful interaction between government and outside interests.

- *Ethical behaviour cannot be regulated:* Lobbyist registry design should recognize that ethical behaviour cannot be regulated, regardless of the prescriptiveness of regulatory requirements.
- *Be clear about outcomes:* Lobbyist registry design should be clear up front with respect to the intended primary and second outcomes.
- *Provide for relevant and substantive disclosure:* Disclosure requirements should provide citizens with more relevant and substantive information about lobbying efforts to assist them in evaluating whether public office holders are making decisions in the public interest.
- *Be clear – in plain, practical language – about what is not considered to be lobbying:* Registry policy should be clear that much of the interaction between outside interests and government is clearly not lobbying but rather the normal interaction between citizens and public office holders.
- *Disclosure consistent with FIPPA:* While disclosure requirements should be as useful as possible in terms of the subject matter of the lobbying/lobbyist's position, they should also be consistent with the third party confidentiality requirements of Freedom of Information/Protection of Privacy legislation and policies.
- *Allocated adequate resources:* The allocation of resources to registries should be sufficient to ensure that the intended outcomes can actually be achieved.
- *Program evaluation:* The design and development of lobbyist registries should include the program evaluation features that will facilitate program evaluation/effectiveness measurement.

Key Design Best Practices

As described earlier, the key design best practices that we are proposing involve what would, in effect, be a new standard of disclosure and transparency. The

purpose of this new standard would be to shift the public focus away from "which companies have hired which lobbyists" (something that is often presented by the media and others in a way that is akin to "gossip") and towards identifying the substantive issues that are the focus of the lobbying and giving the public the tools necessary to hold public office holders accountable for making decisions in the public interest.

The two key best practices related to enhanced disclosure are:

- The lobbying subject matter and specifically the decision that lobbyists are attempting the influence.
- The public office holders lobbied or to be lobbied.

Key Design Best Practice #1:
Increased Disclosure of Lobbying Subject Matter

As discussed elsewhere in this report and *Volume 1*, most lobbyist registries require disclosure of the general subject of the lobbying. While we do not argue with the fact that this is a measure of transparency, our research indicates that this disclosure is at a high level and does not give the public the information it would need to be able to correlate lobbying efforts to actual decisions by public office holders or to better enable them to become more directly engaged.

Consistent with our design principles, part of the purpose of increasing disclosure of this nature is to shift the public attention from the identity of the lobbyists and their clients, towards the actual decisions that lobbyists are attempting to influence.

The following are two different sample approaches to the kind of disclosure that could provide the public with a better and more useful understanding of the

actual decisions lobbyists are attempting to influence and the rationale for their position.

The first of these samples is at a fairly high level, although still more detailed than the broad subject matter questions that are the focus of most lobbyist registries. The second sample is considerably more detailed. The samples were not drafted with a particular level of government in mind but could easily be modified accordingly.

Before we present these samples, however, we want to offer two caveats:

- There is no doubt that more detailed disclosure of subject matter represents a greater burden for lobbyists and their clients. However, in the absence of this kind of disclosure, we continue to be reluctant to suggest that lobbyist registries are worth the investment of public sector time and resources.
- We believe it would be possible to exempt lobbyists from a number of the more detailed subject matter disclosure requirements to the extent that they are involved in other parallel decision making processes within government that:
    - Are already transparent to the public (e.g. an application to change a zoning requirement).
    - Include processes whereby the lobbyist's/client's specific interest and position are already a matter of public record and are accessible to the public through other government channels.

Sample Approach #1: Examples of High Level Disclosure

- Seeking changes to sec.21 of Bill 123 to raise the threshold for reporting on environmental performance.
- Seeking individual Councillor support for a zoning variance on Property X.

- Seeking active support from individual Councillors/Ministers for a grant application where the decision making process has been delegated to administrative staff.
- Seeking active support from Councillors/Ministers for the XYZ software company's bid in response to Tender #12345.
- Seeking to overturn a recommendation from staff to award a contract.
- Seeking to interest Councillors and administrative staff in purchasing a new software package.
- Seeking support from individual Councillors/MPPs to change the City's/province's lobbyist registration by-law to eliminate the need for disclosure of the decisions that lobbyists are attempting to influence.

Sample Approach #2: More Detailed Disclosure

The following is a theoretical (as opposed to being based in actual practice in an existing jurisdiction) example of the kinds of more detailed questions that might be asked of lobbyists as they complete the registration process.

Lobbying to Change Existing Legislation/By-law or Regulations

- Which existing by-law, piece of legislation, regulation, etc. are you interested in?
- Are you proposing or opposing a change?
- Which specific sections of the by-law/legislation/regulation are you proposing/opposing be changed?
- What is your rationale/argument for your position on the specific changes?

Lobbying on Proposed Legislation, Resolutions, Bylaws,

- Which by-law/Bill/resolution, etc. before Council/the Legislature are you interested in?
- Which sections of the by-law/Bill/resolution, etc. are you interested in? Or is it the whole by-law/Bill/resolution, etc?
- Do you, in fact, have a position or are you just monitoring developments, i.e. with the possibility that you might have a position depending on future changes/amendments that might take place?
- If you have a position:
    - Is that position a simple *for or against*? If so, does this position apply to the whole by-law, etc. or just specific sections of it? If specific parts, then which specific parts? Summarize the reasons/arguments for your position.
    - If not a simple *for* or *against*, what is your position on the specific sections that are of interest to you? Are you proposing amendments to these specific sections? What is your rationale/argument for the proposed modification(s)?

Lobbying for a Policy, Program or Other Decision *(i.e. a decision not requiring changes to Legislation, Regulation, Bylaws, etc.)*

- Which policy or program area are you interested in? e.g. education, social housing, development, etc.
- What are the specifics of your interest?
    - Are you proposing changes to current policies or operational practices that would not require changes to legislation or regulations? If yes, which policies and which specific aspects of those policies/practices do you want changed? What is your rationale/argument for wanting those changes?

- Do you want a policy, regulatory or other decision that does not require a policy change? What is the specific decision that you want and what is your rationale/argument for wanting that decision?
- If you do not want any specific decisions or changes to legislation, regulation, or policies, are you simply monitoring developments in the event that something specific arises at a future date?

Lobbying related to Procurement *(would apply to lobbyists, including sales people, who are attempting to market/sell their products to public office holders.*

- What is the nature of the product or service you are interested in selling to the government?
- Which department(s) do you see as the potential purchaser(s) of this product or service?
- Are your activities in anticipation of a future RFP? If so, what is the expected focus of the RFP?
- Are your activities related to an existing RFP? If so, what is the number and focus of the RFP? *(Note: this question would only be relevant in jurisdictions that allow direct lobbying of public office holders after an RFP has been issued – something that jurisdictions viewed as leaders in procurement would usual not consider to be a best practice.)*

Lobbying related to Monitoring Developments *(would potentially apply to lobbyists who are not lobbying to change legislation, regulations, bylaws, or policies or who are not lobbying to get a specific policy, program or other decision)*

- Which policy/program areas are you monitoring?
- Which ministries/departments/agencies will you be monitoring?

A Word about Lobbying related to Monitoring Developments/Research

An issue with respect to lobbying related to monitoring developments or conducting research is whether this should a registerable activity if it does not involve a direct attempt to influence decision making?

There are different approaches to this issue in different jurisdictions.

Some jurisdictions are silent on this issue and in their interpretive material (handbooks, frequently asked questions, etc.) neither explicitly exempting nor including it from the definition of lobbying.

In other jurisdictions, the rules are clear that lobbyists who contact public officials for the purposes of collecting routine or background information on behalf of their client, as long as they do not refer to a specific issue or client position on that issue, would not be required to register for that purpose.

In still others, the context of the contact and the client's true intent in hiring the lobbyist becomes more important, e.g. if the lobbyist knows the routine information will be used as part of the client's/lobbying organization's strategy for dealing with government. For example, at the U.S. federal level, the following interpretation is given:

> *Lobbyist "A," a former chief of staff in a congressional office, is now a partner in the law firm retained to lobby for Client "B." After waiting one year to comply with post-employment restrictions on lobbying, Lobbyist "A" telephones the member on whose staff she served. She asks about the status of legislation affecting Client "B's" interests. Presumably, "B"*

will expect the call to have been part of an effort to influence the member, even though only routine matters were raised at that particular time.

The recently passed, although yet to be implemented, changes to the Government of Canada's registry, would go even further. As discussed in *Volume 1*, the new requirements are intended to capture *all* communications in respect of legislation, regulations, policies, programs, etc. as opposed to communications more focused specifically on influencing a decision.

Key Design Best Practice #2:
Disclosure of Which Public Office Holders

Consistent with our five key questions and design principles, the purpose of disclosing which public office holders are/will be/have been the subject of lobbying is intended to complement the greater disclosure requirements related to lobbying subject matter. The goal is to give the public the information it would need to evaluate whether public office holders are being inappropriately influenced by lobbyists.

It is important to note that the majority of lobbyist registries in North America do not collect this kind of information. However, many registry officials we spoke with suggested that this kind of information would make registries more effective for the public. It is also important to note that British Columbia originally required disclosure of civil service contacts, as well as political contacts, but found the volume of disclosures to be too onerous in terms of technology requirements and have since discontinued the requirement.

Among other public servants we contacted (i.e. individuals not involved in delivering a registry), the reaction to this suggested approach was mixed.

Some felt that while there is no logical reason that this kind of transparency should not be workable, it would likely result in a level of public and political exposure to which provincial public servants are not accustomed. It was felt that this would lead to an undesirable dampening of legitimate and valuable communications between public servants and outside interests.

Others expressed the view that if one is going to have a lobbyist registry, then disclosing the identity of public office holders at all levels within the organization would be the most appropriate and effective course of action. It was also noted that the public profile of municipal public servants is already significantly higher than those at the provincial/state or federal level.

The following are two different options for how best to proceed. Option 2 is the most consistent with the *five key questions* and design principles.

Option 1:

The focus of this option is on elected political officials and the most senior bureaucratic levels of government. Accordingly, lobbyists would be required to disclose the names and positions of the individuals they are lobbying, have lobbied, or plan to lobby in the following positions:

- Elected officials (Councillors, MPs, MPPs, etc.)
- Senior public servants (Commissioners, Deputy Commissioners, Deputy Ministers, Assistant Deputy Ministers, etc.)

Option 2:

The focus of this option is on all public office holders, regardless of level, that would be the subject of lobbying efforts. This would include:

- Elected officials (Councillors, Cabinet Ministers, MPs, MPPs, the Mayor, etc) and their staff.
- All administrative staff.
- Appointees and staff of agencies, boards and commissions.

Secondary Best Practices

The following are secondary, although still important best practices, that would enhance the effectiveness of lobbyist registries.

Analytical Capacity

As reported in *Volume 1*, many of the registries we looked at had only a very limited capacity for citizens to search and analyze the on-line data contained in registries. The focus appeared to be much more on disclosure of each individual transaction, rather than the ability to identify patterns, trends, etc.

Our research and interviews point to an enhanced analytical capacity as an important best practice. The data definitions (terminology that lobbyists will be required to use in registering) and information system used by a registry should allow the public to conduct it own analysis of the data to identify relevant patterns, trends, etc. Potential relevant patterns could include:

- Which major issues and possibly which positions on those issues, are the focuses of the most lobbying?
- For these issues, who are the lobbyists involved and the clients?
- Which public office holders are the subjects of the most lobbying/most accessible to lobbyists and which lobbyists?

- For the most lobbied issues or for those public office holders most frequently lobbied, what are the most prevalent types of lobbying that are taking place, for example – phone calls, meetings, lunches/dinners, etc.

The important point is that citizens and others should be able to cross-reference specific and aggregate information in the registry with the actual decisions taken by public office holders (recognizing that the record of these decisions will likely be contained in other databases/locations). The purpose of this cross-referencing ability is not to suggest for a moment that public office holders should be in any way discouraged from making decisions that are in the private interest (whether commercial or non-profit). Rather, it is an issue of making it easier/more transparent for citizens to evaluate whether in their own view those decisions (particularly decisions that were the subject of lobbying efforts) were also in the public interest.

Enforceable Code of Conduct

We make the point elsewhere that many lobbyist registries are somewhat neutral with respect to what constitutes *good* versus *bad* lobbying. The Ontario registry, for examples, is very neutral, with the exception of a general provision that lobbyists will not place public office holders in a real or potential conflict of interest.

However, the Government of Canada's *Lobbyist Code of Conduct* is a good example of an attempt to put more definition on *good* and *bad*, subject as we discuss further on in this section, to the capacity of the registry to enforce these provisions. The main elements of this Code are the lobbyists should:

- Conduct all relations with public office holders, clients, employers, the public and other lobbyists with integrity and honesty.
- At all times, be open and frank about their lobbying activities.

- Observe the highest professional and ethical standards. In particular, lobbyists should conform fully with not only the letter but the spirit of the Legislation and Code of Conduct.
- Ensure that they provide public office holders with accurate and factual information and that they are not knowingly misleading anyone and have taken proper to care to avoid do so inadvertently.
- Not propose or undertake any action that would constitute an improper influence on a public office holder.

Adequate Resources

Adequacy of resources is a major crosscutting best practice. Our research and, in particular, our interviews with public officials makes it clear that the effectiveness of registries is very dependent on the level of human and technology resourcing that is available – as one registry official put it: "if you are going to do it, do it right". Simply put, jurisdictions that are serious about making their registries effective and useful for the public need to allocate sufficient resources for these purposes.

Most, if not all, of the best practices we identify in this section have resourcing implications. As we have suggested elsewhere, rather than create an ineffective registry, the public might be better served by allocating scarce public resources to other arguably more effective ethics policies and programs such as the areas of conflict of interest and procurement, as well as on developing and maintaining a strong, ethical culture for politicians and their staffs, as well as public servants.

Education and Communication

The research indicates that education and communications – for lobbyists, their current and potential clients, public office holders, and the public – is an important best practice. The experience in other jurisdictions suggests that this is particularly true where there are:

- More complex reporting requirements (for example, more rather than less disclosure).
- A greater emphasis on ensuring that disclosure information is in a format that is useful for citizens and public office holders alike.
- Expectations that public office holders will monitor the registry and identify/report contacts they have had with lobbyists who are not registered or who have provided misleading or false information.

Best practices in this area include regular and, in some jurisdictions, mandatory training for lobbyists and public office holders, as well as the provision of educational material for the public with particular emphasis on ensuring that:

- The public/other registry users understand the purpose of the lobbyist registry and how to make effective use of the data and information.
- Lobbyists understand both the letter and spirit of the legislation, including how to operationalize a Code of Conduct.
- Descriptions of lobbying subject matter are sufficiently detailed to be of practical use to registry users.

We would also include in this area the practice of communicating regularly with lobbyists and the public for the purpose of ensuring the rules are clear and that overall awareness of the importance of ethical behaviour in lobbying remains high. The most common forms of this communication are by way of:

- Frequently asked questions.

- Advisory/interpretive bulletins, whereby registry officials regularly publish official *rules clarifications* in response to inquiries or investigation/enforcement activities.
- Publishing complaints and the results of investigation/enforcement activities as a means to heighten general awareness of the registry and/or a particular form of *bad behaviour* and to demonstrate that the registry has an effective enforcement capacity.

One approach we saw was not only to post these various bulletins, opinions, or enforcement reports on the registry website, but also to summarize them in regular newsletters that were distributed electronically to all registered lobbyists and public office holders and posted on the registry website.

Independent Oversight Body

Most jurisdictions have some form of arms-length body to administer the lobbyist registry (as well as conflict of interest and, in the U.S., campaign financing laws). The point here, however, is to ensure that this body has the mandate and resources (either direct or the capacity to draw on others) to monitor and review registrations, investigate complaints and take enforcement actions, conduct training and education for staff and lobbyists alike, and prepare value-added reports for the public.

Enforcement

As discussed earlier, ensuring that the registry has the resources and powers necessary to effectively enforce registry provisions is an important best practice. This would include but not be limited to ensuring compliance with the various disclosure requirements. Just as or, perhaps more importantly it would include

the powers and capacity to ensure compliance (capacity to investigate, power to require lobbyists to provide additional information/clarification, etc.) with the legislation and, in particular, the Code of Conduct (as described above).

Actively Engaging Public Office Holders

From our perspective, an indication of the level of interest in/effectiveness (or lack thereof) of a registry is the fact that, in many jurisdictions, there is no formal or informal expectation that public office holders will:

- Make use of the registry information on a regular basis.
- Be actively engaged in ensuring that lobbyists are registered and conducting themselves appropriately.

The research clearly leads to the conclusion that lobbyist registries that are not relevant for the public or for public office holders are not the most effective use of public resources.

The best practice in this area is that public office holders would actively use the registry as part of the public policy development process and as part of maintaining high awareness of the importance of ethical behaviour. Expectations for public office holders could include:

- As part of the public policy development process, public office holders would regularly access the registry database to identify who/which organizations are lobbying on particular issues and, most importantly, the lobbyists' positions on issues. This information could be included in policy papers, staff recommendations, etc. that go forward to the political level.
- Reporting someone who a public office holder believes has lobbied them but who is not registered.

- Reporting a lobbyist who has violated the Code of Conduct and in particular the key provisions against providing false/misleading information and/or putting public office holders in real or potential conflicts of interest.

Be Clear that Lawyers are Included

The experience of some jurisdictions, particularly municipalities, in implementing lobbyist registries has been that it was not always clear up-front that lawyers engaging in activity that met the definition of lobbying were considered to be lobbyists. This resulted in some initial confusion (and unsuccessful legal challenges) within the legal community that perhaps lawyers should not be required to register or disclose the same level of detail as non-lawyer lobbyists for reasons of solicitor-client privilege.

Accordingly, it is important that registration requirements are clear up front that lawyers who engage in lobbying would be required to register that activity and that they and their clients would be required to provide full disclosure according to the registration requirements.

Include Procurement and Sales People

The experience of many jurisdictions clearly points to procurement as a problematic area for governments in terms of maintaining high standards of ethical behaviour. The research and expert opinion in this area points in direction of ensuring that lobbyist registration and procurement policies are coordinated and integrated.

To this end, the best practice would be to ensure that the definition of lobbying includes procurement related activities broadly defined and that sales people

contacting public office holders as part of their sales related activities be included in the definition of lobbyists and as such be required to register. We would suggest that "sales related activities" be defined more broadly to include inquiries/research about future potential business opportunities or RFPs, responding to RFPs, etc.

Value-added Reporting to the Public

As a best practice, it is important to ensure that the registry has sufficient resources to and an expectation that it will provide the public with *value-added*, as well as statistical reports. By *value-added*, we mean reports that would:

- Be intended to support and reinforce a more transparent climate and appropriate culture of high standards of ethical behaviour within the organization.
- Establish the context within which the public (and media) should interpret the information from the registry.

This kind of reporting would include analysis of:

- Which consultant lobbyists and lobbying organizations are most active (number of registrations, most contacts with public office holders) – although a least one jurisdiction we spoke with recently halted this practice because they felt it amounted to free advertising for the most active consultant lobbyists.
- Which issues, decisions, by-laws, zoning applications, etc. were the subject of the most intensive lobbying activity, including, issue, decision, etc.
- Some explanatory information for the public that would help them to better understand the issue, decision, etc. that was the focus of the lobbying, i.e. what the various lobbyists wanted.

- Which departments, units within departments, and individual public office holders were the subjects of the most intensive lobbying.

Program Evaluation

As we noted earlier in this volume, no jurisdiction that we looked at had engaged in or was planning to engage in a formal evaluation of the effectiveness of their lobbyist registry. This is consistent with a pattern that we have observed both in Canada, the U.S. and abroad whereby there is often considerable discussion/rhetorical emphasis in the public service on the importance of evaluating the effectiveness of programs, but in practice, little focus in the program design phase on ensuring that a program is actually evaluable and similarly little emphasis on actually conducting program evaluations.

The evidence suggests that both politicians and bureaucrats are often reluctant to learn whether new or existing programs are actually achieving intended results. However, program evaluation continues to be viewed as an important best practice in public administration.

Accordingly, the design and development of a new lobbyist register should include and incorporate the elements that will be necessary for ongoing program/effectiveness evaluation. These elements include a clear description of the intended, measurable outcomes, (e.g. improved public confidence in government decision-making, improved standards of ethical behaviour, etc.) and the capacity/requirement that the necessary data and information be collected, analyzed, and reported.

Identify Lobbyist's Other Relationship with Decision Makers

The research identifies the identification of lobbyists' other relationships with decision makers as a potentially important practice in terms of the public's ability to hold public office holders accountable. This could include:

- Identifying whether and to what extent the lobbyist (consultant or in-house) and their client organization/employer receive funding direct from government as well as the type of funding (e.g. grant) and source (department/program) of that funding (as indicated in *Volume 1*, a standard practice in many lobbyist registries).
- Identifying whether the lobbyist (particularly consultant lobbyists) provides, on their own and for compensation, any direct products or services to government departments/public office holders that are being lobbied, including the nature of those services (e.g. communications consulting services, etc.), the client department/program area, and the key contact within the administration.

Part 5: Conclusion

In this paper, we have attempted to evaluate the effectiveness of lobbyist registries drawing on research and interviews that cut across a number of Canadian and U.S. jurisdictions.

As noted, lobbyist registries have generally been established as part of a suite of ethics related policies and practices, including conflict of interest policies, procurement policies and procedures, campaign financing rules, etc. There is historical evidence that indicates the value of these suites since the 1970's in terms of positively affecting ethical behaviour in government. However, there are few if any formal studies that assess the role of lobbyist registries as one component of the suite, in producing this result.

In our efforts to do so, we identified various explicit and implicit outcomes that registries were intended, or perceived to be intended, to achieve. Drawing on our interviews and literature review, we provided an assessment of how well registries perform in each of these areas.

As discussed earlier, each registry defines its purpose/intended outcome in somewhat different terms. In addition, external stakeholders have their own views about purpose and effectiveness. It is difficult, however, not to come to the conclusion that, despite the various qualifiers expressed by registry officials, lobbyist registries are, in fact, about public confidence in government. As suggested in this volume, how lobbyist registries perform in terms of restoring, enhancing, or forestalling declines in public confidence in government is the most important test of effectiveness and, ultimately, of whether the expenditure of public resources to create a registry was worthwhile.

With this ultimate test in mind, the research and expert opinion indicates that lobbyist registries for the most part do not perform well in many key areas of

performance and that as currently constituted may not be worth the expenditure of public resources. Our specific findings include that:

- While registries generally achieve a measure of enhanced transparency, this is often limited to the question of who is lobbying on behalf of which client, rather than the arguable more relevant questions of who are they lobbying and what do they want.
- There is no evidence to suggest that the public or public office holders make regular use of registry data for meaningful purposes.
- There is no evidence to suggest that in the present day lobbyist registries moderate the amount of lobbying that takes place in a jurisdiction or result in higher standards of ethical behaviour by lobbyists or public office holders.
- Finally, and most importantly, there is no evidence that public confidence in government is actually enhanced as a result of having lobbyist registries in place. Furthermore, there is evidence to suggest that public confidence has actually been eroded through use of registry data by the media and political campaigns.

In response to the question of what would make lobbyist registries more effective, we take the view that the ultimate test of effectiveness has to be enhanced public confidence in decision-making. To this end, future iterations of lobbyist registries need to shift the focus from *who is lobbying?* and for *which client?* to the substantive subject matter of the lobbying and which decision is being sought – in effect, addressing the first three of the five key questions we identified on page 11 of this volume:

- Who is attempting to influence government decision-making?
- Which government decision makers are the focuses of the influencing efforts?
- Which decisions are the subjects of the influence attempt?

As part of an attempt to become more effective, lobbyist registries should provide the public with the answers to these questions so that citizens can then make up their own minds with respect to the crucial remaining two questions:

- Was the attempt to influence successful?
- Was the decision in the public interest?

We acknowledge that this proposed approach represents a new (although by experts and practitioners not unanticipated or un-debated) direction for lobbyist registries and that this kind of disclosure would represent a somewhat greater administrative burden. Our point, as suggested earlier, is that a lobbyist registry focused on *who is lobbying* and subject matter in the broadest possible terms does not appear to be an effective vehicle for instilling confidence in public office holders. If, however, a jurisdiction is determined to put a registry in place, focusing on who is being lobbied and the substantive issues at stake provides for a greater likelihood that this expenditure of scarce public resources will have a demonstrable and beneficial impact.

Appendix A
Who actually uses the information in Lobbyist Registries?

If the public are not major users of this information, who is? The correct answer – as given to us by one Canadian advocacy organization – appears to be that no one really knows. That is to say, no jurisdiction we looked at or read about systematically tracks who accesses the information on the registry, the purposes to which that information is put, and whether the information is thought to have been useful. In the absence of this formal analysis, we have relied on informed opinion coming out of our interviews and literature review, summarized as follows:

Media and Political Campaigns

- The media and political campaigns are major users of the information to write what are most often negative stories that make use of the data to infer inappropriate behaviour, often with respect to a political opponent. One academic described this phenomenon as “grist for the mill”.

Lobbyists

- Lobbyists themselves are a major user of the information. According to lobbyists and registry officials alike, lobbyists/lobbying organizations use the registry information to keep up on their competition (e.g. which competitors have which clients), to plan strategy (e.g. whether organizations opposed to their clients’ interests have also hired lobbyists and who/how politically connected are those lobbyists), and to hold their competitors accountable for complying with registry disclosure requirements.

Public Servants

- Use by public servants of the registry information is mixed.
    - In some jurisdictions (the City of Chicago, for example), public servants are required to refer to the registry on a regular basis and to confirm whether an organization or individual that has contacted them and that they feel was lobbying them is in fact registered.
    - Officials from other municipalities suggested that public servants are already usually quite aware of who is lobbying and what they want, without having to refer to the registry.
    - It was suggested to us that in at least one Canadian jurisdiction, public servants on occasion check the registry as a way of identifying stakeholders on particular issues.
    - Our research indicates that unless there is some form of formal or informal expectation, public servants rarely or never make use of the information in the registry (or, in some cases, were even fully aware of the registry). This suggests to us that public servants in some jurisdiction see little or no value in the registry information.

Ethics Advocacy Groups

- The experience in the U.S. has been that advocacy groups, periodically, are major users of registry information, typically in preparing special reports on lobbying in a particular jurisdiction.
- Reports of this nature that we reviewed as part of our research tended to focus on the triangular relationship between lobbyists, legislators (municipal and state/federal) and the extent of gifts and campaign contributions. For the most part the reports take the position that the rules governing lobbyists are not tough enough. Generally the reports position the data in the context of “where there is smoke there is fire” and call for a

combination of additional and more detailed lobbyist disclosure requirements and campaign financing reform.

Appendix B

How Effective and Influential are Lobbyists?

In response to the question of how effective and influential lobbyists really area, there is no clear answer. As we noted in *Volume 1*, the industry itself downplays the stereotypical services, e.g.

- "Let me use my connections to put a bug in the Councillor's/Minister's ear".
- "I can get you that meeting".
- Let's appear before the Committee but I can also get you in to see the Chair of the Committee and some other key Councillors/MPPs"

Rather the professional focus is on strategy development for clients and political intelligence gathering that feeds into that strategy development.

In response to the question "do I need to hire a lobbyist", Sean Moore, a long time observer of the Ottawa lobbying scene once gave what in our view is a reasonable and succinct answer:

> *There's only one answer. Absolutely yes AND absolutely no.*
>
> *Absolutely No: There's no way progress can be made on any issue - especially if it represents change of any sort - unless there's a well-conceived and ably executed plan that deals with both process and substance.*
>
> *Absolutely Yes: Yes, an organization can do this without a hired-gun lobbyist on the case, provided that there are skilled in-house resources or experienced volunteers that can provide the sound strategic insight and*

direction required to lobby well. Some of the best advocacy efforts in recent years have been executed without paid outside help.

Certainly the media, which as discussed earlier is the public's primary source of information about lobbying, and ethics advocacy groups, have a definite tendency to present consultant lobbyists as extremely powerful and influential, often focusing on a relatively small number of high profile consultants that were former politicians or senior policy staff. However, there is evidence to the contrary as well.

Our interviews indicated that senior bureaucrats often have very little direct contact with consultant lobbyists and do not see them as major influencers on most issues. One official, however, noted that in their own experience, outside organizations that obtain good, objective strategic policy advice on how best to approach government, are usually more effective at brokering decisions that are in both the public and private interest. These observations are consistent with the publicly stated view held by many government relations professionals that a good consultant lobbyist should be "seen and not heard" and "clients are their own best advocates".

This view is confirmed by a more detailed study conducted in 2000 by the Canadian-based Public Policy Forum looking, among other things, at the prevalence and utility of government relations consultants in the on-going relationship between industry and government at the federal level.

The survey canvassed the views of 163 corporate executives and 227 senior federal government officials. Participants were asked to identify the intermediary they preferred to deal with in conducting their government industry relations.

- Private sector respondents said they preferred to rely on their own representations, followed by those of their industry association.

- Government respondents indicated a preference for dealing with industry associations, though in-house company representatives were a close second.
- For both groups of respondents, government relations consultants ranked at distant third at between 11 and 17 percent.

The view that consultant lobbyists are the least preferable intermediary corresponds with the view (also shared by both private sector and civil service respondents) that the number of key decisions makers within government has been narrowing in recent years. As reported in the study, respondents saw the influence of the Prime Minister's Office, cabinet ministers and their political staff, and deputy ministers as increasing, while the influence of Members of the House of Commons, senators and less senior public servants was perceived to be declining.

It is also interesting to focus for a moment on the finding that the private sector respondents did not see their industry associations as the most effective intermediary on issues of importance (preferring, instead, their own employees). The study reports that corporate respondents:

> *"…acknowledge that associations represent industry's collective interests and ensure corporations are provided timely information on government activities, but their assistance as strategic advisors, direct lobbyists and helpers in bridging differences between the two sides was downplayed. In short, corporate respondents appear to see their associations as useful sources of information, but not as important players in actually dealing with government on relevant issues."*

The study noted that this private sector view was at odds with the perception of public servants, who felt that associations "did have a large role in making

representations to government on behalf of industry and providing networking opportunities."

With respect to government relations consultants, the study noted that there is a perception among journalists and government officials that large corporations rely on big consulting firms when dealing with government. However, the survey did not support that perception.

In terms of the effectiveness of government relations consultants:

> *"…both corporate and government respondents gave consultants positive marks for helping corporations identify government decision makers, and corporate respondents acknowledged their role in providing strategic advice. However, consultants are not perceived to be providing other services to any great extent. Surprisingly, public servants saw consultants as more significant to government–industry relations activities than did the corporations themselves."*

Corporate responses indicated that smaller corporations use consultants more often than larger corporations. Service include to providing networking opportunities, cost effective government relations, and a single entry point of industry contact for the federal government.

Finally, the study asked participants *"to what extent do government relations consultants provide the following government–industry relations services for their clients?"*

The responses are shown in the table on the following page. The results indicate that the primary focus of most government relations consulting, as suggesting by the consulting industry's marketing material, is on providing advice, background information, expertise in the decision-making structures, processes, and culture within government, political intelligence gathering, (as well as the apparently

Question	Private Sector	Public Sector
Provide guidance in identifying government decision makers.	61%	58%
Provide strategic advice.	56%	39%
Assist in making appointments with decision makers.	43%	46%
Provide corporations with accurate guidance on what factors are behind a proposed government initiative.	43%	27%
Ensure that corporations are in the right place at the right time in making representation to government.	34%	29%
Ensure corporations are informed of government initiatives in a timely and accurate way.	30%	31%
Provide direct representation (lobbying) to government on behalf of the corporations.	26%	38%
Help to bridge possible differences between corporate and federal government positions on a given issue.	25%	16%
Provide networking opportunities between govt and industry.	25%	36%
Provide cost effective government relations.	20%	14%
Provide a single entry point of industry contact for the federal government as a whole.	13%	13%
Represent the collective interests of industry.	6%	5%
Are forthcoming in disclosing to government the corporate or industry interests they represent.	N/A*	29%
Note: % represents percentage of those who responded either (4) or (5), with (4) being to a "moderately great extent" and (5) to a "great extent		
** Only government respondents were asked this question.*		

ubiquitous but not widely advertised “arranging a meeting”). Both private sector and public sector respondents scored consultants as having much lower value as direct participants (as opposed to behind-the-scenes advisors) in the policy process, either in the role of advocating directly with government officials, attempting to directly broker between their clients and government officials, or as a communications “go-between” between government and industry.

The Public Policy Forum study confirms that in Canada, consultant lobbyists do intervene directly with public office holders, although perhaps with less frequency and impact than the media would have us believe. (The Public Policy Forum study brought to mind a comment offered by one individual – that it is important not to confuse *gaining access* with *having influence*, something that the media, it was suggested, often overlooks.)

Reports from U.S. ethics advocacy organizations are often replete with documented examples of *bad behaviour* provided through interviews with politicians and lobbyists alike. The advocates generally take the position that state and federal politics are rife with this kind of behaviour, that lobbyists are extremely powerful and influential and, in fact, constitute a serious threat to democracy.

Obviously, it is very difficult to determine to what extent the more stereotypical *bad lobbying* – the inappropriate attempts to influence that often give rise to lobbyist registries in the first place – takes place in Canada. It is also very difficult to determine whether and to what extent these efforts are successful and actually result in decisions that are not also in the public interest.

At the same time, however, the evidence suggests that there is no reason to believe that Canadian politicians, their staff, and even public servants are immune from having what the public might perceive as inappropriately close relationships with lobbyists. It is also not unreasonable to assume that some

lobbyists are actually able to directly influence public office holders to make decisions that are not in the public interest.

Finally, the literature and expert opinion point to two key factors that would tend to mitigate against this kind of behaviour:

- The extent to which a large, professional, and competent bureaucracy is in place that is trusted by the politicians, that maintains open communication with all stakeholder groups, and is in a position to effectively counterbalance or neutralize “bad public policy”,
- The extent to which a government decision-making takes place in a transparent environment, including the extent to which public servant analysis and recommendations to politicians are publicly available and political debates and decision-making takes place in a public forum.

Toronto Computer Leasing Inquiry

Research Paper

LOBBYIST REGISTRATION

Volume 3:

City of Toronto & Options/Approaches for Discussion

November 2003

Table of Contents

Executive Summary & Summary of the Options/Approaches

Part 1: Introduction

Volume 3 focuses on lobbyist registration issues with respect to the City of Toronto and options and approaches for discussion related to strengthening strengthen the current City proposal for lobbyist registration. It builds on *Volumes 1* and *2* – respectively, a comparative overview of lobbyist registries in Canadian and U.S. jurisdictions, and an assessment of lobbyist registry effectiveness and related best practices.

The report draws on interviews with 29 academics and other experts, practitioners, and public servants, including lobbyists, lobbyist registry officials, federal, state/provincial, and municipal public servants, and associations representing Ontario municipal officials. Interviews have been supplemented by the available secondary material – academic papers, monographs, articles, etc.

Part 2: Current City Approach to Lobbyist Registration

In terms of formal policies, City currently deals with lobbying in four ways:

- A Conflict of Interest policy for employees who may also be involved in outside organizations that may, from time to time, lobby the City, e.g. for funding, new programs, etc.

- Guidelines for city employees (again under the Conflict of Interest policy) that provide clarification as to what constitutes lobbying/a lobbyist and a set of standard questions that staff should ask themselves when contacted by an outside individual that will help them determine whether that individual is, in fact, a lobbyist.
- A requirement that bidders on large contracts that intend to contact Councillors directly with respect to their bid, register with the Clerk of Council.
- A recent decision by some councillors to voluntarily put log books in place to record visits by lobbyists.

These policies do not, nor were they intended to, constitute a lobbyist registry along the lines of what is in place at the Canadian and U.S. federal governments, various provincial and state governments, and a number of large U.S. municipalities. They can be seen as part of a broader and longer term effort to shape the culture and behaviour of the new City since amalgamation. As suggested to us in a number of interviews, the importance of taking action in this regard was recognized by senior administrative officials in the early days of the new City, particularly in light of the different experiences, approaches, etc. of the various amalgamating organizations.

More recently, the City has developed a *People Strategy* that attempts to move beyond the policy development phase to a more sustained and people-focused effort to shape and embed cultural expectations. This includes defining public service values and expectations for excellence and engaging staff in understanding and participating in a shared City culture.

As reported to us, this shift has been hastened by the recent computer leasing issue. One of the consequences has been a significantly higher level of awareness within the administration and Council with respect to the prevalence of lobbying.

Part 3: Current City of Toronto Proposal

In August 2003, the City of Toronto's Ethics Steering Committee recommended the establishment of a Lobbyist Registry modeled on the registry in place for the Government of Ontario. At this stage, the proposal lacks formal definition in a number of areas that would not likely be developed until after the November 2003 municipal election and potentially not until at least some initial discussions have taken place with the Province concerning additional legal powers for the City.

The City's proposed approach is very consistent with the general approach to lobbyist registration found in other jurisdictions. The approach is at least as rigorous as that of the Ontario Government and even goes further in some areas, such as identifying volunteers as lobbyists and (subject to further discussion at Council) requiring lobbyists to identify individual Councillors and their staff who are being lobbied. In doing so, the City would be positioned clearly within the mainstream of lobbyist registration systems in Canada and the U.S.

Having said this, however, the impact of lobbyist registries in terms of restoring, enhancing, or forestalling declines in public confidence in government is the most important test of effectiveness. The research indicates that lobbyist registries for the most part do not perform well in many key areas and that as currently constituted may not be worth the expenditure of public resources. Among these key areas, we would include:

- The general lack of emphasis on which public office holders (including both elected and appointed individuals) are being lobbied and the nature of the decisions that lobbyists are attempting to influence.
- The need to focus more on the substantive subject matter of the lobbying, specifically which decision is being sought. In effect, addressing the first

three of the five key questions posed in *Volume 2* and referenced on page 38 of this volume.

The need to position lobbyist registries as part of a more comprehensive effort to define, promote, and sustain ethical behaviour and decision-making in government.

Part 4: Lobbying at the City of Toronto

Why a lobbyist registry for the City of Toronto?

As demonstrated during municipal election campaign in the City of Toronto, the immediate impetus for a lobbyist registry for the City comes from the political level. References were made to various forms of undesirable behaviour, e.g. "backroom decision-making", "cronyism", etc. The general concern appears to be that business is conducted behind closed doors by a host of political insiders – former councillors, former political and administrative staff, campaign officials, fundraisers, etc. – on behalf of unspecified outside interests.

In light of this public discussion, it would be reasonable for citizens to have an understanding that the problem to be addressed is more than just a matter of transparency for its own sake (as discussed in Volume 2, transparency is often put forward as the primary objective of most lobbyist registries). That understanding would include the view that changes in behaviour are necessary as part of enhancing public confidence. From our perspective, this important point sets the stage for whatever action the City will take in the future.

The Research on Lobbying at the Municipal Level

In *Volume 1* the view as expressed that a typical Ontario municipality has a mix of structural characteristics – some of which would tend to encourage more activity

along the lines of the U.S.-style lobbying of legislators, and some of which would tend to mitigate against lobbying. Given these characteristics, we would suggest the following major conclusions about lobbying at the municipal level in Ontario:

- *Larger Councils:* Municipalities, particularly those with larger Councils such as the City of Toronto, can legitimately be expected to be the subject of more of what we would call "legal lobbying" than would a provincial or federal legislature.
- *Trust in the bureaucracy:* The bureaucracy's capacity to mitigate the need for lobbying appears to be highly dependent on the extent to which it is trusted by Council and that Council is comfortable delegating responsibility.
- *Delegation:* In many Ontario municipalities, delegation from Council to the administrative staff often does not take place to the extent that would be required for the bureaucracy to function more effectively as a check on lobbying.

Lobbying at the City of Toronto

Defining Good and Bad Behaviour

It is clear from our research that in the wake of amalgamation, the City of Toronto took steps to define and reinforce a consistent culture of ethics and integrity at both the bureaucratic and political levels, including procurement and conflict of interest policies. The difficulty and complexity of the challenge of bringing together the different operating approaches of the amalgamated municipalities cannot be underestimated.

In addition, the recent computer leasing issue has resulted in Councillors and administrative staff being much more aware of lobbying activity. However, this falls short of more formalized and consistently accepted thinking, definitions, etc.

Insufficient Clarity re Roles and Responsibilities

It is not whether and to what extent Councillors remain accessible to in-house and consultant lobbyists, but rather what action they take with the staff as a result of the lobbying contact that matters. In practice, however, with respect to lobbying and lobbyists, roles and responsibilities are not always clear and consistent.

Trust in the Staff/Perception of Too Much Influence

As one interviewee suggested, if Councillors had a high level of trust in the administrative staff, they would be more likely to simply listen politely and refer lobbyists to the appropriate staff person and/or existing policy decision-making process/senior department official. It appears, however, that a sufficient level of trust may not exist at the City of Toronto for this to occur. This has been heightened in the wake of the recent computer leasing issue. Some have suggested that its origins go back to the formation of the new City and the fact that the senior staff of the City were selected by the Transition Team as opposed to Council itself, i.e. were “not their people”.

This distrust is exacerbated by the concern of Councillors in many municipalities with respect to the increasing power of public servants. This perceived problem is a result of a number of factors coming into conflict with the traditional “hands-on”, local/operational orientation of many municipal Councils in Ontario, including:

- The increasing size, scope, and complexity of municipal issues.
- The increasingly professional class of municipal managers.

- The emerging *best practice* in municipal governance whereby Councils are assuming a governing/policy making role, rather than being more operationally focused.

Part 5: Options and Approaches

One of the major limitations of lobbyist registries is that they focus almost exclusively on the behaviour of the lobbyists. However, it is not solely about the lobbyists themselves, but as much or more about how a government and individual public office holders within that government deal with these efforts.

The reality is that the prevailing culture of an organization and the decisions of public office holders determine whether and to what extent both good and bad lobbying will be effective. In defining this culture and making these decisions, public office holders also influence and shape the behaviour of the lobbyists themselves. Simply put, if the culture of the City defines and reinforces good behaviour, it is more likely that good behaviour will result. Conversely, to the extent the culture countenances and rewards bad behaviour, the result will inevitably be more bad behaviour.

With this in mind, options and approaches that would enhance the effectiveness of the City of Toronto's proposed lobbyist registry are presented in three parts:

1. Enhanced disclosure of who is being lobbied and the nature of the decision that the lobbyist is attempting to influence.
2. Defining how the City itself should respond to and deal with lobbying efforts and embedding those responses in the City's operating culture.
3. A number of more operational approaches related to the more detailed mechanisms of the lobbyist registry.

1. Options and Approaches re Enhanced Disclosure

1 a) Disclosure of Public Office Holders

That the City of Toronto require lobbyists, as part of their registration, to identify the individual public office holders (including name and title) that they intend to communicate with as part of their lobbying efforts. In this category, we would include: individual Councillors and their staff, any member of the administrative staff, and any member or staff of a City agency, board, or commission.

1 b) Describing the Decision to be Influenced

We are recommending that the City of Toronto include as part of its lobbyist registry a requirement that registrants be more specific about the subject matter focus of their lobbying including that they be required to disclose and describe at a high level the actual decision they are trying to influence.

1 c) Additional Working-Level Options/Approaches re Enhanced Disclosure

- That after one year, the City review its requirements with respect to disclosing/describing the decision to be influenced with a view to determining whether lobbyists are reporting this information in the manner intended and whether this level of information is proving to be sufficient to allow citizens to understand the decision being sought.

- That the public handbook/registration instructions accompanying the registry be as descriptive as possible in terms of the kinds of decisions that lobbyists/lobbying organizations might be trying to influence. This should be set out in the form of a comprehensive list of situational examples so that lobbyists are as clear as possible with respect to how to characterize their activities.

- That registry staff be directed to be vigilant and vigorous in applying the above mentioned “informed member of the public” test and following up with registrants who have not been sufficiently clear with respect to the decision they are attempting to influence.

- That, as a general business practice, staff reports to Council should include summaries of the lobbying activity that took (or is continuing to take place) on the issues involved.

- That registrants be required to make reference to any publicly available submissions to City officials that they have made that relate to their lobbying effort to allow for easy follow-up by citizen or other interested parties.

2. Options/Approached for discussion re Positioning Lobbyist Registration as Part of Suite of Ethics Related Policies/Creating a Strong Culture of Ethical Behaviour

The research is clear that to maximize effectiveness, lobbyist registries need to be positioned as part of a broader suite of ethics related policies, practices, and tools. This includes conflict of interest policies, codes of behaviour, systems of rewards and sanctions, and procurement policies. This also includes efforts to define and embed a strong culture of ethical behaviour and decision-making for public office holders. We suggest that the City’s process for defining the new cultural expectations could include the following steps:

- Describing the types of lobbying that its public officer holders are subject to. This would include consultant and in-house lobbying and run the full gamut of government decisions that lobbyists are attempting to influence. All Councillors and political and administrative staff would be asked to contribute and the results would be collected and communicated publicly.

- Assessing whether and to what extent these types of lobbying constitute "good" vs. "bad" lobbying – for example, where the lobbying is respectful of the decision-making process and delegated roles and responsibilities vs. where the lobbying seeks to circumvent establish processes or subvert established roles and responsibilities.
- Defining in very situational terms what constitutes good and bad behaviour on the part of public office holders with respect to different types of lobbying efforts, i.e. guidance for how public office holders should be expected to respond to lobbying in various situations.
- Defining the consequences for public office holders who do not respond to on-going lobbying efforts appropriately.
- Embedding the desired behaviours/responses in the City's various ethics policies, such as conflict of interest/codes of behaviour, procurement policies and procedures, Councillor and administrative staff training and mentoring programs, performance management systems, etc.

3. Other Operational Options/Approaches

Analytical Capacity

- That the City of Toronto's registry include a robust search and analysis capacity that can be accessed and used effectively by citizens. Ideally, this would include the capacity to perform both issue-specific and aggregate analysis.

Enforceable Code of Conduct

- That the City of Toronto's lobbyist registry include an enforceable Lobbyist Code of Conduct along the lines of the federal model.

Adequate Resources

- If the City is serious about changing behaviour with respect to lobbying (as opposed to simply putting a lobbyist registry in place), careful consideration be given to adequate resourcing.

Education and Communication

- That the City's lobbyist registration program include training materials and training sessions for lobbyists/lobbying organizations and public office holders, as well as frequently asked questions, advisory/interpretive bulletins, and the publishing of complaints and the results of investigation/enforcement activities.

Actively Engaging Public Office Holders

- That the City's approach include the expectation that public office holders will:

  Make use of the registry information on a regular basis.

  Be actively engaged in ensuring that lobbyists are registered and conducting themselves appropriately.

Disclosing the Lobbyist's Other Relationship with Decision Makers

- That the City of Toronto require lobbyists to disclose the extent of their involvement with public office holders (the latter in their official capacity as opposed to personal friendships) that are the subject of their lobbying efforts.

Being clear that Lawyers and Other Professions are Included

- That the City's registration requirements be made clear up front that any individual engaged in activity that is captured by the definition of lobbying would be required to register.

Being clear to the Public about what is not considered to be Lobbying

- That the City define very clearly those types of activities that are not considered to be lobbying with particular emphasis on exclusions that emphasize the normal course of City business. We would include in this the kinds of day-to-day examples set out in Appendix B.

Including the full range of procurement related activities

- That the City's policy towards lobbyist registration should include all procurement related activity by lobbyists. This would include:

  The various contacts with public office holders that would occur in preparing for and participating in the formal purchasing process.

  All sales and marketing related activities.

Providing Value-added Reporting to the Public

- That the City's registry be responsible for producing value-added public reports that would:
  - Support and reinforce a more transparent climate and appropriate culture of high standards of ethical behaviour within the organization.
  - Establish the context within which the public (and media) should interpret the information from the registry.

Evaluating Program Effectiveness

- That the design and development of the City's lobbyist registry should include and incorporate the elements that will be necessary for ongoing effectiveness evaluation. These elements include a clear description of the intended outcomes, (e.g. improved public confidence in government decision-making, improved standards of ethical behaviour, etc.) and the

requirement that the necessary data and information be collected, analyzed, and reported.

Part 1
Introduction

Volume 3 on lobbyist registration continues to build on the base of information and analysis that we presented in the first and second volumes – respectively, a comparative overview of lobbyist registries in Canadian and U.S. jurisdictions, and an assessment of lobbyist registry effectiveness and related best practices.

Focus and Structure

The focus is on lobbyist registration issues with respect to the City of Toronto. As such, it has five parts in addition to this Introduction, including:

- An overview of the current policy in place at the City of Toronto with respect to lobbyist registration.
- A review and commentary on the proposed approach to lobbyist registration that was put forward to City Council at its last meeting in September 2003.
- A discussion of the issues and challenges associated with lobbying at the City of Toronto as encountered through the research.
- A discussion of options and approaches with respect to how the City of Toronto's proposed approach to a lobbyist registration could be strengthened and made more effective.

To the extent possible, options and approaches identified for discussion are based on best practices that exist in other jurisdictions. As discussed in *Volume 2*, however, the research indicates that current best practices from other jurisdictions include some major limitations (particularly related to disclosure) that impair registry effectiveness. Therefore, in a few key areas options/approaches

are identified that go beyond practices that are already in place in other jurisdictions but that we believe would position the City of Toronto as a leading jurisdiction in terms of setting a new and more meaningful standard.

This report draws on analysis and views expressed in interviews and informal surveys. A total of 29 individuals were contacted, including interviews with academics and other experts, practitioners, and public servants, including lobbyists, lobbyist registry officials, federal, state/provincial, and municipal public servants, and associations representing Ontario municipal officials. Interviews have been supplemented by the available secondary material – academic papers, monographs, articles, etc.

Wherever possible, the analysis and views have been supplemented by the available secondary material – academic papers, monographs, articles, etc.

Part 2

Current City Approach to Lobbyist Registration

It is clear from our research, as evidenced in current policies and procedures, that City officials are very much aware of the existence of lobbying and the challenges/issues that this can present. In terms of formal policies, the City currently deals with lobbying in four ways:

- A Conflict of Interest policy for employees who may also be involved in outside organizations that may, from time to time, lobby the City, e.g. for funding, new programs, etc.
- Guidelines for city employees (again under the Conflict of Interest policy) that provide clarification as to what constitutes lobbying/a lobbyist and a set of standard questions that staff should ask themselves when contacted by an outside individual that will help them determine whether that individual is, in fact, a lobbyist.
- A requirement that bidders on large contracts that intend to contact Councillors directly with respect to their bid, register with the Clerk of Council.
- A recent decision by some councillors to put “log books” in place to record visits by lobbyists: in effect, a form of voluntary registry.

General Comments

The current policies do not, nor were they intended to, constitute a lobbyist registry along the lines of what is in place at the Canadian and U.S. federal governments, various provincial and state governments, and some large U.S. municipalities. In the late 1980’s and early 1990’s the City made various efforts

to put a more robust lobbyist registry in place, having passed a by-law as early as 1989 that:

- Defined a lobbyist as a person acting on behalf of others with respect to an issue and doing so for remuneration and/or compensation.
- Required all lobbyists to file a form with the Clerk showing the name of the lobbyist, the employer(s) or client(s) of the lobbyist, and the issues on which the lobbyist was appearing.
- Allowed for fines of up to $2,000 for lobbyist who undertook their lobbying activities without first registering.
- Defined an undertaking to include oral or written deputations to Council, its committees, or agencies and any communication, oral or written, with Councillors or senior staff.

However, these various by-laws were ultimately repealed by Council, apparently in response to:

- A general lack of evidence that the approach adopted at the time was seen as being of value to Councillors, staff, the general public.
- Legal challenges, primarily from within the legal community with respect to whether lawyers could be regulated as lobbyists.
- Concerns about adequacy of authority under the previous Municipal Act.
- Concerns about administrative burdens on City officials.

The various policies noted above (and described in more detail later in this section) can be seen as part of are broader and longer term effort to shape the culture and behaviour of the new City since amalgamation. As suggested to us in a number of interviews, the importance of taking action in this regard was recognized by senior administrative officials in the early days of the new City, particularly given the different experiences, approaches, etc. of the various amalgamating organizations. However, in the period immediately following

amalgamation the priority and overwhelming focus of senior staff time and attention was by necessity on other pressing matters such as maintaining service levels to the public, setting up decision-making processes, completing the organizational design, human resources/collective bargaining issues, etc.

In the subsequent years, efforts to shape the operating culture of the new City focused on the integration/development of various policies and procedures related to ethics/integrity, transparency, and accountability. With respect to integrity and transparency, this policy development included:

- A conflict of interest policy for Council members.
- A conflict of Interest policy for staff, with conflict of interest components built into the performance management system for senior staff.
- Inclusion of conflict of interest provisions in RFPs.
- An interim complaints protocol and procedures governing Council behaviour.

More recently, the City has developed a *People Strategy* that attempts to move beyond the policy development phase to a more sustained and people-focused effort to shape and embed cultural expectations. This includes defining public service values and expectations for excellence and engaging staff in understanding and participating in a shared City culture.

As reported to us, this shift has been hastened by the recent computer leasing issue. One of the consequences has been a significantly higher level of awareness within the administration and Council with respect to the prevalence of lobbying. On the administration side in particular, this led to discussion and agreement at the senior level with respect to what constitutes appropriate behaviour and is viewed as having resulted in a significant “cooling out” with respect to lobbyist access. This includes a new requirement for staff to seek more senior approval in order to accept lunches, dinners, invitations to sporting events, etc. It also includes greater emphasis on channelling lobbying efforts into

more formal decision-making processes, e.g. directing unsolicited proposals into the procurement/purchasing process. With respect to Council, the response has included the creation of a voluntary registry and a formal proposal for an Integrity Commissioner and more comprehensive lobbyist registry.

From our perspective, these post-computer leasing developments have major relevance with respect to lobbying. As will be suggested later in this report, the extent to which lobbying poses a problem for any government relates very much to what is deemed to be acceptable and unacceptable behaviour by the public office holders themselves. In Toronto's case, this would be how both Councillors and political and administrative staff deal with and respond to lobbyists. Furthermore, it is important to understand that the behaviour of public office holders with respect to lobbying shapes and sets the stage for how lobbyists behave.

As presented in Part 4, the awareness of lobbying issues is very high at the City of Toronto but in practice, a consistent and disciplined organizational approach is not yet in place. As we suggest in the options/approaches discussion in Part 5 of this volume, a lobbyist registry can be part of this disciplined approach but in and of itself has not been proven to be an effective tool for changing behaviour and enhancing public confidence. It is essential that organizations be clear internally about what constitutes appropriate (and inappropriate) responses to different types of lobbying activity and then through various policies and practices, to embed those responses in its operating culture.

City of Toronto Lobbyist-related Policies

The following is an overview of the current status of lobbyist related policies and practices at the City of Toronto.

Lobbying Policy for Employees with Involvement in Outside Organizations (2000)

The current City Conflict of Interest policy anticipates that employees may be involved in outside organizations that from time to time, may lobby City officials for a particular decision, e.g. as a Board member of a community group or agency that is making a funding request.

The policy requires that employees who are involved in outside organizations that are making a brief to the City and/or planning to meet with City officials to argue their case, are required to declare a conflict of interest and exempt themselves from contributing to the brief or participating in the lobbying activity.

Guidance re What Constitutes Lobbying/Whether a External Contact is a Lobbyist (2000)

Appendix 2 of the City's Conflict of Interest Policy provides for definitions of what constitutes lobbying and includes advice to staff in the form of questions that they should ask themselves in determining whether an external contact is, in fact, a lobbyist.

What constitutes lobbying?

The City's definition of what constitutes lobbying is similar to definitions in place at the provincial level in Ontario, B.C. and Nova Scotia, as well as the current federal definition, bearing in mind that this definition will change when Bill C-15, already passed by Parliament, is enacted. (Note: *Appendix II* of *Volume 1* includes a discussion of the new federal requirements that focus on the more general "communicating" with public office holders, as opposed to the more specific and in our opinion, more manageable and relevant "attempting to influence". This change flows from a Court decision that highlighted similarities in language between "influencing decision-making" under lobbyist legislation and the Criminal Code language related to influence peddling.

The following is the current City of Toronto description of what constitutes lobbying:

> *Lobbying is usually defined as direct or indirect efforts to solicit support and influence government decisions on behalf of another party or an organization, often away from public scrutiny.*

What is not considered to be lobbying?

The City has a high level definition which, again, is consistent with the provincial and current federal approaches, in that it exempts routine inquiries for advice and/or information, committee deputations, or other processes that are a matter of public record. (Note: as outlined in *Appendix II*, Bill-C15 changes the federal requirement to be broader in that lobbyists will be required to register even if a public servant has initiated the contact.) The current City policy indicates that:

> *Lobbying activity is to be distinguished from routine advice seeking by members of the public, or contacts by members or employees of*

government conducting official business. Lobbying is also distinguishable from matters that are the subject of committee deputation, or other processes that are a matter of public record where individuals are named and their interest and organizational affiliation identified.

What are the different types of lobbyists?

In this regard, the current City policy (see italics below) is consistent with the various provincial and federal definitions, with the exception that the City has included a fourth category – volunteer lobbyist – where the lobbying activity takes place without compensation:

- *"Consultant lobbyist" means a person who, for payment, lobbies on behalf of a client and includes, but is not limited to, government relations consultants, lawyers, accountants, or other professional advisors who provide lobbying services for their clients;*
- *"Corporate in-house lobbyist" means an employee of a corporation that carries on commercial activities for financial gain and who lobbies as a significant part of their duties;*
- *"Organization in-house lobbyist" means an employee of a non-profit organization, when one or more employees lobby public office holders and where the accumulated lobbying activity of all such employees would constitute a significant part of the duties of one employee; and*
- *"Volunteer lobbyist*" means a person who lobbies without payment on behalf of an individual, corporation, or organization.

Questions staff can ask themselves to determine whether they are being lobbied

The policy includes the following questions that are intended to be used by staff to assist them in determining whether they are, in fact, being lobbied:

- *During the past year, has the contact person attempted to influence you personally, for example, in any administrative action that would have benefited him or her or his or her employer financially?*
- *Does the contact person do business or seek to do business with the City?*
- *Is the contact person seeking to influence outcomes outside a public forum on a matter involving, for example, a license, permit or other entitlement for use currently pending before the city?*
- *Is the contact person a provincially or federally registered lobbyist employer or a client of a registered lobbyist? (Refer to the respective web sites)*
- *Is the contact person a provincially or federally registered lobbyist or lobbying firm?*
- *Does the contact person fall within the definitions provided above?*

Direction to Staff re how to respond to/deal with lobbyists?

The policy is not specific in terms of guidance to staff for how they should respond to/deal with lobbyists. The policy states:

> *Employees shall be vigilant in their duty to serve public interests when faced with lobbying activity.*

Lobbyist Disclosure Information Policy: Registering Bidders on Large Contracts (2001)

As noted in *Volume 1*, the City's current policy on Lobbyist Disclosure Information was not intended to be a more comprehensive approach to the registration of lobbyists.

The focus of the policy is specifically on various components of the competitive tendering process. The policy specifically acknowledges that, as part of the City's current approach to procurement, bidders on City contacts are allowed to contact elected and appointed City officials as part of promoting their own bids and opposing the bids of competitors.

The following are the details of the policy:

- The policy applies only to purchases above the City's Bid Committee award limit of $2.5 million.
- The policy deals with communication by bidders to "members of Council, city officials, appointed members of any City board, agency, commission, task force, or related organization".
- The policy requires that bidders wishing to communicate with any of the above be required to disclose that communication to the City Clerk.
- The policy specifically exempts communication to the "authorized City project contact person", i.e. the staff person officially designated in the RFP/tender call as the contact person for bidders.
- "Communication" is defined generally to include, but not be limited to "all meetings, written correspondence, and telephone conversations".
- Communication includes actions undertaken by employees of the bidding organization, as well as by a third party representative (e.g. consultant

lobbyist) “employed or retained by it to promote its bid/proposal or oppose any competing bid/proposal.”

- Disclosure is made by completing a form provided by the City Clerk’s Office. The form requests the following information:
    - The number of the competitive call/RFP.
    - The name, business address, and telephone number of the bidder.
    - The name, business address, and telephone number of the bidder’s representative (either retained or employed).
    - The list of individuals that were (note – past tense) contacted by the bidder.
- The form must be submitted prior to the contract being awarded (as opposed to prior to the lobbying activity actually taking place).
- Failure to disclose may result in rejection of a bid.
- Copies of the completed disclosure forms are posted on-line via the City’s web-site or available in person during regular business hours at the City Clerk’s Office.

At the time of writing, 17 disclosures from 15 different organizations were available on-line. The completed forms are presented as scanned PDF (Adobe ACROBAT) files – in effect, downloadable photocopies of the original. There is no searching capacity or accessible summary information available on the web site. To learn more about each disclosure, it is necessary to download the PDF versions of the actual submitted forms (a typical three-page form ranges in size anywhere from 13 to 24 megabytes).

Lobbyist Registration Logbooks

In September 2003, Council approved a staff proposal to create a formal lobbyist registry with oversight provided by an independent integrity commission (see Part 3 of this report for a summary of the proposed approach). However, the proposed approach is largely contingent on provincial enabling legislation. In the meantime, a number of Councillors have set up voluntary registries in their offices in the form of logbooks.

The practice is that lobbyists who are visiting those councillors' offices are asked to record their name, their organization/client, and the subject of interest.

Part 3
Current City of Toronto Proposal

In August 2003, the City's Ethics Steering Committee made a recommendation to Council that it accept a staff report (jointly made by the CAO and City Solicitor) for the establishment of a Lobbyist Registry modeled on the registry in place for the Government of Ontario. A copy of the report to Council is included as *Appendix A*. The report was accepted by the previous Council in September 2003.

At this stage, the City's proposal requires further definition in some areas. In discussion with staff, it was suggested that this level of detail would not be developed until after the November 2003 municipal election and potentially not until at least some initial discussions have taken place with the Province concerning additional legal powers for the City. With this as a backdrop, this section focuses on providing a general overview of the City's proposal. In Part 5 we identify a number of options and approaches for discussion that we believe would enhance the effectiveness of the City's efforts.

The City's proposed approach is very consistent with the general approach to lobbyist registration in other jurisdictions. This has both strengths and weaknesses. In its favour, the approach is at least as rigorous as that of the Ontario Government and even goes further in some areas, such as identifying volunteers as lobbyists and (subject to further discussion at Council) requiring lobbyists to identify individual Councillors and their staff who are being lobbied. In doing so, the City would be positioned clearly within the mainstream of lobbyist registration in Canada and the U.S. (taking into account obvious differences between Canadian and U.S. political life, i.e. campaign financing laws, etc.)

In terms of weaknesses, we return to the conclusions we set out at the end of *Volume 2* on lobbyist registration.

- That despite the various qualifiers expressed by registry officials and lobbyists alike, lobbyist registries are, in fact, about public confidence in government.
- How lobbyist registries perform in terms of restoring, enhancing, or forestalling declines in public confidence in government is the most important test of effectiveness and, ultimately, of whether the expenditure of public resources to create a registry was worthwhile.
- The research and expert opinion indicates that lobbyist registries for the most part do not perform well in many key areas and that as currently constituted may not be worth the expenditure of public resources. Among these key areas, is the general lack of emphasis on which public office holders are being lobbied and the nature of the decisions that lobbyists are attempting to influence.

The following are the major elements of the City's proposed approach:

Oversight by an Integrity Commissioner

Oversight of the registry would be provided by an independent City Integrity Commissioner. The intention is that this Commissioner, initially a part-time position, would include the power to:

- Prohibit individuals from lobbying City officials without being registered.
- Revoke or suspend a registration.
- Require disclosure of information/activities by lobbyists.
- Issue interpretations that have legal effect.
- Recover fees.

- Assess penalties up to $25,000 for persons convicted under the by-law.

The Commissioner would also have broader responsibilities related to ethics at the City, including:

- Complaint assessment/investigation related to Council's Code of Conduct.
- Giving advice to members of Council on potential conflict of interest situations.
- Publishing an annual report on the findings of typical cases/inquiries.
- In cases where a member of Council has been found to be in violation of the code of conduct or other matter, recommending to Council that a penalty be imposed with Council making the final decision with respect to whether and what penalty will be enacted.

Definition of Lobbying

Lobbying would be defined as "communicating with a public office holder in an attempt to influence,

- The development of any legislative proposal by the Council or a member of Council.
- The introduction of any bill or resolution in Council or the passage, defeat or amendment of any by-law, bill or resolution that is before Council.
- The development or amendment of any policy or program of the City or the termination of any program of the City.
- A decision by Council to transfer from the City for consideration all or part of, or any interest in or asset of, any business, enterprise or institution that provides goods or services to the City or to the public.
- A decision by Council to have the private sector instead of the City provide goods or services to the City.

- The awarding of any grant, contribution or other financial benefit by or on behalf of the City.
- The awarding of any contract by or on behalf of the City.
- Arranging a meeting between a public office holder and any other person."

Classes of Lobbyists

The proposal creates four classes of lobbyists, the first three of which align with the current definitions in place for Ontario and the Government of Canada:

- "Consultant lobbyist" – a person who, for payment, lobbies on behalf of a client and includes, but is not limited to, government relations consultants, lawyers, accountants, or other professional advisors who provide lobbying services for their clients;
- "Corporate in-house lobbyist" – an employee of a corporation that carries on commercial activities for financial gain and who lobbies as a significant part of their duties;
- "Organization in-house lobbyist" – an employee of a non-profit organization where one or more employees lobby public office holders and where the accumulated lobbying activity of all such employees would constitute a significant part of the duties of one employee; and
- "Volunteer lobbyist" – a person who lobbies without payment on behalf of an individual, corporation, or organization.

Disclosure Elements

The current draft by-law does not include the specific disclosure requirements. The intention was that these would be articulated at a later stage after further discussion. However, the policy paper prepared by City staff points to the same

kinds of general disclosure requirements in place for the Ontario and federal registries, including:

- Basic information on the individual lobbyists/lobbying organizations including names, addresses, nature of the business, information on other parties who have an interest in (e.g., a subsidiary or parent corporation) or who support the lobbying activity by contributing at least $750.00).
- Whether the client/lobbying organization receives government subsidies or other funding.
- Whether the lobbyist is being paid on a contingency basis (i.e. payment is contingent on a successful outcome to the lobbying.)
- The subject matter of lobbying and, if an in-house lobbyist, the subject matter during the six months period of a return and the expected subject matter for the next six months.
- Specific information on the lobbying activity, e.g., the proposed bill or program that is the focus of the lobbying effort.
- The department, agency, etc. they have lobbied or expect to lobby.
- Councillors or Councillors' staff that they have lobbied or expect to lobby.
- The communication techniques to be used, including "grass-roots communication", letters, etc.

Need for Provincial Enabling Legislation

The City's proposal is contingent on the Province of Ontario passing enabling legislation. This could take the form of legislation that was specific to the City of Toronto or more general legislation that would apply to all municipalities in the province.

This enabling legislation is necessary if the City is to establish a lobbyist registry in the provincial/federal model, let alone to implement the various options and

approaches identified in Part 5. This is particularly true with respect to aspects of the City's proposal that would give the kind of investigatory and enforcement "teeth" to the Integrity Commissioner and registry that the research indicates is critical for effectiveness. It includes the proposed exemption from Freedom of Information requirements, the ability to set fine levels, the power to make legal decisions about contraventions being divided between Council and the Integrity Commissioner, and the power to conduct an inquiry and access information under oath.

However, the City's ability to take action is not entirely contingent on provincial legislation. It may be possible for worthwhile elements of the City's approach to be implemented, albeit without the extent of the enforcement capacity that is ultimately required, including:

- Hiring an Integrity Commissioner that is focused on providing non-binding conflict of interest advice and interpretations for Councillors and City staff.
- Hiring someone to investigate code of conduct or other types of ethics policy infractions including violations of the lobbying or other ethics related aspects of procurement policies, etc. While this kind of investigation would not include the capacity to compel cooperation, there are many precedents within government for this type of approach, i.e. internal investigations into allegations of harassment or discrimination in the workplace.

Also in the absence of provincial legislation, many of the more specific concerns about lobbying could be addressed in part through other policies and practices. This could include, for example, rules for lobbying related to procurement, development, or public-private partnerships (as reported to us in interviews, the three most prevalent types of lobbying to which City officials are subjected) that would more clearly define and limit how and when lobbying can take place and how public officer holders at the City should respond to different types of lobbying

efforts. This would be consistent with options and approaches identified in Part 5 of this volume dealing with more definition with respect to how City officials should deal with different types of lobbying and then embedding these as operating values.

Part 4
Lobbying at the City of Toronto

The purpose of this section is not to reproduce an exhaustive series of anecdotes chronicling good and bad behaviour at the City related to lobbying. The research indicates that virtually everyone at City Hall has both positive and negative stories about lobbying. Rather the intention is to focus on the general trends and themes as evidenced in the research.

Why a lobbyist registry for the City of Toronto?

We begin with the question of "why a lobbyist registry for the City of Toronto?" This is the essential question because it frames the problem to be solved and in doing so establishes the basis for evaluating effectiveness. Put another way, if lobbying is a legitimate part of the public policy process, why does it need to be regulated?

Consistent with the experience of other jurisdictions, the immediate impetus for a lobbyist registry for the City comes from the political level. This was clearly demonstrated during the recent municipal election campaign in the City of Toronto. Most if not all of the candidates for Mayor identified relationships between lobbyists and public office holders as an "integrity issue".

References were made to various forms of undesirable behaviour, e.g. "backroom decision-making", "cronyism", etc. The general concern appears to be that business is conducted behind closed doors by a host of political insiders – former councillors, former political and administrative staff, campaign officials, fundraisers, etc. – on behalf of unspecified outside interests. Implicit or inferred

in this is that by hiring one of these insiders, an outside interest receives some form of advantage.

In light of this public discussion, it would be reasonable for citizens to have an understanding that the problem to be addressed is more than just a matter of transparency for its own sake (as discussed in Volume 2, transparency is often put forward as the primary objective of most lobbyist registries). That understanding would include the view that changes in behaviour are necessary as part of enhancing public confidence. From our perspective, this important point sets the stage for whatever action the City will take in the future.

What does the research say about lobbying at the municipal level in general?

In *Volume 1* the view was expressed that a typical Ontario municipality has a mix of structural characteristics – some of which would tend to encourage more activity along the lines of the U.S.-style lobbying of legislators, and some of which would tend to mitigate lobbying. To recap those findings:

- Structural characteristics of Ontario municipalities that would tend to encourage more lobbying include:
    - A more diffuse decision-making process that involves a larger number of elected officials (in Toronto's case, its 44 member Council) in a very public setting.
    - No elected Executive Branch of municipal government with statutory powers to lead/dominate decision-making at the Council level.
    - An emphasis on relatively equal roles and responsibilities for individual Councillors, including equal voting powers and debating opportunities.

- The absence of party discipline and rigidly enforced party-based voting blocks, in favour of a system, by design, of an ongoing series of what are, according to observers, less political unaligned and constantly shifting coalitions.

- Structural characteristics of Ontario municipalities that would tend to mitigate lobbying include:

  - The relatively low financial cost to run for public office and significant limitations on campaign expenses, thereby reducing the need for candidates to be dependent on large amounts of third-party/lobbyist-related campaign financing.

  - The presence of an extensive and, ideally, trusted professional bureaucracy that can provide substantive, objective research, analysis and advice, as well as effectively manage public consultation across the full range of government issues and stakeholders.

Given these findings, the following major conclusions are offered with respect to lobbying at the municipal level in Ontario:

- *Larger Councils:* Municipalities, particularly those with larger Councils such as the City of Toronto, can legitimately be expected to be the subject of more of what we would call “legal lobbying” than would a provincial or federal legislature.
- *Trust in the bureaucracy:* The bureaucracy’s capacity to mitigate the need for lobbying appears to be highly dependent on the extent to which it is trusted by Council, e.g. that Council is comfortable delegating responsibility for public consultation and for the analysis, synthesis, and integration of competing positions from external organizations.

- *Delegation:* In many Ontario municipalities, delegation from Council to the administrative staff may not take place to the extent that would be required for the bureaucracy to function more effectively as a check on lobbying at the political level. This appears to happen most often because of either:
    - A lack of trust in the bureaucracy based on real or perceived demonstrated performance.
    - The tradition of Ontario municipalities (and current practice in many instances) still leans towards Councils as having significant involvement in operational decision-making, as opposed to focusing on setting policy and holding staff accountable for its implementation.

What did we hear about lobbying at the City of Toronto?

With these general findings in mind, the following are some of the highlights of our discussions related to lobbying at the City of Toronto:

- Lobbying has been generally pervasive at the City of Toronto in the wake of amalgamation and given the existence of larger economic opportunities for outside interests. Lobbyists have been and continue to be a familiar presence at City Hall and in particular on the second floor where Councillors' offices are located – a phenomenon known apparently in City circles as "working the second floor".

- The bulk of lobbying at the City has taken place in three main areas:
    - Developers and the development industry – related primarily to variances that need to be approved by Toronto City Council.

- Procurement (purchasing decisions related to tenders, requests for proposals, etc.) decisions – as reported to us, primarily related to decisions that have not been delegated by Council to the staff level.
- Public-private partnerships – what are often unsolicited proposals from the private sector, venture capitalists, and others for new models of service delivery that tend to be presented as providing for more effective service, reduce costs, increase revenues, etc.

Lobbying by social agencies related to funding from the City and trade unions related to jobs and City services has also been noteworthy.

- Within the private sector, lobbyists at Toronto City Hall are seen by some as being more "intrusive" with politicians than they would be with politicians at the provincial or federal level. This was defined for us as a generally much more direct and open involvement with elected officials, e.g. attending Council meetings, providing clients with assurances about arranging meetings with politicians, providing assurance that the client's issues or concerns will be brought to the attention of Councillors. It was suggested that this more intrusive behaviour is in part because City politicians are seen as much more open and accessible to lobbying contacts than their provincial or federal counterparts.

- Lobbyists have provided Councillors with information and questions that actually improve the quality of debate at Council meetings. By the same token, lobbyists sometimes have provided Councillors with inaccurate or misleading information/perceptions that can take inordinate amounts of staff time and effort to respond to and rectify.

- Lobbying efforts have not often resulted in Councillors changing a staff recommendation. It is more likely that the lobbying would have resulted in

a delay in the process as the staff are sent back to do more analysis. Generally speaking, however, if the staff analysis and recommendations are well thought out and if Council has confidence that the staff in question are competent and respected, the staff recommendations have been accepted eventually.

- Lobbying of City officials has for the most part taken place since amalgamation in the absence of a clearly established set of norms for what constitutes acceptable behaviour on the part of lobbyists or acceptable responses to lobbying by public office holders, i.e. what to do with the lobbyist's advice, suggestions, requests, etc.

- How Councillors respond to lobbying efforts can depend on an individual Councillor's view of their own role to provide direction to the staff. The area of unsolicited proposals provides an example of this. Some Councillors, upon receipt of an unsolicited proposal, might thank the lobbyist for their time and indicate that they will forward the proposal "FYI" to the appropriate department head. Other Councillors might call into a department, ask the staff to respond to the lobbyist's claims of savings and direct the staff to meet with the lobbyist. Middle-level or even more senior staff may be reluctant to disregard direction of this kind, particularly from especially powerful or influential Councillors

- How staff respond to a lobbyist can depend on who that lobbyist is and the real or perceived nature of their relationship with Councillors. Some of the most problematic lobbying apparently involves former councillors and staff who are seen as attempting to take advantage of their relationships with current Councillors and staff or who attempt to intervene with/provide direction to staff as if they were still in their official capacities. Staff may have found it difficult to deal with former Councillors who are now lobbyists but who apparently act as if they were still Councillors and

entitled to provide direction to staff. In addition, staff are generally aware of whether and to what extent individual lobbyists are "connected" to Councillors, particularly powerful/influential Councillors.

- In the wake of the recent computer leasing issue, there is clearly a heightened awareness of and sensitivity to lobbying at both the political and bureaucratic levels, and in particular to lobbying that seeks to influence decisions outside of the established decision-making process or delegated roles and responsibilities. It is also apparent that lobbying has diminished significantly since the recent computer leasing issue, particularly with administrative staff.

- At the same time, however, the recent computer leasing matter and other challenges are viewed as having reduced the general confidence that Councillors feel in the public service and make them more likely to be prepared to "second guess" staff advice and decisions and, in doing so, open the door for more lobbying of individual Councillors.

- It was suggested that Councillors have become increasingly aware of ethics and integrity related issues and public perceptions related to lobbying. This increased awareness is demonstrated through measures such as the creation of the Ethics Steering Committee, the interim complaints protocol for Councillors and the proposed integrity commission and lobbyist registry. However, these is also a sense that Councillor behaviour does not always reflect the policy as it exists on paper and that Council has generally not been very effective in terms of policing/enforcing behaviour on its own members.

- It was suggested that Councillors are not always satisfied with (or in all cases, clearly understand or agree with) being in the "governing role". Depending on their own professional background, they may be more used

to managing/operating than governing. Furthermore, their constituents, including lobbyists, do not always understand this distinction and expect that they will be able to intervene directly with staff, etc. on their behalf. Given this, some Councillors might see any measures that would limit how they are to respond to different types of lobbying efforts, as a limit on their real and/or perceived power as an individual Councillors (as opposed to as a measure that makes for more effective public decision-making). More importantly, their constituents could see them as less powerful and influential.

- Lobbying at the City is seen as being related to fundraising for municipal Councillors. Lobbyists and lobbying organizations such as developers and suppliers of goods and services are recognized within the City as major contributors of campaign funds. The issue, however, is not one of whether this funding inappropriately affects decisions by Councillors. Rather it is one of access. The apparent concern is that if Councillors were less accessible to lobbyists and lobbying organizations or, at a minimum, to be less likely to take individual action on behalf of the lobbyist, their fundraising capacity could be impaired.

Conclusions about Lobbying at the City of Toronto

In drawing conclusions about lobbying at the City of Toronto, it is important to restate that everyone at City Hall has both good and bad stories about lobbying. Furthermore, what constitutes good or bad lobbying is most often in the “eye of the beholder”. However, based on our research and interviews, we want to highlight the following themes:

Defining Good and Bad Behaviour

A recurring theme in the research is that culture is a major pre-determinant of the extent to which any organization encounters ethics and integrity related challenges. Organizations that are serious about operating with high ethical standards usually demonstrate this through sustained and well-resourced efforts to develop, support, and reinforce the desired operating values. Policies and procedures are an important way to reinforce and put structure to the desired culture at the operational level.

It is clear from our research that in the wake of amalgamation, the City of Toronto has taken steps to define and reinforce a consistent culture of ethics and integrity at both the bureaucratic and political levels, including procurement and conflict of interest policies. It is also apparent that the difficulty and complexity of bringing together the different operating approaches of the amalgamating municipalities cannot be underestimated.

As reported to us, this shift has been hastened by the recent computer leasing issue. One of the consequences has been a significantly higher level of awareness within the administration and Council with respect to the prevalence of lobbying.
However, this falls short of more formalized and consistently accepted thinking, definitions, etc. with respect to lobbyist activity such as:

- What should be viewed as good and bad lobbying?
- What constitutes appropriate vs. inappropriate behaviour by City officials with respect to lobbying?
- How should different types of lobbying be dealt with relative to existing decision-making process, roles, and responsibilities, etc. within the City?
- What are the best practices for Councillors in terms of taking action in response to lobbyist requests?

- Should staff at different levels be able to "push back" at Councillors – particularly more powerful Councillors – who are attempting to take individual action in response to lobbyist pressures?

Roles and Responsibilities

As emphasized elsewhere, it is not whether and to what extent Councillors and administrative staff remain accessible to in-house and consultant lobbyists, but rather what action they take with the staff as a result of that lobbying contact that matters. Clearly, the governance model for the City of Toronto emphasizes the overall role of Council either as a whole or through its various committees to provide direction to the staff and has in place many transparent/public decision-making processes. In practice, however, it is not always quite as clear and consistent.

Our interviews indicate that individual Councillors often contact staff – not just senior staff but staff at a variety of levels – in response to a lobbying contact. The purpose of the contact can vary depending on the Councillor and their view of their own role in relation to the staff and the lobbyist. These purposes can include:

- Advising the staff that they met with a lobbyist/lobbying organization and that they have referred the individual to the staff as the appropriate point of contact.
- Asking the staff whether they are aware of the issues raised by the lobbyist.
- Asking the staff person to respond to various concerns or allegations put forward by the lobbyist.
- Requesting/directing the staff to meet with the lobbyist, including even if the staff have already had contact with the lobbyist.

- Requesting that staff give formal study to the lobbyist's proposal and bring forward an analysis for Council.

In terms of the relationship between Councillors and staff, this raises a number of issues:

- In which situations is it appropriate for individual councillors to be contacting middle and junior staff directly on matters that have been the focus of lobbying efforts.
- Whether individual Councillors should be attempting to provide direction to staff on these matters.
- Whether staff feel they have the capacity or permission to push back at these kinds of requests.

The prevailing culture at the City does not appear to be one where all staff feel that they have the capacity to politely decline an administrative request from an individual Councillor in response to a lobbying contact. By capacity, we mean that there is a clearly understood expectation of what kind of behaviour is expected in a given situation and that this behaviour will be supported and reinforced by the senior staff and other members of Council. The response seems to vary department by department and also depending on the Councillor involved and their own personality, level of insistence, demonstrated capacity to reward or punish cooperative bureaucrats, etc.

Trust in the Staff/Perception of Too Much Influence

As one interviewee suggested, if Councillors had a high level of trust in the administrative staff, they would be more likely to simply listen politely and refer lobbyists to the appropriate staff person and/or existing policy decision-making process, e.g. deputation before the appropriate Committee. This would include,

for example, unsolicited proposals for goods and services, a request for a grant, a density transfer, a complaint about an unsuccessful contract award, etc. Staff would be expected to gather the various views on a particular issue, including the views put forward by the lobbyist, and to reflect those views along with their own analysis and advice in a report to Council.

It appears, however, that a sufficient level of trust may not exist at the City of Toronto at this time. This has been heightened in the wake of the recent computer leasing issue but according to many observers predates this development. Some have suggested that its origins go back to the formation of the new City and the fact that the senior staff of the City were selected by the Transition Team as opposed to Council itself, i.e. were “not their people”.

This distrust is exacerbated by a more general concern of Councils in many municipalities including the City of Toronto, with respect to what they perceive to be the increasing power of public servants. As suggested to us, this perception is a result of a number of factors coming into conflict with the traditional “hands-on”, local/operational orientation of many municipal Councils in Ontario, including:

- The increasing size, scope, and complexity of municipal issues.
- The increasingly large and professional class of municipal managers.
- The emerging *best practice* in municipal governance whereby Councils are focusing more on their governing/policy making role, rather than being more operationally focused.

According to this view, Councillors could be expected to react negatively to any efforts to put more structured approaches to dealing with lobbying in place on the grounds that Councillors will become less powerful and public servants too powerful.

Part 5
Options & Approaches for Discussion

Effectiveness of Lobbyist Registries

Volume 2 examined whether and to what extent lobbyist registries are effective tools in two important ways:

- The extent to which, in and of themselves, they change behaviour and result in a higher standard of ethical behaviour with respect to the interaction between external interests and pubic office holders.
- The extent to which they result in enhanced public confidence in the integrity of government decision-making.

As discussed in *Volume 2*, the evidence on these two fronts is not encouraging.

Lobbyist registries almost uniformly have their origins in various scandals or related public concern about integrity in government. When governments have announced their intentions to create registries, they have often talked about the need to restore public confidence, end the back room deals, etc. In the process of implementing registries, however, most governments appear to back away from this original intent.

There is a definite tendency, when it comes to the point of actually "putting policy on paper" for governments to reposition their registries as being about transparency for its own sake, as opposed to being clear that the intention is to raise standards of behaviour or enhance public confidence. Our interviews with registry officials confirmed that the decision to narrow the scope of registries was made at the political level – in effect, politicians could not be convinced to go

further in terms of measures that would be more likely to effect behaviour, often stating cost as the major issue.

In Canada and the U.S. the general public has not demonstrated an active interest in the information contained in lobbyist registries. The more extensive experience of the U.S. indicates that the primary users of the information – the media, political campaigns, advocacy groups, and even lobbyists themselves – more often make use of the information in a way that damages, rather than enhances, public confidence in public sector decision-making.

Part of the problem appears to be that the registries themselves provide only very limited disclosure with the focus primarily on the identity of the lobbyist, the identity of their client (in the case of consultant lobbyists) and the very general subject matter focus of the lobbying. Simply put, the information is not sufficient to allow a member of the public to determine whether and to what extent the lobbyist has successfully influenced public decision-making.

This is not to say that transparency for its own sake is not a public good. However, it is clear from the research that transparency in and of itself will not have the kind of impact that the general public, media, and politicians often appear to assume will result from putting a traditional lobbyist registry in place.

Is There Such a Thing as Good and Bad Lobbying?

As noted elsewhere, virtually all lobbyist registration starts from the premise that lobbying is a legitimate part of the public policy process. However, this is not the same as saying that all lobbying is good. Clearly from the research, lobbying, regardless of the jurisdiction, includes both good and bad behaviour. This is reinforced by the fact that lobbyist registries have been established in response to politicians' and the public's concerns about integrity in decision-making.

Is it really possible, however, to define the difference between good and bad lobbying? As demonstrated in the discussion that follows, we think that, at least at a high level, it is important to take this step. The following are some suggested principles that we hope can be used to inform the coming debate at the City with respect to implementing its lobbyist registry.

For the purpose of this discussion we would define "good lobbying" as communication with public office holders that:

- Emphasizes accurate information and analysis.
- Is respectful of the decision-making processes that exist within an organization.
- Is transparent with respect to who is meeting with whom, which decisions are being sought, and what are the arguments being made.
- Focuses on attempting to inform and educate within those decision-making processes.
- Respects the respective decision-making roles and responsibilities of public office holders (for example, between and among politicians and administrative staff).
- Does not put public office holders in real or perceive conflicts of interest or in violation of other policies such as procurement/purchasing.

For the most part, if lobbying was confined to these kinds of activity, there would likely be much less demand for lobbyist registries. As the research indicates, however, lobbyist registries are generally created out of concerns about a lack of integrity in the relationship between lobbyists/lobbying organizations and public office holders. As such, "bad lobbying" would include:

- Attempts to create an advantage as a result of personal relationships or obligations with a public office holder.

- Attempts to convey misleading or inaccurate information.
- Lobbying that is not transparent with respect to who is lobbying, who is being lobbied, what decisions are being sought, etc.
- Lobbying that communicates with public office holders without regard for real or perceived conflicts of interest or that attempts to put them in violation of other ethics related policies, e.g. procurement, limits on gift giving, etc.
- Efforts that do not respect the established roles and responsibilities of public office holders or decision-making processes, including attempts to get public office holders to step outside those processes.

This kind of lobbying includes most of the negative stereotypes that have become so familiar to the public, including:

- Gaining access to “inside” information that would not otherwise be publicly available.
- Using relationships with politicians to have staff be directed to meet with you or, if you have already met with them, to take a “second look” at your proposal.
- Asking politicians to weigh in with staff to influence their recommendations to Council.
- Inviting politicians and bureaucrats to “social” opportunities (trips/vacations, professional sports events, golf tournaments, etc.) for the purposes of creating “good will”, particularly if they are now, or in future will likely be, in a position to decide upon your issue.
- Asking politicians to overturn or otherwise intervene in decisions (e.g. contract awards, grant decisions, etc.) that have been delegated to staff.

Options and Approaches

As discussed earlier in this paper, one of the major limitations of most lobbyist registries is their almost exclusively focus on the behaviour of the lobbyists. To be sure, this can be a critical part of ensuring high standards of ethical behaviour within government. At the end of the day, however, it is not solely about the lobbyists themselves, but as much or perhaps more so about how a government and individual public office holders within that government deal with these efforts.

The research indicates that it is the operating values of an organization and the decisions of public office holders relative to those values that determine the extensiveness of both good and bad lobbying. In defining these values and making decisions, public office holders also influence and shape the behaviour of the lobbyists themselves. Simply put, if the culture of the City defines and reinforces good behaviour, it is more likely that good behaviour will result. Conversely, to the extent that bad behaviour is countenanced and rewarded, the result will inevitably be more bad behaviour.

With this in mind, options and approaches for enhancing the effectiveness of the City of Toronto's proposed lobbyist registry are presented in three parts:

1. Enhanced disclosure of who is being lobbied and the nature of the decision that the lobbyist is attempting to influence.
2. Defining how the City itself will respond to and deal with lobbying efforts and embedding those responses in the City's operating culture.
3. A number of more operational options related to the more detailed mechanisms of the lobbyist registry.

Also, in identified options and approaches that would strengthen the City's proposed approach, we want to reiterate three important points:

- In identifying these options and approaches, we are in no way suggesting that lobbying is not a legitimate part of the political process. The research is clear that much of what constitutes lobbying does provide value to the process for clients, politicians, and bureaucrats alike.
- We are not suggesting that Councillors, their staff, or administrative staff should be restricted from meeting with lobbyists and lobbying organizations. The general concern appears to be not whether a Councillor or staffer meets with a lobbyist, but rather what that Councillor or staff decides to do in response to the lobbying effort.
- We are not suggesting that organizations attempting to influence City decisions through established and transparent/publicly accessible processes (deputations before committees, requests for formal submissions, grant or licence applications, zoning applications, etc.) should be captured as lobbyists. The research is clear that lobbying happens when the organization also goes outside the formal process in an effort to influence individuals.

1. Enhanced Disclosure

In *Volume 2* it was suggested that from a citizen's perspective there are five key questions related to transparency, lobbying, accountability, and the public interest. Those five key questions are:

1. Who is attempting to influence government decision-making?
2. Which government decision makers are the focuses of the influencing efforts?
3. Which decisions are the subjects of the influence attempt?
4. Was the attempt to influence successful?
5. Was the decision in the public interest?

These questions are consistent with the legal definition of lobbying that one finds in most jurisdictions (and that is absent from most lobbyist registries in terms of the information they collect). But it is more than a matter of consistency. In our view, these questions go to the very heart of what lobbying is all about – attempting by various means to influence decisions by public office holders.

It is not being suggested that a lobbyist registry system can or should provide citizens with the answers to all five of these key questions. However, we are suggesting that a lobbyist registry that does not provide citizens with information that answers at least the first three questions may be of very limited value to citizens.

Further, we are suggest that if the City decides to proceed with a lobbyist registry, that it move beyond the traditional approach of identifying the lobbyist, the client, and the very general subject matter focus of the lobbying in two important ways:

1 a) Disclosure of Public Office Holders

We are recommending that the City of Toronto require lobbyists, as part of their registration, to identify the individual public office holders (including name and title) that they intend to communicate with as part of their lobbying efforts. In this category we would include:

- Individual Councillors.
- Members of a Councillor's staff.
- Any member of the administrative staff, regardless of level.
- Any member of a City agency, board, or commission.
- Any staff member of a City agency, board, or commission.

1 b) Describing the Decision to be Influenced

We are recommending that the City of Toronto include as part of its lobbyist registry a requirement that registrants be required to disclose and describe at a high level the actual decision they are trying to influence.

In terms of the level of detail to be required, as we indicated in *Volume 2* of our report, there are no readily available models for this kind of disclosure that can be adapted for use in the City of Toronto. We are not suggesting at this point that the disclosure of the decision to be influenced needs to be exhaustive in terms of detail. The test should be whether the stated purpose of the lobbying would be clear to a reasonably informed member of the public, i.e. which decision the lobbyist/lobbying is attempting to influence. This could involve fairly general statements such as:

- Seeking individual Councillor support for a zoning variance on Property X.
- Seeking active support from individual Councillors for a grant application, for example where the decision-making process has been delegated to administrative staff.
- Seeking to overturn a recommendation from staff to award a contract.
- Seeking to interest Councillors and administrative staff in purchasing a new software package.
- Seeking support from individual Councillors to change the City's lobbyist registration by-law to eliminate the need for disclosure of the decisions that lobbyists are attempting to influence.

One useful approach for determining an appropriate level of detail would be to formally seek input from interested parties, including consultant lobbyists, in-

house lobbying organizations, the general public, with a view to how but not whether to provide for this disclosure. This has the added benefits of promoting a consensus-based approach, and heightening public office holder and public awareness of the importance of this issue.

1c) Additional Working-Level Options/Approaches re Disclosure

The following five approaches also relate to disclosure are more working-level in nature:

- That after one year, the City review its requirements with respect to disclosing/describing the decision to be influenced. The purpose of this review would be determine whether lobbyists are reporting this information in manner intended, whether this level of information is proving to be sufficient to allow citizens to understand the decision being sought, and whether any further changes or additional requirements might be necessary.
- That the public handbook/registration instructions accompanying the registry be as descriptive as possible in terms of the kinds of decisions that lobbyists/lobbying organizations might be trying to influence. This should be set out in the form of a comprehensive list of specific examples so that lobbyists are a clear as possible with respect to how to characterize their activities.
- That registry staff be directed to be vigilant and vigorous in applying the above mentioned “informed member of the public” test and following up with registrants who have not been sufficiently clear with respect to disclosing the decision they are attempting to influence.
- That, as a general business practice, staff reports to Council should include summaries of the lobbying activity that took (or is continuing to take place) on the issues involved.

- That the City also require lobbyists, in their registration, to make reference to any publicly-available submissions to City officials that they have made that relate to their lobbying effort. The intention is to allow members of the public to more easily make the linkage between lobbying efforts and City decisions. For example, a developer who noted in his/her registration that they are lobbying individual Councillors to approve a density transfer request would also indicate that the details of the request have been submitted publicly to the City.

2. Lobbyist Registration as part of a Suite of Ethics Related Policies/Creating a Strong Culture of Ethical Behaviour

The research is clear that to maximize effectiveness, lobbyist registries need to be positioned as part of a broader suite of ethics related policies, practices, and tools. This includes conflict of interest policies, codes of behaviour, systems of rewards and sanctions, and procurement policies. The research confirms that this broader suite of ethics related policies, practices, and tools is the critical foundation for organizations in terms of promoting a culture and practice of ethical behaviour and decision-making. It is also through these various policies and practices that an organization has the opportunity to embed expectations in its operating culture.

It is suggested, therefore, that the essential element in ensuring a high ethical standard with respect to lobbying is how an organization decides to respond to and deal with lobbying. Also, it is important to note that the process of discussing and reaching a decision on how to respond to lobbying efforts in various situations is as important as the actual decisions themselves in terms of building consensus and establishing a commonly understood set of expectations.

To this end, we would suggest that the City's process for defining its expectations could include the following steps:

- Describing the types of lobbying that its public officer holders experience. This would include consultant and in-house lobbying and run the full gamut of government decisions that lobbyists are attempting to influence. All Councillors and political and administrative staff would be asked to contribute and the results would be collected and communicated publicly.
- Assessing whether and to what extent these types of lobbying constitute "good" vs. "bad" lobbying – for example, where the lobbying is respectful of the decision-making processes and delegated roles and responsibilities vs. where the lobbying seeks to circumvent establish processes or subvert established roles and responsibilities.
- Defining what constitutes good and bad behaviour on the part of public office holders with respect to different types of lobbying efforts, i.e. guidance for how public office holders should be expected to respond to lobbying in various situations. Our suggestion would be that this definition be as situational as possible for the purpose of providing clear guidance in the future – for example:
    - What to do with unsolicited proposals.
    - How to deal with marketing pitches that do not have a specific sales component.
    - How to deal with lobbying on matters that have been delegated to staff.
- Defining what the consequences are for public office holders who do not respond to on-going lobbying efforts appropriately.
- Embedding the desired behaviours/responses in the City's various ethics policies, such as conflict of interest/codes of behaviour, procurement policies and procedures, Councillor and administrative staff training and mentoring programs, performance management systems, etc.

There is nothing particularly unique about the approach we have described above. It includes the basic elements of cultural change, with a focus on the simple but effective and essential step of "naming the behaviour". This includes identifying the desired behaviour and also the undesirable behaviour, being clear about the consequences of both, and then reinforcing the desired behaviour in existing policies and practices.

3. Other Operational Options/Approaches

In this section, we present a number of more detailed operational approaches related to the City's proposed approach. For the most part, these align with the best practices we described in *Volume 2* of this report and are intended to build upon the basic structure already identified in the City's policy proposal, including:

- Adopting the same general legal definitions of what constitutes lobbying as are in place at the Province of Ontario.
- Oversight being provided by an independent ethics/integrity commissioner with effective and meaningful powers to investigate and enforce the lobbyist registry requirements.
- Providing for meaningful penalties for violations of registry policy, including the failure to register or providing misleading information.
- Ensuring that registry staff has the power to request additional information or changes to how a lobbyist characterizes their activities and to effectively investigate areas of concern.
- Providing for a "cooling off" period for public office holders before they can become consultant lobbyists.

a) Analytical Capacity

As reported in *Volume 1*, a number of the registries reviewed as part of this study, including most Canadian registries, had only a very limited capacity for citizens to search and analyze the on-line data contained in registries. The focus appeared to be much more on disclosure of each individual transaction, rather than the ability to identify patterns, trends, etc.

An approach for the City of Toronto's registry would be to include a robust search and analysis capacity that can be accessed and used effectively by citizens. Ideally, this would include the capacity to perform both issue-specific and aggregate analysis, including:

- Which issues are the focus of the most lobbying?
- Which departments are the subject of the most lobbying?
- Which lobbyists/organizations are most active, e.g. lobbying on the most issues, doing the most contacting of public office holders?
- Which public office holders are the subjects of the most lobbying?
- Which types of lobbying activities are most common, e.g. phone calls, arranging or participating in meetings, lunches/dinners, etc?

b) Enforceable Code of Conduct

As noted in *Volume 2*, many registries are somewhat neutral with respect to what constitutes *good* versus *bad* lobbying. The Province of Ontario's registry, for example, is very neutral, with the exception of a general provision that lobbyists will not place public office holders in a real or potential conflict of interest.

However, the Government of Canada's *Lobbyist Code of Conduct* is a good example of an attempt to put more definition on *good* and *bad*, subject to the capacity of the registry to enforce these provisions.

Accordingly the City of Toronto's lobbyist registry could include an enforceable Lobbyist Code of Conduct along the lines of the federal model that identifies and defines both good and bad behaviour on the part of lobbyists, including that they should:

- Conduct all relations with public office holders, clients, employers, the public and other lobbyists with integrity and honesty.
- At all times, be open and frank about their lobbying activities.
- Observe the highest professional and ethical standards. In particular, lobbyists should conform fully with not only the letter but the spirit of the City's by-law and Lobbyist Code of Conduct.
- Ensure that they provide public office holders with accurate and factual information and that they are not knowingly misleading anyone and have taken proper care to avoid doing so inadvertently.
- Not propose or undertake any action that would constitute an improper influence on a public office holder.

That Lobbyist Code of Conduct should also be clear about the lobbyist's obligation to respect City policies and procedures as they relate to lobbying and ethics more generally, including, for example, not knowingly:

- Attempting to put City officials in a real or perceive conflict of interest.
- Requesting or encouraging City officials to violate rules on the receipt of gifts, etc.
- Requesting or encouraging City officials to violate or circumvent established procurement policies and practices.

c) Adequate Resources

In *Volume 2*, we identified *adequacy of resources* as a major cross-cutting best practice. The research clearly indicated that the effectiveness of registries is very dependent on the level of human and technology resourcing that is available.

If the City is serious about changing behaviour with respect to lobbying (as opposed to simply putting a lobbyist registry in place), careful consideration be given to adequate resourcing, including education and communication but also enforcement, audit, etc. If only very limited resources will be available for a lobbyist registry, those resources might better be allocated towards other, arguably more effective policies and practices (conflict of interest, procurement, defining and embedding a culture based on high standards of ethical behaviour), rather than creating an ineffective registry.

d) Education and Communication

The research indicates that education and communications – for lobbyists, their current and potential clients, public office holders, and the public – is an important best practice. The experience in other jurisdictions suggests that this is particularly true where there are:

- More complex reporting requirements (for example, more rather than less disclosure).
- A greater emphasis on ensuring that disclosure information is in a format that is useful for citizens and public office holders alike.
- Expectations that public office holders will monitor the registry and identify/report contacts they have had with lobbyists who are not registered or who have provided misleading or false information.

Education and communication become even more important given the option already identified of requiring lobbyists to disclose the decision they are attempting to influence. Our sense is that without ongoing education of lobbyists and public office holders alike, the registry will not be able to produce consistent, high quality and useful information about lobbying activities at the City.

This communication and education should include:

- Training materials and training sessions for consultant and in-house lobbyists.
- Training materials and training sessions for public office holders (ideally this training should be part of an overall training effort focused on ethical behaviour as only one component of a more comprehensive culture change effort.)
- Frequently asked questions.
- Advisory/interpretive bulletins, whereby registry officials regularly publish official *rules clarifications* in response to inquiries or investigation/enforcement activities.
- Publishing complaints and the results of investigation/enforcement activities as a means to heighten general awareness of the registry and/or a particular form of *bad behaviour* and to demonstrate that the registry has an effective enforcement capacity.

All of these materials be publicly available at a minimum through the Internet.

e) Actively Engaging Public Office Holders

From our perspective, part of the reason why many registries are not meaningful for public office holders within a jurisdiction is that there is usually no expectation, either formal or informal, that public office holders will:

- Make use of the registry information on a regular basis.
- Be actively engaged in ensuring that lobbyists are registered and conducting themselves appropriately.

Accordingly, consideration could be given to the City of Toronto establishing a formal expectation that public office holders will actively reference the registry as part of the day-to-day conduct of the public's business. This would include:

- As part of the public policy development process, public office holders would regularly access the registry database to identify who/which organizations are lobbying on particular issues and, most importantly, the lobbyists' positions on issues. This would include a report on the extent to which lobbying has occurred on a particular issue as part of the formal staff advice and analysis presented in reports to Council and Council Committees.
- Reporting someone who a public office holder believes has lobbied them but who is not registered.
- Reporting a lobbyist who has violated the Code of Conduct and in particular the key provisions against providing false/misleading information and/or attempting to put public office holders in violation of conflict of interest, procurement, or other ethics related policies.

f) Disclosing the Lobbyist's Other Relationship with Decision Makers

The research suggests that requiring lobbyists to disclose at least some their other relationships with decision makers (i.e. fundraising, gift giving, etc.) as a potentially important practice in terms of the public's ability to hold public office holders accountable. Accordingly, one approach would be for the City of Toronto to require lobbyists to disclose the extent of their involvement with public office holders (the latter in their official capacity as opposed to personal friendships) that are the subject of their lobbying efforts.

Two solid approaches, based on demonstrated best practices in other jurisdictions, include:

- Identifying whether and to what extent a lobbying organization or the client of a consultant lobbyist receives funding direct from government as well as the type of funding (e.g. grant) and source (department/program) of that funding. This is a standard feature of many lobbyist registries and would affect any organization that is actively lobbying City officials that also received a portion of their funding from a City department.
- Requiring the lobbyist or lobbying organization to disclose whether the lobbyist/lobbying organization has donated funds or provided other gifts (gift baskets, tickets to sporting events, etc.) to public office holders that are the subject of their lobbying efforts, including identification of the public office holder, and the amount of funding/value of the gift. This would mean that lobbyists would have to disclose in their publicly accessible registration information not only which public office holders they intend to lobby, but whether and to what extent they have donated money or provided other gifts to those individuals.

In addition to these two solid approaches, we would suggest that the City give serious consideration to taking action in the following two areas where to date, most jurisdictions have been reluctant to take action:

- Requiring a lobbyist to identify as part of their registration, whether at the same time they are lobbying public officer holders or various departments of the City, they are also providing services under contract to any of those individuals or departments. This would include instances where for example, a consultant lobbyist is contacting Council members or different departments on behalf a client but may also be providing, for example, communications or other professional consulting advice under contact to one or more of those Councillors or departments.
- Requiring a lobbyist to identify as part of their registration whether either presently or in the past (we would suggest a reasonable time limit, e.g. two years) the lobbyist has acted in any paid or voluntary capacity on behalf of or in support of a public office holder that they intend to lobby. For example, a lobbyist would have to disclose whether they had been a campaign manager, campaign volunteer, fundraiser, etc. on behalf of a public office holder that they intend to lobby.

f) Being Clear that Lawyers and Other Professions are Included

As reported in *Volume 2*, the experience of some jurisdictions in implementing lobbyist registries was that it was not always clear up-front that professionals and in particular lawyers that were engaging in activity that met the legal definition of lobbying were considered to be lobbyists. This resulted in some initial confusion (and unsuccessful legal challenges) within the legal community that perhaps lawyers should not be required to register or disclose the same level of detail as non-lawyer lobbyists for reasons of solicitor-client privilege.

Accordingly, the City's registration requirements could be made clear up front that any individual engaged in activity that is captured by the definition of lobbying would be required to register.

g) Being Clear to the Public about what is not considered to be Lobbying

As discussed in *Volume 1*, most lobbyist registries attempt to be clear about the types of activities that are exempt from lobbying. The following are typical examples, emphasizing the normal course of City business, that are found in most other jurisdictions and that could be considered for the City of Toronto:

- Journalists with periodicals, newspapers, media, in the ordinary course of conducting their business.
- Officials of the City, or of any other unit of government, who appear in their official capacities before any City agency for the purpose of explaining the effect of any legislative or administrative matter pending before such body.
- Persons who participate in drafting by-laws, resolutions, or similar documents at the request of the City.
- Persons who appear in formal proceedings before the City Council, a committee or other subdivision of the City Council, or any City agency, department, board or commission.
- Submissions to a public official with respect to the enforcement, interpretation, or application of a law or regulation by that official.
- Submissions in direct response to written requests from the City for advice or comment.
- General requests by City officials for information

The City of Toronto could take this approach one step further by communicating in very plain language the various day-to-day interactions between citizens and the City that would not be considered to be lobbying. In this, we would refer the City to the example provided by the City of Chicago (see *Appendix B*).

h) Including the full range of procurement related activities

The experience of many jurisdictions clearly points to procurement as a problematic area for governments in terms of maintaining high standards of ethical behaviour. Our research specific to the City of Toronto confirms that procurement/purchasing, along with development and public-private partnerships are the three areas subject to the most intensive lobbying of City officials.

The research and expert opinion in this area points in the direction of ensuring that lobbyist registration and procurement policies are coordinated and integrated. To a degree, we have attempted to deal with that linkage under the section of entitled *Positioning Lobbyist Registration as Part of Suite of Ethics Related Policies/Creating a Strong Culture of Ethical Behaviour.*

We want to use this opportunity, however, to emphasize that the City's policy towards lobbyist registration should include all procurement related activity by lobbyists. This would include:

- The various contacts with public office holders that would occur in preparing for and participating in the formal purchasing process (This would not, of course, include the official contacts that are designated as part of the official procurement process. It would, however, include contacts made during the upfront work by bidders to research a known business opportunity, to prepare and submit a bid, and to follow up with public office holders once the bidding process has been concluded).

- All sales related activities, i.e. communicating with public office holders with a view to attempting to sell a product or service. This would include unsolicited proposals, cold calls, or similar contacts where the ultimate objective of the contact is to interest a public official in purchasing a product or service.
- All marketing related activities, i.e. communicating with public office holders with a view to informing them about a product or service but without specifically attempting to interest them in its purchase. This would include contacts with public office holders where message is along the lines of "We are not here to sell you anything. We just want you to know about the products and services we offer and if at some point in the future, you are thinking about purchasing along these lines, we would want to be included in the tendering process."

i) Providing Value-added Reporting to the Public

In an earlier discussion, we raised the options of registry data being made available to the public in a manner that allows for citizens to do their own analysis of specific lobbying transactions, as well as more aggregate analysis.

Our review of best practices indicates that it is also important for lobbyist registries to prepare and publish their own analysis that goes beyond the basic statistical level and attempts to provide additional value. Accordingly, the City's registry could be responsible for producing value-added public reports that would:

- Support and reinforce a more transparent climate and appropriate culture of high standards of ethical behaviour within the organization.
- Establish the context within which the public (and media) should interpret the information from the registry.

This kind of reporting would include analysis of:

- Which consultant lobbyists and lobbying organizations are most active (number of clients, most contacts with public office holders) – although at least one jurisdiction we spoke with recently halted this practice because they felt it amounted to free advertising for the most active consultant lobbyists?
- Which issues, decisions, by-laws, purchasing opportunities, zoning applications, etc. were the subjects of the most intensive lobbying activity?
- Some explanatory information for the public that would help them to better understand the issue, decision, etc. that was the focus of the lobbying, i.e. what the various lobbyists wanted.
- Which departments, units within departments, and individual public office holders were the subjects of the most intensive lobbying?

j) Evaluating Program Effectiveness

As we noted in *Volume 2*, no jurisdiction that we looked at had engaged in or was planning to engage in a formal evaluation of the effectiveness of their lobbyist registry. This is consistent with a pattern that we have observed in many governments both in Canada, the U.S. and abroad – whereby there is often considerable discussion/rhetorical emphasis on the importance of evaluating the effectiveness of programs, but in practice, little focus in the program design phase on ensuring that a program is actually evaluable and similarly little emphasis on actually conducting program evaluations.

The evidence suggests that both politicians and bureaucrats are often reluctant to learn whether new or existing programs are actually achieving intended results. However, program evaluation continues to be viewed as an important best practice in public administration.

Accordingly, the design and development of the City's lobbyist registry could include and incorporate the elements that will be necessary for ongoing program/effectiveness evaluation. These elements include a clear description of the intended outcomes, (e.g. improved public confidence in government decision-making, improved standards of ethical behaviour, etc.) and the capacity/requirement that the necessary data and information be collected, analyzed, and reported.

Appendix A

August 2003 Report to Council

Re Establishing a City Lobbyist Registry

Request for Provincial Enabling Legislation to Establish a City Lobbyist Registry Within the Office of a City Integrity Commissioner

The Administration Committee recommends the adoption of the Recommendation of the Ethics Steering Committee embodied in the following communication (September 3, 2003) from the City Clerk:

Recommendation:

The Ethics Steering Committee recommends the adoption of the joint report (August 28, 2003) from the City Solicitor and the Chief Administrative Officer.

Background:

At its meeting on September 3, 2003, the Ethics Steering Committee gave consideration to the attached joint report (August 28, 2003) from the City Solicitor and the Chief Administrative Officer seeking authority from Council to make an application to the Province for enabling legislation to establish a City lobbyist registration system. The request to the Province is linked to the previous decision of Council to apply for enabling legislation to establish a City Integrity Commissioner office. Approval of the requests will provide Council with the powers it needs to pass by-laws that establish the functions along the same lines as the provincial model and recommends that:

(1) Council grant authority to make an application to the Province for the special legislation contained in Appendix 2, to establish a permanent City lobbyist registration system in conjunction with the application for special legislation for a City Integrity Commissioner office, as previously authorized by Council;

(2) the City Solicitor and the Chief Administrative Officer, prior to advertising the City application as required, consult with Provincial staff on the direction taken by the City in its draft legislation;

(3) the Ethics Steering Committee report to the Administration Committee on the merits of including restrictions on former members of Council after they have left office in the future City by-law for a lobbyist registry system;

(4) the City Solicitor and the Chief Administrative Officer report back to the Ethics Steering Committee, or the Administration Committee, as necessary on Council directives that are dependent on obtaining Provincial approval for the special legislation including the development of final City by-laws, implementation and resource requirements; and

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

(Joint report dated August 28, 2003, addressed to the Ethics Steering Committee from the City Solicitor and The Chief Administrative Officer, entitled "Request for Provincial Enabling Legislation to Establish a City Lobbyist Registry Within the Office of a City Integrity Commissioner".)

Purpose:

This report seeks authority from Council to make an application to the Province for enabling legislation to establish a City lobbyist registration system. The request to the Province is linked to the previous decision of Council to apply for enabling legislation to establish a City Integrity Commissioner office. Approval of the requests will provide Council with the powers it needs to pass by-laws that establish the functions along the same lines as the provincial model.

Financial Implications and Impact Statement:

As previously reported and approved, there are one-time costs involved in filing and processing an application to the Province for special legislation. These costs include a filing fee, publishing weekly notices of application for four weeks, printing the private bill, and printing the Act in the annual statutes. It is estimated that the cost (most attributable to advertising) for an application will not exceed $6,000.00. There will be additional costs if the requests for special legislation to establish a City Integrity Commissioner and Lobbyist Registry are processed separately.

Discussion with the Clerk's division indicates that funding is available within the approved Council budget to cover the costs of the application for special legislation during 2003.

Recommendations:

It is recommended that:

(1) Council grant authority to make an application to the Province for the special legislation contained in Appendix 2, to establish a permanent City lobbyist registration system in conjunction with the application for special legislation for a City Integrity Commissioner office, as previously authorized by Council;

(2) the City Solicitor and the Chief Administrative Officer, prior to advertising the City application as required, consult with Provincial staff on the direction taken by the City in its draft legislation;

(3) the Ethics Steering Committee report to the Administration Committee on the merits of including restrictions on former members of Council after they have left office in the future City by-law for a lobbyist registry system;

(4) the City Solicitor and the Chief Administrative Officer report back to the Ethics Steering Committee, or the Administration Committee, as necessary on Council directives that are dependent on obtaining Provincial approval for the special legislation including the development of final City by-laws, implementation and resource requirements; and

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

Background:

While lobbying is an acknowledged part of government processes, Council has expressed a desire to ensure that information on lobbying activities (who is lobbying which public office holders) is available to the public. Council has considered the following reports on lobbying and related matters:

(i) "Interim Report on a Registry of Lobbyists and Related Matters" in June 1998;

(ii) "Code of Conduct for Members of Council" in September 1999;

(iii) "Procedures under the Lobbyists Registration Act, 1998" in April 2000;

(iv) "Lobbying Disclosure Policy for Certain Requests for Proposals and Tender/Quotation Calls" in March 2001;

(v) "Feasibility of a Lobbyist Registration Policy Similar to Provincial and Federal Models" in April 2002; and

(vi) "Establishing a City Lobbyist Registry Similar to Provincial and Federal Systems: Implementation Issues, Costs and Requirements" in February 2003.

In February 2003, Council adopted Clause No. 4(a) in Report No. 14 of The Administration Committee, as amended, and, among other matters, requested the Chief Administrative Officer and the City Solicitor to submit a joint report to the Administration Committee:

(a) outlining a request to the Province of Ontario for enabling legislation for a permanent lobbyist registry system, within the context of the request for enabling legislation for a City Integrity Commissioner; and

(b) on the administrative aspects of the lobbyist registry system as it relates to the Office of the Integrity Commissioner.

This report addresses the preceding directives and also contains in Appendix 2, a Draft Act providing Council with the necessary powers to pass by-laws establishing a City Lobbyist Registry as part of the responsibilities of a City Integrity Commissioner office.

The following additional directives to the Chief Administrative Officer and City Solicitor are wholly dependent upon the City obtaining approval for special legislation and will be addressed at the appropriate time:

(i) consult with the City Clerk and Commissioners to ensure an effective City lobbyist registry that will address the applications, procedures and functions likely to attract a high degree of lobbyist activity, as well as being consistent with provincial and federal principles for the registration process;

(ii) following consultation with the City Clerk and Commissioners, report to Administration Committee on a final form lobby registry by-law;

(iii) establish a permanent and formal City-wide lobbyist registry system, similar to the system described in the joint report (October 30, 2002) from the Chief Administrative Officer and the City Solicitor (as embodied in the Clause); and

(iv) under a permanent registration system, consider whether professional lobbyists should be charged an amount for registration.

Council also requested the Ethics Steering Committee to refine the details of data collection and definitions to be applied to lobbyist activities and report back to Council through the Administration Committee. It was specified that the report should also address the issue of lobbying by unions, developers, fundraisers and special interest groups.

Further directives to the CAO relate to ongoing policy development respecting lobbyist activities, and include:

(i) with the City Solicitor, continue to develop policies and procedures governing lobbyists based on external industry/association policies, regulations and laws; and

(ii) with the Commissioner of Corporate Services, take steps toward a general goal of City policy banning or implementing stronger controls on the lobbying of civil servants.

<u>Council Authority and Powers Provided to the City by the Draft Legislation</u>:

Appendices 1 and 2 to this report contain draft legislation that will provide Council with the necessary powers to pass by-laws permitting, respectively, the establishment of a City Integrity Commissioner office and, a City Lobbyist Registration system, similar to that provided by statute at the Provincial level. Obtaining approval from the Province for special legislation provides the Council with the general authority to fine-tune both the Integrity Commissioner office and the lobbyist registration system, by by-law.

Accordingly, much of the detail on definitions, procedures and administrative provisions in the provincial *Lobbyist Registration Act, 1998* and *Members' Integrity Act, 1994* that is being used as the basis for the proposed City operations, will be set out in the City's by-law and not the draft legislation in Appendices 1 and 2 of this report. One example of a matter to be included in the by-law, rather than in draft legislation, is the definition of classes of lobbyists. Another example is the requirement for the Integrity Commissioner to produce annual reports.

Overview of City Draft Legislation for an Integrity Commissioner Office (Appendix 1):

As described in City reports to-date, a City Integrity Commissioner is to be:

(i) initially, a part-time contract position with the City;

(ii) a retired judge with extensive adjudication, municipal and administrative law experience;

(iii) responsible for complaint assessment/investigation within Council's Code of Conduct;

(iv) given exemption from certain *Municipal Freedom of Information and Protection of Privacy Act* requirements;

(v) responsible for advising members on potential (Code) conflict of interest situations; and

(vi) responsible for publishing an annual report on the findings of typical cases/inquiries.

Council has already granted authority to make an application for special legislation to establish and implement a City Integrity Commissioner office similar to the Provincial model. The draft private bill is contained in Appendix 1 ("IC Draft Act") and, of importance to this report, provides for the appointment of the City Integrity Commissioner as the Registrar for an approved City lobbyist registration system.

In addition, the IC Draft Act includes provisions for dealing with confidential information (s.9), immunity (s.5), and the non-compelibility of the Commissioner and the Commissioner's staff in civil proceedings (s.6). It also provides that the Commissioner has rights of access to City records and to require evidence under oath, similar to the City Auditor.

The IC Draft Act provides that Council could, by by-law, adopt all or part of a City policy or by-law respecting the conduct of members of Council as a 'code of conduct' (s.2.). It also authorizes Council to pass by-laws respecting the procedures to be followed and any limitations Council deems advisable in these matters (s.7). Finally, the Draft Act will also provide that the Integrity Commissioner will perform such other duties as required by Council with respect to ethical matters or practices and procedures that, in Council's opinion, are related to, or may have an impact on, its Code of Conduct for Council Members (s.3(3)) and giving advice on the *Municipal Conflict of Interest Act* (s.3(4)).

If special legislation is granted, Protocols for requesting advice and for processing complaint investigations specific to the City will be adopted (per the Council authority noted above). For example, in contrast with the provincial model and in keeping with the compliance section of the (City) Code of Conduct, complaints by members of the public will be processed to the Integrity Commissioner for review if the by-law permits other referrals (s. 7(2)).

The IC Draft Act provides that it is Council that makes the final decision on whether any penalty (as may be recommended by the Integrity Commissioner) is imposed on a member found to have contravened the Code of Conduct. This approach follows the Provincial model because the Code of Conduct, like the Provincial Act (in terms of its conduct provisions) is not a precise document. The IC Draft Act also provides that Council's final decision may be reported to a meeting of Council or its committees that is open to the public (s. 14 (6)).

Overview of City Draft Legislation for a Lobbyist Registry (Appendix 2):

The City's draft private bill respecting lobbyist registration in Appendix 2 (the "LR Draft Act") is based upon the Provincial *Lobbyist Registration Act, 1998*, ("Provincial Act") that, in turn, replicates the federal government's lobbyist registration Act to a significant degree. The LR Draft Act permits the City to follow the Provincial model, where the Integrity Commissioner has been appointed as the Registrar and is responsible for managing the lobbyist registry and associated operations. The LR Draft Act permits the City to pass a by-law that will be similar in effect to the provincial Act provisions (as illustrated in the first draft lobbyist registration by-law attached to Clause No. 4(a) in Administration Committee Report No. 14). At the same time, the City by-law will allow those provisions to be fine-tuned so that a successful lobbyist registration system can be put in place at the City given that far more of its activities technically fit into the definition of lobbying.

(a) Definition Matters:

Lobbying is usually defined as direct or indirect efforts to solicit the support of members and officials to influence government decisions on behalf of another party or an organization, often away from public scrutiny. The term "lobby" in the LR Draft Act (s.1) is based on the definition in the Provincial Act and reflects this general definition. Under the City's by-law powers in the LR Draft Act, the by-law can set out activities and persons who are not subject to the

by-law in order to be reflective of City operations. Examples of exemptions in the by-law could be routine constituency work, as well as members of Council and City staff when acting in their official capacity. Similarly, Committee deputation and other processes that are a matter of public record, where individuals are named and their interest and organizational affiliation identified, may also be excluded from the registration requirement.

Lobbyists are most commonly defined as individuals paid to communicate with elected or appointed officials and any staff of government, in a deliberate and concerted attempt to influence government decisions. The behaviour under scrutiny is specifically related to the phrase "attempt to influence government decisions" because the activity often occurs beyond public scrutiny and is on behalf of someone else.

In the approved Council Code of Conduct, the term "lobbyist" includes the following:

(i) "consultant lobbyist" means a person who, for payment, lobbies on behalf of a client and includes, but is not limited to, government relations consultants, lawyers, accountants, or other professional advisors who provide lobbying services for their clients;

(ii) "corporate in-house lobbyist" means an employee of a corporation that carries on commercial activities for financial gain and who lobbies as a significant part of their duties;

(iii) "organization in-house lobbyist" means an employee of a non-profit organization when one or more employees lobby public office holders and where the accumulated lobbying activity of all such employees would constitute a significant part of the duties of one employee; and

(iv) "volunteer lobbyist" means a person who lobbies without payment on behalf of an individual, corporation, or organization.

The LR Draft Act will allow the City to define classes of lobbyists in its by-law and specifically provides that this may include lobbyists who receive no payment (i.e., 'volunteers') or those who receive partial payment (s.2(2)). In contrast, the Provincial Act only applies to paid lobbyists.

(b) Powers, Information Filed, Registrar Duties, Exception and Offence Provisions:

Other provisions in the LR Draft Act also reflect the City context and provide flexibility as to what will be provided in the final by-law. For example, the City by-law could allow its Agencies, Boards, Commissions and City-controlled organizations to be added to the definition of public office holder (ss.1,2(2)) and, could provide a general power to the City to exempt any person or organization from all or any part of the by-law (s.2 (3)).

Under the LR Draft Act, the by-law could require returns to be filed that contain information on lobbyists and lobbying activities similar to the Provincial Act requirements (s.2(3)), as follows:

(1) basic information on the individual lobbyists, the senior officer and the client or employer: name, address and the nature of the business or activities; information on other parties who have an interest in (e.g., a subsidiary or parent corporation) or who support the lobbying activity by contributing at least $750.00);

(2) information on financial matters: government subsidies to the client or employer, and contingency fees for the services of a consultant lobbyist;

(3) information on the nature of the lobbying activity or proposed activity including:

(i) the subject matter of lobbying and, if an in-house lobbyist (organizations), the subject matter during the six months period of a return and the expected subject matter for the next six months;

(ii) specific information on the undertaking, e.g., the proposed bill or program;

(iii) the ministry, agency, etc. they have lobbied or expect to lobby;

(iv) MPPs or MPP staff they have lobbied or expect to lobby; and

(v) the communication techniques to be used, including "grass-roots communication" (as defined in the Act).

Under the LR Draft Act the powers and duties of the registrar will be set out in the by-law (s.5). The by-law will, for example, provide for any annual report and other reporting requirements.

The LR Draft Act includes the special administrative, evidentiary and legal exception provisions of the Provincial Act. For example, the legal effect of a registrar's interpretation bulletin (s.5(2)), fee recovery (s.3), evidence from records (s.4), an uncontested right to remove returns from the registry (s.6), and delegation powers (s.7).

The LR Draft Act also allows for the special offence provisions in the Provincial Act (s. 8) including the imposition of a fine, in the by-law, of up to $25,000.00 (the *Provincial Offences Act* applicable to most municipal by-law offences, has a maximum fine of $5,000.00.) and, making it an offence to knowingly place a public-office holder in a position of real or potential conflict of interest, as well as the offence to knowingly make a false or misleading

statement in a return or other document.

Next Steps and Possible By-Law Provisions:

The draft private bill in Appendix 1 ("IC Draft Act") now provides for the appointment of the City Integrity Commissioner as the Registrar under the draft private bill in Appendix 2 to establish a City Lobbyist Registry system (s.3(5)). For this reason, if authority is granted by Council to process the draft private bill for a Lobbyist registration system, it is appropriate that the two pieces of legislation be examined in conjunction and in light of the legislation affecting the draft private bills.

It is, therefore, recommended that Council grant authority for application to be made for special legislation from the Province to establish a permanent City lobbyist registration system in conjunction with the application for special legislation for a City Integrity Commissioner office, as previously authorized by Council.

It is also recommended that the City Solicitor and the Chief Administrative Officer, prior to advertising the City application as required, consult with Provincial staff on the direction taken by the City in its draft legislation.

In addition to the matters previously discussed, other provisions could be developed for inclusion in the future City by-law. For example, restrictions on former members of Council after they have left office in the lobbyist registration by-law may more clearly regulate the treatment of confidential or insider information, as well as the dealings of City office-holders with other sectors both during and following their official duties. (Post office restrictions apply to Ministers under the provincial *Member's Integrity Act*, *1994.)* Further assessment of the value, applicability and development of such policy for inclusion in the future City by-law, appears to be of value and is consistent with the mandate of the Ethics Steering Committee. This could include, for example, an examination of the needed Council authority to impose conditions beyond the "business activities" jurisdiction of the *Municipal Act*, an appropriate time-period of applicability for the limitations, as well as realistic City offence provisions for contravention.

It is, therefore, recommended that the Ethics Steering Committee report to the Administration Committee on the merits of including a post office-holder restriction provision in the future City by-law for a lobbyist registry system.

Finally, it is recommended that the City Solicitor and the Chief Administrative Officer report back to the Ethics Steering Committee, or the Administration Committee, as necessary on Council directives that are dependent on obtaining Provincial approval for the special legislation including the development of final City by-laws, implementation and resource requirements.

Conclusion:

This report seeks authority from Council to make an application to the Province for enabling legislation to establish a City lobbyist registration system. The request is linked to the previous decision of Council to apply for enabling legislation to establish a City Integrity Commissioner office along the same lines as the provincial model as directed by Council.

Much of the detail on definitions, procedures and administrative provisions in the provincial *Lobbyist Registration Act, 1998* and *Members' Integrity Act, 1994* that is being used as the basis for the proposed City operations, will be set out in the City's by-law and not the draft legislation in Appendices 1 and 2 of this report.

Accordingly, this report is recommending that Council authorize the request to the Province respecting the establishment of a lobbyist registration system and for staff to consult with the Province on the draft legislation in Appendices 1 and 2. The draft legislation provides Council with the necessary powers to pass by-laws permitting respectively, the establishment of a City Integrity Commissioner office and, a City Lobbyist Registration system.

The report also recommends further reporting to the Administration Committee on the merits of including a post office-holder restriction in the by-law, as well as other Council directives that are dependent on obtaining Provincial approval for the special legislation being requested.

List of Attachments:

Appendix 1: Draft Bill for a City of Toronto Integrity Commissioner.
Appendix 2: Draft Bill for City of Toronto Lobbyist Registration.

Appendix 1
Draft Bill for a City of Toronto Integrity Commissioner

An Act respecting an integrity commissioner for the City of Toronto.

Preamble:
The Council of the City of Toronto has applied for special legislation in respect of the matters set out in this Act.

It is appropriate to grant the application.

Therefore, Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

Definitions
1. In this Act,

"code of conduct" means a City policy respecting the conduct of members of council as adopted by by-law under section 2;

"Integrity Commissioner" means the person appointed as Integrity Commissioner under section 3;

"Council" means the Council of the City of Toronto;

"member" means a member of Council.

Code of conduct
2. (1) Council may pass by-laws for governing the conduct of its members.

(2) A by-law passed under subsection (1) may regulate or prohibit with respect to conduct matters and may require persons to do things.
Integrity Commissioner
3. (1) Council may by by-law appoint an Integrity Commissioner.

Powers and duties
(2) The Integrity Commissioner may exercise the powers and shall perform the duties assigned to him or her under this Act or under a by-law passed under subsection 3(3).

Same
(3) Council may pass by-laws assigning to the Integrity Commissioner other duties with respect to ethical matters or practices and procedures that, in Council's opinion, are related to or may have an impact on the code of conduct.

Same
(4) Council may pass by-laws assigning to the Integrity Commissioner duties respecting the provision of advice on the *Municipal Conflict of Interest Act.*

Same
(5) Council may appoint the Integrity Commissioner as the registrar under the *City of Toronto Act (Lobbyist Registration), 2003*.

Term
(5) An Integrity Commissioner shall not be appointed for a term exceeding five years.

Same
(6) The person appointed continues to hold office after the expiry of the term until reappointed, or until a successor is appointed.

Acting Integrity Commissioner
(7) If the Integrity Commissioner is unable to act because of illness, Council may appoint an acting Integrity Commissioner, whose appointment comes to an end when the Integrity Commissioner is again able to act or when the office becomes vacant.

Remuneration
(8) The Integrity Commissioner shall be paid the remuneration, allowances and expenses as Council may provide.

Staff
(9) Council may provide to the Integrity Commissioner the municipal employees that Council considers necessary for the performance of the Integrity Commissioner's duties or, at the Council's request, the Integrity Commissioner may provide his or her own employees.

Reporting relationship
4. (1) The Integrity Commissioner shall report to Council or as otherwise provided in a by-law passed under section 7.

Annual report
(2) The Integrity Commissioner shall report annually on the affairs of the office.

Contents
(3) The annual report may summarize advice given by the Integrity Commissioner, but shall not disclose confidential information or information that could identify a person concerned.

Immunity
5. No proceeding shall be commenced against the Integrity Commissioner or an employee in his or her office, including a municipal employee seconded to that office under subsection 3(9), for any act done or omitted in good faith in the execution or intended execution of the Integrity Commissioner's or employee's duties under this Act or a by-law passed under subsection 3(3).

Testimony

6. Neither the Integrity Commissioner nor an employee of his or her office, including a municipal employee seconded to that office under subsection 3(9), is a competent or compellable witness in a civil proceeding in connection with anything done under this Act or a by-law passed under subsection 3(3).

By-laws re procedures

7. (1) Council may pass by-laws respecting the procedures to be followed and any limitations Council deems advisable, on requests for advice from the Integrity Commissioner under section 8 and the processing of complaints to the Integrity Commissioner under section 10 or a by-law passed under this section.

Other referrals

(2) A by-law passed under subsection (1) may provide for the referral of a matter to the Integrity Commissioner to give an opinion, where a person other than a member has reasonable and probable grounds to believe that a member has contravened the code of conduct.

Time for requesting inquiry limited

(3) A by-law passed under subsection (1) shall provide for time limits on making a request for an inquiry under section 10 or a by-law passed under this section, which do not exceed the following limits,

(a) a request for an inquiry by a member or a person who is not a member may be made within six weeks after the fact comes to his or her knowledge that a member may have contravened the code of conduct; and

(b) no request for an inquiry under section 10 shall be brought after the expiration of six years from the time at which the contravention is alleged to have occurred.

REQUESTS FOR ADVICE

Opinion and recommendations
8. (1) A member may request that the Integrity Commissioner give an opinion and recommendations on any matter respecting the member's obligations under the code of conduct, subject to any by-law passed under section 7.

Inquiries
(2) The Integrity Commissioner may make such inquiries as he or she considers appropriate and shall provide the member with an opinion and recommendations, subject to any by-law passed under section 7.

Confidentiality
(3) The Integrity Commissioner's opinion and recommendations are confidential, but may be released by the member or with the member's consent.

Writing
(4) The member's request, the Integrity Commissioner's opinion and recommendations and the member's consent, if any, shall be in writing.

Confidentiality
9. (1) Information disclosed to the Integrity Commissioner under this Act is confidential and shall not be disclosed to any person, except,

(a) by the member, or with his or her consent;

(b) in a criminal proceeding, as required by law; or

(c) otherwise in accordance with this Act.

Municipal Freedom of Information and Protection of Privacy Act
(2) Subsection (1) prevails over the *Municipal Freedom of Information and Protection of Privacy Act*.

REQUESTS FOR INQUIRIES

Matter referred by member
10. (1) A member who has reasonable and probable grounds to believe that another member has contravened the code of conduct may request that the Integrity Commissioner give an opinion as to the matter, subject to any by-law passed under section 7.

Request
(2) The request shall be in writing and shall set out the grounds for the belief and the contravention alleged.

File with Clerk

(3) The member making the request shall file the request with the City Clerk, who shall cause the request to be processed as provided in a by-law passed under section 7.

Matter referred by Council
(4) Subject to any by-law passed under section 7, Council may, by resolution, request that the Integrity Commissioner give an opinion as to whether a member has contravened the code of conduct or other matters assigned to the Integrity Commissioner under a by-law passed under subsection 3(3).

Inquiry by Council
(5) Council and its committees shall not conduct an inquiry into a matter that has been referred to the Integrity Commissioner under subsection (3) or (4), or a by-law passed under section 7.

Inquiry by Integrity Commissioner
11. (1) When a matter is referred to the Integrity Commissioner under section 10 or a by-law passed under subsection 7(2), the Integrity Commissioner may conduct an inquiry, after giving the member whose conduct is concerned reasonable notice.

Same
(2) If the matter was referred by a member, by Council or by another person under a by-law passed under section 7,

(a) the Integrity Commissioner has right of access at all reasonable hours to all records respecting the referred matter of the municipality or any of its local boards,

(b) the Integrity Commissioner may elect to exercise the powers of a commission under Parts I and II of the *Public Inquiries Act*, in which case those Parts apply to the inquiry as if it were an inquiry under that Act; and

(c) the Integrity Commissioner shall report his or her opinion to the City Clerk.

Inquiry powers
(3) Clause 2(b) does not authorize the Integrity Commissioner to hold a full public inquiry under the *Public Inquiries Act,* unless Council has specifically authorized such an inquiry.

Copies
(4) The City Clerk shall,

(a) give a copy of the opinion to the member whose conduct is concerned;

(b) if the matter was referred by a member or other person, give a copy of the opinion to that member or person; and

(c) cause the opinion to be laid before the next meeting of Council or one of its committees, as provided for in a by-law passed under section 7.

Refusal to conduct inquiry
(5) If the Integrity Commissioner is of the opinion that the referral of a matter to him or her is frivolous, vexatious or not made in good faith, or that there are no grounds or insufficient grounds for an inquiry, the Integrity Commissioner shall not conduct an inquiry and shall state the reasons for not doing so in the report.

Member not blameworthy
(6) If the Integrity Commissioner determines that there has been no contravention of the code of conduct or other matters assigned to the Integrity Commissioner under a by-law passed under subsection 3(3), or that a contravention occurred although the member took all reasonable measures to prevent it, or that a contravention occurred that was trivial or committed through inadvertence or an error of judgment made in good faith, the Integrity Commissioner shall so state in the report and shall recommend that no penalty be imposed.

Reliance on Integrity Commissioner's advice
(7) If the Integrity Commissioner determines that there was a contravention of the code of conduct or other matter but that the member was acting in accordance with the Integrity Commissioner's recommendations and had, before receiving those recommendations, disclosed to the Integrity Commissioner all the relevant facts that were known to the member, the Integrity Commissioner shall so state in the report and shall recommend that no penalty be imposed.

(8) Subsection (7) does not apply to advice given to a member on the application of the *Municipal Conflict of Interest Act.*

Police investigation or charge
12. If the Integrity Commissioner, when conducting an inquiry, discovers that the subject-matter of the inquiry is being investigated by police or that a charge has been laid, or that an application under section 9 of the *Municipal Conflict of Interest Act* is being processed, the Integrity Commissioner shall suspend the inquiry until the police investigation, charge or application has been finally disposed of, and shall report the suspension to the City Clerk.

Reference to appropriate authorities
13. If the Integrity Commissioner, when conducting an inquiry, determines that there are reasonable grounds to believe that there has been a contravention of the Criminal Code (Canada), the Integrity Commissioner shall immediately refer the matter to the appropriate authorities and suspend the inquiry until any resulting police investigation and charge have been finally disposed of, and shall report the suspension to the City Clerk.

Recommendation re penalty
14. (1) Where the Integrity Commissioner conducts an inquiry under subsection 10(1) or (4) or a by-law passed under section 7, and finds that the member has contravened the code of conduct or other matter, the Integrity Commissioner shall recommend in his or her report,

(a) that no penalty be imposed;

(b) that the member be reprimanded; or

(c) that the member's right to sit and vote in Council be suspended for a specified period or until a condition imposed by the Integrity Commissioner is fulfilled.

Duty of Council
(2) Council shall consider and respond to the report within 90 days after the day the report is laid before it.

Response
(3) If the Integrity Commissioner recommends that a penalty be imposed, Council may approve the recommendation and order that the penalty be imposed, or may reject the recommendation, in which case no penalty shall be imposed.

Power of Council
(4) Council may impose penalties binding on a member, but does not have power to inquire further into the contravention, to impose a penalty if the Integrity Commissioner recommended that none be imposed, or to impose a penalty other than the one recommended.

Decision final
(5) Council's decision is final and conclusive.

(6) Despite the *Municipal Freedom of Information and Protection of Privacy Act*, Council may cause its decision to be reported to a meeting of the Council or its committees that is open to the public.

Settlement
15. (1) If authorized by a by-law passed under section 3, the Integrity Commissioner may attempt to settle the complaint and shall include in the report any proposed terms of settlement and may recommend other corrective action.

(2) Section 14, does not prohibit Council from approving terms of settlement or adopting the suggestions for other corrective action.

Destruction of records
16. (1) The Integrity Commissioner shall destroy any record in his or her possession that relates to a member or former member of the Council, or to a person who belongs to his or her household, during the 12-month period that follows the tenth anniversary of the creation of the record.

Exception
(2) If an inquiry to which a record may relate is being conducted under this Act or section 100 of the *Municipal Act*, or if the Integrity Commissioner is aware of an application under section 9 of the *Municipal Conflict of Interest Act* to which it may relate or that a charge to which it may relate has been laid under the Criminal Code (Canada) against the member or former member or a person who belongs to his or her household, the record shall not be destroyed until the inquiry, the application or the charge has been finally disposed of.

Appendix 2
Draft Private Bill for City of Toronto Lobbyist Registration

An Act respecting lobbyist registration in the City of Toronto

Preamble
The Council of the City of Toronto has applied for special legislation in respect of the matters set out in this Act.

It is appropriate to grant the application.

Therefore, Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

Definitions
1. In this Act,

"Council" means the Council of the City of Toronto;

"lobby" means to communicate with a public office holder in an attempt to influence,

(a) the development of any legislative proposal by the Council or a member of Council,

(b) the introduction of any bill or resolution in Council or the passage, defeat or amendment of any by-law, bill or resolution that is before Council,

(c) the development or amendment of any policy or program of the City or the termination of any program of the City,

(d) a decision by Council to transfer from the City for consideration all or part of, or any interest in or asset of, any business, enterprise or institution that provides goods or services to the City or to the public,

(e) a decision by Council to have the private sector instead of the City provide goods or services to the City,

(f) the awarding of any grant, contribution or other financial benefit by or on behalf of the City, and

(g) if provided in a by-law passed under section 2,

(i) to communicate with a public office holder in an attempt to influence the awarding of any contract by or on behalf of the City, or

(ii) to arrange a meeting between a public office holder and any other person;

"lobbyist" means an individual who engages in lobbying activities;

"organization" means,

(a) a business, trade, industry, professional or voluntary organization,

(b) a trade union or labour organization,

(c) a chamber of commerce or board of trade,

(d) an association, a charitable organization, a coalition or an interest group,

(e) a government, other than the City, and

(f) a corporation without share capital incorporated to pursue, without financial gain to its members, objects of a national, provincial, territorial, patriotic, religious, philanthropic, charitable, educational, agricultural, scientific, artistic, social, professional, fraternal, sporting or athletic character or other similar objects;

"public office holder" means,

(a) any officer or employee of the City not otherwise referred to in clauses (b) and (c) of this definition,

(b) a member of the Council and any person on his or her staff, and

(c) if specified in a by-law passed under section 2,

(i) a person who is appointed to an office or body by Council, and

(ii) an officer, director or employee of an agency, board or commission of the City or a corporation where the City is the majority shareholder;

"registrar" means the registrar appointed under section 5;

"senior officer" means the most senior officer of an organization who is compensated for the performance of his or her duties.

By-law

2. (1) The Council of the City of Toronto may:

(a) pass by-laws to regulate or prohibit lobbying of public office holders, and

(b) as part of the power to regulate or prohibit lobbying, may require persons and organizations to do things, provide for a system of registration and impose conditions as a requirement of continuing to hold or renew a registration.

Scope
(2) A by-law passed under subsection (1) may,

(a) be general or specific in its application and may differentiate in any way and on any basis the City considers appropriate,

(b) define different classes of lobbyists, including lobbyists who lobby without payment or receive partial payment, and may deal differently with different classes of lobbyists,

(c) provide that the definition of "lobby" in clause (h)(i) or (ii) or both applies to a class of lobbyists,

(d) define different classes of public office holders and deal differently with different classes of policy holders,

(e) define different classes of organizations and deal differently with different classes of organizations, and

(f) define when the duties of an employee to lobby on behalf of an employer constitute a significant part of his or her duties as an employee for the purpose of defining a class of lobbyists.

Registry
(3) The power to establish and maintain a registry and to require an individual who engages in lobbying activities or who is a senior officer of an organization that employs an individual to lobby on its behalf, to register respecting lobbyists and lobbying activities and to maintain its registration in the registry includes the power,

(a) to prohibit the carrying on of or engaging in the lobbying activities unless the individual or senior officer has registered in the registry,

(b) to revoke or suspend a registration,

(c) to require that information on lobbyists and lobbying activities be provided, including the information set out in sections 4(4), 5(3) and 6(3) of the *Lobbyists Registration Act, 1998,* with necessary changes, including the changes necessary to apply to lobbyists who are not paid or receive only partial payment for engaging in a lobbying activity,

(d) to require, for both initial and ongoing registration, that any other information for the registry specified in the by-law to be of municipal interest, be provided,

(e) to require, within the time frame specified in the by-law, updated information for the registry to be provided if the information under clause (c) or (d) changes,

(f) to exempt any person or organization from all or any part of the by-law,

(g) to require a fee to be paid on the filing of a return or a return of a class of returns or for any service performed or the use of any facility provided by the registrar and may provided for a difference in or the waiver of the fee for filing a return based on the manner in which the return is submitted to the registrar; and

(h) to permit public inspection of all or part of the registry.

Recovery of fees
3. (1) Fees imposed by the City under this Act constitute a debt of the person or organization to the City.

Amount owing added to tax roll
(2) The treasurer of the City may add fees imposed by the City under this Act to the tax roll for any property for which all of the owners are responsible for paying the fees and charges and collect them in the same manner as municipal taxes.

Storage
4. (1) Any return or other document that is received by the registrar, under a by-law passed under section 2, may be entered or recorded by any information storage device, including any system of mechanical or electronic data processing, that is capable of reproducing the stored return or other document in intelligible form within a reasonable time.

Evidence
(2) In any prosecution for an offence under this Act or by-law passed under section 2, a copy of a return or other document that is reproduced from an information storage device referred to in subsection (1) and certified under the registrar's signature as a true copy is admissible in evidence without proof of the signature or official character of the person appearing to have signed the copy and, in the absence of evidence to the contrary, has the same probative force as the original would have if it were proved in the ordinary way.

Registrar
5. (1) The City may appoint a registrar.

Powers and Duties
(2) A by-law passed under section 2 may,

(a) provide for the powers and duties of the registrar including the power:

(i) to establish and maintain the registry, including the form of the registry,

(ii) to establish the manner and time for public inspection,

(iii) to verify the information contained in any return or other document submitted, and

(iv) to refuse to accept a return or document that does not comply with the by-law or that contains information and statements not requested,

(b) permit the registrar to issue advisory opinions and interpretation bulletins with respect to the enforcement, interpretation or application of the by-law and this Act, and

(c) provide that the advisory opinions and interpretation issued under the authority of the by-law are not binding.

Removal from registry
6. (1) A bylaw passed under section 2 may permit the registrar to remove a return from the registry if the individual who filed the return fails to confirm information contained in it, advise the registrar of matters required under the by-law or fails to give the registrar requested information within the time periods specified in the by-law.

Same
(2) The *Statutory Powers Procedure Act* does not apply with respect to the registrar's decision to remove a return from the registry, and the registrar may remove the return without giving notice to the individual who filed the return and without holding a hearing.

Effect of removal
(3) When a return is removed from the registry, the individual who filed it shall be deemed, for the purposes of his or her existing and future obligations under the by-law, not to have filed the return.

Delegation of powers
7. (1) A bylaw passed under section 2 may permit the registrar to delegate in writing any of his or her powers or duties under this Act or the by-law to a person employed in the registrar's office or a City employee seconded to that office and may authorize him or her to delegate any of those powers or duties to another person employed in or seconded to that office.

Conditions, etc.
(2) A delegation may be made subject to such conditions and restrictions as specified in the by-law and, if permitted in the by-law, as the person making the delegation considers appropriate.

Registrar retains powers and duties
(3) The registrar may continue to exercise any delegated powers and duties despite the delegation.

False or misleading statements
8. (1) A by-law passed under section 2 may provide that every individual who knowingly makes a false or misleading statement in a return or other document submitted to the registrar under the by-law is guilty of an offence.

Conflict of interest offence
(2) A by-law passed under section 2 may provide that a lobbyist or a specified class of lobbyist is guilty of an offence if, in the course of lobbying a public office holder, the lobbyist knowingly places the public office holder in a position of real or potential conflict of interest as described in subsection (3).

Same
(3) A public office holder is in a position of conflict of interest if he or she engages in an activity that is prohibited by the *Municipal Conflict of Interest Act* or that would be so prohibited if the public office holder were a member of the Council.

Limitation
(4) No proceeding in respect of an offence under a by-law passed under section 2 shall be commenced more than two years after the time when the subject-matter of the proceeding arose.

Penalty for by-law offence
(5) A by-law passed under section 425 of the *Municipal Act, 2001*, may also provide for the imposition of fines of not more than $25,000 on every person who is convicted of an offence under the by-law.

(6) If the maximum amount of the fine that may be imposed under subsection (5) is less than the maximum fine under subsection 18(8) of the *Lobbyist Registration Act, 1998,* a by-law passed under section 2 may provide for the imposition of a fine of not more than the maximum fine under subsection 18(8) of that Act.

Commencement
9. This Act comes into force on the day it receives Royal Assent.

Short title
10. The short title of this Act is the City of Toronto Act (Lobbyist Registration), 2003.

Appendix B

City of Chicago Practical Examples

The City of Chicago provides a fairly comprehensive set of practical examples as to what it does not consider to be lobbying. This purpose of these examples is to provide guidance and reassurance to citizens and public office holders with respect to what is and is not considered to be lobbying:

- A restaurant owner who applies to the Department of Revenue for food and liquor licenses.
- An accountant who responds to a Department of Revenue request to produce his client's business records for purposes of a tax audit.
- A supplier of goods who responds to an RFP (a Request for Proposals).
- A homeowner who submits an application for a building permit.
- An attorney who appears before the Department of Administrative Hearings on behalf of a client to contest a notice of violation.
- An officer of a not-for-profit corporation who meets with a representative of a City department to learn how to apply for a City grant.
- An individual who calls the Department of Zoning to inquire whether a particular business activity is authorized at a specific location.
- A property owner who testifies before the City Council Committee on Zoning against a proposed building project in his neighborhood.
- A lawyer, architect or other representative of a building developer who testifies before the Chicago Plan Commission in support of a proposed development, and who is identified as testifying on behalf of the developer.

- A constituent who calls her alderman to request an additional stop sign on her block.
- A group of developers who, at the invitation of a department head or alderman, tours a neighborhood.
- An engineering consulting firm that seeks from City employees a status report on a client's project or license application.
- An attorney who files a notice of appearance in a case in which the City is a codefendant.
- An attorney representing the City's adversary in litigation who comes to the Law Department to try to work out a compromise and reach a settlement.
- An attorney who represents a client before the Zoning Board of Appeals.
- A consultant hired by a manufacturer who assists the company in responding to an RFP (Request for Proposals). (The consultant receives a fee if the company's proposal is accepted.)
- A property owner who, on her own behalf, calls the Department of Planning and Development to urge the creation of a TIF (Tax Increment Financing district) in her area.
- A citizen who calls on behalf of her mother to make an inquiry about a notice her mother received about a building violation.
- A lawyer who calls on behalf of a client to seek information about a notice the client received about a food preparation violation.
- A lawyer who files a client's application for a liquor license and asks office staff some questions about the procedures and timing.
- A citizen who, on behalf of a neighborhood group, speaks to a meeting of the Community Development Commission, and urges that it adopt a

particular plan for the neighborhood. The citizen states her name and identifies the neighborhood group she represents.

- A citizen who urges an alderman to do something to create more parking in the ward. The citizen is a member of a neighborhood group seeking more parking, but was not asked by the organization to act on its behalf.
- Constituents who meet with their alderman to oppose a halfway house in the neighborhood; the constituents are in the process of forming an informal organization for this purpose.

Toronto Computer Leasing Inquiry

Research Paper

PROCUREMENT

Volume 1: Common Risk Areas

December 2003

Table of Contents

Executive Summary

Part 1: Introduction

This is the first of a two-volume research report for the Toronto Computer Leasing Inquiry examining procurement issues.

Procurement is a complex and highly developed area of professional expertise that spans the public and private sectors. It has been the subject of extensive on-going professional/academic review and critical evaluation that has resulted in a very well developed body of professional knowledge. The reality is that each of the various subject areas within this body of knowledge could be an extensive study in itself.

Focus on the Public Sector

In order to narrow the focus of study to a relevant and manageable subset of issues, the decision was made to focus in this report on public sector procurement. There are well-documented differences between public and private sector procurement that would support this decision. First among these is the fact that process considerations that are paramount in the public sector related to openness, fairness, and equity are offset by business/commercial considerations in the private sector.

Most of the public sector's activities include a strong emphasis on "levelling the playing" field between competitors through competitive procurement processes as part of ensuring fairness and equity in an environment of transparency and public scrutiny. At the same time, public officials are typically under tremendous pressure to lower the cost of government and to demonstrate high levels of value

for money. The result is an inherent tension within public sector purchasing that is often very difficult to manage.

Focus on Risk

Volume 1 reviews the most common and most significant risks that public sector jurisdictions face with respect to procurement, including the following:

- Values-Based Procurement
- Readiness
- Specifications
- Pre-RFP Consultation
- Vender Debriefing & Complaints Handling
- Single Point of Contact
- Role of Elected Officials
- Training & Development
- Evaluation
- Clear Roles & Responsibilities
- Efficiency & Effectiveness/Value for Money
- Fairness Commissioners
- Best and Final Offer

With the stage set by *Volume 1*, *Volume 2* will focus on a discussion of current procurement policies and practices at the City of Toronto, including current issues and challenges, as well as options and approaches related to potential changes.

Research Approach

The preparation of Volumes 1 and 2 included reviews of over 2,000 pages of documents and a series of interviews with more than 20 individuals including current and former municipal officials, provincial government officials, academics, private sector officials, and other experts. Documentary resources from a wide range of jurisdictions included:

- Statutes and by-laws.

- Government policies, directives, and guidelines.
- Procurement handbooks and other interpretive material.
- Academic and other expert reports, articles, or commentaries.

Part 2: Discussion of Risks

1. Values-Based Procurement

Leading jurisdictions recognize that it is neither possible nor desirable to prescribe the appropriate course of action for staff in every given situation. This not only stifles creativity but also limits the flexibility necessary to make appropriate decisions in different situations. In light of this, the importance of values is strongly emphasized in the literature and educational offerings of the procurement community.

According to procurement organizations, ethics training for procurement staff has been successful in assisting staff to deal with ethical dilemmas. The Canadian federal Treasury Board and Public Works and Government Services Canada suggest that:

> *"In the procurement world, staff are continually confronted with decisions that require careful attention and that may pose ethical dilemmas. Procurement officers are honest brokers navigating the sometimes competing interests of client departments looking for a service and contractors with an obligation to make money."*

2. Specifications

The development of specifications is consistently identified as a potential high-risk area for procurement in two respects:

- *Value-for-money:* the ability of organizations to understand their own purchasing requirements and to clearly articulate these for vendors.
- *Fairness and equity in the process:* ensuring that specifications do not present a risk to fair and open competition.

As reported by experts, there are a number of other common problems or risks associated with specification development, including that:

- Requirements can be too complex or too numerous.
- Specifications can be too prescriptive and not leave sufficient room for creativity.
- Requirements may not be sufficiently detailed.

Not surprisingly, specification development is a significant and well-defined aspect of training and certification for procurement professionals. Within organizations, this often translates into standardized expectations, definitions, templates, and other tools as important parts of the quality assurance process. Other examples of recognized best practices in this area include:

- The development of extensive handbooks or other instructive materials and the use of procurement libraries.
- Collecting as much information as possible from the buying department.
- Collecting product information from the industry.
- Looking for standards and other information from professional societies.
- Calling on other “experts” in the purchasing community for help.

3. Readiness

In interviews, experts indicated that lack of readiness is a continuing problem area, particularly but not necessarily limited to larger, more complex procurements. As reported, the failure of large public sector projects can usually be attributed to one or more readiness factors. The reasons for lack of readiness are relatively common and easily understood:

- The time and resources required to do a thorough analysis and workup of the project have been underestimated or are not available.
- In some cases, an announcement has already been made at the political level and public officials are playing “catch-up”.
- The expertise may not exist internally to conduct a thorough assessment.
- The procurement process does not include a formal *risk assessment*.

The remedies as reported in the literature and by experts include:

- Not underestimating the time and resources involved in properly researching and scoping a major, complex procurement.
- Establishing a standing expectation that readiness assessment and reporting on readiness will be a standard part of the procurement planning.
- Incorporating a risk management component into the process that brings greater rigour to the identification of risks and mitigating strategies.
- Maximizing opportunities for structured dialogue with the private sector in the pre-release period as an additional way of identifying potential issues, shortcomings, risks, etc.
- Establishing a standing best practice of *reverse calendar planning* for procurement projects.
- The use of standardized checklists and templates.

In reviewing policies and procedures from different organizations, it was evident that many organizations have well-developed and formal risk assessment/risk management methodologies that are expected to be used throughout a procurement project, particularly for larger and more complex projects.

4. Pre-Request Consultation with the Private Sector

The literature and input from experts strongly emphasizes the importance of significant and substantive upfront consultation with the private sector before a request document is released as a major element in reducing risk and exposure, particularly for larger and more complex projects.

Most public sector organizations accept the need for some degree of contact and exchange of information. In some jurisdictions, this is found in more formal policies and best practice statements related to supply market analysis. In other jurisdictions, there is no formal expectation and each department makes its own determination, often in consultation with the central purchasing authority.

Although consultation is recognized as being essential, it is also important to make a clear distinction between:

- Contact for the purposes of gathering information, researching solutions, and understanding more about what might be available in the marketplace.
- More formal and fairness/equity-based processes to legitimately narrow down the selection of vendors that are invited to compete.

Experts suggest that for larger, more complex purchases, significant dialogue with the vendor community should be taking place in the range of three to six

months before a request document is released. The next stages generally involve much more formal and documented processes including Requests for Expressions of Interest, Requests for Information, Requests for Pre-Qualification, and Requests for Comments on the RFP.

5. Single Point of Contact

Poorly managed communication between bidders and government officials can pose a major risk to the integrity of the procurement process. A common best practice is to establish a single government point of contact (typically the official responsible for managing the actual procurement process and, in some cases, an additional technical contact from the line department). The best practice is not one of prohibiting all communication, but rather ensuring that communication is formally managed as part of controlling the integrity of the process.

For very large or potential highly sought after procurements where the competitive process will take place over an extended period, it is frequently advisable to establish the single point of contact approach often well in advance of an actual request document being released. This can be important particularly if there are various formal processes of information exchange taking place in the pre-release period, such as Requests for Information, Requests for Comment on draft request documents, etc.

The principle of a single point of contact as central to the integrity of the procurement process is very clear among professional procurement officials. This is so much the case that many jurisdictions do not have a formal written policy in place requiring this approach – in effect, it is taken as a given in terms of the fundamentals of good procurement and well-embedded in the organization's operating culture.

6. Vendor Debriefing and Complaints Handling

The literature, expert interviews, and best practices from various jurisdictions emphasize the need for clear and transparent policies with respect to both post-award debriefings and formal complaints handing procedures.

Most experts agree that as a best practice, public sector organizations should have a standing expectation and procedure with respect to debriefing unsuccessful bidders once a contract award has been announced. Typically, briefings are voluntary rather than mandatory for vendors. In some jurisdictions, vender debriefings are mandatory for more complex or potentially controversial projects. The literature and a review practices indicates that debriefings are exclusively administrative in nature and generally not complex in terms of process.

The literature, practices in many other jurisdictions, and expert opinion also emphasizes the importance of clear, transparent policies with respect to reviewing complaints from bidders. Benefits include:

- Fewer lawsuits.
- Useful information with respect to potential policy/process improvements.
- An opportunity to demonstrate the integrity of the process.
- The opportunity to insulate/protect politicians from the perils of becoming directly involved in the procurement process.

Political involvement in the complaints process tends to vary from jurisdiction to jurisdiction. In many Ontario municipalities, for example, this often takes the form of a deputation to Council or a Standing Committee of Council as the first level of response to the complaint.

In other jurisdictions and at other levels of government, elected officials purposely avoid becoming the appeal mechanism for staff decisions on procurement. The latter approach is consistent with the literature, best practices in leading jurisdictions, and expert opinion. These sources generally emphasize that while complaints handling policies should be approved and mandated by elected officials, the public interest is best served by delegating the process to professional administrative staff.

7. Role of Elected Officials

Experts suggest that one of the important benefits of a having a highly professionalized procurement function is the ability to insulate and protect politicians from allegations of attempting to influence procurement decisions. In discussing the role of politicians, most experts emphasize the up-front role of elected officials to:

- Approve procurement policies, including identifying which types of projects require their express approval.
- Ensure that a professional purchasing infrastructure exists.
- Pre-approve the organization's purchasing requirements as part of the overall budget process.
- Approve any purchasing needs that exceed authorized budgets before any formal purchasing activity is initiated.

To the extent that problems with political involvement in the procurement process arise, they tend to be either during or at the back-end of the process, e.g. at the contract award stage or in the handling of debriefings and/or complaints. According to some experts, politicians do not always support fair and open competition, particularly when their constituents are involved.

As discussed in the section on *Single Point of Contact*, the best practice approach is to establish the expectation that vendors and their lobbyists/agents will only communicate with the designated procurement official. At more senior levels of government (i.e. provinces, federal government), this prohibition would typically be in place until the contract award announcement has been made. At the municipal level, the practice is not as consistent.

Whether and to what extent an individual municipality will adopt a policy response to the problem depends to a large extent on the culture or personality of individual Councils. In some jurisdictions, direct lobbying of elected officials at all stages during and after the competitive processes is viewed as a legitimate and acceptable part of the process. In other jurisdictions, no policy is in place to prohibit this kind of activity because there is general agreement among elected officials that this is not acceptable behaviour. Still other jurisdictions have established a more formal single point of contact policy that applies to both administrative staff and Councillors. In some cases, a single point of contact policy is in place until an award recommendation is made public. In other cases, the single point of contact prohibition is in place until an award has actually be made and announced.

Experts suggest that in reviewing staff award recommendations, politicians who understand their role and the importance of fairness and equity would tend to focus on quality assurance, i.e. whether the approved process was followed and used appropriately. Where this kind of understanding does not exist, the political level can often become overly and in the view of many experts, inappropriately involved in the details of the award.

8. Training and Development

The importance of having highly training and professional procurement staff is a key component in risk mitigation. Fortunately, professional development in procurement is a highly developed, recognized, and well-established aspect of the profession. This is reflected in the emphasis it receives in the professional literature and the range and depth of training and development opportunities for procurement officials. Training offerings include in-house courses run by central purchasing authorities and through the education programs of state, provincial, and national professional purchasing associations.

Experts and leading jurisdictions stress that the foundation of training and development for procurement rest on core principles. The thinking in this regard is that an understanding of rules, processes, techniques, analytical frameworks and tools, checklists, etc. is only a component of the best practice approach. In leading jurisdictions, the commitment to training and professional development of the procurement function is clearly articulated including the extensive use of formal and self-managed training instruments in addition to traditional policies and procedures manuals.

9. Evaluation

The evaluation process is considered by experts to be a potential risk area in terms of ensuring that evaluators have sufficient capacity with regard to training, skill, and experience and that the evaluation process is conducted with due regard to the integrity of the process and value-for-money considerations.

The most commonly reported problems with respect to evaluation include:

- Evaluation criteria are flawed, ambiguous, or subject to change midstream during the process.
- The evaluation criteria are not followed or applied properly, most often through a lack of experience or knowledge.

Leading jurisdictions provide extensive training and other supports such as guidebooks, checklists, best practice information, analytical tools, etc. to assist procurement professionals. In terms of subject matter, evaluation is typically a major area of focus within both the formal curriculum and ongoing supports.

With respect to evaluation criteria, the most important piece of advice from experts and the literature alike is that these criteria should be firmly established before the evaluation process begins. The integrity of the process is frequently placed at risk if criteria are left out or added during the actual evaluation.

10. Clear Roles and Responsibilities

Experts and practitioners agree that a lack of internal clarity with respect to the relative roles and responsibilities of different players in the procurement process poses a high risk for both the integrity of the process and the likelihood of a value-for-money outcome. This includes roles and responsibilities for the central purchasing authority, the buying department, legal counsel, finance/budget staff, etc.

The best practice in this area is relatively straightforward – to identify and describe these roles and responsibilities in clear and unambiguous terms as part of the overall purchasing policy and to embed these descriptions in training, guidelines, handbooks, checklists, to ensure a clear and consistent

understanding across the organization. There are very many examples of roles and responsibilities descriptions from other jurisdictions that can be used as source documents.

11. Efficiency and Effectiveness/Value for Money

Within the procurement community there is an ongoing debate with respect to the appropriate balance between centralized and decentralized management of the procurement function. Most jurisdictions reviewed for this study recognize that it is neither efficient nor effective to make all purchases centrally and that the key is achieving the right balance. The typical standard in place involves a centralized purchasing authority as well as a certain amount of delegation to line departments. The central purchasing authority's responsibilities typically include:

- Organization-wide purchasing policies, standards, training and certification requirements, etc.
- Responsibility for establishing standing agreements, vendor of record arrangements, blanket contracts, procurement cards, etc.
- Managing the procurement of goods and services over an established dollar value threshold.
- Monitoring compliance across the organization and reporting on performance to senior management.
- Continually analyzing the organization's business requirements and identifying opportunities for additional savings, more strategic approaches, etc.

In addition to working with the central purchasing authority on centrally managed purchasing opportunities, trained/certified staff in line departments usually have

responsibility for making purchases of particular types and below specific thresholds in-department.

In this division of responsibilities, one of the key considerations is value-for-money. This includes the need to match the complexity of the procurement process with the value and complexity of the contract. The essential theme is that “no single purchasing method suits all situations”. The standard practice across municipalities and other levels of government appears to be to use the three-quote process up to a specified threshold – typically ranging from $20,000 to $50,000 depending on the jurisdiction for most goods or services.

12. Fairness Commissioners

From the literature, practices in other jurisdictions, and expert interviews, it is apparent that the use of fairness commissioners is an important emerging risk mitigation tool aimed at strengthening both the reality and perception of integrity in public procurement. A fairness commissioner is an individual who monitors the procurement process with a view to:

- Providing the purchasing organization with assurance that procurement management practices and processes are of the highest standards.
- Communicating/demonstrating to external and internal observers that fairness, objectivity, impartiality, clarity, openness & transparency has been maintained.

The commissioner can be an internal person (e.g. from the central purchasing authority) for small to mid-size projects, often at the invitation of the line department, particularly where there is some foreknowledge or anticipation of a higher than normal degree of external scrutiny. For larger, more complex projects, it is much more likely to be an external expert.

Experts in both the public and private sectors suggest that having a fairness commissioner results in a higher level of confidence among prospective bidders that the process will be managed fairly. There is also evidence to suggest that the private sector is less likely to challenge a particular procurement if a fairness commissioner has been involved.

The greater prevalence of and interest in fairness commissioners is generally viewed as arising from procurement processes and procurements becoming more complex in response to changing external and internal requirements. According to experts, this approach is often adopted in response to political concerns (frequently raised initially by unsuccessful vendors) with respect to the perceived fairness of the process.

In terms of best practices, the fairness commissioner should not be seen as an advisor only to the officials responsible for the procurement. It was emphasized by experts that this individual should have an independent oversight role and capacity to ensure that disagreements with the officials managing the procurement on the government side are brought to the attention of and resolved by appropriate senior management. In addition, fairness commissioners are often engaged much earlier on in the process, particularly with respect to large and complex undertakings. This would generally be after the business case has been developed and approved but before the procurement methodology has been finalized and more formal pre-release discussions with the private sector have commenced.

13. Best and Final Offer

As indicated in the literature and by experts, request documents are rarely perfect. Examples of issues include where:

- Request documents are too rigid to allow for creativity or innovation.
- Ambiguous specifications provide too much latitude for vendor responses.
- Specifications did not take into account the range of available products or services that might be available.
- The purchasing organization underestimated the cost and complexity of the undertaking, or over-scheduled part of the implementation, etc.
- All bids were considered too high or not competitive, or exceeded project funding or that technical compliance could be improved.

Much of the discussion of technique in procurement is focused on tools that are intended to minimize these kinds of problems. From the research, expert opinion, and practice in other jurisdictions, the Best and Final Offer (BAFO) methodology emerges as a best practice designed to mitigate the risk associated with traditional *one-shot* processes.

BAFO is essentially a two-stage procurement process, with the focus in the second stage of either the top evaluated bidder or a short list of the top bidders. It provides an opportunity for short-listed suppliers to improve the quality of their proposals in specific identified areas, particularly but not limited to cost. Under BAFO, the top-rated bidder or bidders are asked for revised proposals in the specified areas, which then become their best and final offer and the basis for additional evaluation and final selection. Any information received in response to the first request document is not disclosed to other bidders as part of the BAFO process.

BAFO is used extensively in the United States at all levels of government for large and small/simple and complex procurements. Most U.S. jurisdictions view it as very useful vehicle for ensuring the best possible technical solutions at the lowest prices and for avoiding unnecessary competition cancellations. Experts interviewed for this project were not aware of any Canadian jurisdictions that have adopted this option.

Part 3: Conclusion

The purpose of this paper has been to provide an overview of the most common risk issues associated with public sector procurement as reported in the literature, the experience and practice of selected jurisdictions, and in the opinion of experts.

The results of this review point to a relatively well-defined set of risks that are commonly recognized in the literature, by experts, and in the policies and practices of various jurisdictions. These risks are generally the same across jurisdictions regardless of size, level (municipal, provincial/state, and federal), or country – Canada, the U.S., the U.K., Australia, etc.

The key themes that would distinguish a best practice or leading jurisdiction are not particularly complex. In many respects, they mirror the more generic aspects of excellence in public sector management, including:

- A strong commitment to ethics, integrity, and professionalism in public service.
- A careful approach to identifying and managing risks.
- A strong commitment to training and development.
- Clearly articulated policies and procedures with an emphasis on practical, useful guidance to staff.
- Clearly articulated roles and responsibilities between and among administrative officials as well as between administrative and elected officials.
- Trust and confidence by elected officials in the professional capacity of administrative staff, backed up by robust and appropriate accountability mechanisms and a well managed administrative-political interface.

Most importantly – and again, consistent with the essential components of excellence in public sector management – is the recognition that maximizing risk mitigation in procurement requires a significant degree of investment of financial resources and senior management time and attention. This includes investment in training people, in taking the time to develop comprehensive policy guidance materials for staff, in researching and remaining current on best practices, and in communicating to the public and vendor community.

Part 1
Introduction

Scope

This is the first of a two-volume research report for the Toronto Computer Leasing Inquiry examining procurement and related issues.

This introduction begins with a discussion of the scope of *Volume 1*. As will be discussed in other sections, procurement is a complex and highly developed area of professional expertise that spans the public and private sectors. It has been the subject of extensive on-going professional and academic review and critical evaluation resulting in a very extensive and well-developed body of professional knowledge found in literally hundreds of:

- Public and private sector organizations with mature procurement functions.
- Municipal, state, provincial, federal, national, and international professional procurement/purchasing associations that focus on standards and methodology development, training, certification, and best practices.
- Academic and research organizations.
- International development and trade organizations.
- Private consulting organizations that focus on excellence in public and private sector procurement.

Within the spectrum of procurement related studies, there is a range of major subject areas, including, to name but a few:

- The actual process of making a purchase, including methodologies, techniques, and best practices related to preparing bid request documents, developing specifications, evaluating bids, selecting vendors, etc.
- The very complex world of supply chain management and supplier relationships, including sourcing strategies, designing and developing supply chain processes and information infrastructures, etc.
- Procurement/purchasing law and international trade agreements.
- Project and contract lifecycle management.
- Cost and value analysis.
- Risk analysis and risk management in the procurement process.
- Electronic commerce and the emerging area of e-procurement policies, practices, and economic benefits.
- The increasingly common view of purchasing as a major strategic element in business management, including strategic sourcing and outsourcing.
- How organizations are structured to deliver effective procurement related services.
- The development of overarching, multi-year procurement strategic plans.

The study of procurement is further segmented on a sectoral basis. At a broad level, this includes the public and private sector. Within these, however, there are significant sub-categories such as:

- Commodity purchasing.
- Defence purchasing.
- Construction.
- Materials management.
- Health care.
- Leasing.
- Manufacturing supply.
- Real estate.

Within the public sector, very large public sector organizations such as the U.S. federal government as a whole or the U.S. Department of Defence are often themselves considered their own legitimate areas of study.

The reality is that each of these areas could be the basis for an extensive review, including individual subsets of the literature, professional designations, certifications, critical evaluations, best practices, discussion of strengths and weaknesses, emerging issues, inherent controversies, etc.

The initial challenge for this report, therefore, has been to narrow the focus to a relevant and manageable subset of issues.

Public Sector Emphasis

The first decision was to focus on public sector procurement. This is not to say that there are not lessons in terms of strategies, techniques, practices, etc. from procurement in the private sector that would be applicable to the public sector. In fact, the research suggests that at the technical level, the basic elements are generally consistent.

Part of the rationale for focusing on the public sector is found in the limitations of time and physical format for this study. By definition, a review of procurement writ large would be, at best, extremely high-level in its orientation and of less utility as part of this series of background reports for the Toronto Computer Leasing Inquiry. However, there are well-documented essential differences

between private and private sector procurement that would suggest a public sector focus as the most appropriate focus.

The first of these is the reality that private sector procurement, while equally (but perhaps differently) complex relative to the public sector, has a different fundamental orientation. Process considerations that are often paramount in public sector procurement such as openness, fairness, and equity are offset by considerations related to maximizing value for shareholders and achieving strategic business advantage. In addition, supply chain management considerations are much more prominent – the processes whereby companies ensure the timely receipt of inputs to their own business processes. The private sector is often much more aggressive in prescribing the terms under which they will do business – i.e. mandatory internet based processes, being more selective in terms of which companies will be invited to bid, when to do a sole-source purchase, no recourse on final decisions, etc. Finally, the procurement function in the private sector operates in the absence of any legal prescriptions with respect to fairness, equity, and transparency. It is, essentially, a private activity.

In contrast, much of the public sector's activities with respect to procurement are not strictly related to shareholder value or supply chain considerations. The professional literature on public sector procurement indicates a strong emphasis on "levelling the playing" field and ensuring fairness and equity through competitive procurement processes. Furthermore, these processes must necessarily take place in a public environment of transparency and scrutiny.

At the same time as they are required to ensure fairness and equity, however, public officials are typically under tremendous pressure to lower the cost of government and to demonstrate high levels of value for money. The result is an inherent tension that is often very difficult to manage. Intense expectations that the process will be fair and equitable are usually matched by equally intense expectations that the best value/lowest cost will be received. The reality is that

one does not inevitably lead to the other. A high degree of attention in the public sector to the integrity of the process can easily take precedence over more strictly bottom-line considerations. This is particularly the case with respect to larger and more complex procurements, as opposed to relatively straightforward or simple fixed-price goods and services, e.g. clothing, repairs, food, utilities, etc. To make the public servant's fairness/value-for-money challenge even more complicated, governments typically layer on additional "value" expectations for their officials. These can include myriad expectations related to, for example:

- International trade agreements.
- Preferences for local suppliers.
- Preferences for suppliers with strong performance in other policy areas that are important to a particular government, e.g. environment, human rights, equality, fair wages, etc.

Focus on Risk

In terms of further narrowing the scope of this report, a number of options were considered including:

- The different approaches between and among jurisdictions with respect to mandating procurement policies (i.e. legislation and by-laws vs. policies, directives, guidelines, etc.
- The various elements included in procurement policies across different jurisdictions.
- The various ways in which different jurisdictions define the steps in the procurement process.

It was readily apparent, however, that much of this work and analysis has already been completed, often in great detail, by others. One such work that was referenced in the preparation of this study is *The Request for Proposal Handbook*

by British Columbia-based procurement expert Michael Asner. In the course of 484 pages (plus 600 samples on an accompanying CD-ROM), Mr. Asner provides a very detailed comparative approach to policies and practices in place in a number of predominantly North American jurisdictions.

From the review of this literature and discussions with experts, the predominant theme of risk is consistently evident and emphasized across all public sector procurement, including the notion that procurement in the public sector is an inherently risky undertaking. This includes risks in terms of obtaining the best value-for-money but also a unique emphasis in the public sector on risks related to the integrity of the process.

With this in mind, the focus of this report is on the most common and most significant risks that public sector jurisdictions face with respect to procurement, with a particular emphasis on larger and more complex undertakings. From the literature and through interviews with practitioners and other experts, a number of key risks have been identified, including the following:

- Values-Based Procurement.
- Readiness.
- Specifications.
- Pre-release Consultation.
- Vender Debriefing & Complaints Handling.
- Single Point of Contact.
- Role of Elected Officials.
- Training & Development.
- Evaluation.
- Clear Roles & Responsibilities.
- Efficiency & Effectiveness/Value for Money.

Included in the discussion of each of these is a description of the perceived risk or threat and a description of best practices as suggested by experts and/or in place in various jurisdictions to address the situation.

In addition, a discussion of two emerging best practices that are in effect, tools for mitigating a number of the risks identified above, is also included:

- The use of fairness commissioners as part of the integrity/quality assurance process.
- The use of a Best and Final Offer procurement methodology as part of maximizing value-for-money.

With the stage set by *Volume 1*, this report focuses on a discussion of current procurement policies and practices at the City of Toronto, including current issues and challenges, as well as options and approaches related to potential changes.

Research Approach

The preparation of Volumes 1 and 2 included reviews of over 2,000 pages of documents and a series of expert interviews. The latter were particularly important in terms of identifying and refining the list of identified major risks and confirming various best practice mitigation strategies. In the course of the research, interviews were conducted with more than 20 individuals including current and former municipal officials, provincial government officials, private sector executives, academics, and other experts.

Documentary resources included:

- Statutes and by-laws.

- Government policies, directives, and guidelines.
- Procurement handbooks, other interpretive material, and examples of best practice tools.
- Academic and other expert reports, articles, or commentaries.

Material was collected on a wide range of jurisdictions including examples from across Canada, the U.S., the United Kingdom, Australia, and New Zealand. Sources for these documents included various departments/branches of municipal, provincial, and state governments, academic institutions, private corporations, foundations and research organizations, and associations representing procurement officials.

Key Differences between Municipal and Other Levels of Government

Although this paper looks at public sector procurement at all levels of government, a number of interviewees spoke to what they viewed as key procurement related differences between the municipal and provincial/federal levels. Some of these differences are more definitive in nature (e.g. mandated transparency requirements) while others are historical or cultural. As part of setting the stage for the discussion of specific risk areas in Part 2 of this report, the following is a summary of the key points:

- As a mandated legal requirement, the municipal sector in Ontario and elsewhere operates under a fundamentally different approach to transparency of decision-making than provincial or federal governments. There is no comparable concept of cabinet or executive confidentiality. Staff analysis/recommendations and debate by elected officials on procurement and most other matters generally take place in a public

forum with a degree of transparency and scrutiny that would be unimaginable at other levels of government in Canada.

- Relative to the federal and provincial levels, municipal processes, including procurement, tend to be much more locally oriented. When municipalities make purchases, they most often want to do so locally, with all of the potential suppliers closely scrutinizing the process and the decisions. This includes what is generally viewed (and will be discussed in more detail later on in this report) as more access and interaction between local politicians and vendors than one would find at more senior levels of government. As a result, public servants at the municipal level are more likely to be asked by elected officials to justify individual decisions, often in response to a direct complaint from a vendor.

- The general view among experts is that although many municipalities have excellent purchasing policies and strong professional purchasing capacity in their staff, historically professional procurement function has tended to receive more attention at the provincial/federal level in terms of the maturity of policies and processes, investment of resources, senior management time and attention, and professional development.

- Political intervention in the procurement process at the provincial or federal level is generally seen as less frequent or intensive. This is in part because of the system at those levels of cabinet/ministerial authority for decision-making and public service accountability. This generally results in greater distance between politicians/legislators and administration officials which in turn is reflected in greater delegation to and decision-making independence for administrative staff with respect to procurement processes and decision-making.

- In comparison, the municipal system in Ontario where the administration reports to Council as a whole, results in individual legislators/Councillors having considerably more direct contact and *de facto* (if not necessarily

statutory) capacity to become involved in administrative matters. There is also a general sense that federal and provincial politicians may be more likely than many municipal politicians to see procurement as an area fraught with political dangers and one that is “best left to professionals”.

Terminology

The purpose of this section is to provide a brief overview of key terms that appear in this report. This section is not intended to be a comprehensive glossary of procurement related terms, but rather to provide clarity with respect to language. Consistent with the highly professionalized nature of procurement in the public sector nationally and internationally, the use of these terms across jurisdictions is very consistent.

- ***Bid:*** This refers to a tender, proposal or quotation submitted in response to a solicitation from a contracting authority, i.e. submitted in response to an Invitation to Tender, Request for Proposal, or Request for Quotation from a contracting authority.

- ***Award:*** This refers to notification to a bidder or tenderer of acceptance of a bid or tender that brings a contract into existence.

- ***Central Purchasing Authority:*** This refers to the central department in a government that is responsible for purchasing policy and overseeing the purchasing process across departments. In many cases, it also includes responsibility for directly managing purchases that are made centrally, and for managing purchases over a certain value on behalf of departments.

- ***Buying Department:*** Also referred to as the “line” or “end user” department***.*** This term relates to the department within government that is the actual purchaser and end user of the good or service. In most jurisdictions, the line departments manage their own procurement according to corporate policies up to a certain dollar value, with the advice and support of the central purchasing authority. Above that threshold, the buying department relies on the central purchasing authority to manage the purchasing process. In almost all jurisdictions, the buying department retains accountability for deciding what to purchase and which bidder to select.

- ***Request Document:*** This term is used in this report as a *catch-all* for the different types of documents used to solicit bids from outside organizations for the purchase of goods and services. Examples of bid release documents include:

    - ***Request for Proposal:*** A competitive procurement process for obtaining unique proposals designed to meet broad outcomes to a complex problem or need for which there is no clear or single solution.

    - ***Request for Tender*****:** Also known as an Invitation to Tender. A competitive procurement process for obtaining competitive bids based on precisely defined requirements for which a clear or single solution exists. This approach usually involves the lowest-priced responsive bid (the lowest bid that complies with all the mandatory requirements) being awarded the contract.

    - ***Request for Quotes***: Generally used to mean the same thing as Request for Tender.

- ***Request for Standing Offer/Vendor of Record****:* This term refers to a (usually) centrally established agreement with a vendor or vendors (through a competitive process), typically for goods or services that are commonly required across departments. The expectation is that departments with requirements for goods or services covered by the agreement will establish contracts with the vendor(s) who have been pre-selected by the central purchasing authority. ***Blanket contracts*** are a variation on this theme, in this case, a formal purchase agreement up to a maximum contract amount, for a commonly required good or service and against which one or more departments can make purchases.

- ***Request for Expressions of Interest:*** A general market research tool to determine vendor interest in a proposed procurement. It is used prior to issuing a call for bids or proposals and is not intended to result in the award of a contract.

- ***Request for Information:*** A general market research tool used to determine what products and services are available, scope out business requirements and/or estimate project costs. A Request for Information is used to provide vendors with a general or preliminary description of a problem or need and to request vendors to provide information or advice about how to better define the problem or need, or alternative solutions. It should not be used to pre-qualify or screen vendors. It is not intended to result in the award of a contract.

- ***Request for Pre-Qualification:*** A procurement process used to pre-qualify vendors for subsequent participation in an invitational Request for Proposal. Responses from proponents are evaluated

against selection criteria set out in the solicitation, and a short-list of pre-qualified proponents is created.

- ***Vendors:*** This term is used to refer to companies that are potential bidders on contracts. It is used interchangeably with “bidders”.

- ***Bid Protest***: A complaint that is made against the methods employed or decisions made by a contracting authority in the administration of a process leading to the award of a contract.

- ***Bidders' Conference:*** A meeting to discuss with potential bidders, technical, operational and performance specifications, and/or the full extent of financial, security and other contractual obligations related to a bid solicitation.

- ***Specification:*** A concise statement of requirements to be satisfied for materiel, a product or service, including the identification of test methods or the procedures which will determine whether the requirements have been met.

Part 2
Discussion of Risks

1. Values-Based Procurement

In surveying the literature and research on procurement, it quickly becomes evident that a primary focus of professional attention is on policies, procedures, directives, guidelines, techniques, best practices, etc. However, as also documented in the literature and validated in expert interviews, procurement is about more than the technical components. Almost universally, experts offered the view that ethics-related values and principles are the essential foundation of public sector procurement in leading jurisdictions.

Leading jurisdictions recognize that it is neither possible nor desirable to prescribe the appropriate course of action for staff in every given situation. This not only stifles creativity but also limits the flexibility necessary to make appropriate decisions in different situations. As indicated in the literature on governance, the remedy of too much specificity can be as problematic as not enough.

For the most part, the values underlying procurement practices in jurisdictions that were part of this study were similar and can be reduced to a core of four:

- Fairness and equity.
- Openness.
- Value-for-Money.
- Good Management.

The importance of values in terms of training and ongoing conduct of procurement matters is strongly emphasized in the literature and educational offerings of the procurement community. *Appendix A* includes a *Procurement Code of Ethics* developed by the Purchasing Management Association of Canada (PMAC). The Code deals with values, norms of behaviour, and enforcement practices. The following is the portion of the code that describes the values:

> *"Members will operate and conduct their decisions and actions based on the following values:*
>
> - *Honesty/Integrity: Maintaining an unimpeachable standard of integrity in all their business relationships both inside and outside the organizations in which they are employed;*
> - *Professionalism: Fostering the highest standards of professional competence amongst those for whom they are responsible;*
> - *Responsible Management: Optimizing the use of resources for which they are responsible so as to provide the maximum benefit to their employers;*
> - *Serving the Public Interest: Not using their authority of office for personal benefit, rejecting and denouncing any business practice that is improper;*
> - *Conformity to the Laws in Terms of:*
>   - *The laws of the country in which they practice;*
>   - *The Institute's or Corporation's Rules and Regulations*
>   - *Contractual obligations."*

The following examples from various jurisdictions illustrate how values are expressed directly by purchasing organizations:

City of Cambridge, Ontario: Ethical Principles of Procurement

- *We subscribe to the principle that personal aggrandizement or personal profit obtained through misuse of public or personal relationships is dishonest and not tolerable.*
- *We endeavour to identify and eliminate participation of any individual in operational situations where a conflict of interest may be involved.*
- *We believe that members of our staff should at no time or under any circumstances, accept directly or indirectly gifts, gratuities or other things of value from vendors.*
- *Any supplier whose practices are found to contravene these ethical principles will be disqualified from future tenders or purchases.*

Halton Co-operative Purchasing Group (Halton Region, Ontario)

1. *High standard of ethics and integrity for all members.*
2. *Co-operation and participation by all members, working together to achieve the right price, the right source, the right quantity and the right quality, at the right time.*
3. *Support of fair and open market competition, with an impartial approach to award all contracts and tenders.*
4. *Accountability by all members to the H.C.P.G. and to the agencies they represent, for seeking and providing the best value in the most cost effective way.*
5. *An energetic and proactive approach to customer service.*
6. *An innovative and progressive approach to dealing with changing technology, legislation.*

California Association of Public Purchasing Officers:
Standards of Purchasing Practice

- *To regard public service as a sacred trust, giving primary consideration to the interests of the public agency that employs us.*
- *To purchase without prejudice, seeking to obtain the maximum value for each dollar expended.*
- *To avoid unfair practices, giving all qualified vendors equal opportunity.*
- *To honor our obligations and require that obligations to our public agency be honored.*
- *To accord vendor representatives courteous treatment, remembering that these representatives are important sources of information and assistance in solving our purchasing needs.*
- *To refuse to accept any form of commercial bribery, and prevent any appearance of so doing.*
- *To be receptive to counsel from our colleagues, and to cooperate with them to promote a spirit of teamwork and unity.*
- *To conduct ourselves with fairness and dignity, and to demand honesty and truth in the purchasing process.*
- *To strive for greater knowledge of purchasing methods and of the materials we purchase.*
- *To cooperate with all organizations and individuals involved in activities designed to enhance the development of the purchasing profession, remembering that our actions reflect on the entire purchasing profession.*

Waterloo Region (Ontario) Purchasing Cooperative
Statement of Ethics for Public Purchasers

"The Staff associated with the purchasing process subscribe to and practise their profession according to the Ontario Public Buyers Association's Code of Ethics, which is based on the following tenets:

1. *Open and Honest Dealings with Everyone Who is Involved in the Purchasing Process*
    - *This includes all businesses with which this agency contracts or from which it purchases goods and services, as well as all members of our staff and of the public who utilize the services of the purchasing department.*
2. *Fair and Impartial Award Recommendations for All Contracts and Tenders*
    - *This means that we do not extend preferential treatment to any vendor, including local companies. Not only is it against the law, it is not good business practice, since it limits fair and open competition for all vendors and is therefore a detriment to obtaining the best possible value for each tax dollar.*
3. *An Irreproachable Standard of Personal Integrity*
    - *Absolutely no gifts or favours are accepted by the staff associated with the purchasing process in return for business or the consideration of business. Also, the staff associated with the purchasing process do not publicly endorse one company in order to give that company an advantage over others.*
4. *Cooperation With Other Public Agencies in Order to Obtain the Best Possible Value for Every Tax Dollar:*
    - *This agency is a member of a cooperative purchasing group. Made up of several public agencies, this group pools its*

expertise and resources in order to practise good value analysis and to purchase goods and services in volume and save tax dollars.

5. *Continuous Development of Purchasing Excellence:*
    - *All staff associated with the purchasing process of this agency take advantage of the many opportunities provided by the Ontario Public Buyers Association to further their knowledge of good public purchasing principles and professional excellence."*

The Canadian federal Treasury Board and Public Works and Government Services Canada (PWGSC – the federal government's purchasing arm) deal specifically with the ethical demands placed on procurement officials as part of their on-going training related to ethics and modern controllership in the federal government:

> *"In the procurement world, staff are continually confronted with decisions that require careful attention and that may pose ethical dilemmas. Procurement officers are honest brokers navigating the sometimes competing interests of client departments looking for a service and contractors with an obligation to make money."*

According to these organizations, ethics training for procurement staff has been successful in assisting staff to deal with ethical dilemmas:

> *"Staff that have undergone ethics training are better equipped to act in an independent and objective way. They are also more likely to consider the impact their decision will have on other parties. The training is taking the struggle out of not knowing the answer to a problem and is encouraging people to make a carefully reasoned decision and then move on. In managing procurement projects, the most complex projects are the ones that have continually shifting objectives so that only the underlying values and principles are stable. The focus of these projects is on governance*

based on values. The Ethics Program is a perfect complement to our own complex procurement training which focuses on governance issues."

"Rather than prescribe right or wrong answers, the Program helps people follow a path that leads them to a decision they are comfortable with."

In support of this achievement, these federal departments have identified three important success factors that are consistent with the literature on good management in general but that also apply to good management of the procurement function, in terms of defining and embedding values:

- *"Senior Management Commitment: senior management demonstrating that values and ethics are a priority for the organization. In the federal context, having the Deputy co-chair the ethics committee certainly helps put the importance of the issue into perspective."*
- *Strong Leadership: ethics program leaders have worked diligently not only getting their message out but also listening to the various groups undergoing training and then tailoring courses appropriately.*
- *Calibre of the Courses: course material should be interesting and staff delivering courses dynamic."*

2. Specifications

According to the State of Queensland's (Australia) *Guide to Developing Specifications*,

> *"In a purchasing context, a specification can be defined as a statement of needs. It defines what the purchaser wants to buy and, consequently, what the supplier is required to provide. Specifications can be simple or complex depending on the need.*
>
> *The success of the purchasing activity relies on the specification being a true and accurate statement of the buyer's requirements.*
>
> *Apart from being a means of identifying the goods or services required, a specification will form part of any future contract that might result from offers received.*
>
> *The specification forms part of an "Invitation to Offer" document. Other elements in the invitation document include the "Conditions of Offer", the "Conditions of Arrangement/Supply/Contract" and "Form of Offer" and response schedules."*

In the literature and expert interviews, the development of specifications is consistently identified as a potential high-risk area. The State of Idaho's Division of Purchasing suggests that:

> *"Specifications are one of the most important elements of the purchasing process. The preparation of good specifications is probably the most difficult function in the process. Inadequate or poorly written specifications are the cause of many bidder challenges and can considerably delay the purchasing process."*

The U.K. Department of Trade and Industry identifies the preparation of specifications as “an essential preliminary step in the purchasing cycle.”

Specification development is particularly important in two respects that, again, speak to the dual purposes of public sector procurement:

- The first of these speaks to value-for-money: the ability of the purchasing organization to understand its own purchasing requirements and to clearly articulate these for the vendor community.
- The second speaks to the need for fairness and equity in the process: ensuring that a specification does not present a risk to fair and open competition, i.e. unnecessarily discourages or prevents particular vendors or groups of vendors from competing.

In many jurisdictions, the importance of fairness and equity is emphasized in formal procurement statutes and policies.

- The State of Idaho’s purchasing policy states that: *“Specifications shall, as much as practical, be non-restrictive to provide an equal basis for participation by an optimum number of vendors and to encourage competition.”*
- Similarly, the State of Pennsylvania, in its procurement handbook stresses that *“If bidders are misled by what was required by the specifications, the bidding was not on a common basis, and the lowest figures submitted would not, in law, be the lowest bid since it lacked fair competition.”*
- Queensland’s approach specifies that specifications should “*provide equal opportunity for all potential suppliers to offer goods or services which satisfies the needs of the user, including goods or services incorporating alternative solutions.*”

Some interviewees suggested that there is a general (and, in their view, not inaccurate) perception in the private sector that the development of specifications

in the public sector is often to be found lacking. The prevailing sense is that the resulting ambiguity more often plays out in the private as opposed to public interest.

As reported by experts, there are a number of other common problems or risks associated with specification development, including:

- Requirements can actually be too complex or numerous relative to the value of the contract.
- There can be too many mandatory requirements relative to the risks inherent in the project.
- Specifications can be overly prescriptive and not leave sufficient room for vendors to demonstrate creativity or bring additional value to their offerings.
- Requirements may not be sufficiently detailed and as a result, suppliers may have room to describe products or services that do not necessarily meet the purchaser's requirements.

The U.K. Department of Trade and Industry highlights the potential consequences for its staff as follows:

> *"If the specification is wrong, inadequate or unnecessarily tightly drawn it may result in:*
>
> - *A suitable tenderer being precluded from bidding;*
> - *Tenderers wrongly or variously interpreting the requirement;*
> - *Tenderers failing to submit satisfactory tenders;*
> - *Major difficulties in evaluating the bids; or*
> - *Wrong or unsuitable goods/services being offered/supplied or services not meeting the perceived requirement."*

In addition, specification development requires a good knowledge of what exists in the marketplace. This can be particularly challenging for large, complex projects where the required expertise to do so may not reside in government. Many purchasing departments define as part of their role to assist line departments in identifying whether they in fact do have sufficient expertise or whether external expertise should be acquired. This is particularly the case with larger and more complex projects, which tend to place greater emphasis on internal collaborative approaches. This typically involves the buying department working closely with specification writers and purchasing process managers from the central purchasing authority, as well as other internal and/or external technical experts.

Often the role of the purchasing specialist is clearly articulated either in formal policies or in more interpretative guidelines or handbooks. The U.K. Department of Trade and Industry specifies that:

> *"Wherever feasible, specialist purchasing staff should be brought into the discussions at an early stage of a purchase. They have a responsibility for referring back to the user any doubts that they may have about the specification, description or recommended supplier recorded on the purchase requisition. They are also:*
>
> - *Experts (or have ready access to experts) in procurement and contractual law.*
> - *Able to advise on the source of specialist specification advice most appropriate and any legal constraints.*
> - *Able to provide access to existing specifications.*
> - *Familiar with the requirement to decide the method of purchase.*
> - *In a position to know whether the requirement is available under existing contracts.*

- *Able to help with the development of an acquisition strategy.*
- *Able to help with market research.*
- *In a position to develop specific contractual clauses to complement the specification."*

Procurement specialists have the responsibility of challenging specifications where they seem to be restrictive and may prevent best value for money being obtained."

Not surprisingly, specification development is a significant and well-defined aspect of training and certification for procurement professionals. This is reflected in the educational offerings of virtually all professional procurement associations, including the National Institute of Governmental Purchasing (NIGP), the Purchasing Management Association of Canada (PMAC), the Ontario Public Buyers Association (OPBA) to name a few.

Within organizations, the importance of specifications development often translates into standardized expectations, definitions, templates, and other tools as important parts of the quality assurance process. Again, Pennsylvania's procurement handbook speaks to the utility of common standards in this area:

"The common standard is necessary in order that the Commonwealth may have the advantage of fair and just competition, thus eliminating as much as possible, any question of favouritism. The purpose of competitive procurement is frustrated where there is no common standard on which bids and proposals are based. The common standard provides the level playing field for those who want to compete for Commonwealth contracts."

Another common best-practice approach is the development of what are often extensive handbooks or other instructive materials that focus on specification development. In the course of surveying jurisdictions, many examples of

practical guides for the use of procurement staff were identified. Often these guides were in a very user-friendly format and language and were intended to supplement, rather than replace, more formal training requirements or more formal policies, directives, guidelines, etc. that might be place.

The use of procurement libraries is another common best practice. In many organizations, these have been developed and maintained for the use of staff and include examples of actual specifications that have already been used. In some cases, these specification libraries are publicly accessible with a view to sharing examples between and among jurisdictions and with the vendor community.

Best practice organizations often have a standing expectation that staff will access and make use of extensive libraries or repositories of specifications that exist in external organizations. These typically include the various state, provincial, and national purchasing associations. For example, the National Institute of Governmental Purchasing (NIGP) maintains a library of over 10,000 sample specifications. Closer to home, the Ontario Public Buyers Association has an on-line catalogue of more than 2,000 examples.

Other examples of recognized best practices in this area include:

- Collecting as much information as possible from the buying department or end-user as to the function and performance of the requested product and making maximum use of their expertise and knowledge.
- Collecting product information from the industry (brochures, catalogues, specs, etc.), including catalogues and product specifications available on the internet.
- Looking for standards and test information from professional societies where available.
- Calling on other “experts” in the purchasing community for help.

- The use of simple checklists (see the example below from the U.K.'s Department of Trade and Industry).

U.K. Department of Trade and Industry Checklist

- *"Are previous (similar or related) specifications available?*
- *Are the requirements stated clearly, concisely, logically and unambiguously and contain only the essential features or characteristics of the requirement?*
- *Is the specification presented in performance terms rather than a detailed design?*
- *Do the specifications contain enough information for potential suppliers to design and cost the products or services they will offer?*
- *Are limits, tolerances or performance targets reasonable and easy to check? Are they written in such a way that they define the criteria for acceptance of offered products or services as well as permitting them to be evaluated by examination, trial, test or documentation?*
- *If appropriate, do specifications conform to European, international or national standards and comply with any legal obligations?*
- *Do specifications provide equal opportunity for all potential suppliers to offer a product or service which satisfies the needs of the user and which may incorporate alternative technical solutions?*
- *Ensure that specifications do not contain features that directly or indirectly discriminate in favour of, or against, any supplier, product, process or source.*
- *Ensure that they do not over-specify requirements - i.e. specify performance that is more than "Fit For Purpose".*
- *Have you taken due account of the Department's environmental policies?*

- *Is variety reduction and simplification exercised?*
- *Are site-specific requirements necessary?"*

3. Readiness

In interviews, experts indicated that lack of readiness is a continuing problem area, particularly for large, more complex procurements. Readiness in these terms is seen as including:

- Adequate knowledge of the capacities/products/services available in the marketplace.
- A clear understanding of the organization's business requirements, including organizational, financial, and technical considerations.
- A well-developed and high quality business case, including clarity and due diligence with respect to the anticipated benefits.
- Clear political, senior management, and related stakeholder commitment to the undertaking, including direction and authority to proceed.
- A consistent level of senior management attention.
- Having well-training staff who understand their respective roles and responsibilities.
- A well-developed and carefully planned procurement process.
- A clear framework for accountability related to ongoing contract management once the opportunity has been awarded.

Where one or more of the above elements are not present, the project is subject to a higher degree of risk. As reported in interviews, the failure of large public sector projects can usually be attributed to one or more of these factors.

The factors that can lead to a lack of readiness are commonly understood:

- The time and resources required to do a thorough analysis and workup of the project have been underestimated or are not available.
- In some cases, an announcement has already been made at the political level and public officials are playing “catch-up”.
- The expertise may not exist internally to conduct a thorough assessment.
- The procurement process does not include a formal “risk assessment” component that emphasizes risk identification and management.

The result is often a procurement process that is flawed in terms of the purchasing organization’s ability to articulate its needs and just as importantly to effectively evaluate responses.

The remedies as reported in the literature and by experts include:

- Not underestimating the time and resources involved in properly researching and scoping a major, complex procurement.
- Establishing a standing expectation that readiness assessment and reporting on readiness will be a standard part of the procurement planning methodology within the organization. (see discussion below of the U.K.’s *Gateway Review Process*.)
- Incorporating a risk-management component into the process that brings greater rigour to the process of identifying risk and mitigating strategies.
- Maximizing opportunities for structured dialogue with the private sector in the pre-release period as an additional way of identifying potential issues, shortcomings, risks, etc.
- Establishing a standing best practice of *reverse calendar planning* for procurement projects. This involves, in the initial planning phase of a procurement, a statement of when the project should be finished and then backing up from that point the various steps that will need to occur. With

this in place, a simple risk assessment allows one to determine whether the various milestones are in fact realistic and where elements of the process or key decisions are beyond the control of the project.

- The development and utilization of standardized checklists and templates as part of part of embedding readiness considerations in procurement planning and development.

As an example of the latter, the U.K. Office of Government Commerce provides its senior executives with a relatively simple checklist of key questions that are designed to get add readiness issues and potential shortcoming.

"Does the Department and other key stakeholders understand how this project will affect the business and how much and how little can be changed once it is launched?

- *Is the basic design for this project fixed, cleared and visible with all key people (including Ministers) – do these people understand that the basic design is now "frozen"?*
- *Do the Departments know what it can change as the project progresses and how much changes will cost in terms of money, performance reduction and timescales?*
- *Explain the Business Case to me so that I understand why each of the components of the project are necessary to achieve our business objectives. Does each component deliver benefit? Are the future users of the technology properly represented on the project, are they sufficiently engaged, knowledgeable and senior to take decisions quickly and authoritatively?*
- *Explain to me how our business processes and environment will change, internally and externally, as a result of the project.*

- *What are the benefits that we have to deliver after the project is handed over?*
- *Do we have a benefit delivery plan? Do we have a transition plan to new systems?"*

"Is the project properly staffed to enable effective leadership, decision-making and risk management to begin from day one and continue consistently to the end?

- *Who is the senior manager with real understanding of the business requirement and responsible for delivery of the benefits?*
- *Is there someone with a full time commitment and appropriate experience to manage the project?*
- *Who is the very senior individual personally accountable for the delivery of this project - is he or she committed from now until it is completed and signed-off and does he or she have the authority to make key decisions (affecting this Department and others)?*
- *Do I understand the business requirement and the expected results of the project, and am I convinced that they are realistic?*
- *Will there be sufficient experienced project and "user" staff on this project from day one?*
- *What are the top ten risks for this project - have we plans in place to manage these risks and contingency plans to respond if, despite our best efforts, the risk actually happens.*
- *Do the project structures, roles and responsibilities recognise the distinction between the in-house business change project and the contributing supplier led development project, where these are different?*

- *At what points will I able to tell if the project is failing – and how quickly will I be able (contractually and politically) to implement remedial actions or stop the project if it fails?"*

In reviewing policies and procedures from different organizations, it was evident that many organizations have well-developed, formal assessment methodologies that are expected to be used throughout a procurement project, particularly for larger and more complex projects. According to the Ottawa-based procurement consulting firm Partnering in Procurement, readiness assessments are not just to be performed at the outset of an undertaking, but periodically throughout as part of validating "the organization's preparedness for the next step or next steps of the project".

One example of this is the U.K. Office of Government Commerce's (OGC) *Gateway Process*. This process was part of the government's response to a review of procurement in the civil central government (Gershon Report). The authors of the review had identified the need for "*a well defined, common process for the strategic management of large, complex or novel procurements.*" A key recommendation was for the development and implementation of a form of readiness assessment that would:

- *"Help to ensure a more consistent and enhanced level of performance on project orientated procurements, thereby saving money and boosting efficiency.*
- *Catalyse widespread use of best practice, as this will increasingly be documented in the definition of the deliverables.*
- *Provide a foundation for procurements which support joined-up Government initiatives."*

The following is an OGC description of the process that can apply to all procurements in the U.K. civil central government, including services,

construction/property, IT-enabled business transformation projects, and vendor of record/blanket contracts.

"What is a Gateway Review?

- *In simple terms, it is a review of a procurement project carried out at a key decision point by a team of experienced people, independent of the project team. Procurements are any finite activity designed to deliver a government requirement and involving government expenditure.*
- *The Gateway Process is based on well-proven techniques that lead to more effective delivery of benefits together with more predictable costs and outcomes. The process considers the project at critical points in its development. These critical points are identified as Gateways. There are six Gateways during the lifecycle of a project, four before contract award and two looking at service implementation and confirmation of the operational benefits. The Process emphasises early review for maximum added value.*
- *Gateway 0 may be applied at the startup of a programme or project. It is expected at the start up of a programme and is recommended practice for a major project that is high risk.*
- *A Gateway review is held before key decision points in the lifecycle of a procurement project. The review teams are made up of independent experienced practitioners who bring their prior knowledge and skills to bear to identify the key issues that need to be addressed for the project to succeed. The review criteria are established and published in a set of workbooks available on Office of Government Commerce's website. The work of a Gateway team is for the project senior responsible officer, and ownership of the review report and recommendations lies with the SRO. A Gateway review is carried out over a period of 4-5 days at the most with the review report presented*

and discussed with the SRO before the review team leaves the client premises."

There is currently no minimum value required for a Gateway process to be applied, although the complexity of the process can be varied depending on levels of risk. Each procurement project is required to submit a profile to a central Gateway team, which in turn meets with the line department to discuss and agree on a risk profile and a determination of the extensiveness/rigour of the process to be applied.

4. Pre-Request Consultation with the Private Sector

The literature, practice in other jurisdictions, and input from experts strongly emphasizes the importance of significant and substantive upfront consultation with the private sector before a request document is released as a major element in reducing risk and exposure, particularly for larger and more complex projects. According to the State of New Mexico:

> *"Experience has shown that most of the procurements which are cancelled prior to award suffer from miscommunication or misdirection at the beginning of the procurement. Without a clearly defined objective and direction, the procurement results may differ significantly from management expectations, resources requirements or funding ability."*

The commonly understood goals include ensuring to the extent possible that:

- The purchaser has the best possible understanding of what exists in the marketplace, including capabilities or weaknesses, the range of products, prices, innovations available, etc.
- Vendors understand the government's requirements and are better prepared to submit qualified responses.
- The purchaser has an opportunity to refine and improve its approach to a particular procurement through feedback and input from the vendor community. This can include business case accuracy, appropriateness of financial models, specifications, a better balance of prescriptiveness and flexibility/opportunities for innovation, etc.

There is some indication from the research that the prevailing private sector view is one of public sector organizations not having a strong, consistent track record in this regard. With respect to municipalities, the perception exists in some parts of the private sector – although not based on a comprehensive sampling – that

this level of government is somewhat less likely to engage vendors in up front discussions compared to the provincial or federal level.

Apart from the size, scope, and complexity of the undertaking, lack of time, resources, or expertise are often factors in determining to what extent this kind of activity is undertaken in the public sector. However, a major determining factor can be issues related to fairness and equity.

As discussed earlier, fairness and equity considerations are not as paramount in private sector procurement processes, where there is typically a much higher comfort level with the early identification of a smaller group of companies that are believed to be capable of meeting the need. Within the public sector, there is an ongoing debate with respect to whether the inherent risks of less formal pre-release consultation can be effectively managed. Often this results in an organization being perceived as having overly prescriptive, rules-based policies.

Most public sector organizations, however, accept the need for some degree of contact and exchange of information. In some jurisdictions, this is found in more formal policies and best practice statements related to supply market analysis. In other jurisdictions, there is no such formal expectation and each department makes its own determination, often in consultation with the central purchasing authority.

In general, however, it is recognized as being essential to make a clear distinction between contact with selected suppliers for the purposes of gathering information, researching solutions, and understanding more about what might be available in the marketplace, as compared to more formal and fairness/equity-based processes to legitimately narrow down the selection of vendors that are invited to compete.

Experts suggest that for larger, more complex purchases, significant dialogue with the vendor community should take place in the range of three to six months before a request document is released. This can include market research and one-on-one discussions.

The next stages generally involve much more formal and documented processes that are, in effect, the initial stages of the formal procurement process. These include various mechanisms as discussed in the earlier section of this report dealing with *Terminology*, including:

- *Requests for Expressions of Interest:* A general market research tool to determine vendor interest in a proposed procurement. It is used prior to issuing a call for bids or proposals and is not intended to result in the award of a contract.
- *Requests for Information*: A general market research tool used to determine what products and services are available, scope out business requirements and/or estimate project costs. A Request for Information is used to provide vendors with a general or preliminary description of a problem or need and to request vendors to provide information or advice about how to better define the problem or need, or alternative solutions. It should not be used to pre-qualify or screen vendors. It is not intended to result in the award of a contract.
- *Requests for Pre-Qualification*: A procurement process used to pre-qualify vendors for subsequent participation in an invitational Request for Proposal. Responses from proponents are evaluated against selection criteria set out in the solicitation, and a short-list of pre-qualified proponents is created.
- *Requests for Comments on the RFP*: A formal, documented process whereby all interested vendors are asked to review and comment on the draft release document. Vendors are often supplied with an initial list of questions as well as asked to make any additional comments. In some

cases – depending on a jurisdiction's comfort in terms of transparency – the input is summarized publicly and forms part of the permanent record of the project.

On the issue of one-on-one discussions well in advance of the release of a request document, some experts feel that these are too risky in terms of potential perceived advantages for one or more vendors and should be avoided. Others argue that:

- They are often essential to the process of refining the government's business requirements.
- They provide an early opportunity for vendors to bring forward better or at least alternative solutions.
- Vendors are rarely forthcoming in more open group settings where their competition is also present.

A central issue in this debate is the reality that, depending on the number of potential suppliers in the marketplace, this process can by necessity mean that not all potential bidders are contacted. Generally, the literature and many experts view this as an acceptable risk given that this is intended to be an initial scoping exercise. The literature and expert opinion supports the view that perceptions of an advantage having been conferred on one or more vendors can be offset through fairness, equity, and openness in subsequent more formal processes, including:

- Providing subsequent more formal consultative opportunities for all prospective bidders to provide information on their products and services through a Request for Information.
- Providing potential bidders with an equal opportunity to review and comment on a draft version of the request document.

- Ensuring that the formal bid process is open, fair, and equitable, including any formal steps taken to legitimately narrow the field of potential bidders such as a Request for Qualifications.

It was suggested by one interviewee that a relatively simple benchmark of how effective the pre-consultation can be found in the number of addendums that are sent out as part of the competitive process. According to this view, bid documents that have been the subject of more rather than less consultation in the pre-release period, would have fewer addendums.

The literature and discussion with experts emphasizes the process of requesting input on the draft request document stage as being particularly important. The general consensus is that while post-release bidders conferences are standing operating procedure in most jurisdictions, particularly for contracts over a certain size/complexity, they are not very effective in terms of meaningful dialogue and input primarily for reasons of exposure, i.e.:

- At that stage, all of the competitors are in the room.
- There is usually strong reluctance to ask key questions at that stage for fear of giving away a competitive advantage.

Most importantly, in terms of getting the request document "right", the bidders' conference is seen as simply being too late. Even if vendors did feel comfortable being more open in such a public setting, there is no opportunity at that stage to make any material changes to the business case, specifications, evaluation weighting, etc. without exposing the process to a challenge from unsuccessful bidders. Even the more extreme step of cancelling the competition and issuing a new request document with the appropriate changes could be subject to challenge.

5. Single Point of Contact

Most experts agree that poorly managed communication between bidders and government officials can pose a major risk to the integrity of the procurement process at all levels of government in terms of demonstrating fairness, equity, and transparency.

According to experts and the professional literature on procurement, a common best practice is to establish a single point of government contact (typically the official responsible for managing the actual procurement process) and require that all vendor communication with government officials be made through that single point of contact.

In some jurisdictions, this is known as a *black-out* period or in a number of cases, a *cone of silence*. During a number of interviews, however, it became evident that the term *black-out* can be confusing or misleading for some. Some have expressed concern that this might mean a prohibition on all contact between bidders and the contracting organization. They correctly point out that this would be impractical in terms of being able to respond to legitimate inquiries on the part of vendors. The best practice, however, is not one of prohibiting all communication, but rather of ensuring that communication is formally managed as part of controlling the integrity of the process.

By way of example, the Ontario Government is fairly typical in this regard. Request documents are usually quite specific that from the time a release document is issued until a contract award has been made there can be no contact by bidders or their agents/lobbyists with any government officials (including specific reference to Ministers and Minister's staff) other than the designated contact person.

This approach to managed communications is often extended in the case of very large or potential highly sought after procurements that will take place over an extended period. Experts suggest that it is frequently advisable to establish the single point of contact approach often well in advance of an actual request document being released, particularly if there are various formal processes of information exchange planned or taking in the pre-release period, such as Request for Information, Requests for Comment on a draft request document, etc.

As reported in the literature and interviews, the principle of a single point of contact as central to the integrity of the procurement process is typically very clear among professional procurement officials. This is so much the case that many jurisdictions do not have a formal written policy in place requiring this approach – in effect, it is taken as a given in terms of the fundamentals of good procurement and well-embedded in the organization's operating culture.

The bid document should make clear how and when inquiries would be welcomed. Some jurisdictions allow questions to be asked up until bids are submitted. Others set a time limit, usually a few days before bids closes. The second approach is generally seen as a good idea because the best practice is that questions and answers are recorded and distributed to all of those who have requested a copy of the bid request document. Allowing questions to be received up until the last minute might mean that not all participants would have access to the information before their bid has to be submitted and as such, the process could be placed at risk. For complex projects or particularly competitive environments, the process is usually quite rigorous in terms of documenting and distributing questions and answers to all bidders.

With smaller contracts, it is generally seen as appropriate for the question and answer process to be managed on a somewhat less formal basis. This is consistent with the need to balance value for money with fairness and equity. In

those cases, the officials managing the procurement would normally have more flexibility to determine whether the answer to a question would confer a material advantage on the inquirer. Again, the application of the governing principles should come into play. If there would be an advantage, then all organizations that received a copy of the bid would need to be notified.

Once the deadline for submitting responses has passed, the general view is that inquiries from bidders should be kept to a minimum as follows:

- Process and timing questions are generally acceptable, e.g. when will a decision be made.
- Questions that relate to the content of a bid already submitted or evaluation criteria, trying to determine who is on the evaluation committee, etc. are generally viewed as not appropriate.

The State of Massachusetts's Procurement Code includes the following prohibition with respect to bidder communication similar to the Ontario practice:

> *Bidders are prohibited from communicating directly with any employee of the procuring department except as specified in this RFR [request for response], and no other individual Commonwealth employee or representative is authorized to provide any information or respond to any question or inquiry concerning this RFR* [Request for Response – Massachusetts' generic bid request document]. *Bidders may contact the contact person for this RFR in the event this RFR is incomplete or the bidder is having trouble obtaining any required attachments.*

A closely related issue is that of Vendor Debriefings and Complaints Handling. As discussed in the next section in this report, the principle of a single point of contact carries over into policies and procedures relating to communicating with unsuccessful vendors in the post-contract award period. The best practice is to provide a single point of contact for debriefing unsuccessful vendors and a formal

process for hearing and adjudicating on vendor complaints. The expectation at all levels in the organization would be that complaints received by individuals would be referred to this process.

6. Vendor Debriefing and Complaints Handling

As noted at the outset of this report, procurement is seen as an inherently risky undertaking. Much of the discussion of risk focuses on risks associated with maintaining a fair, equitable, open, and transparent process. In this regard, the most important definition of success is often not whether the process resulted in the best value-for-money purchasing decisions, but rather whether it was challenged by any of the participants and was either sustained or found lacking.

Accordingly, the literature, expert interviews, and best practices from various jurisdictions emphasize the need for clear and transparent policies with respect to both post-award debriefings and formal complaints handing procedures as essential risk management tools. According to the State of Queensland's purchasing guidebook *Managing Complaints about Procurement:*

> *"Prevention is better than cure. Preventing complaints from occurring saves the department's/agency's and supplier's time and valuable resources. Many complaints originate through a lack of understanding and/or poor communication between buyers and suppliers."*

Vendor Debriefings

Most experts agree that as a best practice, public sector organizations should have a standing expectation and procedure with respect to debriefing unsuccessful bidders once a contract award has been announced.

As described by the U.K.'s Office of Government Commerce, the benefits of debriefing include:

> *"For the buyer department or agency:*

- *Identifying ways of improving the process for next time.*
- *Suggesting ways of improving communications.*
- *Making sure best practice and guidance is updated to reflect any relevant issues that have been highlighted.*
- *Encouraging better bids from those suppliers in future.*
- *Getting closer to how that segment of the market is thinking (enhancing the intelligent customer role).*
- *Helping to establish a reputation as a fair, open and ethical buyer with whom suppliers will want to do business in future.*

For the government and the wider public sector:

- *Demonstrating commitment to good practice and openness.*
- *Contributing to intelligence gathering about the market and its segments.*
- *Educating the market that the public sector is value-driven and not cost-driven.*

Potential benefits for the supplier:

- *Helping companies to rethink their approach so that future bids are more successful.*
- *Offering targeted guidance to new or smaller companies to improve their chances of doing business in the public sector.*
- *Providing reassurance about the process and their contribution or role (if not the actual result).*
- *Providing a better understanding of what differentiates public sector procurement from the private."*

Some jurisdictions have established a threshold in terms of the value of the contract, below which vendor debriefings are not required for line departments. In the U.K., however, the central purchasing authority "strongly recommends" that debriefings be offered in all cases.

Typically, debriefings are voluntary rather than mandatory for vendors but, if requested, must be provided. In some jurisdictions, vender debriefings are mandatory (usually as a condition of submitting a bid) for more complex or potentially controversial projects.

The literature and a review practices across jurisdictions indicates that debriefings are exclusively administrative in nature and generally not complex in terms of process. The latter means that telephone calls are generally acceptable although face-to-face sessions are often advised for more complex projects or controversial situations. In these face-to-face encounters, having other government officials present and taking minutes are also recommended practices.

In many cases, the requirement for vendor debriefings is clearly enshrined in formal purchasing polices, including in the example below from the State of Massachusetts the requirement that a vendor must request and participate in a formal debriefing as a precondition of launching the next stage of complaint:

> *"Non-successful bidders may request a debriefing from the department. Department debriefing procedures may be found in the RFR* [Request-for-Response]*. Non-successful bidders aggrieved by the decision of a department must participate in a debriefing as a prerequisite to an administrative appeal."*

Other jurisdictions prepare simple checklists for officials who are conducting debriefing sessions. As reported in Ontario-based Summit Magazine, the

following is one such checklist used by Purchasing Services of the Ontario Ministry of Health:

- *"If the debriefing is a face-to-face meeting, then establish the rules up front. Make it clear that the reason for the meeting is to explain the evaluation process and why the respondent was unsuccessful.*
- *Take time to explain the RFP evaluation process. Many times, the vendor does not appreciate the integrity and thoroughness of the process.*
- *Only discuss the proposal made by the unsuccessful party. DO NOT make comparisons between it and the winning proposal.*
- *Only refer to the evaluation criteria listed in the RFP. DO NOT make comments on matters unrelated to the RFP criteria.*
- *Use the evaluation spreadsheet that listed the scores for the unsuccessful respondent. Emphasize the weakness of the proposal as per the score. "Out of a total of 50 points …your proposal scored 25." Do not provide scores for any other specific proposals.*
- *Explain where the unsuccessful proposal ranked in the final scoring, but not in relationship to any other specific proposals. Say only that "Out of five proposals, yours ranked third (or fourth, etc.)." Do not mention the names of the other proponents.*
- *Only release a written statement of the individual score and/or the final score of the unsuccessful proposal.*
- *Point out the strengths of the respondent's proposal and acknowledge where the proposal scored well.*
- *Provide advice on how the respondent can improve their scoring in future proposal submissions.*
- *Confirm at the end of the session that the respondent is satisfied with the debriefing."*

Handling Complaints

In terms of mitigating and managing risk, the literature, practices in other jurisdictions, and expert opinion emphasize the importance of clear, transparent policies with respect to reviewing complaints from bidders.

At its core, a formal complaints process is meant to be an additional physical embodiment of fairness, equity, and transparency and well as a further check on value-for-money decision-making on the part of public officials. Consistent with these principles, a well-developed complaints procedure is generally seen as something that bidders have a right to expect.

There are, however, other more direct benefits for the purchasing organization, including:

- The process reduces the likelihood of more costly and time-consuming lawsuits.
- Regardless of whether the complaint is sustained or denied, the process can provide useful information to the purchasing organization with respect to potential policy/process improvements.
- The process can be used in an ongoing way to communicate the integrity and effectiveness of decision-making by procurement officials.
- The process results in a body of *case law* that, assuming decisions are made public, can provide future guidance to public officials and the vendor community alike in terms of best practices.

Political Involvement in the Complaints Process

Experts point to another very important and generally accepted benefit for public sector organizations – the opportunity to insulate/protect politicians from the perils of becoming directly involved in the procurement process.

Political involvement in the complaints process tends to vary from jurisdiction to jurisdiction. In many Ontario municipalities, for example, this often takes the form of a deputation to Council or a Standing Committee of Council as the first level of response to the complaint, in some case even before the competitive process has been concluded. In other jurisdictions and at other levels of government, elected officials purposely avoid becoming the appeal mechanism for staff decisions on procurement. The latter approach is consistent with the literature, best practices in leading jurisdictions, and expert opinion. These sources generally emphasize that while complaints handling policies should be approved and mandated by elected officials, the public interest is best served by delegating the process to professional administrative staff.

This is not to say that the decisions of administrative staff should not be subject to appeal. However, many jurisdictions see the value of avoiding the involvement of elected officials in appeals. For example, the State of South Carolina allows for appeals of written staff decisions in response to complaints by striking a panel made up of:

- The chair of the policy committee of the state legislature that has responsibility for recommending procurement policy (i.e. has a direct stake in maintaining the integrity of the policy).
- Five representatives of various professions from outside government.
- Two public servants who were not involved in the original process or staff review of the complaint.

In the U.S. federal government, appeals of department procurement decisions are heard by the Office of the General Counsel of the General Accounting Office (GAO).

Typically, the delegated decision-making process is formal in nature involving:

- Clearly established roles and responsibilities within the department/agency.
- Training for officials involved in the complaints process.
- The review being conducted by someone other than the individual/department that was responsible for managing the procurement in the first place.
- A set time limit after a contract is awarded during which a complaint can be made.
- Set criteria for how the complaint should be presented, e.g. expectation that formal complaints will be made in writing.
- A formal internal review process that is at arms-length from the part of the organization that was managing the procurement.
- Reasons for upholding or rejecting the complaint should be recorded.
- The creation of a database of decisions that can be tracked and analyzed to identify trends, opportunities for remedial action, policy and process improvements, etc.
- A clear expectation that confidentiality will be respected regarding the complaint and that the complainant should not be victimised or harassed as a result of any complaint.

South Carolina sets an additional expectation that the senior official conducting the review will attempt to resolve the dispute without needing to resort to a formal hearing and written decision.

The U.S. federal government's GAO is also very clear in its policies with respect to the types of matters that are appropriate subjects for appeal and matters that are not considered appropriate.

One of the most important points about dealing with complaints, however, is to keep in mind that they are the "back-end" of the process and, as quoted at the outset of this section, "prevention is better than cure." The following is an extract from an article that appeared in Summit Magazine, written by Michael Tipman, a Principal at AMS Management Systems Canada, Inc. The article very effectively sets out the benefits of a well-developed and more systematic approach to quality assurance:

> *"Dealing with a challenge can be time consuming and costly to your department. Knowing the procurement rules and following them will ensure that you have done everything necessary to withstand a challenge. But to prevent a challenge – or minimize the risk of being challenged – there are a number of positive things that can be done while preparing for your procurement.*
>
> *Getting the vendor community involved early is a good start. Publish a Request for Information (RFI) and follow up with those vendors that respond, meeting with them one-on-one to discuss their concerns. If their comments make sense and are fair, take them into consideration when writing the Request for Proposal (RFP).*
>
> *Early on, hire a Fairness Monitor – an external third party who ensures that there is no built-in bias for any vendor or product. He will be worth every penny you pay him. He provides guidance on how to word the RFP, he monitors the bid evaluation process and helps to ensure that any rulings regarding issues with bids, evaluation criteria or rejection of a bid, are done fairly and consistently. He also helps at the bidder debriefing which follows the contract award. Although using a Fairness Monitor alone does not*

guarantee that there will be no challenges, he does provide a level of assurance that all was done according to the rules set up for the procurement.

Keep the vendors involved throughout. Put out a draft of the RFP and take into account the comments of the vendor community when developing the final RFP. When writing the RFP, keep to simple wording and phrasing as much as possible. Now is not the time to impress the vendor community with your Master's Degree in English Literature. If the bidders feel that nothing has been hidden, chances are they will be less likely to challenge the result. However, no matter how careful you are you will discover that the RFP can and will be interpreted in a number of ways. This also goes for the evaluation criteria and the point allocation for each rated item. It helps to emphasize principle-based decision making rather than the blind application of rules. If the criteria turn out to make no sense, change them under control while being consistent.

Establish an Issues Resolution Team that includes as a minimum the Fairness Monitor and the Procurement Officer. Whatever the issue, rule fairly and consistently and, where there is some leeway in the ruling, try to give the bidder the benefit of the doubt. Record and save all issues along with their rulings – this provides proof that fairness and consistency prevailed throughout the evaluation process. In fact, good record keeping can be critical in the event of a challenge before the CITT. Make sure to document all the activity throughout the entire procurement process – don't shred project and bid evaluation material. Challenges have been won because the Crown could not prove that the procurement process was flawless.

Once the contract has been awarded, the Crown's last formal task is to debrief the bidders. They have a right to know where they went wrong and where they were strong in their bid. It is critical that they know how the process was done, that they were always given the benefit of the doubt and

that they clearly understand the reason(s) they failed. If the RFI/RFP process and the evaluation process are sound and the lines of communication have remained open between the Crown and the bidder, there is less chance that there will be a challenge.

However, even though you have been meticulous throughout the procurement – from RFP development to the awarding of the contract – there could still be a challenge. Plan for it from the beginning and you have nothing to fear."

7. Role of Elected Officials

Experts suggest that in best practices jurisdictions – U.S. and Canada, federal, provincial/state, and municipal – elected officials understand the importance of remaining outside of the competitive tendering process. In this regard, it is generally viewed that one of the benefits of a having a highly professionalized procurement function is the ability to insulate and protect politicians from allegations of attempting to influence procurement decisions.

In discussing the role of politicians, most experts emphasize the up-front role of elected officials to:

- Approve procurement policies, including identifying which types of projects require their express approval.
- Ensure that a professional purchasing infrastructure exists.
- Pre-approve the organization's purchasing requirements as part of the overall budget process.
- Approve any purchasing needs that exceed approved budgets before any formal purchasing activity is initiated.

For the most part, the above are seen as relatively straightforward and non-controversial. To the extent that problems with political involvement in the procurement process arise, however, they tend to be either during or at the back-end of the process, e.g. at the contract award stage or in the handling of debriefings and/or complaints

According to the experts, politicians do not always support fair and open competition, particularly when constituents are involved, i.e. not understanding that their direct intervention on behalf of a constituent would affect the fairness

and equity of the process for other bidders. Typical examples of poor practices on the part of individual elected officials include:

- Becoming directly involved in the development of request documents including involvement in the development of the detailed specifications.
- Attempting to provide direction to staff with respect to any aspect of the request document's development that would influence who might ultimately be able to bid on a project.
- Requesting or receiving copies of draft specifications or even complete request documents prior to their public release or outside of the formal internal approval process.
- Meeting with bidders and/or their lobbyists after a request document has been released. (According to experts, in best practice jurisdictions, elected officials often decline meetings with bidders/lobbyists at an even earlier stage, i.e. once a certain stage has passed in the request document development process.)
- Directing or attempting to direct staff to waive or disregard mandatory criteria from a request document, e.g. missed deadline for submission, incomplete bid document, late amendments to a bid document.
- Entertaining complaints from bidders and/or their lobbyists with respect to a current or closed competition instead of, as a matter of course, referring the complainant to the appropriate internal complaints resolution process.

As discussed in the previous section on *Single Point of Contact*, the best practice approach to dealing with political involvement during the competitive process is to establish the expectation that vendors and their lobbyists/agents will only communicate with the designated procurement official. At more senior levels of government (i.e. provinces, federal government) this prohibition would typically be in place until the contract award has been announced. At that point, unsuccessful vendors would be debriefed and complaints dealt with through the

formal complaints procedure. The prohibition is usually enforced via threat of disqualification.

At the municipal level, the practice is not as consistent. From the interviews and evidence from other jurisdictions, the municipal level of government in both Canada and the U.S. can be particularly problematic with respect to the involvement of elected officials in the procurement process. There is evidence from the public record that this is a recurring issue for many municipalities.

In Ontario, the perception within the procurement community is that elected officials in some municipalities are generally more accessible to procurement related lobbying than their federal or provincial counterparts. Furthermore, it was suggested that lobbyists at the municipal level (again, depending on the municipality) are often more intrusive, i.e. they make direct approaches to municipal councillors in terms of attempting to influence procurement decisions such as contract awards that were described as "unthinkable" at other levels of government.

A structural factor that contributes to this greater tendency – as discussed in the Toronto Computer Leasing Inquiry Research Paper *Municipal Governance Volume 1* – is the absence at the municipal level in Ontario of a system of strong Mayor/Ministerial/Cabinet accountability. Where this is present, individual legislators/Councillors are more insulated from administrative decision-making and the capacity of administrative officials to push back at individual attempts to influence is significantly strengthened.

Whether and to what extent an individual municipality will adopt a policy response to the problem appears depends to a large extent on the culture or personality of individual Councils. In some – but based on the sampling for this report, not many – jurisdictions (including the City of Toronto, as discussed in the Toronto Computer Leasing Inquiry Research Paper *Lobbyist Registration Volume*

2), direct lobbying of elected officials at all stages during and after the competitive process is generally viewed as legitimate and acceptable.

In other jurisdictions, a formal ban on this kind of contact is often seen as not being necessary because:

- There is a high degree of trust in the professional procurement staff.
- There is general but unwritten agreement among elected officials that this is not acceptable behaviour and that the political response to in-process lobbying should be “go see the professionals”.

Still other jurisdictions have established a formal *single point of contact* policy expectation. In some cases, this prohibition is in place until an award recommendation to the political level has been made public. At that point, there is no prohibition on vendors or their lobbyists contacting elected officials, although as reported in interviews, the practice is frowned on in many Councils and experts agree that this risk to the integrity of the process should be actively discouraged. In other cases, the single point of contact prohibition is in place until an award has actually be made and announced. At that point, the policy provides that both elected officials and public servants would refer unsuccessful bidders to the formal complaints process. Examples of these policies are provided in *Appendix B*.

In terms of contract awards, the interviews indicated that most municipalities refer relatively few awards to the political level for formal approval. The generally accepted best practice appears to be that if an item was budgeted for, and the lowest bidder has been selected, Council approval is not or should not be required. At the same time, it is a general practice that projects with a high degree of political sensitivity or that were not the lowest bid should go to Council for approval of the award.

None of this is to suggest that elected officials do not have a right to know what their staff are doing. In terms of governance, the issue is how they should become aware. As discussed in the Toronto Computer Leasing Inquiry Research Paper *Municipal Governance Volume 2*, experts have suggested that elected officials do not always have a clear understanding of the kinds of accountability mechanisms that can be used to ensure their officials are operating in accordance with policy, e.g. compliance reporting mechanisms, policy compliance audits or reviews, etc. All too often, according to the literature on governance, the response is to more directly oversee individual operational decisions (referred to by many as *micro-managing*) or in the worst-case scenario, to take those decisions on themselves.

It is also important to make the distinction between micromanaging and approving very large purchases. In most jurisdictions, it is common for extremely large purchases to be approved at the political level. Staff would typically provide a briefing to clarify and demonstrate that:

- The contract award is within the budget for this item already approved by Council/the government.
- The appropriate process in accordance with corporate policy was followed.

Experts suggest that politicians who understand their role and the importance of fairness and equity in procurement would tend to focus on quality assurance, i.e. whether the approved process was followed and used appropriately. Only in the most exceptional circumstances would a staff recommendation be rejected or a competition cancelled. Even more usual would be for a Council or Standing Committee to ignore a staff recommendation and make an award to another bidder.

Where this kind of understanding does not exist, the political level can often become overly and in the view of many experts, inappropriately involved in the

details of the award. This could include wanting to review the RFP in detail, wanting to see actual bid documents, scrutinizing individual evaluations, meeting with individual vendors, etc. At its most extreme – and in terms of the integrity of the process, highest risk – this could involve a Council or Standing Committee beginning to engage in re-evaluating the bids and making its own decision about the outcome.

From the literature and expert opinion, it is generally recognized that some elected officials will always resist any attempt to prescribe their behaviour in the procurement process for a variety of reasons:

- Some elected officials will argue it is, in fact, their role to have this kind of hands-on involvement in administrative matters and that this is an important and appropriate counterbalance to the power of the bureaucracy – in essence, the *governor* vs. *manager*/*trust in the bureaucracy* debate that was discussed in more detail in the Toronto Computer Leasing Inquiry research paper *Municipal Governance Volume 2*.
- Some elected officials may simply believe that no process should restrict their ability to hear from any member of the public on any issue at any time. (The Mayor of Almeda, California, in rejecting a staff recommendation to prevent lobbying of elected officials during the procurement process, made a typical statement in this regard in that "he opposes the lobbying restriction because as an elected official, he will be accessible to anyone who wants to talk to him.")
- Depending on the Council, vendors and their lobbyists are seen as providing significant hospitality opportunities for Councillors.
- For some Councillors, accessibility by vendors and their lobbyists is often directly connected to fundraising opportunities. Any measures designed to limit or restrict access by vendors/lobbyists or restrict actions that individual Councillors may take in response to or on behalf of vendor

lobbying (i.e. publicly championing the cause of unsuccessful bidders rather than relying on established complaints handing procedures) could negatively affect fundraising capacity.

Confidence in the Procurement Professionals

As indicated above, not all of the pitfalls in the procurement process relate to policies and procedures. The nature of the relationship between elected officials and administrative staff also has an important bearing on the determination of a best practice jurisdiction. Procurement experts and practitioners suggest that political confidence in procurement professionals and senior management team is an essential precondition of any jurisdiction/organization wishing to be considered as having best practices in procurement. As one interviewee indicated, the root issue is *"how much authority does Council want to give the senior administration to mange the business of the City? You have to settle that question and then flow it down throughout the various levels."*

The general expert opinion from the literature on governance is that governing bodies that do not trust their staff to manage processes and make decisions in accordance with policy need to deal with this trust issue *head on*. This could mean reviewing policies, receiving regular purchasing decision variance reports, etc. and even disciplining or dismissing/replacing staff.

8. Training and Development

In discussions with experts and as demonstrated in the approach of many jurisdictions, the importance of having highly trained and professional procurement staff is a key component of risk mitigation.

Fortunately, professional development in procurement is a recognized, well-developed, and established aspect of the profession. This is reflected in the emphasis it receives in the professional literature and the vast array and depth of training and development opportunities for procurement officials. Training includes in-house courses run by central purchasing authorities or offered through various state, provincial, and national professional purchasing associations.

Experts and leading jurisdictions stress that the foundation of training and development for procurement is the core principles. The thinking in this regard is that an understanding of rules, processes, techniques, analytical frameworks and tools, checklists, is only a component of the best practice approach.

As discussed earlier in this report, these leading jurisdictions recognize that it is neither possible nor desirable to prescribe the appropriate course of action for staff in every given situation. This not only stifles creativity but also limits the flexibility necessary to make appropriate decisions in different situations. Equally important is the need for staff at all levels to understand the core principles and in particular, how to apply these principles in situations that are not covered by rules or procedures and for management actions to be governed accordingly.

In leading jurisdictions, the commitment to training and professional development of the procurement function is clearly articulated, most often as a subset of a broader commitment to training and development of the public service in general.

The U.K.'s Department of Trade and Industry rationalizes its commitment in this area as follows:

> *"Staff undertaking procurement activity, however small a part of their job this might be, are utilising public funds provided by the taxpayer. The activity carries with it an obligation to maximise the value for money obtained from the scarce resources expended, by achieving an optimal combination of cost and quality and minimising transaction costs."*

For leading jurisdictions, this includes minimum training and certification/recertification requirements for all staff involved in the procurement process, i.e. the analyst/coordinator level, specification writers, evaluators, managers, and senior executives. In terms of specificity and intensity, this training typically makes distinctions between and among positions in terms of their importance to the procurement process.

It also includes an express commitment to procurement as a professional speciality within the public service in terms of:

- The need to create a professional environment that ensures the retention of highly skilled and valuable professional staff.
- The importance of ensuring ample and rewarding career development opportunities for staff.
- The importance of ensuring that their organization can attract experienced professionals from other government organizations and sectors.

The U.K. government is an example of this kind of practice in the creation of Government Procurement Service (GPS). This branch of the public service was created in 1999 with the stated purpose of establishing procurement as a professional discipline in government, analogous to accountants and auditors. The official objectives of the GPS are:

- "*To enhance procurement's contribution to the achievement of government objectives by ensuring the availability of staff with appropriate skills, experience and qualifications to deliver professional, ethical and legally compliant processes;*
- *To provide departments and GPS members with best practice guidance on training, career developments, and related issues to help ensure the best match of procurement staff to posts; and*
- *To provide GPS members with information on employment opportunities and a mechanism for more effective career management."*

The stated benefits of the GPS are also clearly articulated (and are aligned with the more general emphasis in the theory and best practice of good management with respect to the value of investing in training and development):

- *"Providing for enhanced career opportunities through the provision of a career record management system, with procurement vacancy listings across government - the system may be further developed to provide opportunities for secondment to industry and the wider public sector.*
- *Ensuring better information on remuneration to help expose the real value of skills and inform the setting of appropriate remuneration bids.*
- *Providing for better-focused training and development plans for individuals, consistent with Investors in People requirements.*
- *Supporting the non-procurement line manager by providing a link to the Head of Procurement for training and career development issues."*

In departments of the U.K. government that have a significant procurement function, staff involved in procurement are identified as being in "key" and "designated" procurement posts and as such are required to register with the GPS. The Service is, however, also open to other staff who are interested in a career in procurement, e.g. those with some work experience in the area but who

have since moved on to other areas, or those whose current involvement in procurement is more peripheral.

Australia and New Zealand share a similar, formally stated understanding of the importance of training and development in procurement:

> *"Chief Executives are responsible for managing their agency's procurement functions and should ensure that staff undertaking procurement have appropriate skills and training. To enable procurement to be conducted correctly, it requires a high level of procurement knowledge and skills. Officials undertaking procurement need to develop a comprehensive understanding of procurement and associated policies as well as subject matter expertise to ensure they are informed buyers."*

In best-practice jurisdictions, the commitment includes the extensive use of formal and self-managed training instruments in addition to traditional policies and procedures manuals. A number of jurisdictions included in this review have a wide range of resources available to the staff including:

- Internal and external training and certification opportunities.
- Extensive collections of interpretive guidebooks that are meant to supplement more formal polices and procedures.
- An array of ready-made analytical frameworks, including business case development, risk management, value-for-money assessment, etc.
- Regular internal newsletters for procurement professionals.
- Regular releases of tip sheets and checklists.
- Case studies of real life situations and how the principles should be applied in determining an appropriate resolution.

The Canadian federal government through Public Works and Government Services Canada and the Australian State of Queensland are noteworthy

examples of jurisdictions with a plethora of training materials, best practice guides, tools, and templates, available on the internet for staff.

The U.K.'s Office of Government Commerce (OGC) is perhaps even more extensive in this regard. The OGC maintains an exceptionally extensive on-line (and publicly accessible) service of training opportunities, a one-stop procurement "successful delivery toolkit", a comprehensive on-line library of best practices, frameworks, templates, analytical tools, and background information on new and emerging developments in procurement. These materials cover not only the core procurement process, but also related areas such supplier management, contract management and sub-specialities such as e-procurement and IT procurement.

9. Evaluation

The evaluation process is considered by experts to be a potential risk in terms of ensuring that:

- Evaluators have sufficient capacity, training, skill, and experience.
- The evaluation process is conducted with due regard to safeguarding and maintaining the integrity of the process and at the same time ensuring value-for-money.

The most commonly reported problems with respect to evaluation include:

- Evaluation criteria are flawed, ambiguous, or subject to change midstream during the process.
- Evaluation criteria are not followed or applied properly, most often through a lack of experience or knowledge.

Best practices in training and development are discussed in more detail beginning on page 62 of this report. As indicated, leading jurisdictions provide extensive training and other supports such as guidebooks, checklist, best practices, analytical tools, etc. to assist procurement professionals. In terms of subject matter, evaluation is typically a major area of focus within both the formal curriculum and other less formal educational supports.

With respect to evaluation criteria, the most important piece of advice from experts and the literature alike is that these criteria should be firmly established before the evaluation process begins. Mid-stream changes are usually the result of incomplete or inadequate preparation. The important message is that the integrity of the process is frequently placed at risk if criteria are left out or added during the actual evaluation. For example, the Province of Ontario's directives specify that:

"Ministries must take particular care in evaluating submissions and proposals against the stated mandatory requirements. Ministries must consistently apply all mandatory requirements set out in a request for qualifications or proposals to all submissions and proposals."

The State of South Carolina's purchasing policy states that:

"*Proposals shall be evaluated using only the criteria stated in the request for proposals and there must be adherence to any weighting that have been previously assigned*".

The State of Queensland, Australia provides a similar caution:

"Under no circumstances should new or revised evaluation criteria be introduced during the evaluation of offers. Take the time to think carefully about how you plan to select the best offer and be sure to ask the suppliers to provide you with all the information that you might need to fully evaluate their offers."

Queensland goes on to advise managers and staff about the "ultimate price" of any attempt to adjust criteria in-process to compensate for proposal shortcomings.

"You may find it difficult to rule out an otherwise high quality offer because of a minor technical non-compliance. This is natural, especially when the offeror is well known in your department or agency as a quality provider. However, the principles of fair process and probity mean that you have very little choice. It is up to offerors to get their offers right, not for you to be making allowances for their failure to do so. There have been many examples of court cases where a purchaser did not rule out an offer which was technically non-compliant and that offer was subsequently selected as the winning offer. Court cases such as this cost time, effort and

money, damage relationships with suppliers and are embarrassing for the Government."

In terms of developing evaluation criteria, as mentioned earlier, formal training in this area is a focus for many jurisdictions. Again the creation of an accessible library of templates, examples of high quality evaluation approaches, sample evaluation sheets, etc. emerges from the literature as an accompanying best practice. The following from Queensland demonstrates the latter approach:

"A typical plan would contain the following information:

- *Objectives of the purchase being undertaken;*
- *A description of the requirement and the deliverables;*
- *Details of the administrative arrangements for handling the offer documentation to ensure integrity of the process and to manage communication with offerors during the evaluation stage;*
- *Listing of the evaluation criteria to be applied in evaluating offers received. (These must be consistent with the criteria identified in the invitation documentation, especially with regard to which criteria are mandatory);*
- *Details of officers to be involved in the offer evaluation including their major responsibilities. (This section should also include details of any internal specialists to be consulted and any consultants to be contracted for the performance of the evaluation);*
- *An evaluation timetable showing the key evaluation activities and a timeframe for their completion;*
- *Details of the offer evaluation method to be used in screening, shortlisting and selecting offers. (Procedures for offer clarification should also be stated. If applicable, guidelines for site visits should be included in this section;*

- *Details of financial and/or contractual approvals required to complete the purchase);*
- *Details of any progress reports which are required; and*
- *Arrangements for providing feedback to unsuccessful offerors should also be outlined."*

The literature and interviews indicate the use of evaluation panels as a generally accepted best practice. The composition of the evaluation panel is considered important in terms of ensuring a high quality outcome. There is a consensus that these should be multi-skilled/multi-disciplined teams, including individuals from outside the buying department.

In some jurisdictions, the use of evaluation panels is a standing best practice – taken, in effect, as a "given" – as opposed to an expectation formally described in guidelines, policies, or statutes. In other jurisdictions, guidelines that are more specific are provided to purchasing staff that include descriptions of what an evaluation panel should include. In still other jurisdictions, particularly for more complex undertakings, the requirement to have an evaluation panel is more formally enshrined in policy and in some cases actually legislation. This often goes beyond the stating the actual expectation to include direction with respect the composition of the panel.

For example, the State of Queensland's handbook on evaluation includes the following approach in the form of a suggested best practice:

"An evaluation will typically involve input from at least the following groups of people:

- *Departmental/agency managers who normally exercise financial delegations and/or oversee the purchasing process for probity and compliance with Government policies.*

- *Purchasing/procurement officers who need to work together with management, end-users and financial, legal and technical experts to achieve procurement results. (Purchasing officers also have responsibility for understanding the market, ensuring that Government policies are adhered to and for negotiating with suppliers to achieve the best result)*
- *End-users who need to specify what is needed and work together with managers and purchasing officers to get what is required.*
- *Technical experts who understand and offer guidance on the technical requirements."*

In the State of Utah, evaluation panel requirements are enshrined in the formal policy:

> *"A formal selection committee must be established to evaluate proposals received for consultant and other selected types of services. This is due to the sophistication and complexity of this type of procurement. A committee should represent a variety of disciplinary skills to evaluate proposals. The following is a general discussion of how a committee might be formed.*
>
> *Members should be appointed by the agency seeding proposals with approval of selection from the Purchasing Agent. There should be one other member from a separate state agency experienced in the same or similar field to which the proposal applies. This person will not participate in the project being bid and must be completely impartial in making an award recommendation.*
>
> *The following summarizes the expertise the members could bring to the evaluation committee:*

- *Agency – (three members): technical knowledge (program representation), general business, administrative, fiscal expertise (administrative representation).*

- *Purchasing Office (optional) – (one member): procurement expertise (responsiveness to RFP).*

- *Third Party – (one member): technical expertise, fresh look, no vested interest, objectivity.*

Vested talents are desirable so the evaluation committee can recommend the most economical proposal to meet the state's needs with the highest probability for a successful project. The committee must impartially evaluate the merits of each proposal. The committee should involve legal counsel if needed to make its recommendation."

Additional best practices with respect to integrity in the evaluation process include:

- Identifying and eliminating potential conflict of interest by measures such as requiring participants to sign a conflict of interest and confidentiality undertaking as a condition of participation.
- Requiring participants to undergo mandatory training with respect to their responsibilities and methodologies, as part of ensuring consistency of approach and adherence to policy and principles.
- Ensuring that there is communication among evaluators, including reviews of scores and discussion of major differences. This is intended to ensure that all evaluators have a common understanding of the bid document and that scores are not unnecessarily skewed through misinterpretation of one or more elements.
- Requiring the chair of the panel to certify at the end of the evaluation process that the committee conducted itself in accordance with policy.

- Including an external fairness observer (see the discussion of the use of fairness commissioners on page 88), again as part of ensuring consistency of approach and adherence to policy and principles.

Oral presentations by bidder are viewed as critical for larger, more complex projects in order for evaluators to get a better overall sense of the vendor's proposed team and related strengths and weaknesses – judgements that are generally recognized as being difficult to make based on written submissions. Experts stress that the actual people who will be delivering the service from the vendor organization should be required to make the presentation.

In addition, it is increasingly recognized that all request documents should include the weighting formula. As reported in the literature, this is often not the case. However, most experts suggest that this kind of disclosure is critical from at least two perspectives:

- Protecting the integrity of the process by ensuring that all proponents understand how their proposals will be evaluated.
- Reducing the possibility of arbitrariness on the part of the evaluators.

Finally, most experts in leading edge practices emphasize that there is little advantage in withholding useful information from vendors and that a goal throughout the process should be to provide vendors with as much information as possible. This includes both the content of the request document (providing the evaluation criteria and weighting system) but also providing structured opportunities in advance of the request release to provide information to and engage in dialogue with potential bidders.

According to procurement expert Michael Asner:

> *"Unfortunately, some organizations do not publish the weights. They offer little guidance to suppliers. They believe that the suppliers should*

somehow know and propose the particular combination of their products, services, and solutions that fits the requirements best."

As noted by Asner, some jurisdictions such as the State of Alaska feel strongly enough about this best practice that it has been enshrined in the State's procurement regulations.

10. Clear Roles and Responsibilities

Experts and practitioners alike agree that a lack of internal clarity with respect to the relative roles and responsibilities of different players in the procurement process poses a high risk for both the integrity of the process and the likelihood of a value-for-money outcome. This includes roles and responsibilities for the central purchasing authority, the buying department, legal counsel, finance/budget staff, etc.

The best practice in this area is relatively straightforward – to identify and describe these roles and responsibilities in clear and unambiguous terms as part of the overall purchasing policy and to embed these descriptions in training, guidelines, handbooks, checklists, case studies, etc. as part of ensuring a clear and consistent understanding across the organization.

There are very many examples of roles and responsibilities descriptions from other jurisdictions. The best of these are at reasonably detailed level. For example, Massachusetts in its *Procurement Policies and Procedures Handbook* provides a very extensive description of the roles and responsibilities of:

- The central purchasing authority.
- Various functions, including individual team leaders within the central purchasing authority in particularly in relation to the services that line departments can expect from the central service.
- The line departments.

The distinction is also made between and among roles and responsibilities for procurements that are to be managed by the central purchasing authority on behalf of a line department, as compared to situations when the line department will manage its own procurement in accordance with approved delegations of

authority. Depending on the type of procurement, the rules are specific with respect to which part of the organization (central purchasing authority or line department) is accountable for decision-making, for maintaining records, and ultimately for defending the process and/or the decision.

The U.K.'s Department of Trade and Industry has developed a simple table for the purposes of quickly communicating in this area:

Table -1: Roles in the pre-tendering phase

ROLES **FUNCTIONS**	**Budget Holder**	**Line Manager**	**End-User**	**Purchasing Staff**
Procurement arrangements		✔		
Business Case				
preparation			✔	
approval	✔			
Specification			✔	
Requisitioning			✔	
Sourcing				✔
Strategy				
preparation			✔	
approval		✔		
implementation				✔

Table -2: Roles from tendering to ordering

ROLES FUNCTIONS	Budget Holder	End-User	Purchasing Staff	Third Party
Quotations			✔	
Tendering				
ITTs				
evaluation		✔	✔	✔
negotiation			✔	
Debriefing			✔	
Ordering				
preparation of entry form		✔		
initial authorisation	✔			
data entry			✔	
final authorisation	✔			
issue of purchase order			✔	

Table -3: Roles from receipt onwards

ROLES FUNCTIONS	Budget Holder	Liaison Officer	End-User	Purchasing Staff	Finance Staff
Certifying receipt		✔	✔		
Payment					
authorisation				✔	

processing					✔
Contract Management		✔			
Disposals					
request			✔		
initial authorisation	✔				
implementation				✔	
final authorisation					✔

The following is an additional example from the U.K. Treasury's policy, dealing with the specific sub-issue of the appropriate distinction between financial and purchasing authorities:

> *"Within devolved budgeting arrangements there should be separation of financial authority and purchasing authority (other than for standard call-off arrangements). Budget holders should have freedom to commission orders by specifying their requirements and providing financial authority for the expenditure. The authority to place that order should be in separate hands. In addition, there should be an appropriate separation of duties within the purchasing cycle between staff who place orders, those who receive goods or services, and those who authorise payment. Separation of functions should be designed both to provide necessary safeguards against impropriety or unethical practice and to ensure achievement of value for money."*

Suggested key central purchasing authority responsibilities, as defined by the National Institute of Governmental Purchasing (NIGP) include:

- *“Assisting user departments to select the most appropriate purchasing methods, and to develop and write purchase specifications, statements of work, bid evaluation formulas, and proposal evaluation methodologies.*
- *Compiling and maintaining lists of potential suppliers.*
- *Participating in decisions whether to make or buy services – that is, whether to provide a service in-house or contract it out.*
- *Securing quotes, bids, and proposals and working with the user departments to evaluate the offers received.*
- *Awarding contracts on behalf of the user departments.*
- *Maintaining continuity of supply through coordinated planning, and scheduling, term contracts, and inventory.*
- *Seeking to assure the quality of needed goods and services through standardization, inspection, and contract administration.*
- *Advising management and user departments on such matters as market conditions, product improvements and new products, and opportunities for building (proper) goodwill in the business community.”*

11. Efficiency and Effectiveness/Value for Money

Within the procurement community there is apparently a perennial debate with respect to the appropriate balance between centralized and decentralized management of the procurement function. This includes the extent to which line departments need administrative flexibility to make efficient management decisions vs. greater emphasis on more formal and centrally driven rules-based approaches.

There is some suggestion in the research and also indicated in interviews, that over the past several years, there has been an increasing emphasis across jurisdictions on centrally managed, rules-driven processes. In general, this has been in response to public, vendor, and political perceptions with respect to fairness, court or other challenges of awards, etc.

The existence of this debate does not mean there are questions about the foundation principles of fairness, equity, transparency, etc. and the importance of minimizing the incidence of process challenges. However, from time to time, central purchasing authorities, line departments, and vendor community express concern that overly prescriptive approaches do not always result in the best value for money. The general sense is that increased emphasis on formal and more extensive process can result in increased costs and delays for both the vendor community and government and can distort the appropriate relationship between the cost of competing and the actual value of the contract to the vendor.

With respect to the structure and organization of the procurement function in most jurisdictions, it is important to clarify that this centralized/decentralized debate is in effect a matter of degrees of difference rather than fundamentally opposing views. The standard in place in most jurisdictions considered in this review is a centralized purchasing authority, with a certain amount of delegation

to line departments. The Institute of Supply Management offers the following typical descriptions of the advantages of centralization:

> *"High level of buying expertise, lower operating costs through central coordination of purchasing activities, avoiding duplication of effort, better prices, and providing more time for line managers to manage (rather than engage in procurement activities)."*

The U.S. Council of State Governments also lists some of the benefits of centralization, not the least of which is cost savings:

> *"An effective central purchasing program reduces the cost of government. It inspires public confidence in government. It directly improves the quality and timeliness of services rendered by program departments and agencies. It is government's meaningful link to the business community; it promotes honesty and integrity throughout governmental operations."*

Notwithstanding the advantages of a centralized approach, most jurisdictions recognize that it is neither efficient nor effective to make all purchases centrally and that the key is achieving the right balance.

In many jurisdictions, the central purchasing authority's responsibilities typically include:

- Organization-wide purchasing policies, standards, training and certification requirements, etc.
- Responsibility for establishing standing agreements, vendor of record arrangements, blanket contracts, procurement cards, etc.
- Managing the procurement of goods and services over an established dollar value threshold.
- Monitoring compliance across the organizations and reporting on performance to senior management.

- Continually analyzing the organization's business requirements and identifying opportunities for additional savings, more strategic approaches, etc.

In addition to working with the central purchasing authority on centrally managed purchasing opportunities, trained/certified staff in line departments usually have responsibility for making purchases of particular types and below specific thresholds in-department. In all cases, line department purchases are to be made in accordance with corporate purchasing policies and procedures and existing financial delegations. Typical direct purchasing by line departments includes:

- Micro-value petty cash purchases (in effect, a sole source decision).
- Purchases up to a certain predetermined value made with the centrally managed procurement card ("p-card").
- Drawing down on existing standing offer agreements or blanket contracts.
- A competitive process of some sort (typically receiving three quotes from known, qualified bidders) for purchases up to a certain level (also known as a departmental purchase order or DPO).

Beyond the DPO level, the competitive purchasing process is often managed by the central purchasing authority. Also, it is important to note that the best practice in leading jurisdictions is to maximize the use of centrally managed p-cards, standing offers, blanket contracts, etc. for the repeat purchases (this could include clothing, food, utilities, repairs, etc.) This means that the competitive process should, for the most part, be reserved for items that do not fit as part of one of these approaches. The research suggests that organizations that make extensive use of p-cards, standing offers, and blanket contracts, have significantly lower requirements for DPOs.

In this division of responsibilities between the central authority and line departments, one of the key considerations appears to be value-for-money. This is a concept that has been written about extensively in the professional literature on procurement. It has many dimensions, but at its core is the need to strike the right balance between more extensive rules-driven processes that are intended to ensure fairness, equity, etc. and the very real need for efficiency and effectiveness for both government and the vendor community. In layman's terms, this means matching the complexity of the procurement process with the value and complexity of the contract.

According to the Government of Australia:

> *"To achieve best Value for Money, procurement must be efficient and effective. Officials approving expenditure proposals must satisfy themselves that the proposed expenditure will make efficient and effective use of public money. As no single purchasing method suits all situations the Government does not prescribe a specific purchasing method nor any arbitrary thresholds. Buyers must consider the requirements and existing market conditions of each procurement, and select a procurement method on its merits."*

The essential theme here is that "no single purchasing method suits all situations". In practical terms, this means that a government that relies almost exclusively on the formal competitive process (i.e. an open, publicly advertised, sealed bid competitive process) for all purchases over minimum thresholds will not be achieving value for money. Likewise, a government that relies almost exclusively on legitimate but more informal approaches such as soliciting three quotes from known, competent suppliers will not be demonstrating the values of fairness, equity, and openness. The State of Massachusetts, in its procurement handbook, describes this in the following terms – emphasizing the benefit of being able to align internal procurement resources more effectively and efficiently:

"Achieving best value procurements is defeated if the procurement process is cumbersome and inefficient. Although this handbook defines several minimum procedural steps for a procurement, procuring departments are empowered to design a procurement process that achieves results within their required time frames. Simple procurements may be done quickly, allowing departments to devote the appropriate amount of time to more complex or larger procurements."

By way of explanation, it is important to note that use of the terms *formal* and *informal* within the professional procurement community should not be taken to mean that one process is more legitimate than the other. Both are technical terms used commonly in the profession. "Formal" generally refers to a fully advertised, competitive sealed bid process. "Informal" generally refers to the process of obtaining a smaller number (typically three to five) quotes from known suppliers either through email, fax, in writing, or over the telephone.

Notwithstanding the Australian position that each situation is different and should be judged on its own merits, most jurisdictions reviewed for this study have established standards that are meant to guide staff decision-making. Typically, these standards not only establish where and when a formal process (advertising, competitive sealed bidding process) is required but also the threshold above which the central purchasing authority takes over management of the procurement process. The generally applied rule is that the need for central management of the process increases with the complexity of the project.

With respect to DPOs, the research indicates a high degree of consistency in both regards at least at the municipal level. A 2001 study by the University of Arizona's Centre of Advanced Procurement Studies found that larger U.S. municipalities (over 500,000 in population), established DPO levels anywhere between $1,000 and $5,000 (U.S.) Some Ontario jurisdictions are higher – the City of Ottawa for example at $10,000 (Cdn.) but this appears to be at or near the

upper limit. The generally accepted best practice for DPO purchases (i.e. purchases that are not covered by p-cards or blanket contracts) is one of using an informal competitive process, i.e. using a minimum of three quotes from known suppliers. However, some jurisdictions – the State of Idaho for example – leave that decision to the discretion of individual departments. In most jurisdictions, the line department flexibility in this regard is balanced by their accountability for the price-value component of its decision.

With respect to the appropriate DPO threshold, the research suggests that it is important not to become too focused on this issue. What appears to matter more is whether and to what extent purchases above the DPO maximum (including purchases above the threshold requiring management by the central purchasing authority) can be made using similar informal practices.

Again, the practice across municipalities appears to be to use the three-quote process up to a specified threshold for most goods or services. For example,

- Halton Region's policy relies on the informal process for purchases up to $25,000. Above that level, a formal, advertised, competitive sealed bid process is required and is managed by the City's central purchasing authority.
- The City of Cambridge allows for informal quotes for purchases up to $20,000. A formal process – managed by the line department – is required for purchases up to $100,000. Above $100,000, the process is managed by the central purchasing authority.
- The City of Ottawa has a threshold of $25,000 before requiring a formal procurement process.
- The City of Anaheim, California allows an informal process for purchases between $5,000 and $20,000. Between $20,000 and $50,000 requires a formal sealed bids but the process can be limited to a subset of known

buyers. Above $50,000 requires a formal sealed bids and a fully advertised competition.

- The City of London, Ontario allows line departments to use the three-quote process for requests for quotes up to $50,000, without requiring the involvement of the central purchasing authority.

The above municipal examples are generally in line with what is in place at more senior levels of government:

- The Ontario Government allows for an informal process below $25,000 managed within each department. Above that level, a formal competitive sealed bid process through the central purchasing authority is required. For information technology, where a Vendor of Record list exists, ministries can obtain three quotes from listed vendors up to $249,999.
- The State of Louisiana requires that three quotes be obtained up to $5,000 and five quotes up to $20,000.
- The State of Arizona establishes the level above which a formal sealed bid process is required at $35,000.
- The State of Massachusetts allows for three informal quotes for contract values up to $50,000 and requires a full, competitive sealed bid process above that amount.
- The U.K. Department of Trade and Industry requires three informal quotes for purchases up to £10,000.

As noted earlier, the thresholds described above apply to a broad range of goods and services. One common area of exception is consulting services. In many jurisdictions, the threshold for requiring a formal process in the purchase of consulting services is somewhat higher. For example, the City of Ottawa allows for a variance in its approach – including sole sourcing as a possibly – for

consulting contracts up to $50,000. The State of Idaho allows for the informal three-quote approach for consulting contracts up to $50,000.

12. Fairness Commissioners

As discussed throughout this paper, effective public sector procurement needs to be seen at all times to be fair, equitable, and transparent. Yet, not withstanding the high level of professionalism that exists in many jurisdictions, the public, vendor, and/or political perception can often be negative in this regard.

From the literature, practices in other jurisdictions, and expert interviews, it is apparent that the use of fairness commissioners is an important emerging risk mitigation tool aimed at strengthening both the reality and perception of integrity in public procurement.

A fairness commissioner is an individual who monitors the procurement process with a view to:

- Providing the purchasing organization with assurance that procurement management practices and processes are of the highest standards.
- Communicating/demonstrating to external and internal observers that fairness, objectivity, impartiality, clarity, openness & transparency have been maintained.

The Commissioner can be an internal person (e.g. from the central purchasing authority), often at the invitation of the line department and particularly where there is some foreknowledge or anticipation of a higher than normal degree of external scrutiny. For larger, more complex projects, it is much more likely to be an external expert mandated by the central purchasing authority.

According to Ottawa-based Partnering in Procurement Inc. (PPI), a consulting firm that specializes in this kind of service, the value/role of the fairness

commissioner includes (see *Appendix C* for a more detailed description of roles/benefits developed by PPI):

- *"Providing assurance to both the contracting authority and the vendor community as to the fairness and integrity of the procurement process.*
- *Monitoring and reporting at key points in the process in the context of maintaining alignment with the original procurement objectives.*
- *Identifying any policy, financial and/or technical issues that may not have been readily apparent to the project implementation team at the start of the project or may arise during the process.*
- *Establishing and articulating a set of principles and operational requirements against which the actual conduct of a tendering process is assessed.*
- *Examining how the specification of requirements and assessment and selection criteria were developed.*
- *Identifying any ambiguities in the stated objectives of the procurement initiative.*
- *Assessing and assuring clarity in all vendor information and solicitation documents relative to the product or service requirements and the assessment criteria and selection methodology.*
- *Examining how the weighting of financial and non-financial factors (quality and reliability of service) were developed.*
- *Verifying that the processes followed are consistent with relevant statutes, regulations, public policy directives, administrative guidelines and best practice principles.*
- *Identifying and reporting on any actual or potential conflicts of interest for Project or Evaluation Team members that may impair their ability to participate in the evaluation of responses.*

- *Providing oversight, guidance and advice to evaluation teams to ensure consistency, lack of external influences, compliance with policies and guiding principles, and lack of bias.*
- *Providing an independent, real-time opinion on fairness issues throughout the procurement process and an independent report whether the concluded process has or has not met all the requirements for fairness, openness and transparency."*

Experts in both the public and private sectors suggest that having a fairness commissioner results in a higher level of confidence by prospective bidders that the process will be managed fairly. There is evidence to suggest that the private sector is less likely to challenge a particular procurement if a fairness commissioner has been involved. Generally, this can result in organizations having more flexibility to consult with vendors on a one-on-one basis during the pre-release period.

Increasingly, jurisdictions – to date more likely to be at the state/provincial or federal level rather than at the municipal level – are turning to fairness commissioners. In Ontario, for example, internal and external fairness commissioners are emerging as standard for larger projects. In the federal government, they are even more prominent as part of that jurisdiction demonstrating its adherence to international trade agreements. In some jurisdictions, such as the Australia federal and state governments, the practice is even more formalized. Tasmania has created a *Probity Adviser* (aka fairness commissioner) *Panel Directory* – in effect, a list of pre-qualified fairness commissioners who have been selected to assist with the management of complex procurements.

According to Transparency International, a CIDA-funded, international advocacy organization headquartered in Berlin, Germany and interested in transparency and access to information:

"The role of 'outsiders' is basically to hamper the creation of insider relationships of 'trust' during the decision-making and implementation processes. Procedures should focus on keeping 'outsiders' as 'outsiders', and not allowing them to be drawn into internal processes. Like external auditors, the 'outsiders' should provide expertise combined with integrity. Outsiders can assist in preparing bidding documentation (especially independent consultants with public reputations to defend). Outsiders can participate in evaluation (adding an independent 'audit' note of concurrence or otherwise)."

The greater prevalence of and interest in fairness commissioners is generally viewed as arising from procurement processes and procurements becoming more complex in response to changing external and internal requirements. These include:

- Increasingly complex public-private contracting arrangements, such as risk/benefit sharing arrangements, public-private partnerships, etc.
- New forms of contracting with private sector interests for access and use of the enabling capabilities of new technologies both to improve service delivery and manage complex delivery requirements in new ways.
- New forms of contracting with private sector interests for both financing and managing infrastructure renewal and program and services delivery.
- New forms of procurement collaboration, partnering or contracting (including funding contribution agreements) among and between various levels of government to meet changing constituency expectations of access and service.

According to experts, this approach is also often adopted in response to political concerns (often raised initially by unsuccessful vendors) with respect to the perceived fairness of the process.

In terms of best practices, the fairness commissioner should not be seen as an advisor only to the officials responsible for the procurement. It was emphasized by experts that this individual should have an independent oversight role and capacity to ensure that disagreements with the officials managing the procurement on the government side are brought to the attention of and resolved by appropriate senior management.

Particularly for complex projects, fairness commissioners are usually independent, external third parties, typically in the form of consultants. As noted earlier, internal staff can be used, particularly for smaller, less complex projects. However, experts caution that it is important to ensure that the internal person has both objectivity and independence from the procurement decision-makers. In the absence of this independence, their advice can be more easily disregarded by the procurement process manager. This independence can be achieved by ensuring that the internal fairness commissioner reports higher in the organization (for the purposes of the specific procurement project) than the senior official overseeing the process.

Furthermore, the role does not have to be limited just to the actual period from when a request document is released until a recommendation for award goes forward. Fairness commissioners are often engaged much earlier on in the process, particularly with respect to larger and more complex undertakings. Generally, this would be after the business case has been developed and approved but before the procurement methodology has been finalized and more formal pre-release discussions with the private sector commenced.

During this phase, the buying organization would look to the fairness commissioner for oversight of the process of developing the bid request, including ensuring fairness, openness, and transparency in the development of the specifications/draft request document. This would include the relative

fairness of different procurement methodologies, evaluation tools and assessment techniques, potential lessons from other jurisdictions, etc.

13. Best and Final Offer

As indicated in the literature and by experts, request documents are rarely perfect. Examples of issues include where:

- Request documents are too rigid to allow for creativity or innovation from vendors.
- Ambiguous specifications provide too much latitude for vendor responses.
- Specifications did not take into account the range of different products or services that might be available.
- The bid request document was not clear in some areas or misinterpreted by the vendor.
- The purchasing organization underestimated the cost and complexity of the undertaking, or over-scheduled part of the implementation, etc.
- All proposed costs were considered too high or not competitive, or exceeded project funding and the suppliers are asked to revise/reduce their proposed price.
- It is anticipated that an additional round of bid improvement would be required to ensure technical compliance in the desired price range.

As presented in other sections of this report, much of the discussion of technique in procurement is focused on tools that are intended to minimize these kinds of problems – pre-release consultation with vendors, requests for information, request for vendor comments on draft request documents, etc. Yet, problems continue to arise that often cannot be addressed within the constraints of traditional *one-shot* procurement policies. The impact on value-for-money can be significant, with purchasing organizations being left to select from less than ideal proposals or cancelling the process.

From the research, expert opinion, and practice in other jurisdictions, it is apparent that the Best and Final Offer (BAFO) methodology has emerged as a best practice designed to mitigate the risk associated with traditional *one-shot* processes.

BAFO is essentially a two-stage procurement process, with the focus in the second stage on either the top evaluated bidder or a short list of the top bidders. It provides an opportunity for short-listed suppliers to improve the quality of their proposals in specific identified areas, particularly but not limited to price/cost. Under BAFO, the top-rated bidder or bidders are asked for revised proposals in the specified areas, which then become their best and final offer and the basis for additional evaluation and selection. Any information received in response to the first request document is not disclosed to other bidders as part of the BAFO procurement process.

Responding with a BAFO is usually voluntary. There is typically no requirement that a BAFO response be submitted. If a vendor chooses not to submit a BAFO, their original bid responds stands for the purposes of the final round of evaluation. Submission is generally treated with the same rigour as the initial bid response – sealed BAFOs being submitted at a specific time, date, and location and in a specified format. Normal policies for written notification of bidders, late filing, errors, etc. would apply. Only the sections of the bidder's submission that have been revised in their BAFO are re-evaluated. If at that stage, the procurement manager thinks that further improvements either in technical requirements or price can be made, some jurisdictions allow for a second round of BAFO.

BAFO is currently used extensively in the U.S. at the federal and state level as well as in many municipalities for large and small/simple and complex procurements. While there is some awareness of the approach in Canada, this

appears to be limited. Experts interviewed for this project were not aware of any Canadian public sector jurisdictions that have adopted this option.

Most U.S. jurisdictions view it as very useful vehicle for ensuring the best possible technical solutions at the lowest prices and for avoiding unnecessary competition cancellations. According to the State of New Mexico:

> *"The best and final offer step has produced some truly amazing results over the years saving the State literally millions of dollars. The step works best on single source awards. However, it is valuable for every procurement as it is the only step in the process where the offeror is given an opportunity to amend the proposal."*

The following policy description of BAFO is taken from the State of Massachusetts' Procurement Policies and Procedures Handbook:

> *"At any time after submission of Responses and prior to the final selection of Bidders for Contract negotiation or execution, a Procuring Department shall have the option to provide Bidders with an opportunity to provide a Best and Final Offer and may limit the number of Bidders selected for this option.*
>
> *A Procurement Management Team may provide bidders with an opportunity to provide a Best and Final Offer (BAFO). The BAFO process represents an optional step in the bidder selection process and is not part of the contract negotiation process. BAFOs may be useful when no single response addresses all the specifications, when the costs submitted by all bidders are too high, when two or more bidders are virtually tied after the evaluation process or when all bidders submitted responses that are unclear or deficient in one or more areas.*
>
> *The PMT may restrict the number of bidders invited to submit a BAFO, or may offer the option to all bidders. In either case, the PMT should provide*

the same information and the same submission requirements to all bidders chosen to submit a BAFO. Departments are required to develop and distribute to selected bidders the written terms for a BAFO with specific information on what is being requested, submission requirements with timelines and information on the basis for evaluating responses and determining the successful bidder(s). Bidders may be asked to reduce costs or provide additional clarification to specific sections of the RFR.

Selected bidders are not required to submit a BAFO and may submit a written response notifying the PMT that their response remains as originally submitted. The terms of the BAFO may not identify either the current rank of any of the bidders selected for a BAFO or the lowest costs currently proposed. The Procurement Team Leader will have full discretion to accept or reject any information submitted in a BAFO. OSD recommends that departments consider how the BAFO option will be evaluated. Departments may evaluate the submissions of BAFOs as an addition to the scores already received by bidders on their original RFR responses or may develop a new evaluation process based entirely on the BAFO submission. Departments should articulate in the evaluation criteria the process to be used in evaluating the BAFO."

The following is a description of an actual BAFO policy being applied, taken from the State of New Mexico's Procurement Guide:

"Several years ago four proposals were received in response to a professional services RFP. All four were responsive and the point spread ranged from a high of 850 points to a low of 655 points. With only 100 points remaining for the oral presentation, the Evaluation Committee was in a quandary regarding the selection of finalists. After considerable deliberation, it was decided that all four offerors would be selected. That decision produced the following results. The highest-ranked proposal that was leading by 50 points finished a poor third. As it turned out, the offeror

had highly-qualified proposal writers on its staff who were far more competent than the professionals proposed for the project. The proposal document was excellent, but the staff to perform the work was not knowledgeable in the application. They were weak technically as well. The offeror who was ranked second submitted an aggressive best and final offer and ended up winning the contract by a narrow margin over the fourth ranked proposal. The fourth ranked offeror had very knowledgeable staff who were involved in a critical phase of another engagement and were unavailable when the proposal was written. The proposed project staff had a significant level of application expertise and outstanding technical skills. The third ranked offeror did not submit a best and final offer and ended up in fourth place."

In terms of weaknesses, a potential criticism of the BAFO process is that it may result in vendors not submitting their best price in their initial bid. However, as demonstrated in U.S. jurisdictions, vendors have no guarantee that they will be asked to participate in a BAFO process (i.e. the process may be open only to the top bidder or top few bidders) or even that a BAFO opportunity will be offered at all.

The primary suggested strength is that this approach provides a way around the problem of rigid RFPs that give the vendor and the purchaser additional opportunities to "get it right" and to get the best value for taxpayers. Having said this, experts caution that a BAFO process should not be an opportunity for the purchasing organization to revise its specifications or have bidders respond to new or changed requirements.

Part 3
Conclusion

As stated at the outset of this paper, procurement in the public sector is an inherently risky undertaking. The purpose of this paper has been to provide an overview of the most common risk areas associated with public sector procurement as reported in the literature, the experience and practice of selected jurisdictions, and in the opinion of experts.

The results of this review point to a relatively well-defined set of risks that are commonly recognized in the literature, by experts, and in the policies and practices of various jurisdictions. These risks are generally the same across jurisdictions regardless of size, level (municipal, provincial/state, and federal), or country – Canada, the U.S., the U.K., Australia, etc.

In addition, there is a considerable body of best practices information available. This includes training and certification programs and research on procurement best practices through various procurement professional associations. It also includes extensive examples of best practice handbooks, interpretive guides, evaluation frameworks, checklists, and many other types of more specific tools and techniques that are readily available from various jurisdictions, particularly those that see the value of and have a demonstrated commitment to transparency and access to information.

The key themes that would distinguish a best practice or leading jurisdiction are not particularly complex. In many respects, they mirror the more generic aspects of excellence in public sector management, including:

- A strong commitment to ethics, integrity, and professionalism in public service.
- A careful approach to identifying and managing risks.
- A strong commitment to training and development.
- Clearly articulated policies and procedures with an emphasis on practical, useful guidance to staff.
- Clearly articulated roles and responsibilities between and among administrative officials as well as between administrative and elected officials.
- Trust and confidence by elected officials in the professional capacity of administrative staff, backed up by robust and appropriate accountability mechanisms and a well managed administrative-political interface.

Most importantly – and again, consistent with the essential components of excellence in public sector management – appears to be the recognition in leading jurisdictions that maximizing risk mitigation in procurement requires a significant degree of investment of financial resources and senior management time and attention. This includes investment in training people, in taking the time to develop comprehensive policy guidance materials for staff, in researching and remaining current on best practices, and in communicating to the public and vendor community.

Appendix A

Purchasing Management Association of Canada

Code of Ethics

Appendix B

Examples of Single Point of Contact Policies

The City of San Antonio's 2003 report of the Mayor's Committee on Integrity and Trust in Local government recommended a prohibition on lobbying city officials during the RFP evaluation process, noting in its introduction that "The degree of public anger and the current cost of the erosion of public trust and confidence in city government should not be underestimated."

Dade County, Florida has a highly developed policy in this regard, known as the "Cone of Silence". It too was proposed as part of task force report, the purpose of which as suggested by the local media was "largely as a means of getting the commission out of the procurement process, expanding the cone of silence on procurement matters so that the mayor, commissioners and their staff are forbidden from communicating with the manager's staff."

> *"The Cone of Silence prohibits certain oral communications regarding a particular RFP, RFQ or bid during the period the Cone is in effect. The Cone of Silence commences after advertisement of the RFP, RFQ or bid solicitation. Any oral communication regarding a particular RFP, RFQ or bid is prohibited between:*
>
> - *A potential vendor, service provider, bidder, lobbyist or consultant and the County's professional staff. The professional staff includes, but is not limited to, the County Manager and his or her staff.*
> - *A potential vendor, service provider, bidder, lobbyist or consultant and the Mayor, County Commissioners, or their respective staffs.*

- *The Mayor, County Commissioners, or their respective staffs and any member of the County's professional staff, including but not limited to, the County Manager and his or her staff.*
- *A potential vendor, service provider, bidder, lobbyist or consultant and any member of the respective selection committee.*
- *The Mayor, County Commissioners, or their respective staffs and any member of the respective selection committee.*
- *Any member of the County's professional staff and any member of the respective selection committee."*

Other examples include:

Broward County, Florida

- *'Cone of Silence means a prohibition on any communication regarding a particular Request for Proposals (RFP), Request for Letters of Interest (RLI), bid, or other competitive solicitation between:*
  - *Any person who seeks an award therefrom, including a potential vendor or vendor's representative, and*
  - *Any County Commissioner [elected official] or the Commissioner's staff, the County Administrator, Deputy and Assistants to the County Administrator, and their respective support staff, or any person appointed by the County Commission to evaluate or recommend selection in such procurement process."*

Orange County Florida

- *"Black-out period is the period from issuance of a solicitation (IFB, RFP, RFI, or RFQ) until the Board selects successful bidder or proposer. During black-out period no lobbyist, principal or other person*

may lobby on behalf of a competing party for a particular procurement matter, including any member of the Board or any County employee assigned to the Procurement Committee."

Los Angeles County Metropolitan Transportation Authority (LACMTA)

- *Commencing with the issuance of an RFP, RFIQ or IFB and ending on the date the staff recommendation for award is made public, no lobbyist representing a person or entity submitting a proposal in response to the RFP, RFIQ or IFB shall contact by any means or engage in any discussion concerning the award of the contract with any Board Member/Alternate or his/her staff, or any MTA staff. Any such contact shall be grounds for the disqualification of the proposer.*

- *During price negotiations of non-low bid contracts, lobbyists shall not contact, lobby or otherwise attempt to influence MTA staff, other than negotiation team members, or Board Members/Alternates and their staff, relative to any aspect of the contract under negotiation. This provision shall apply from the time of award until the recommendation for execution of the contract is made public. Any concerns relative to any contract under negotiation shall be communicated only to the CEO for resolution.*

- *A lobbyist representing a person or entity who submitted a proposal or bid in response to the RFP, RFIQ, or IFB shall not contact a Board Member/Alternate or his/her staff regarding a protest submitted regarding the recommended contract award or any lawsuit or potential lawsuit regarding the recommended contract award or any issue relating to the underlying procurement.*

City of Phoenix Communication Protocol *– a policy adopted for major projects:*

- *"The City is committed to a fair and open competitive process that allows all interested parties to receive information about the procurement for the Project. This Communications Protocol is intended to maintain the integrity of the procurement process, to maximize the benefits of a fair and open competitive process and to set forth the guidelines for all permitted communications relating to the procurement.*

- *The Mayor and the City Council are committed to the procurement process as the means of ensuring that the selection of a contractor for the Project is completely based on a Proposal's merit.*

- *Respondents and Proposers are advised that no contacts permitted under this Section shall be made by telephone, other than to schedule a public meeting. In the event calls related to this Project are received by the Mayor, any City Council Member or their staff, [or senior administrative official] they will be directed to Michael Gritzuk, P.E., Water Services Director for proper response. All requests for meetings permitted under this Section shall be made to the Project Manager via letter, facsimile, E-mail or other written method and shall be made available to the public, press and all other Respondents and Proposers.*

- *If a Respondent or Proposer, including any of its representatives, violates this Communication Protocol with elected officials with*

respect to the Project, after the City's announcement for the submittal of qualification statements, the City reserves the right to reject the Respondent or Proposer."

Appendix C

Fairness Commission Role Description

PARTNERING AND PROCUREMENT INC.

PPI Fairness Commissioner Services

Background

Openness, fairness and transparency is a contemporary issue in public sector procurement management emerging from:

- renewed and updated public service ethos (modern comptrollership, accountability, public-public and public-private partnering, user-focused service delivery, etc.);
- openness, fairness and transparency as an axiom of public service;
- increasingly complex procurement requirements for both products and services;
- the increasing level of private sector participation in government service delivery (devolution and flexible delivery of service);
- increased competition and scrutiny (i.e. increased number of players – local, national and international based) in pursuit of business opportunities arising from new forms of public sector service delivery and increasingly complex bidding processes (e.g. Common Purpose Procurement, Benefits-Based Procurement, Common Business Solutions, Public-Private Partnering-P3);
- an increased level of open discussion and dialogue among vendors (e.g. through trade associations such as ITAC), about their experience in public procurement processes;

- the increased willingness of the supplier community to challenge both process and decisions – vendors are very aware of legal precedent and avenues open for political, administrative or judicial review;
- public employees/managers having limited experience in managing complex procurement initiatives;
- increasing concerns about the high costs to industry in responding to RFIs / RFQs / RFPs;
- increased political sensitivities resulting from:
    - the scale and complexity of projects;
    - commitment to multi-year contracts;
    - HR considerations and impacts;
    - vendor community challenges;
    - special interest group challenges; and
    - the scrutiny of public review in the context of value for money auditing.

These developments have led to:

- an increasing requirement for specialized knowledge of procurement management practices on larger scale and/or complex procurement initiatives;
- recent common law decisions that are setting new precedents for ongoing procurement management practices;
- the development of quasi-judicial bodies (e.g. the Canadian International Trade Tribunal - CITT) to investigate and arbitrate or rule on challenges to public procurement undertakings;
- new statutory and regulatory directions requiring reform of administrative practice / procedures and standards as part of new accountability frameworks; and
- the development of new methods and techniques for evaluation and selection processes

The PPI Fairness Commissioner Role

Partnering and Procurement Inc.'s Fairness Commissioner services encompasses a wide range of activities, depending on the stage of engagement and complexity of a procurement initiative. This may include:

- verification of any statutory, regulatory, internal policies and procedures/management directives, and administrative rules and conditions governing both the procurement framework and procurement practices;
- verification of the authority, roles, responsibilities and function of the designated procurement management team;
- training / orientation for the procurement management team, e.g.
  - details of the bidding process;
  - "the rules of the game";
  - Code of Conduct for team members;
  - evaluation and selection processes;
- ensuring broad and appropriate publication of requirements to the vendor community (i.e. availability to all interested parties in a consistent and timely manner through a readily accessible medium at no or reasonable cost); and
- verification that there is an adequate exit strategy identified in the RFP process to make meaningful re-competition possible.

- **Oversight of the solicitation, evaluation and assessment process**
  This process includes:
  - ensuring sufficiency, relevance, completeness and accuracy of formal documentation including the review of RFI / RFQ / RFP documents (including any Appendices related to proposed contract award processes, particularly extended-term options or ensuring consistency

between the bid conditions expressed in the RFP and the proposed contracting terms and conditions);

- ensuring that any contact between procurement and evaluation personnel and prospective proponents is kept on a formal basis and maintained within the rules of established procurement practice;
- ensuring adequate communications and timely disclosure to proponents (e.g. changes in information or requirements);
- the review of salient characteristics of stated requirements to ensure fairness – i.e. avoiding prescriptive requirements that only a named brand or exact duplicate could meet, thereby restricting competition and having the effect of exclusivity;
- the review of significant definitions for clarity and completeness;
- the identification of any material exceptions;
- attendance and monitoring at vendor briefing sessions;
- objectivity review of qualitative evaluation criteria, scoring methodologies and assessment tools;
- the review of the method of weighting assigned to various elements of evaluation criteria
- the Review of methods of assessing price vs. qualitative evaluation criteria;
- ensuring that all criteria for evaluation proposals are set out in RFP documentation;
- attendance at and monitoring of evaluation meetings, e.g.:
  - to ensure that all proposals are evaluated strictly in accordance with published criteria;
  - verification of non-compliant bids / proposals; or
  - ensuring that evaluations are undertaken by more than one evaluator to confirm freedom from bias, etc.;
- attendance at debriefing sessions to:
  - note and flag anomalies;

        - identify and verify analysis, written determination and justification for any brand-specific requirements;
    - provide periodic / milestone-based written reports (which may include notices of warning and caution;
    - ensuring protection of confidential information (to avoid unfair advantage that might arise from its publication). e.g.:
        - bids and proposals;
        - trade secrets;
        - commercial or financial information;
        - scientific or technical information; and/or
        - evaluations.
    - ensuring that information that may be deemed to be confidential is clearly identified and that all stakeholder representatives or procurement management team members understand their role and responsibility in maintaining such confidentiality, from concept through to project implementation.

Conflict of Interest Issues

Conflict of interest considerations are a primary element in ensuring openness and transparency. In this context, the role of the Fairness Commissioner would include:

- the review of Conflict of Interest Guidelines for stakeholders/owners/managers/incumbent suppliers and their subsequent distribution or publication;
- an assessment of disclosure in the public interest where required (e.g. disclosure of consultation with relevant third parties);
- the identification and resolution of Conflicts of Interest (e.g. among team members, evaluators, key stakeholder representatives, et al); and

- the review of disclosure requirements for proponents and/or incumbents.

High-Level "Monitoring" Considerations

The Fairness Commissioner provides a high-level monitoring role, e.g.:

- the identification of policy, financial and/or technical issues that may not have been readily apparent to the project implementation team at the start of the project;
- synthesizing and/or rationalizing any emerging issues that could have a significant impact on the conduct of both the procurement and the contracting process; and/or
- ensuring that the full range of policy, administrative and operational issues are:
    - appropriately addressed in the formalization of the RFP and consistent with proposed services contracts; and
    - articulated in a manner that defines and sustains public policy interests.

Advisory Considerations

The Fairness Commissioner provides advice to senior management or executive on procurement strategy. This could include activities such as:

- advice and support on the delineation of fundamental policy and operational considerations to be incorporated in the RFP development process which would include:
    - reviewing any emerging dependencies among various operating scenarios;
    - identification and management of public sector risk considerations associated with the use of third party suppliers or contractors;

    - reviewing evaluation approaches and primary selection methodologies;
    - reviewing primary transition issues to be addressed in the RFP (e.g. service continuity and on-going relationship management with selected partners);
    - developing consensus and/or a common understanding of issues among the RFP Working Group, e.g.
        - an acceptable range of contractual and financial relationships for embodiment in a formal RFP process; and/or
        - the “most-likely” RFP development timelines and subsequent implementation; etc.;
- advice on setting adequate and reasonable time for interested proponents to prepare and submit proposals (which may include time to initiate and complete any necessary qualification procedures);
- advice on the particular needs of complex, high-value or sensitive procurement initiatives in terms of staged procedures such as Requests for Information (RFI), Request for Expressions of Interest (RFEI) or vendor pre-qualification processes;
- advice on the requirements and procedures for pre-qualification of vendors;
- advice on avoiding unnecessary costs for both the buyer and suppliers;
- advice on openness, fairness and transparency in moving to a second-place proponent where agreement cannot be reached with a first-place proponent; and
- advice on resolving any complaints about the procurement process or any alleged breaches of procurement laws, regulations, policies or administrative procedures

In a further support role, the Fairness Commissioner can:

- assist the RFP/RFI/RFQ Working Group in the preparation of related submissions and presentations to senior management on the resources,

business processes and organizational requirements to move the initiative forward in a timely and effective manner; and

- assess and make recommendations to senior management relative to emerging procurement management considerations that may have an impact on implementation schedules

Monitoring contract negotiations

At the contract negotiation stage, the Fairness Commissioner would be engaged to:

- ensure that contract negotiation is conducted in a structured and ethical manner by trained and experienced contract negotiators; and
- ensure that the terms and conditions of the irrevocable tender set out in the solicitation documents (i.e. Contract A) is consistent with the terms and conditions of the acceptance proposed by the supplier (i.e. Contract B).

A focus on outcomes

In PPI's approach the focus on outcomes is maintained throughout the engagement. This includes:

- ensuring that sensitivity to the interests of a wide community of stakeholders is maintained;
- ensuring that the process can withstand scrutiny from auditors, political leaders, the press and the public, i.e. fairness, objectivity, impartiality, clarity, and openness and transparency has been maintained;
- ensuring that the initiative results in the creation of a mutually beneficial service relationship between the public and private sector where responsibilities, risks and rewards are appropriately allocated;
- ensuring that government and private sector interests in terms of accountability to citizens and shareholders / meeting citizen expectations

about stewardship of public sector resources and services are aligned; and

- ensuring that public policy interests are sustained throughout the full life cycle of the services delivery arrangement.

PMAC
Purchasing Management Association of Canada

PMAC Professional Code of Ethics

1. INTRODUCTION

It is a condition of membership in the Purchasing Management Association of Canada and its affiliated Institutes and Corporation that members shall abide by the Constitution and the Rules and By-Laws of the Institute or Corporation in which they are members. This Professional Code of Ethics is binding upon all members.

2. DEFINITIONS

Purchasing Management Association of Canada means the national body of the association

Institute means the Institute of a province affiliated with the Purchasing Management Association of Canada.

Corporation means the Corporation des approvisionneurs du Québec affiliated with the Purchasing Management Association of Canada.

3. VALUES AND NORMS OF ETHICAL BEHAVIOUR

A) Values

Members will operate and conduct their decisions and actions based on the following values:

1. **Honesty/Integrity**
   Maintaining an unimpeachable standard of integrity in all their business relationships both inside and outside the organizations in which they are employed;

2. **Professionalism**
   Fostering the highest standards of professional competence amongst those for whom they are responsible;

3. **Responsible Management**
   Optimizing the use of resources for which they are responsible so as to provide the maximum benefit to their employers;

4. **Serving the Public Interest**
   Not using their authority of office for personal benefit, rejecting and denouncing any business practice that is improper;

5. **Conformity to the Laws in Terms of:**
   a) The laws of the country in which they practice;
   b) The Institute's or Corporation's Rules and Regulations
   c) Contractual obligations.

B) Norms of Ethical Behaviour

1. To consider first, the interest of one's organization in all transactions and to carry out and believe in its established policies.

2. To be receptive to competent counsel from one's colleagues and be guided by such counsel without impairing the responsibility of one's office.

3. To buy without prejudice, seeking to obtain the maximum value for each dollar of expenditure.

4. To strive for increased knowledge of the materials and processes of manufacture, and to establish practical procedures for the performance of one's responsibilities.

5. To participate in professional development programs so that one's purchasing knowledge and performance are enhanced.

6. To subscribe to and work for honesty in buying and selling and to denounce all forms of improper business practice.

7. To accord a prompt and courteous reception to all who call on a legitimate business mission.

8. To abide by and to encourage others to practice the Professional Code of Ethics of the Purchasing Management Association of Canada and its affiliated Institutes and Corporation.

9. To counsel and assist fellow purchasers in the performance of their duties.

10. To co-operate with all organizations and individuals engaged in activities that enhance the development and standing of purchasing and materials management.

4. RULES OF CONDUCT

In applying these rules of conduct, members should follow guidance set out below:

A) Declaration of Interest.
Any personal interest which may impinge or might reasonably be deemed by others to impinge on a member's impartiality in any matter relevant to his or her duties should be immediately declared to his or her employer.

B) Confidentiality and Accuracy of Information.
The confidentiality of information received in the course of duty must be respected and should not be used for personal gain; information given in the course of duty should be true and fair and not designed to mislead.

C) Fair Competition.
While considering the advantages to the member's employer of maintaining a continuing relationship with a supplier, any arrangement which might prevent the effective operation of fair competition should be avoided.

D) Business Gifts and Hospitality.
To preserve the image and integrity of the member, the employer and the profession, business gifts other than items of small intrinsic value should not be accepted. Reasonable hospitality is an accepted courtesy of a business relationship. The frequency and nature of gifts or hospitality accepted should not be allowed whereby the recipient might be or might be deemed by others to have been influenced in making a business decision as a consequence of accepting such hospitality or gifts.

E) Discrimination and Harassment.
No member shall knowingly participate in acts of discrimination or harassment towards any person that he or she has business relations with.

F) Environmental Issues.
Members shall recognize their responsibility to environmental issues consistent with their corporate goals or missions.

G) Interpretation.
When in doubt on the interpretation of these rules of conduct, members should refer to the Ethics Committee of their Institute or Corporation.

5 ENFORCEMENT PROCEDURES

The following procedures shall apply unless otherwise governed by provincial legislation.
Cases of members reported to have breached the Ethical Code shall be referred to the Institute or Corporation for review by their Ethics Committee.

A) Complaint Process

1. Allegations of a breach to the Professional Code of Ethics shall be made in writing by the witness to the Institute or Corporation.

2. Upon receipt of the complaint, the Institute or Corporation will send an acknowledgement of receipt to the witness and will advise the accused in writing that he or she is under investigation, and the nature of the complaint.

B) Investigation

1. The Ethics Committee will conduct an investigation, which will include the opportunity for the accused to present his or her own version of the facts.

2. The Ethics Committee will, within a reasonable period of time, present its report to the President of the Institute or Corporation. The report will include the nature of the complaint and the decision as to the dismissal of the complaint, or the sanction to be applied.

3. The President will then send the decision to the accused, who has thirty days to appeal.

4. If the accused decides to make a request of appeal, then the request must be in writing to the President.

5. The President will convene an Appeal Committee meeting with the witnesses, the accused and all other persons who could have new information about the case.

6. The Appeal Committee will make its decision within 30 days of the receipt of the request of appeal. The decision of the Appeal Committee is final and without appeal.

C) Sanctions

1. Where a case is proven, a member may, depending on the circumstances and the gravity of the charge, be reprimanded, suspended from membership or expelled and removed from the list of members.

   Details of cases in which members are found in breach of the Code may be published in such a manner as the Institure or Corporation shall deem appropriate.

2. Enforcement shall be in accordance with the requirements of the member's Institute or Corporation.

Toronto Computer Leasing Inquiry

Research Paper

PROCUREMENT

Volume 2:

City of Toronto &

Options/Approaches for Discussion

December 2003

Table of Contents

Executive Summary

Part 1: Introduction

The focus of this second and final volume on procurement is on issues and challenges facing the City of Toronto as well as options and approaches for discussion related to potential changes to current procurement polices and practices. In addition to this Introduction, the report is presented in four sections:

- An overview of the procurement provisions of the *Municipal Act, 2001* (Ontario) and other guidance provided by the Ministry of Municipal Affairs and Housing.
- A summary of the City Auditor General's March 2003 procurement review.
- An overview of current policies and practices in place at the City.
- Options and approaches for discussion related to changes to the City's procurement function.

This report builds on *Procurement Volume 1* dealing with common and significant risks that public sector jurisdictions face concerning procurement, including:

- Values-Based Procurement.
- Readiness.
- Specifications.
- Pre-RFP Consultation.
- Vender Debriefing & Complaints Handling.
- Single Point of Contact.
- Role of Elected Officials.
- Training & Development.
- Evaluation.
- Clear Roles & Responsibilities.
- Efficiency & Effectiveness/Value for Money.

Volume 1 also included a discussion of two best practices:

- The use of fairness commissioners.
- The use of a Best and Final Offer procurement methodology.

Research Approach

The preparation of Volumes 1 and 2 included reviews of over 2,000 pages of documents and interviews with more than 20 individuals, including current and former municipal officials, provincial government officials, academics, private sector executives, and other experts. Information was collected on a wide range of jurisdictions including examples from Canada, the U.S., the United Kingdom, Australia, and New Zealand. Sources included departments/branches of municipal, provincial, and state governments, academic institutions, private corporations, foundations and research organizations, and associations representing procurement officials.

Part 2: Requirements of the *Municipal Act, 2001*

The *Municipal Act, 2001* contains specific provisions requiring Ontario municipalities and local boards to have procurement policies in place by January 1, 2005 and specifies eight areas to be addressed.

- "*The types of procurement processes that shall be used;*
- *The goals to be achieved by using each type of procurement process;*
- *The circumstances under which each type of procurement process shall be used;*
- *The circumstances under which a tendering process is not required;*
- *The circumstances under which in-house bids will be encouraged as part of the tendering process;*

- *How the integrity of each procurement process will be maintained;*
- *How the interests of the municipality or local board, as the case may be, the public and persons participating in a procurement will be protected;*
- *How and when the procurement processes will be reviewed to evaluate th*eir effectiveness."

Specific Guidance

To assist municipalities and local boards in meeting the requirements of section 271 (1), MMAH created a 75-page *Guide to Developing Procurement Bylaws* (July 2003). The focus is on best practice processes that can be used to create a bylaw or review an existing bylaw, including key questions that municipalities should ask throughout the process. The guide contains much useful advice in its three core sections:

Goals

This section includes a set of "suggested goals" that are in fact underlying values/principles that would be recognized widely by procurement professionals:

- Effectiveness.
- Objectivity.
- Fairness.
- Openness and Transparency.
- Accountability.
- Efficiency.

Types of procurement processes, and when to use them

This section carries the key message that municipal procurement bylaws and policies should be clear with respect to "*the types of procurement processes that will be used, the goals of each, the circumstances under which each type will be*

used, and the circumstances where a tendering process is not required." Two major themes in this section are:

- The distinction between formal and informal procurement processes.
- The need to be clear when no competitive process is required.

Maintaining integrity and protecting interests in procurement

In this section, the guide addresses the theme often stated in the research and reiterated in *Volume 1* that procurement is an inherently risky undertaking. The Ministry proposes a risk management approach, i.e. one in which maintaining integrity and protecting stakeholder interests involves identifying "*risks than can arise…and the measures that can be taken to minimize or mitigate them*." This focus on risk management is consistent with the best practice in many jurisdictions.

Part 3: Procurement Process Review – Auditor General

The City of Toronto's Purchasing and Materials Management Division (PMMD) has already been the subject of a major procurement process review by the City's Auditor General (*Procurement Process Review – City of Toronto, March 2003*). The resulting 70-page report contained 43 recommendations for improvements to the City's policies and practices. Overall response from management was very positive, including agreement that the function was in need of a comprehensive review/update and that the Auditor General's report has been a useful catalyst and focus for this review.

Key Findings and Options/Approaches for Discussion

- ***Organization:*** The review team suggested that there is "no one 'best' organizational structure" for the procurement function and that it was "premature" to recommend a specific revised structure.
- ***Lack of clarity with respect to roles and responsibilities:*** The review identified the need for greater clarity with respect to roles and responsibilities between PMMD and line departments.
- ***Changes to Bylaws:*** The review recommended a small number of changes to the current Purchasing and Financial Control bylaws, including in a number of cases that Council focus more on holding administrative staff accountable for decisions in accordance with policy as opposed to making those operational decisions itself.
- ***Enhanced Policy Guidance:*** The review noted that PMMD appears to be focused primarily on processing procurement transactions. The equally important functions of developing and providing useful, practical guidance and interpretive materials for staff were found to be lacking.
- ***Training and Development:*** The review recommended that training and development for both PMMD and line department staff should be enhanced.
- ***Specifications:*** The review identified the need for improved guidance for line department staff in developing specifications, including templates, guidelines, etc.
- ***Evaluation of Bids/Decision Making Process:*** The review made a number of recommendations with respect to ensuring the integrity of the evaluation process and related decision-making, including training, standardized methodologies, a clearer oversight role for PMMD, a "no informal contact" policy, a prohibition on accepting gifts, etc.
- ***Low Dollar Value Purchases:*** The review team noted the opportunity for a better application of value-for-money considerations, including implementing a procurement card and making more use of informal competitive processes for low value purchases.

- ***The Bid Committee:*** The review recommended that the Bid Committee be required to open high-value RFQs and RFPs.
- ***Dealing with Mathematical Errors in Bids and Related Disqualification:*** The review recommended that a policy be established with respect to the disqualification of bids containing mathematical errors and that this policy be clearly stated in all request documents.
- ***Standardized Contract Award Reports:*** The review recommended that contract award reports to Standing Committees and Council be standardized/focus on demonstrating that "*due diligence was followed in the overall process, relative to the financial risk and complexity*".
- ***Fairness Commissioner:*** The review recommended the use of fairness commissioners "on an as-required basis" for complex, high risk/cost or high profile projects.
- ***Conflict of Interest:*** The review recommended that staff be required to sign an annual declaration acknowledging their understanding of and agreement with the policy.
- ***Lobbyist Disclosure Policy:*** The review recommended that the current lobbyist disclosure policy be extended to apply to all City purchases regardless of the dollar amount.
- ***Use of External Consultants:*** The review recommended a formal policy to prohibit external consultants hired by the City to assist in the internal preparation of a request document from responding to that request document.

Part 4: City of Toronto Current Policies & Practices

Context for Change

It is appropriate to view the need for change in the context of amalgamation and as part of the legitimate evolution of the procurement function in the new City. For the procurement function, the two major priorities in the post-amalgamation period were very clear:

- The need to quickly develop a consolidated procurement policy, practice, and process that would ensure a consistent and professional approach for the City's major purchasing requirements.
- The need to quickly ensure that the new City was benefiting from more efficient and centralized purchasing opportunities through blanket contracts, vendors of record, standing agreements, etc.

In terms of bylaws and formal corporate procurement policies, a great deal has been accomplished since amalgamation. However, overall structure, functions, roles and responsibilities, etc. have not evolved significantly beyond the needs, pressures, and organizational requirements of the immediate post-amalgamation period. Additional factors that consumed PMMD and senior management attention during this period included:

- The implementation of a new integrated financial information system (SAP) that included a procurement module.
- PMMD staffing was reduced by 13.5 percent from 33 FTEs to 28.5.
- The advent of the recent computer leasing issue and pressures associated with responding to this matter.
- Senior executive turnover, including the recruitment of a CFO.

Notwithstanding these various pressures, in retrospect there is every indication that the goals of this highly centralized initial approach were successfully achieved although at a certain cost, including:

- Occupying much of PMMD's available time and attention.
- Emphasizing to a greater extent than perhaps one would find in a more mature organization, the control/policing function of PMMD.
- A strong focus on professional capacity within PMMD but a more fragmented approach across line departments.
- Providing for a consistent understanding within PMMD with respect to interpreting the bylaw and formal policies, and operationalizing procurement practices but less clarity and consistent interpretation and application across divisions.

Assessment of City Policies and Practices

Establishing a New Procurement Culture

It is apparent that to date a consistent culture of procurement related values and practices has not fully emerged in the City and that values and practices can vary between and among departments and divisions in ways that have the potential to detract from effectiveness and the integrity of the process.

Values-Based Procurement

Similar to many other Canadian municipalities, the City of Toronto's purchasing policies were developed based on widely recognized and acclaimed professional standards. However, one generally does not find extensive evidence of these values being actively pursued and reinforced at the City as a means of building and maintaining consistently high professional standards.

Roles and Responsibilities

A lack of clarity in terms of roles and responsibilities emerges from the research as a central problem area for the City. For both the central purchasing authority and line departments, roles and responsibilities – and corresponding accountabilities – are not viewed as being sufficiently clear, which has resulted in confusion/frustration, delays, overlap and duplication.

Policies and Procedures

Toronto's purchasing bylaw and formal policies compare in generally favourable terms with many other municipalities. However, a reasonably crafted bylaw is not the most effective tool for communicating processes, standards, guidelines, best practices, etc. One is left with the overall impression of an approach that is overly focused on formal policy statements and relatively *bare bones* in terms of more operationally relevant guidance to staff, i.e. material that answers the critical *how to* questions.

Training and Development

As discussed in *Volume 1*, the importance of having highly trained and professional procurement staff is a key component of risk mitigation. For leading jurisdictions, this includes minimum training and certification/recertification requirements for all staff involved in the procurement process, i.e. the analyst/coordinator level, specification writers, evaluators, managers, and senior executives. This kind of more comprehensive approach is not in place at the City. The City currently does not have a formally articulated, standard set of expected competencies, skills, and experience and associated training and development programs for individuals who are involved at different stages/degrees of intensity in the procurement process and in all parts of the organization.

Value for Money

The City does not currently have a balanced approach in this regard and is not making effective value-for-money distinctions in terms of the procurement processes used for purchases above the current $7,500 Departmental Purchasing Order (DPO) level. While current City policies allow for the use of an informal (e.g. three quote) process above this level, by practice virtually all contracts above $7,500 are submitted to a formal sealed-bid, competitive tendering process, regardless of the size/complexity. This is costly for both the City and vendors, results in unnecessary delays, and is inefficient for lower value contracts.

Single Point of Contact

While the Auditor General pointed out that there is no formal policy in this area, the long-standing general practice has been that request documents put out by PMMD usually do include a single point of contact requirement. However, this best practice is undermined by the lack of consistent application to all City officials and, in particular, to elected officials. Contact – and sometimes extensive contact – between vendors (including their lobbyists) and individual Councillors is allowed by convention if not by policy, to take place during the competitive process. This is not consistent with best practices in place in many other jurisdictions.

Complaints Handling

At present, the City does not have what would be considered a best practices approach in this area, i.e. an established, well-developed and transparent complaints handling policy and set of procedures that safeguard the integrity of the process. In the absence of this kind of managed process, the result can only be described in professional procurement policy terms as something of a “free-for-all”.

Lobbying

Lobbying of Council members emerges from the research as an ongoing concern in terms of the real and perceived integrity of the process. Procurement related lobbying can be very intense, particularly for larger business opportunities. There are no ongoing restrictions on how and when a Councillor can be lobbied and as a result lobbying can take place at all stages of the procurement process. In the past, when restrictions on lobbying have been agreed to on a one-off basis for a particularly high profile procurement, the general perception is that the rules were ignored without consequences by a number of lobbyists and Councillors.

Other Political Involvement in the Process

In general, there has not been a uniform or consistent understanding of the role of elected officials in the procurement process at the City of Toronto, particularly as it relates to demonstrating and safeguarding the integrity of the process.

On-Line Processes

Toronto's continued reliance on distributing paper versions of request documents is seen as increasingly out of date and administratively unnecessary. Many other Canadian and U.S. jurisdictions – municipalities, provinces/states, and federal governments – have already moved in the direction of on-line distribution, often at the request of vendors, including small businesses.

PMMD Resourcing/Staff Turnover

There is a general awareness that PMMD has significant resourcing and staff turnover/morale issues. The resources issue is in part related to reductions in staffing levels that have taken place since amalgamation. As a result, the Division appears to some interviewees as being left with a more narrow focus on transactions, as opposed to value-added services.

Part 5: Options and Approaches for Discussion

A number of the options and approaches discussed in this section are intended to reinforce and/or propose additional dimensions to key Auditor General recommendations. In other cases, they are intended to supplement the Auditor General's recommendations.

Values-Based Procurement

It is suggested that the City's overall approach to procurement include a more active and robust approach to embedding procurement ethics in the organization's operating culture including:

- Inclusion of procurement ethics as part of the proposed citywide ethics management program identified on page 37 of the Toronto Computer Leasing Inquiry Research Paper *Conflict of Interest Volume 2*.
- The development of meaningful, practical descriptions of how the values are to be used by staff in all departments, including real-life case studies.
- Consistent, centrally mandated ethics related training for all procurement staff (PMMD and line departments).
- Training in procurement ethics for elected officials.
- Inclusion of procurement issues in regular meetings between Council and senior administrative officials to discuss ethics and code of conduct issues, including the use of case studies (see discussion on page 39 of *Conflict of Interest Volume 2*).

A More Decentralized Accountability

It is clear that the current level of centralization at the City made particular sense in the immediate post-amalgamation period when compliance with the new City's

procurement policies and the need to maximize efficiencies were paramount considerations. It is not clear, however, that this is the best approach for a more mature purchasing function in an organization of the size and complexity of the City of Toronto.

As part of the review of the procurement function currently underway through the CFO's office, consideration could be given to establishing a more decentralized procurement function. This would give line departments the authority and, just as importantly, the accountability for managing their own procurement requirements under a specific dollar-value threshold. This enhanced line authority would be subject to a clearer and enhanced overall oversight/controllership role for PMMD.

Roles and Responsibilities

The Auditor General's recommendation for greater clarity is strongly supported, particularly in light of the above identified organizational structure and overarching quality assurance/controllership role for PMMD. In developing these clear responsibilities and accountabilities, it is suggested that the City draw on examples from other jurisdictions in terms of how these should be aligned and communicated effectively to staff.

Value for Money

Consistent with the Auditor General's finding, the City should establish a threshold (for example, $25,000) below which staff would use the informal/3-5 quotes process. In the more decentralized organization identified above, this would mean that procurement staff in line departments would manage most of these under-$25,000 informal competitive processes.

Training and Development

Consistent with the best practice in leading jurisdictions, the City could adopt a broader and more comprehensive approach to competencies skills, and expertise standards and related professional training and development across all City departments. The City could also seek to establish formal *twinning* agreements with other large public sector organizations that would allow procurement staff to move between and among the organizations (i.e. in the form of secondments) as part of their career path and ongoing professional development. The benefits of this approach would include enhanced career and professional development opportunities and better positioning of Toronto as an attractive workplace for procurement professionals.

More Robust Policy Supports

The PMMD could be given the direction to develop and implement a more comprehensive and robust set of policy supports (drawing on/adapting to the extent possible high quality materials already developed and available from other jurisdictions). These materials could be made available on-line to all City staff and, as per the subsequent discussion in this report dealing with **Transparency**, to the public and vendors.

Risk Management

Consideration should be given to basing the City's procurement policies and practices more formally on a risk management approach that would provide guidance to staff in PMMD and line departments. This would include the development (or adoption/modification from another jurisdiction) of risk management frameworks tailored to the needs of procurement specialists. As a best practice approach, these would be supplemented by project risk management guidelines, risk management checklists and other similar tools, as

well as the identification of risk management as a competency required for procurement professionals and as a component of ongoing training.

Official Contact Point during the Competitive Process

In this area, the City of Toronto should consider committing itself to the highest standards of integrity with respect to managing communications between vendors and City officials during the competitive process, including that:

- The requirement for an official contact person during the competitive process be reinforced in the existing purchasing bylaw.
- This policy be clear that the competitive process includes all stages in the decision-making process up until such time as an award decision has been reached and announced.
- It be made clear that the policy of an official contact person for dealing with vendors applies to vendor contact with Councillors as well as administrative staff.

Complaints Handing Procedure

In this area, the City of Toronto should consider committing itself to the highest demonstrated standards of integrity with respect to dealing with vendor complaints including:

- Clarifying in policy the expectation that all vendors are entitled to formal debriefings.
- Adopting a formal two-stage process to manage vendor complaints to replace the current standing committee/deputation approach, including:

- Complaints to be adjudicated at the first level by a neutral panel of administrative staff that does not include the officials responsible for the procurement process.
- Complaints to be adjudicated at the second level by a panel of officials from the Auditor General's Office (as a body whose independence and integrity would be beyond question).
- The decision of the second panel would be considered final and not subject to further appeal within the City.

Where Councillors have concerns about a particular procurement process that are unprompted by a vendor (i.e. should not otherwise be part of the formal vendor-initiated complaints process) these should be brought forward in an environment of professionalism, respect, and trust between the elected and administrative levels of government.

Delegation

It this area, the Council should consider a more extensive and streamlined delegation of authority for procurement decision-making to the senior administrative staff through the Bid Committee. Consistent with best practices in governance, the CAO would provide the Council with regular reports that would be designed to satisfy Council with respect to policy and procedural compliance and the exercise of good judgement on the part of the Bid Committee. The revised delegation should include, at a minimum, the following:

Contract awards above the CAO signing authority of $500,000 and up to $5 million (initially, with the intention that once Council is confident in this approach, a higher limit could be set at a higher level) to be made by the Bid Committee (instead of the current $2.5 million) for goods and services as well as consulting contracts, where the item is already a part of the approved budget and where the Bid Committee is satisfied that

appropriate policies and processes were followed. (Contracts in excess of approved budgets would continue to require Council approval.)

- Authority/discretion for the Bid Committee to award contracts to other than the lowest bidder if:
  - Such an award is contemplated in the request document, i.e. a request for proposals that incorporates a price/value trade-off, as opposed to lowest-price, commodity based tenders.
  - The Bid Committee has legitimate and documented concerns about the capacity of the lowest bid to meet specifications/provide appropriate value-for-money. (The Bid Committee should be required to report annually to Council summarizing the situations in which these types of decisions were made.)
  - The requirement that contracts valued at over the Bid Committee's upper limit (initially $5 million) would be approved by Council.

Standing Committee Award Decision-Making

Note: the options and approaches discussed in the immediately preceding section on Delegation *would eliminate the need for Standing Committees to review contract awards. As such, the following discussion of Standing Committee involvement in the process should be viewed as an* interim *approach.*

The following options and approaches for discussion should be considered:

- The primary focus of contract award discussions at Standing Committees should be between the Committee members and staff with the focus being on due diligence as per the Auditor General's report.
- As part of ensuring fairness and equity, deputations from unsuccessful (or successful) vendors, their lobbyists/agents, and individual Councillors

should not be permitted. Rather, complaints should be directed through the official complaints procedure.

It be clearly communicated to all vendors and their lobbyists/agents that the prohibition on lobbying City officials during the competitive process includes all stages in the decision-making process, up to and including Standing Committee and Council consideration of staff contract award recommendations and that vendor concerns about a staff contact award recommendation should be directed to the formal complaints process.

Fairness Commissioners

The central issue with respect to fairness commissioners should not be one of "whether" but rather "how and when". The following are options and approaches for discussion:

- Adopt a policy of requiring external independent fairness commissioners as a standard quality assurance feature of larger, more complex procurements.
- Provide for broad latitude in terms of the kind of roles and functions that fairness commissioners could provide.
- Within these policy parametres, delegate decision-making on the use of fairness commissioners in individual procurement processes to the CFO in consultation with the line department
- Provide for the independence of fairness commissioners by establishing their accountability directly to the CFO.
- Require an annual report to Council that summarize the use of fairness commissioners, consistent with the policy approved by Council, general classes of issues that may have been raised by fairness commissioners, and actions that were taken to address the issues/prevent their reoccurrence.

Best and Final Offer

The Best and Final Offer (BAFO) model of procurement is worthy of consideration on a pilot basis for the City of Toronto, including:

- A set of existing BAFO policies and procedures be adapted from another jurisdiction and approved by Council for the purposes of a pilot.
- Testing on a range of different procurements, including small, medium, and larger sizes.
- A report to Council on the results of the pilot tests.

Transparency

Consideration should be given to making all of the City's procurement related materials publicly available on its website, including policies, procedures, manuals, guidebooks, checklists, templates, etc.

On-Line Bid Request Documents

The City's practice of mailing out release documents is increasingly out of date relative to other municipalities and other levels of government. Concerns with respect to limited on-line access for small bidders or modest additional costs for on-line tendering services appear to have been effectively dealt with by many other jurisdictions.

Part 1
Introduction

The focus of this second and final volume on procurement is on issues and challenges facing the City of Toronto as well as a discussion of options and approaches for potential changes to its current procurement polices and practices.

In addition to this Introduction, the report is presented in four sections:

- An overview of the procurement related provisions of the *Municipal Act, 2001* (Ontario) as well as the key features of the Ministry of Municipal Affairs and Housing's *Guide to the Developing Procurement Bylaws*.
- A summary of the key findings and recommendations of the major review of the City's procurement function completed in March 2003 by a team from the Auditor General's office.
- An overview of current policies and practices in place at the City of Toronto, incorporating feedback received during the interview process.
- Flowing from the description of issues and challenges, a discussion of options and approaches for potential changes to the City's procurement policies and practices.

This report builds on the discussion and conclusions presented in *Volume 1* with respect to common and significant procurement risks that public sector jurisdictions face, including the following:

- Values-Based Procurement.
- Readiness.
- Specifications.

- Pre-RFP Consultation.
- Vender Debriefing & Complaints Handling.
- Single Point of Contact.
- Role of Elected Officials.
- Training & Development.
- Evaluation.
- Clear Roles & Responsibilities.
- Efficiency & Effectiveness/Value for Money.

Volume 1 also included a discussion of two best practices that are in effect tools for mitigating a number of the risks identified above:

- The use of fairness commissioners as part of the integrity/quality assurance process.
- The use of a Best and Final Offer procurement methodology as part of maximizing value-for-money.

Research Approach

The preparation of Volumes 1 and 2 included reviews of over 2,000 pages of documents and a series of interviews. The latter were particularly important in terms of identifying and refining the list of identified major risks and confirming various best practice mitigation strategies. In the course of the research, interviews were conducted with over 20 individuals including current and former municipal officials, provincial government officials, academics, private sector executives, and other experts.

Documentary resources included:

- Statutes and by-laws.
- Government policies, directives, and guidelines.
- Procurement handbooks, other interpretive material, and examples of best practice tools.
- Academic and other expert reports, articles, and commentaries.

Material was collected from a wide range of jurisdictions including examples from across Canada, the U.S., the United Kingdom, Australia, and New Zealand. Sources for these documents included various departments/branches of municipal, provincial, and state governments, academic institutions, private corporations, foundations and research organizations, and associations representing procurement officials.

Part 2

Requirements of the *Municipal Act, 2001*

The *Municipal Act, 2001* contains specific provisions requiring Ontario municipalities and local boards to have procurement policies in place by January 1, 2005. The Act specifies eight minimum requirements with respect to policy issues that these procurement policies are required to address.

Section 271 (1) of the Act states that:

> *"Before January 1, 2005, a municipality and a local board shall adopt policies with respect to its procurement of goods and services, including policies with respect to,*
>
> - *The types of procurement processes that shall be used;*
> - *The goals to be achieved by using each type of procurement process;*
> - *The circumstances under which each type of procurement process shall be used;*
> - *The circumstances under which a tendering process is not required;*
> - *The circumstances under which in-house bids will be encouraged as part of the tendering process;*
> - *How the integrity of each procurement process will be maintained;*
> - *How the interests of the municipality or local board, as the case may be, the public and persons participating in a procurement will be protected;*
> - *How and when the procurement processes will be reviewed to evaluate their effectiveness."*

Section 271 (2), also dealing with procurement, focuses on the Minister's powers to make regulations in the following areas:

- Authority to establish additional areas that municipal procurement policies would be required to address in addition to items a) through h) above, and the timeframe in which those would need to be in place.
- Authority to establish procurement policies for a municipality or local board or to require a municipality or local board to comply with its own policies (presumably where a municipality or local board has either failed to put the necessary policies in place as per section 271 (1) or is not following its policies in these areas.)

Context for the New Requirements

Historically, specific requirements with respect to procurement policies and their content were not part of previous Municipal Acts in Ontario. It was left to each municipality to determine whether and to what extent to put a policy in place.

The requirements in section 271 were part of a more general provincial policy direction towards more extensive provincially mandated standards of accountability for municipalities and local boards. From the provincial perspective, the new *Municipal Act, 2001* provided municipalities with greater administrative flexibility and additional local powers (see Toronto Computer Leasing Inquiry Research Paper *Municipal Governance Volume 1* for a discussion of the new Act) and, in particular, the addition of *natural person powers* and the identification *of ten spheres of jurisdictions*. As a quid pro quo, the province argued that municipalities would need to be held to a more consistent standard of public accountability and transparency "*aimed at ensuring taxpayers can easily understand how their municipality operates*".

The most visible indication of this standard was the creation of the Municipal Performance Measurement Program. As described by the Ministry of Municipal Affairs and Housing (MMAH), the program requires municipalities to collect data to measure their performance in 10 core municipal service areas, with a view to achieving the following objectives:

- *"To provide a tool to assess how well municipal services are delivered to improve performance: measuring the efficiency (cost) and effectiveness (quality) of local services.*
- *To strengthen local accountability to taxpayers and promote greater understanding of municipal responsibilities by the taxpayer.*
- *To provide a systematic resource that allows municipalities to share information on performance and learn better/new practices from each other."*

Specific Guidance

To assist municipalities and local boards in meeting the requirements of section 271 (1), MMAH created a 75-page *Guide to Developing Procurement Bylaws* (July 2003).

The guide is intended to be advisory in nature and there are no requirements for its use by municipalities. In addition, it is important to note – as the Ministry does at the outset of the document – that the guide is focused on "*the steps that can be taken to develop bylaws/resolutions for procuring goods and services*". The Ministry stresses that "*The guide is not a procurement procedural manual*". By this, MMAH means that the guide was not intended to provide municipalities with a "how-to" of best practices in procurement. Rather, the focus is on best practice processes that can be used to create a bylaw or review an existing bylaw,

including the key questions that municipalities should ask throughout the process (see *Appendix A* for a flow chart of MMAH's recommended process).

As will noted below, however, in a number of cases the Ministry's advice goes beyond the aforementioned focus on "steps that can be taken to develop bylaws" to provide what is in effect, actual best practice information on good procurement practices.

The guide contains much useful advice in its three core sections:

- Goals.
- Types of procurement processes, and when to use them.
- Maintaining integrity and protecting interests in procurement.

The following are selected highlights from each of these sections.

Goals

As noted in the Toronto Computer Leasing Inquiry Research Paper *Procurement Volume 1: Common Risk Areas*, values and principles are the essential foundation of public sector procurement in leading jurisdictions. This section of the guide includes a set of "suggested goals" that are in fact underlying values/principles that would be recognized widely by procurement professionals and that in best practice jurisdictions would form the basis of policies and procedures as well as training and development:

> ***"Effectiveness:*** *Effectiveness refers to the extent to which the procurement process is achieving its intended results (i.e., the process delivered the goods and services required to meet the municipality's/local board's needs). The results here are the "substantive" or quality results*

as opposed to process results. Process results are the types of results that are described in the goals below.

Objectivity: *Objectivity refers to approaching the procurement of goods and services in an unbiased way not influenced by personal preferences, prejudices or interpretations.*

Fairness: *Fairness refers to applying the policies equally to all bidders.*

Openness and Transparency: *Openness and transparency refer to clarity and disclosure about the process for arriving at procurement decisions. Municipal/local board procurement is undertaken within the context of legal considerations about confidentiality and the protection of privacy. Policies that promote openness and transparency need to be governed by these considerations.*

Accountability: *Accountability refers to the obligation to answer for procurement results and for the way that procurement responsibilities are delegated. Accountability, unlike responsibility, cannot be delegated.*

Efficiency*: Efficiency measures the quality, cost and amount of goods and services procured as compared to the time, money and effort to procure them."*

Types of procurement processes, and when to use them

This section of the guide carries the key message that municipal procurement bylaws and policies should be clear about "*the types of procurement processes that will be used, the goals of each, the circumstances under which each type will be used, and the circumstances where a tendering process is not required.*"

Much of this section is actually dedicated to providing municipalities with what is, in effect, practical "how-to" advice in the form of a set of four tables (see *Appendix B*). Presented as a "typical" municipal approach, these tables describe the different types of procurements that a municipal procurement policy should include, as well as the process that would be appropriate for each, and the circumstances that would lend themselves to a particular process. Two major themes in this section are:

- The distinction between formal and informal procurement processes (e.g. a sealed bid competitive process vs. obtaining written quotes from selected suppliers).
- The importance of being clear when a competitive process (either formal or informal) is not required – and suggested policy guidance with respect to the appropriate circumstances.

With respect to the first point, the guide suggests that the informal process (i.e. competitive pricing information obtained by telephone, fax, in writing, etc. typically from a minimum of three vendors) would be used for "low value procurement". The guide does not put forward a recommended low value threshold. However, as discussed in *Procurement Volume 1*, $20,000 to $25,000 would be considered the lower end of the range for most of the jurisdictions surveyed.

On the second point, Table 3a (*see Appendix B*) provides advice again in the form of a typical example, with respect to the circumstances under which non-competitive procurement should be considered/allowed.

Maintaining integrity and protecting interests in procurement

In this section, the guide addresses the theme often stated in the research and reiterated in *Volume 1* that procurement is an inherently risky undertaking.

The Ministry proposes a general risk management approach, i.e. one in which maintaining integrity and protecting stakeholder interests involves identifying "*risks than can arise…and the measures that can be taken to minimize or mitigate them*." Much of this section of the guide is actually in the form of tables that describe common or typical risks to the goals identified earlier (aka the underlying values/principles)

- Procurement goals.
- Effectiveness.
- Objectivity.
- Fairness.
- Openness and transparency.
- Accountability.
- Efficiency.

In each case, the guide provides municipalities with advice with respect to the appropriate mitigating strategy or policy. For example:

> *"When evaluating the bids:*
>
> *…if municipal/local board elected or appointed officials are in contact with suppliers during the bid evaluation process, then integrity can suffer as several of the goals of the procurement process can be put at risk.*

A policy of "no informal contact" between municipal/local board staff or elected officials involved in the procurement with potential suppliers during the evaluation period can minimize this risk. (A broader policy on contact at other stages of the procurement process, specifying who, when and how the contact may be made, can address risks that can arise at other stages of the process as well)."

The MMAH guide's focus on risk management is consistent with the best practice in many jurisdictions where it is identified as an essential component of procurement planning and management. By definition, the MMAH guide focuses on using a risk management approach to identifying bylaw/policy requirements. As such, it stops short of suggesting that municipalities should adopt formal risk management frameworks and/or incorporate risk analysis tools into their day-to-day purchasing practices.

Many best practice jurisdictions take the use of risk management methodologies and tools to this next level of professional management. The Australian Ministry of Finance and Administration, in its 2002 *Commonwealth Procurement Guidelines & Best Practice Guidance* document, notes that:

"Managing risk is an integral part of good management. Risk management strategies are fundamental to supporting sound procurement decisions and as such, a formal risk assessment should be a part of any procurement. Identifying potential risks early and selecting the best option for managing those risks helps agencies achieve more favourable and reliable outcomes."

Australia and other jurisdictions and organizations reflect this emphasis on risk management in procurement at a day-to-day operational level through the creation of procurement-related risk management frameworks, analytical tools, checklists, staff training, etc.

Part 3

Procurement Process Review – Auditor General

The purchasing function at the City of Toronto – including but not limited to the Purchasing and Material Management Division (PMMD – the City's central purchasing authority) has already been the subject of a major procurement process review conducted by the City's Auditor General (*Procurement Process Review – City of Toronto, March 2003*). This section of *Volume 2* provides an overview of that review, including:

- Background information on the origins of the review.
- A brief summary of recommendations, particularly those that relate to the risk areas discussed in *Volume 1*.
- Information on the City's initial response to the report and recommendations.

Appendix C provides a copy of the report's Executive Summary and summary of the recommendations. *Appendix D* includes a copy of management's initial response.

Background

In November 2001, Council requested that the CAO and the City Auditor conduct a "comprehensive review" of the City's procurement function. The review was to include, but not be limited to:

- Reporting structure of the purchasing function.
- Administrative procedures and safeguards.
- Quality control measures.

- Purchasing for larger items done by the City's special purpose bodies.
- Potential amendments to the City's purchasing bylaw.
- The issuance of payments in a timely manner.

It was subsequently agreed that the review should be conducted by the Auditor General's office, given that the purchasing function had already been included in the Auditor General's approved workplan for 2002.

It was agreed that a team in the Auditor General's office under a Director and Manager would look at:

- The organizational structure of PMMD.
- The roles and responsibilities of PMMD and operating departments in the procurement process.
- The adequacy of the Purchasing and Financial Control by-laws.
- The integrity, efficiency and cost effectiveness of the procurement process.
- Administrative controls and management information.

The team conducted surveys of practices in other jurisdictions, examined key success factors related to procurement, and conducted internal and external interviews and focus groups.

The year-long review resulted in a 70-page report containing 43 recommendations for improvements to the City's current policies and practices. As noted by the audit review team, the report in places is somewhat high-level in terms of both its description of the problem to be solved and the actual solutions proposed:

> *"The report identifies areas where procurement and related processes can be further improved. For the most part, it does not provide specific*

solutions, as some areas have policy implications, require further study, or are dependent on the results of action taken on other issues identified. However, it does provide direction in terms of areas requiring attention, as well as considerations that should be taken into account when addressing the respective issues."

Management Response

Overall response from management was very positive (see *Appendix D* for a copy of management's initial response to the various recommendations). For the most part the Auditor General's recommendations were viewed as being reasonable and effective. There was general agreement that the function was in need of a comprehensive review/update and that the Auditor General's report has been a useful catalyst and focus for this review.

A project team, led by an external consultant with specialist expertise in procurement, has been set up in the CFO's Office to lead and oversee implementation.

Key Findings and Recommendations

Overall, the review found that PMMD was generally effective in terms of ensuring line department compliance with corporate procurement policies and that the current Purchasing (Toronto Municipal Code Chapter 195) and Financial Control (Toronto Municipal Code Chapter 71) bylaws, with a few exceptions, were "*comprehensive in terms of the responsibilities and legal authorities delegated to staff*."

The following is a summary of the key findings and recommendations of the audit review team. The purpose of this summary is not to duplicate the information included in *Appendix C*, but rather to highlight the thoroughness of the Audit team's recommendations and the very high correlation between the team's findings/recommendations and the key risk areas discussed in Part 2 of *Volume 1*.

Organization

The review team suggested that there is "no one 'best' organizational structure" for the procurement function, in terms of the alignment/realignment of responsibilities between the central purchasing authority and line departments (e.g. the potential for greater delegation of responsibility and accountability to line departments to manage their own procurements, consistent with corporate policies and up to a maximum dollar value threshold). The review team felt it was "premature" to recommend a specific structure and recommended that the structure be revisited once the respective roles and responsibilities of PMMD and line departments are clarified (see next recommendation).

Lack of clarity with respect to roles and responsibilities

The review identified the need for greater clarity with respect to roles and responsibilities between PMMD and line departments, including accountability for decisions at various points in the procurement process. The review recommended that staff be trained on expectations in this area and that compliance/consequences for non-compliance be incorporated into the performance review process.

Changes to Bylaws

The review recommended a small number of changes to the current Purchasing and Financial Control bylaws. In a number of cases, the recommendations were in response to the advice provided by the Ministry of Municipal Affairs and Housing in its *Guide to Developing Procurement Bylaws* (see Part 2 of this report for an overview) or long-standing issues/concerns that had been previously identified by staff.

An additional theme in this area – although not stated as such in the report – is roles and responsibilities of Council and Standing Committees. In effect, the review team found that Council should focus more on holding administrative staff accountable for making operational decisions in accordance with City policy and within clear decision-making parametres, as opposed to making those operational decisions itself.

The following are the key bylaw change recommendations (again, a complete list of recommendations is provided in *Appendix C*):

- Greater clarity in the purchasing bylaw for staff with respect to the "criteria and considerations" that should be used by staff in determining which procurement method to use (e.g. RFQ, RFP, Tender). (As discussed in Part 2 of this report, the importance of being clear in a procurement bylaw with respect to the "*Types of procurement processes, and when to use them*" is a major focus of the MMAH *Guide to Developing Procurement Bylaws*.)

- The delegation of authority below the Commissioner level for emergency purchases within "clear parametres and guidelines" as a legitimate means of ensuring a timely capacity to respond to emergencies.

- Providing authority to administrative staff – within clear decision-making parametres – to award multi-year contracts, i.e. contracts that straddle from one year to the next, for both capital and operating expenditures, thereby addressing a long-standing issue for staff. (The current "strict interpretation" of the City's legal department is that until the budget is established each year, Council has to approve/reapprove all contracts, regardless of dollar value, delegated signing authority, etc. that span from one year to the next.)

- Giving administrative staff the authority/responsibility to make decisions – again within budgetary approvals and clear decision-making parametres – with respect to contract over-expenditures for contracts up to the CAO's $500,000 signing authority limit and that the Chief Financial Officer provide Council with an annual report on cases of all over-expenditures in excess of 10 percent for contracts up to the $500,000 level. (The current City policy requires Council to approve contract over-expenditures that exceed 10 percent of the awarded contract amount, regardless of the size of the contract.)

Enhanced Policy Guidance

The review noted that PMMD appears to be focused primarily on processing procurement transactions. The equally important functions of developing and providing useful, practical guidance and interpretive materials for staff were found to be lacking.

Training and Development

The review found that training and development for both PMMD and line department staff should be enhanced, including:

- More formal identification of the skills and expertise required within PMMD and training to ensure those skills are present.
- More extensive training for line department staff, particularly in light of the previously mentioned recommendation to clarify roles and responsibilities and strengthen compliance.

Specifications

The review identified the need for improved guidance for line department staff in developing specifications, including templates, guidelines, etc. for what should be included in specifications, online access to a central library of previous City specifications, and improved access to/making better use of specifications from other jurisdictions/levels of government.

Evaluation of Bids/Decision Making Process

The review made a number of recommendations with respect to ensuring the integrity of the evaluation process and related decision-making. Again, in many areas, the recommended approach mirrors best practices discussed in *Procurement Volume 1*, including that:

- Staff in line departments should be "properly trained" to manage and participate in the evaluation process.
- Staff in line departments should have access to guidance with respect to evaluation methodologies, the proper composition/expertise of evaluation panels, documentation requirements, etc.
- PMMD staff should be involved in the evaluations for contracts over a pre-determined dollar threshold limit in order to "monitor, provide guidance, and ensure due process is followed".
- Request documents should consistently include the proposed evaluation criteria, including any pre-determined weighting.

- External business expertise (e.g. consultants) be retained as a support for complex and high-risk procurement transactions as part of ensuring sound business decisions.
- A formal policy be established of “no informal contact” between department staff involved in the procurement and potential suppliers, including before and during evaluation and before the contract award.
- Staff involved in the procurement cannot accept gifts, entertainment, or other benefits (an area already addressed in the City’s Conflict of Interest policy for employees) and that a vendor making these kinds of offers could be disqualified.

Low Dollar Value Purchases

The review team noted the opportunity for a better application of value-for-money considerations with respect to low dollar value purchases and made a number of best practice recommendations to ensure greater efficiency and effectiveness in this area, while still protecting the values of fairness, equity, and openness, including that:

- The City expedite its plans to implement a procurement card (“p-card”) for small dollar-value purchases as per the practice already in place in many other jurisdictions.
- Consistent with the practice in most other jurisdictions, that the City make more extensive use of informal competitive purchasing methodologies that are already approved as part of existing City policies (e.g. three quotes) for purchases below an established threshold. (See *Procurement Volume 1, Part 2, #11. Efficiency & Effectiveness/Value for Money* for more discussion of this issue.)

The Bid Committee

As part of enhancing transparency, the review recommended that the Bid Committee (a weekly senior staff-level committee that opens tenders) also be required to open high-value RFQs and RFPs. These are currently opened by the PMMD.

Dealing with Mathematical Errors in Bids and Related Disqualification

The review recommended that a clear policy be established with respect to the circumstances in which a bid would be disqualified for containing mathematical errors and that this policy be clearly stated in all request documents.

Standardized Contract Award Reports

The review recommended that contract award reports going forward for approval to Standing Committees and Council be standardized "*with respect to the nature and level of information contained*". Again, the theme of respective roles and responsibilities between Councillors and administrative staff emerges in the review team recommendation that, consistent with best practice in this area as discussed in *Volume 1*, the information in these reports should focus on demonstrating to Council that "*due diligence was followed in the overall process, relative to the financial risk and complexity of the contract, as well as include all critical terms and conditions*".

Fairness Commissioner

The review recommended the use of fairness commissioners on an "as-required basis" for complex, high risk/cost or high profile projects as a means of providing greater assurance with respect to the integrity of the procurement process.

Conflict of Interest

The review recommended that staff be sent an annual notice with respect to the City's conflict of interest policy and be required to sign an annual declaration acknowledging their understanding of and agreement with the policy.

Lobbyist Disclosure Policy

The review recommended that the current lobbyist disclosure policy be extended to apply to all City purchases regardless of the dollar amount. (Currently, vendors are required to register with the Clerk if they intend to lobby Councillors on contracts in excess of the current Bid Committee decision-making limit of $2.5 million.)

Use of External Consultants

The review recommended a formal policy to prohibit external consultants that were hired by the City to assist in the internal preparation of a request document from also responding to that request document. The practice had been generally prohibited by practice within the City, as opposed to by policy.

Part 4
City of Toronto Current Policies & Practices

The purpose of this section is to provide an overview of the procurement function at the City of Toronto, including:

- A brief program description of the current procurement process, taken from the Auditor General's report, as a form of *baseline* for subsequent discussion.
- A discussion of the context for change, including that a number of the Auditor General's recommendations and those contained in this report are to an extent rooted in the pressures of amalgamation.
- An assessment of the City's current policies and practices in the various key risk areas identified in *Volume 1*.

On the latter point, it is important to note that the intention of this assessment is not to repeat the extensive discussion and analysis in the Auditor General's report, but rather to focus on and add value with respect to the key risk areas.

Program Description

The following is a succinct description of the basic elements of the City of Toronto's procurement process taken from the Auditor General's report:

> *"The Toronto Municipal Code, Chapter 195 (Purchasing By-law) and Chapter 71 (Financial Control By-law), along with various policies (such as Canadian Content, Fair Wage, Policy for the Selection and Hiring of Professional and Consulting Services, Code of Conduct for Council*

Members, Conflict of Interest, Lobbyist Disclosure) approved by Council, as well as administrative procedures/directives issued by the Purchasing and Materials Management Division (Purchasing Division) from time to time, provide the framework for the conduct of procurement activities in the City.

Currently, departments may procure goods and services costing up to $7,500, without going through the Purchasing Division, through the issuance of a Departmental Purchase Order (DPO). It should be noted that departments are expected to use DPOs for one-time, small dollar purchases up to $7,500. Repetitive purchases are to be processed by the Purchasing Division.

Purchases in excess of the $7,500 Departmental Purchase Order limit are administered by the Purchasing Division using one of three main processes: Request for Quotations; Request for Tenders; and Request for Proposals.

When the award of a contract is expected to be based on the lowest price meeting specifications and requirements, bids are solicited by the Purchasing Division by issuing a public tender for construction projects, and a Request for Quotations for non-construction contracts. Request for Proposals are used when a contract award is not based solely on the price and where there is some latitude in terms of the deliverable or solution offered.

The procurement process generally involves:

- *departments developing the specifications and requirements for the goods and services;*

- *the Purchasing Division incorporating the department's specifications into a formal call document (Request for Quotations or Request for Tenders) or request document (Request for Proposals);*
- *the Purchasing Division mailing the call or request documents to all suppliers on the City's Bidders' List that provide the particular good or service. Requests for construction tenders are normally advertised in trade magazines and local newspapers, and are not mailed out to suppliers on the Bidders' List;*
- *the Purchasing Division posting the opportunity on the City's Internet site, with instructions regarding how to obtain a copy of the call/request document and how to obtain further information with respect to the call/request;*
- *a public opening of the responses to Request for Quotations (bids) and Request for Proposals (proposals) by the Purchasing Division and a public opening of responses to tenders (bids) by the Bid Committee;*
- *the Purchasing Division summarizing the replies to the call/request and forwarding the bids or proposals received to the department for evaluation and recommendation on award of the contract;*
- *departments performing an evaluation of the bids and proposals received and submitting their award recommendation to the Purchasing Division; and*
- *awarding of the contract based on the following limits as delegated by Council:*
    - *Up to $500,000* Chief Administrative Officer/Department Head/Director of Purchasing and Materials Management where the contract is awarded to the low bid meeting specifications. If the contract award is not to the lowest bidder, the contract is referred to the appropriate Standing Committee. Delegated*

authority for approving consulting type commitments has a more limited level of authority for commissioners.

- *Up to $2.5 million* Bid Committee*
- *Up to $5 million* Standing Committee*
- *Over $5 million Council*

The Purchasing Division, reporting to the Chief Financial Officer and Treasurer, is responsible for the procurement of goods and services to all City departments, as well as the Toronto Police Service, Exhibition Place and the Toronto Atmospheric Fund.

The Division had a staff complement of 106.5 positions in 2002, and a net operating budget of $5.6 million. In 2002, $66.4 million of goods and services were procured directly by departments through the issuance of DPOs (65,487), while the Purchasing Division issued 3,854 Purchase Orders (POs) totalling $982.5 million on behalf of City departments, Agencies, Boards and Commissions."

Context for Change

In considering the extensive set of recommendations that have been made to date by the Auditor General, as well as the options and approaches discussed in Part 5 of this report, one could easily be left with the impression that the procurement function at the City must be significantly "broken" if so many changes are required.

This, however, would not be a fair assessment from at least two perspectives.

- First, it is important to note that the staff and senior management have not disagreed with the Auditor General's analysis and have been supportive

of the need to take action in the recommended areas. Many of the issues identified and actions recommended by the Auditor had already been identified by senior management and staff as areas to be addressed and/or opportunities to be seized.

- Second, it is also important to note that this study and the Auditor General's review both include assessments of the City against best practices in other jurisdictions. This includes organizations with very mature procurement functions that over the years have been priorities for their respective organizations and the subject of considerable investment in time, resources, and senior management attention.

It is perhaps more useful and appropriate to view the Auditor General's recommendations, the work of the implementation team, and the recommendations contained in this report in the context of amalgamation and as part of the legitimate evolution of the procurement function in the new City.

In terms of bylaws and formal corporate procurement policies, there has been considerable accomplishment since amalgamation. This includes the development and adoption of governing purchasing and financial control bylaws, as well as related policies such as the Code of Conduct for elected officials, a conflict of interest policy for employees, a lobbyist disclosure policy, a fair wage policy, etc.

However, in terms of overall structure, function, roles and responsibilities, etc., these had not evolved significantly beyond the needs, pressures, and organizational requirements of the immediate post-amalgamation period. The Audit General's review gave focus to these issues.

By way of explanation, the general view is that for the procurement function, the two major priorities in the post-amalgamation period were very clear:

- The need to quickly develop a consolidated procurement policy and process that would ensure a consistent and professional approach for the City's major purchasing requirements.
- The need to quickly ensure that the new City was taking maximum advantage of various more efficient and centralized purchasing opportunities through blanket contracts, vendors of record, standing agreements, etc.

To a considerable extent, the resulting bylaw, organizational structure, operational priorities, etc. that were encountered by the Auditor General are a reflection of these priorities.

With respect to a consolidated bylaw, there was an immediate need to develop a new consolidated purchasing bylaw from what existed in the former municipalities, and to do so at the same time as major elements of the City's new administrative structure were still being put in place. Consequently:

- The process focused primarily on adapting the policies previously in place at the former City of Toronto (which also provided purchasing services for Metro Toronto).
- It did not involve a more substantive review of current best practices from other large governments or careful consideration/rethinking of the purchasing requirements of the new City.
- There was not felt to be sufficient time for more extensive consultation with line departments.
- There was a limited emphasis on training and supplementary policy guidance materials for staff.

The need for a consistent approach to the City's major purchasing requirements, as well as the need to find savings in effectiveness and efficiency, was addressed through the creation of a highly centralized purchasing authority in

PMMD. This included responsibility for all purchases above the departmental purchase order level and as noted above, achieving efficiencies through consolidation of contracts, standardization of purchases, harmonizing DPO usage, blanket contracts, vendors of record, etc.

Additional factors that consumed PMMD and senior management attention during this period included:

- Early on its history, the City moved to implement a new integrated financial information system (SAP) with a procurement module that would be mandatory for all City departments, including new on-line procedures for purchase requisitions, department purchase orders, contract release orders, etc.
- During this period, staffing in PMMD was reduced by 13.5 percent from 33 FTEs to 28.5.
- The advent of the recent computer leasing issues and pressures associated with responding to this matter.
- Senior executive turnover, including the recruitment of a new CFO.

Notwithstanding these various pressures, in retrospect there is every indication that the goals of this highly centralized initial were successfully achieved. For example:

- Centralized procurement through PMMD did result in the application of consistent professional practices with respect to the City's major purchasing requirements. Internal and external experts interviewed for this study generally concurred that PMMD has consistently demonstrated a high degree of professionalism and integrity in this regard.

- Centralized procurement also resulted in considerable efficiencies across the new City, including:

- A reduction in the total number of purchase orders issues by all departments in the former municipalities from 50,181 in 1997 to 3,854 by the year 2002.
- An immediate reduction in the release of bid request documents from 2,803 in 1996 to a low of 1,222 in 1999, which had risen by 2002 to 2,223.
- An overall increase in total annual purchasing from 1997 to 2002 from $403 million to $982 million.

Also in retrospect, however, these achievements came with certain inherent costs, including:

- Occupying much of PMMD's available time and attention.
- Emphasizing to a greater extent than one would find in a more mature organization, the control/policing function of PMMD and the need to deal with resistance from within line departments related to the different cultures and practices of the former municipalities. As the new City structure has *settled* this has resulted in increasing tension between the line departments and PMMD and an general sense of over-prescriptiveness.
- Placing a strong focus on professional capacity within PMMD but a more fragmented approach to standards, training, professional development, quality control, etc. across line departments.
- Providing for a consistent understanding within PMMD with respect to interpreting the bylaw and formal policies, and operationalizing procurement practices (i.e. understood among professionals, as opposed to formally articulated in guidelines, best practice documents, etc.) but the potential for less clarity and consistent interpretation/application across departments.

All of this points to a relatively positive and developmental context for understanding the Auditor General's recommendations as well as the recommendations in this report. The City's procurement function emerges not as one badly in need of repair, but rather as one that successfully met and perhaps even exceeded the requirements of the organization during the complex period of amalgamation and that itself recognizes the opportunity/need to evolve and grow.

Assessment of City Policies and Practices

The assessment presented in this section is based on a review of current City policies and practices, interviews both internal and external to the City, and comparison with best practices from other jurisdictions. In terms of structure, it touches on most of the key risk areas identified in *Volume 1*.

As noted at the outset of this section, the intention of this assessment is to focus on and add value with respect to the key risk areas from *Volume 1* rather than simple to repeat the extensive discussion and analysis in the Auditor General's report. By necessity, there is a certain amount of overlap but also a somewhat different emphasis in a number of areas.

One notable area of difference concerns the involvement of elected officials in the procurement process and the real or perceived challenges this poses to the integrity of the process. This issue was generally absent from the Auditor General's report and only touched on marginally in his recommendations, but emerged more prominently from the research and interviews conducted for this report.

Establishing a New Procurement Culture

As per the earlier discussion of amalgamation, it is apparent that to date a consistent culture of procurement related values and practices has not fully emerged in the City and that values and practices can vary between and among departments and divisions in ways that have the potential to detract from effectiveness and the integrity of the process. Although consolidation of policies, financial systems, etc. took place early on in the life of the new City, these actions in and of themselves were not sufficient to build a new and consistent operating culture. Furthermore, there was insufficient time and resources – as well as many other competing priorities – to focus on this particular aspect of organizational development.

Values-Based Procurement

As noted in *Volume 1*, ethics-related values and principles are viewed as the essential foundation of public sector procurement in leading jurisdictions in both theory and practice. A leading organization is one whose formal policies and interpretation/guidance documents have a demonstrated and visible connection to stated values and principles. Staff would have a solid basis in ethics training and a demonstrated capacity to apply values and principles in their day-to-day activities and decision-making.

Similar to many other Canadian municipalities, City of Toronto purchasing policies are formally based on the widely recognized and acclaimed professional standards established by the National Institute of Governmental Purchasing (NIGP) and the Purchasing Management Association of Canada (PMAC). This foundation is formally expressed in section 195-3 of the City's purchasing by-law under "Ethics in purchasing".

> *"In addition to any conflict of interest policy applicable to employees, as adopted by Council from time to time, the code of purchasing ethics established by the National Institute of Governmental Purchasing Inc. and the Purchasing Management Association of Canada shall apply to all staff involved in the procurement process."*

While the formal policy direction exists, however, one generally does not find extensive evidence of these values being actively pursued and reinforced at the City as a means of building and maintaining consistently high professional standards.

This is not to say that the City's purchasing polices do not inherently reflect these values. It also does not mean that staff across the City are not aware of these values – particularly those who have completed professional procurement training/certification – or that staff involved in procurement in all departments do not generally conduct themselves with integrity. However, relative to a number of other jurisdictions reviewed as part of this study, more outward *best practice* indications of values as a driving force in building and maintaining consistently high professional standards are not present.

A relatively simple example of this would be that a staff member (or member of the public) who, in noting the reference in section 195-3 of the purchasing bylaw, would not be able to find a copy of the NIGP or PMAC codes of ethics on the internal or external procurement website.

In more complex terms, however, there is no description or discussion of the larger operational context for these values, including for example:

- Demonstrations of commitment from City senior executives to operationalizing these values.
- A meaningful description for staff of how the values are to be used in all departments as a form of "living document" that provides practical guidance.

- Consistent, centrally mandated training standards for all staff (PMMD and line departments) involved in the procurement function related to values/ethics and ongoing associated ethics training.
- Training in procurement ethics for elected officials
- Examples of case studies that demonstrate the values in action and opportunities to discuss and learn from these case studies as a part of ongoing professional development.

Roles and Responsibilities

Consistent with the discussion of key risk areas in *Volume 1*, as well as the findings in the Auditor General's report, a lack of clarity in terms of roles and responsibilities emerges from the research as a central problem area for the City. For both the central purchasing authority and line departments, roles and responsibilities – and corresponding accountabilities – are not viewed as being sufficiently clear, resulting in confusion/frustration, delays, overlap and duplication.

As noted in the Auditor General's report, in some cases the issues at stake are surprisingly picayune or administrative, for example:

- Whether line departments should be required to adopt a consistent approach to entering contract release orders (draw-downs against blanket contracts) in the financial information system.
- Whether line departments or PMMD should be responsible for tracking overall spending by line departments on their own blanket contracts.

In other cases, they are more significant, for example:

- The role of PMMD to provide quality assurance/controllership over procurement processes used by line departments.

- Whether the line department or the central purchasing authority should have the final say with respect to specifications.
- The expectation that PMMD and departments would both be actively engaged in the kind of analysis required to achieve additional efficiencies through blanket contracts, vendors of record, or other similar vehicles.

Part of the obstacle in this area is a marked tension (noted in the Auditor General's report but also apparent in this study) between PMMD and line departments generally with respect to controllership and the appropriate balance between PMMD vs. line department responsibility/accountability. Based on the experience of other jurisdictions, the debate is not uncommon. The typical line department concern is that central purchasing authorities are too controlling of line department transactions and activities that should be within the discretion of line department officials. Central purchasing authorities maintain that they are usually seen as being responsible for overall controllership and that in the absence of clear accountability resting with line departments, they are compelled to intervene.

At present in the City, these issues or points of tension are well recognized and understood within the administration and have been acknowledged by the project team leading the implementation of the Auditor General's report. To date, however, a conclusive effort has not been made to achieve a resolution and then to clearly articulate that resolution in both formal policy and in guidelines and interpretive documents that can be easily understood by all staff.

Policies and Procedures

Based on samples reviewed as part of this study – and as noted by the Auditor General – Toronto's purchasing bylaw and formal purchasing policies (fair wage, non-discrimination, etc.) compare in generally favourable terms with many other

municipalities and against the Ministry of Municipal Affairs and Housing's *Guide to Developing Procurement Bylaws*. As noted in the Part 3 of this report, the Auditor General identified a relatively small number of areas where changes should be made, including the following:

- Delegation of authority for emergency purchases.
- Authority for contract awards that extend/straddle over into the following year.
- Streamlining delegations and reporting with respect to over-expenditures.
- Greater delegation to the staff to deal with contract amendments that result from legitimate unforeseen circumstances.

However, as touched on by the Auditor, and as evidenced in the course of this review, a reasonably crafted bylaw is not the most effective tool for communicating processes, standards, guidelines, best practices, etc. The overall impression of the current City of Toronto approach – compared to a number of other jurisdictions surveyed for this study – is of one that is overly focused on formal policy statements and relatively *bare bones* in terms of more operationally relevant guidance to staff, i.e. material that answers the critical "how to" questions.

As described in *Procurement Volume 1*, leading jurisdictions invest considerable time and resources in ensuring that their core procurement policies (statute, bylaw, code, ordinance, etc.) are supported by an extensive and robust array of supplementary materials. In addition to the traditional bylaw and policy manual, these materials include guidebooks on specific aspects of the procurement process, process flowcharts, frequently asked questions, case studies, collections of best practices, checklists, templates, etc. In leading jurisdictions these materials are broadly accessible to staff, vendors, and the general public through the internet. Based on examples viewed as part of this study, individual topics can include:

- A general overview of the procurement process.
- The basics of procurement planning.
- Writing specifications.
- Conducting evaluations.
- Managing risk.
- The Complaints Process.
- Vendor Debriefings.
- Understanding Value for Money.
- Why Projects Fail.
- Skills Development.
- A guide to small purchases.
- Process integrity.
- Risk management checklist.

The benefits of this more transparent approach include:

- A demonstrated commitment to openness/transparency and professionalism.
- A higher level of understanding and awareness of requirements by staff and the vendor community.
- Higher levels of compliance/fewer incidences of errors with respect to policy and procedures, as well as a greater utilization of best practices.

Within PMMD, there is every indication that officials have a good understanding – through training, practice, and experience – of the various steps in the procurement process and appropriate practices in key areas such as specification preparation and evaluation. That PMMD will apply these in a consistent manner for projects that the Division manages is recognized. Also, within various departments (again, varying

somewhat department by department) there are accepted policies and procedures, sometimes written down or expressed in department-specific training, other times not.

However, there is no comprehensive body of supplementary material that would ensure consistency of approaches, uniformity of expectations, a shared understanding of how to operationalize values, recommended best practices, etc.

Examples of this problem are dealt with in the Auditor General's report:

- The Audit General identified the need for a policy that prohibited firms or vendors who were involved in preparing a bid request document from bidding on that particular project. Management's response notes that this prohibition already exists in practice and is generally understood across departments. However, the policy is not expressed in the form of a formal policy and staff that may not be aware cannot access useful descriptive material (i.e. in addition to a formal policy statement) that would highlight the requirement.
- The Auditor General identified the need for all staff to understand their roles and responsibilities in the procurement process. Management noted that policies have been put in place dealing with conflict of interest, the requirement for a business case when hiring outside consultants, etc. but acknowledged the need for more guidance for staff on how to operationalize these requirements.
- The Auditor General noted that "*while the City's by-laws are comprehensive in nature…Often times, user departments and the Purchasing Division seek clarification from the City Solicitor and the Auditor General's Office for interpretation*."

On a positive note, the need for a more comprehensive and robust approach is generally recognized. There have been efforts underway to create a policy manual and this has been identified as a priority for the team implementing the

Auditor General's report. However, a single policy manual – while a step forward – would not in and of itself meet the best practice test (issue-specific handbooks, checklists, tip sheets, templates, etc.)

The following is an example of how a best practice approach would play out in practical terms with respect to the evaluation process (but that could easily apply to other aspects of procurement, such as developing a business case, developing specifications, debriefing vendors, handling a complaint, etc.):

- A line department staff person has been asked to participate in an evaluation panel. In preparation for this participation, they would be able to access helpful, practical, easy to read and understand (as opposed to the formal rules-oriented language and focus of most policy manuals) information on-line that describes:
    - The principles that underlie the evaluation process.
    - The distinction between evaluation and selection.
    - The *best practice* make up of a panel and the respective roles of the various participants.
    - The actual steps the panel will go through as it carries out its duties.
    - An explanation of any special requirements for panel members, such as signing a "no conflict" declaration.
    - A description of confidentiality requirements.
    - How to actually conduct the evaluation.
    - Examples of evaluation frameworks or tools.
    - A description of the most common errors and how to avoid them.
    - Frequently asked questions and answers.
    - An evaluator's checklist of key issues.

Training and Development

As discussed in *Volume 1*, the importance of having highly trained and professional procurement staff is a key component of risk mitigation. Within the procurement field, professional development in procurement is a recognized, well-developed, and established aspect of the profession. For leading jurisdictions, this includes minimum training and certification/recertification requirements for all staff involved in the procurement process, i.e. the analyst/coordinator level, specification writers, evaluators, managers, and senior executives. In terms of specificity and intensity, this training typically makes distinctions between and among positions in terms of their importance to the procurement process. The emphasis in best practice organizations on training and development also has an important added dimension related to ensuring that the organization can attract and retain high quality staff.

This kind of more comprehensive approach is not in place at the City. The City currently does not have a formally articulated, standard set of expected competencies, skills, and experience and associated training and development programs for individuals who are involved at different stages/degrees of intensity in the procurement process. At present, PMMD is responsible for the training and development needs of its own staff and for offering training, when requested, to line department. Line departments are responsible for identifying and addressing their own procurement-related training needs.

While as indicated in its response to the Auditor General's report, management is confident that PMMD staff "*meet the professional and technical requirements to carry out their duties*", this assessment does not appear to have been made against more formal expectations or benchmarks that one would find in a leading jurisdiction. Similarly, there is no consistent set of competency, skill, or expertise standards, or related training and development requirements for staff involved in procurement in the line departments.

It is important to stress that this finding is in no way meant to call into question the professional competence of PMMD or line department staff but rather to highlight the best practice *gap* in terms of quality assurance. It also represents a best practice gap in establishing the City as an attractive organization in terms of recruiting and retaining staff.

Value for Money

As discussed in *Volume 1*, the essential value-for-money theme is that "no single purchasing method suits all situations". In practical terms, this means that a government that relies almost exclusively on the formal competitive process (i.e. an open, publicly advertised, sealed bid competitive process) for all purchases over minimum thresholds will not be achieving value for money. Likewise, a government that relies almost exclusively on informal approaches such as soliciting three quotes from known, competent suppliers will not be demonstrating the values of fairness, equity, and openness.

The sense both internally and externally – and confirmed in the Auditor General's report – is that the City does not currently have a balanced approach in this regard and is not making effective value-for-money distinctions in procurement processes for purchases above the current $7,500 DPO level. While current City policies allow for the use of informal (e.g. three quote) processes above this level, by practice virtually all contracts above $7,500 are subject to a formal sealed-bid, competitive tendering approach, regardless of the size/complexity of the contract or its value to bidders.

The general view is that this emphasis on the formal process is costly for both the City and vendors, results in unnecessary delays, is inefficient for lower value contracts, and clearly out of step with many other organizations (both larger and

smaller). The interviews indicated a consensus that greater reliance on informal processes below a pre-determined threshold (comparable to other jurisdictions, e.g. in the range of $25,000) would result in improved efficiency and effectiveness and an enhanced capacity to focus resources on larger, more complex, and higher risk undertakings.

Single Point of Contact

As discussed in *Volume 1*, failure to manage communications effectively during the competitive process can pose both real and perceived risks to the integrity of the process. The best practice is to carefully and consistently manage interaction between vendors and the purchasing organization during the competitive process. At present, however, this best practice is undermined by the lack of application to all City officials.

While the Auditor General's report correctly points out that there is no formal policy in this area, the research shows that this is not unusual in many leading jurisdictions given that the practice is so well established in many cases that a formal policy would be viewed as unnecessary.

In operational terms, the long-standing general practice is that request documents put out by PMMD do include some form of single point of contact requirement. This can be either an individual in the PMMD or the line department, depending on who is leading the procurement, or on occasion a combination of the two (the PMMD person for inquiries about the process and the line person for more technical/specification related inquiries). For these kinds of competitions, PMMD is usually in a monitoring/compliance assurance role and the general view within the City that the current practice is respected at the staff level.

For purchases under the $7,500 DPO, departments have the flexibility to determine their own approach but have the same general understanding of the recommended best practice (although the requirement is somewhat less relevant below the DPO threshold given that competitive processes at that level tend to involve obtaining three quotes).

In light of the above, the Auditor General has recommended – and management has concurred – that a more formal policy should be developed and, as discussed in *Volume 1*, there are many examples of good policies from other jurisdictions that can be easily adapted for use in Toronto. One outstanding issue, however, that was not addressed in the Auditor General's report is the applicability of the policy to elected officials.

At present, there appears to be some confusion within the City in this regard. Some of those interviewed were clear that the current requirement in bid request documents (requiring vendors or their lobbyists/agents to deal only with the designated contact person) applied to both staff and elected officials. Others took the position that the requirement technically only applied to staff. In either case, the general consensus was that vendor/lobbyist contact with elected officials often took place while the competitive process was underway. There was also a general awareness that this is not consistent with best practices in place in many other jurisdictions.

Complaints Handling

As discussed in *Volume 1*, clear, transparent policies with respect to reviewing complaints from bidders is emphasized in the literature, practices in other jurisdictions, and expert opinion as an important best practice in terms of mitigating and managing risk. At its core, a formal complaints process is meant to be an additional physical embodiment of fairness, equity, and transparency as

well as a further check on value-for-money decision-making. Consistent with these principles, a well-developed complaints procedure is generally seen as something that bidders should have a right to expect.

At present, the City does not have what would be considered a best practices approach in this area, i.e. an established, well-developed and transparent complaints handling policy and set of procedures that safeguards the integrity of the process.

In the absence of this kind of managed approach, the result can only be described in professional procurement policy terms as something of a "free-for-all", particularly at the political level, including the following as not-uncommon occurrences:

- Vendors or their lobbyists/agents are not prohibited from voicing complaints to Councillors at any stage in the process (notwithstanding "single point of contact" requirements stated in the request document).
- Councillors can choose to contact staff directly, champion the bidder's complaint in public at a Council meeting, or make a deputation on the complainant's behalf to the appropriate Standing Committee at the time the contract award is being considered.
- Unhappy bidders and/or their lobbyists/agents can make their own deputation to the appropriate Standing Committee when that Committee meets to review the staff award recommendation. In response, the winning bidder can also make a deputation at the same time, sometimes resulting in debates between and among competing vendors and lobbyists.

Lobbying

Lobbying of Toronto Council members emerges from the research as an ongoing concern in terms of the real and perceived integrity of the procurement process. As noted in the Toronto Computer Leasing Inquiry Research Paper *Lobbyist Registration Volume 3 – City of Toronto & Options/Approaches for Discussion*:

> *"Lobbying has been generally pervasive at the City of Toronto in the wake of amalgamation and given the existence of larger economic opportunities for outside interests. Lobbyists have been and continue to be a familiar presence at City Hall and in particular on the second floor where Councillors' offices are located – a phenomenon known apparently in City circles as 'working the second floor'."*

This message was strongly reinforced during the research for this report (*Procurement Volume 2*). The following are key highlights:

- Procurement-related lobbying of Councillors is often very intense, particularly for larger business opportunities. In general, Toronto City Councillors are seen as much more accessible and responsive to lobbyists than many other municipalities or other levels of government, often reflecting the prevailing approach in their respective former municipalities. As reported, this results in a form of *self-fulfilling prophecy* phenomenon within the private sector i.e. if the competition is doing it, you need to do it as well.

- For the most part, there are no restrictions on how and when a Councillor can be lobbied on a procurement related matter and as a result lobbying – and often very intensive lobbying – takes place at all stages of the procurement process, including:
    - After a request document has been released.

- Once the bid receipt deadline has passed.
- During the evaluation process.
- During the period in which staff are formulating award recommendations.
- During the process when staff are presenting their recommendations to Council.
- During the period after an award has been made.

- Professional lobbyists at the City are often not the “unseen backroom strategists” that one typically finds at in Canada, particular at more senior levels of government (see Toronto Computer Leasing Inquiry research paper *Lobbyist Registration Volume 1: Comparative Overview*). Rather they have a level of prominence and visibility that, as reported in external interviews, would be viewed as offensive or even unthinkable in many other municipalities or at other levels of government, e.g. provincial/federal level.

- In terms of defining their services, lobbyists active at the City of Toronto are seen in the private sector as being more interventionist with elected officials than the same lobbyists would be at the provincial or federal level. As reported, this includes:
  - A much higher incidence of direct advocacy with elected officials and staff on behalf of their clients than is generally the case at the provincial or federal level including providing elected officials with briefing material designed to counter staff contract award recommendations.
  - A highly visible presence at Council meetings and Standing Committee meetings.

- Making deputations on behalf of clients – particularly unsuccessful clients – to Standing Committees, including debates between lobbyists before the Committee.

- In the past, when restrictions on lobbying have been agreed to on a one-off basis for a particularly high profile procurement, the general perception is that the rules were ignored by many lobbyists and some Councillors as well and that there were no consequences for this lack of compliance.

- The general view among procurement experts was that elected officials who advocate for this kind of unrestricted approach to lobbying typically use the same public rationale – to paraphrase the Mayor of Almeda California (p.60 in *Procurement Volume 1*):
  - That as elected officials, they need to be accessible to anyone who wants to talk to them and that just because they are listening, does not mean that their judgement is inappropriately affected.

- According to experts, the thinking behind this rationale often reflects one or more of the following:
  - This kind of unrestricted lobbying can have a powerful appeal to some elected officials – the chance to be seen to exercise power, hospitality opportunities, fundraising opportunities, etc. – and attempts to restrict it are often resisted for these reasons.
  - Some elected officials interpret the concepts of *transparency* and *democracy* to mean access at any time to elected officials and the right of elected officials to intervene at anytime on behalf of their constituents, rather than their role to provide a policy-driven process that ensures a level playing field for all vendors.
  - Some elected officials may simply and legitimately not have a good understanding of the more structured, professional, and policy-

oriented ways in which they can ensure fairness, equity, and transparency for all bidders (as opposed to just those with lobbyists) without jeopardizing the real or perceived integrity of the process.

Other Political Involvement in the Process

Beyond the specific issues discussed above with respect to single point of contact, complaints handling, and lobbying, there is a general internal and external sense that there has not been a uniform or consistent understanding of the role of elected officials in the procurement process at the City of Toronto, particularly as it relates to demonstrating and safeguarding the integrity of the process. The following are other past examples:

- Individual requests for copies of bid request documents before they have been made public.
- Calls to administrative staff on behalf of a bidder while the procurement process was underway urging that a late bid be accepted.
- Standing Committees intervening to "re-award" contracts to unsuccessful bidders (although these attempts are generally overturned by Council given the obvious legal implications).

On-Line Processes

Toronto's continued reliance on distributing paper versions of request documents is seen as increasingly out of date and, even though a fee is charged for this service, administratively unnecessary. Many of those interviewed noted that other Canadian and U.S. jurisdictions – municipalities, provinces/states, and federal governments – have already moved in this direction, often at the request

of vendors, including small businesses. Approaches include either managing the service directly through their own website or through third party electronic tendering services. Although some jurisdictions also provide paper copies of documents by request, many took the position at the outset that it was reasonable in the present day to expect that even small vendors wishing to respond to request documents should have the capacity to access request documents or other information on line.

PMMD Resourcing/Staff Turnover

There is a general awareness that PMMD has significant resourcing and staff turnover/morale issues. The resources issue is in part related to reductions in staffing levels that have taken place since amalgamation. As a result, the Division appears to some interviewees as being left with a more "bare bones" focus on transactions, as opposed to value-added services.

With respect to turnover, an additional consideration appears to be workload and morale. The currently highly centralized model in place in the City, in conjunction with resourcing levels, has resulted in heavy workload demands, long hours, and a consistently low level of customer satisfaction within line departments. As reported, the situation is exacerbated by what are perceived as negative or unhelpful attitudes/activities of Council itself, including:

- The tendency for some members of Council to be highly critical in public of the professionalism and integrity of procurement officials as a *first response* rather than to deal more directly with the CAO or CFO with respect to performance concerns.
- External to the City, Toronto Councillors in general are viewed as being more inappropriately interventionist in procurement related activities relative to many other municipalities or other levels of government.

As suggested at various points during the interview process, the above factors combine to give the City of Toronto a recognized negative reputation in the larger community of public sector procurement professionals as a less attractive place to work.

Part 5

Options and Approaches for Discussion

This section focuses on options and approaches that would strengthen current procurement policies and practices at the City of Toronto. As noted elsewhere, the Auditor General's review resulted in a comprehensive set of detailed recommendations. For the most part, these appear to have been viewed within the City as reasonable and valid recommendations that have been accepted and are being acted upon.

With a few exceptions (as discussed below) the Auditor General's recommendations are supported and reinforced by the results of this study. The challenge in this case has been one of adding value to, rather than duplicating/simply repeating the very comprehensive recommendations of the Auditor General.

As presented, the options and approaches discussed below (for example, with respect to clarity in roles and responsibilities, value for money, etc.) are intended to reinforce and/or propose additional dimensions to key Auditor General recommendations. In other cases (for example, dealing with the role of Councillors in the procurement process, transparency, risk management, and delegation), they could be used to supplement the Auditor General's recommendations.

Options are approaches for discussion are identified in the following areas:

- Values-based procurement
- A more decentralized accountability.
- Roles and responsibilities.

- Value for money.
- Training and development.
- More robust policy supports.
- Risk management.
- Official contact point during the competitive process.
- Complaints handling.
- Delegation.
- Standing Committee award decision-making.
- Fairness commissioners.
- Best and final offer.
- Transparency.
- On-line bid request documents.

Values-Based Procurement

As an option, the City's overall approach to procurement could be modified to include a more active and robust approach to embedding procurement ethics in the organization's operating culture (i.e. consistent with the discussion under "Continuing to Build an Ethical Organization" in TCLI Research Paper *Conflict of Interest Volume 2*). This would involve the following types of activities:

- Inclusion of procurement ethics as part of the proposed citywide ethics management program discussed on page 37 of *Conflict of Interest Volume 2*.
- Identifying ongoing opportunities for City senior executives to emphasize and demonstrate the values for staff.

- The development of meaningful descriptions of how the values are to be used by staff in all departments as a form of "living document" that provides practical guidance.
- Consistent, centrally mandated training standards for all staff (PMMD and line departments) involved in the procurement function related to values/ethics and ongoing ethics training and development in support of these standards.
- Training in procurement ethics for elected officials.
- Examples of real-life case studies that demonstrate the values in action and opportunities to discuss and learn from these case studies as a part of ongoing professional development.
- Inclusion of procurement issues in the previously discussed regular meetings between Council and senior administrative officials to discuss ethics and code of conduct issues, including the use of case studies (see discussion on page 39 of *Conflict of Interest Volume 2*).

A More Decentralized Accountability

The Auditor General's report found that there is no single best practice with respect to organization of the procurement function and that no changes should be made to the current structure until roles and responsibilities have been more thoroughly clarified. This finding is certainly true across a wide range of different organizations. However, on the issue of the appropriate balance between centralized and decentralized accountability in purchasing, the research conducted for this report suggests that there is a pattern for larger government organizations. This typically involves a greater degree of decentralization and responsibility/accountability in line departments than currently exists in the City of Toronto.

In these other jurisdictions, it is generally clear that this greater decentralization of authority relates to both managing the competitive process and making awards within the context of clearly articulated corporate policy and process expectations.

It is clear that the current level of centralization at the City made particular sense in the immediate post-amalgamation period when compliance with the new City's procurement policies and the need to maximize the use of blanket contracts, vendors or record, etc. were paramount considerations. It is not as clear, however, that this is the best approach for a more mature purchasing function in an organization of the size and complexity of the City of Toronto and one that otherwise places a high value on the accountability of line departments for making effective decisions within corporate policies.

With this in mind, consideration could be given to including, as part of the review of the procurement function currently underway through the CFO's office:

- The establishment of a more decentralized procurement function. This would involve giving line departments the authority and, as importantly, the accountability for managing their own procurement requirements under a specific dollar-value threshold, with PMMD more clearly positioned in an enhanced overall oversight/controllership role.
- The start of this review need not wait until roles and responsibilities under the current configuration are clarified (as had been recommended by the Auditor General).
- Accommodation for the fact that not all departments have procurement volumes sufficient to warrant the decentralized approach and may wish to continue to utilize PMMD for their requirements. In these cases, service level agreements should be established.

- The delegation of authority and accountability to individual departments be made on a department-by-department basis involving a form of quality assurance certification by PMMD and supported by:
    - Clear standards for competencies, skills, experience, training, and development for staff in line departments established and monitored by PMMD and with centralized training and professional development provided by PMMD.
    - Consistent expectations for data entry, monitoring, tracking, and reporting.
    - The availability of much more extensive, user-friendly and operationally relevant materials (handbooks, checklists, etc.) that define and describe required processes and recommended best practices, again as part of the oversight role of PMMD.
- As a condition of receiving this decentralized responsibility and accountability, the procurement staff in a line department would:
    - Have a dual accountability relationship – for administrative and management purposes to the line department and for professional competence and adherence to corporately-established policies, procedures, guidelines, best practices, etc. to the Director of PMMD (including joint line-PMMD responsibility for performance management).
    - Be required to meet training and competency standards established by PMMD.
- The dollar value threshold for procurements managed within line departments should be established commensurate with risk, i.e. extensiveness of training, whether external fairness commissioner or internal quality assurance advisors are utilized consistently, etc. For a fully capable line department, a maximum threshold of $100,000 would not be unreasonable.

Roles and Responsibilities

Both the Auditor's study and this review identified the lack of internal clarity with respect to roles and responsibilities as a major issue for the City. As such, the Auditor General's recommendation in this area is strongly supported, particularly in light of the organizational structure changes and overarching quality assurance/controllership role for PMMD proposed above.

In developing these clear responsibilities and accountabilities, it is suggested that the City could draw on numerous examples from other jurisdictions in terms of not only how these should be aligned, but also how to communicate these effectively to staff.

Value for Money

As discussed in this report, as well as in the Auditor General's review, the City's current approach of requiring a competitive sealed bid process for virtually all projects above the $7,500 DPO level is not consistent with best practices in other jurisdictions and is not maximizing efficiency, effectiveness, and value for money.

Consistent with the direction in the Auditor General's report, the City should consider establishing a threshold, (for example, $25,000) above which a sealed competitive bid process with public opening of responses would be the norm. Below that level, City staff would primarily use the informal competitive process, emphasizing where possible pre-qualified bidders, with bids to be received and awarded by staff, i.e. this approach would not require the public opening of bids.

In the more decentralized organization discussed earlier, this would mean that procurement staff in line departments would manage these under-$25,000 informal competitive processes.

Training and Development

Consistent with the best practice in leading jurisdictions, the City could consider adopting a broader and more comprehensive approach than that initially recommended by the Auditor General, i.e. one that would emphasis the professional development of the procurement function across all City departments, including that:

- Skills, experience, and competency levels be identified for positions that have substantive involvement in the procurement process.
- Training and certification standards be put in place for each of these positions that recognizes and makes appropriate distinctions in terms of complexity/their importance to the procurement process.
- Individuals currently in these positions be assessed and appropriate training/certification plans put in place.
- Individuals in key positions have paid membership in one or more professional associations with the expectation that this membership will be used to further enhance their professional development.
- PMMD, in consultation with line departments and corporate Human Resources, be responsible for standard setting and quality control with respect to the professional development of staff that have substantive involvement in the procurement process in all departments.

An additional concern and approach for discussion in this area relates to opportunities for career path development and staff recruitment/retention. These

issues were identified in the interview process and in the Auditor General's report.

The specific concern is that procurement is increasingly considered a professional discipline in the public service and individuals in this area often want to plan their careers within this discipline. However, opportunities for professional development and advancement can be limited within individual organizations with obvious implications for staff retention/turnover.

Many public sector organizations have recognized the benefits of what are, in effect, "twinning" agreements with other organizations. The purpose of these agreements would be to allow staff in the participating organizations the opportunity to move between and among the organizations (i.e. in the form of secondments) as part of their career path and ongoing professional development. The benefits of this approach include:

- Staff access to career and professional development opportunities that would not otherwise be available.
- Higher levels of job/career satisfaction among staff and higher retention rates.
- Positioning Toronto as a more attractive workplace for procurement professionals, resulting in an improved capacity to fill vacancies/attract qualified new people.
- Cross-fertilization of ideas and professional experiences between and among participating organizations.

With this in mind, one approach worthy of consideration would be for the City to establish formal agreements as described above with other large public sector organizations – the Province of Ontario and Public Works and Government Services Canada (PWGSC) would be two obvious potential candidates.

More Robust Policy Supports

As described in *Procurement Volume 1*, leading jurisdictions invest considerable time and resources in ensuring that their core procurement policies (statute, bylaw, code, ordinance, etc.) are supported by an extensive and robust array of supplementary materials. As discussed elsewhere, in addition to the traditional bylaw and policy manual, these materials include guidebooks on specific aspects of the procurement process, process flowcharts, frequently asked questions, case studies, collections of best practices, checklists, templates, etc. Also as noted, in leading jurisdictions these materials are broadly accessible to staff, vendors, and the public through the internet. Based on examples viewed as part of this study, individual topics can include:

- A general overview of the procurement process.
- The basics of procurement planning.
- Writing specifications.
- Conducting evaluations.
- Managing risk.
- The Complaints Process.
- Vendor Debriefings.
- Understanding Value for Money.
- Why Projects Fail.
- Skills Development.
- A guide to small purchases.
- Process integrity.
- Risk management checklist.

The benefits of this approach include:

- A demonstrated commitment to openness/transparency and professionalism.
- A higher level of understanding and awareness of requirements by staff and the vendor community.
- Higher levels of compliance/fewer incidences of errors with respect to policy and procedures, as well as a greater utilization of best practices.

As per the above practices in other jurisdictions, PMMD could be directed to develop and implement a comprehensive and robust set of policy supports as described above (drawing on/adapting to the extent possible high quality materials already developed and available from other jurisdictions). These materials would ideally be available via the internet to all City staff and, as per the discussion of Transparency presented later on in this section, to the public/vendors.

Risk Management

As discussed in *Volume 1*, risk management methodologies and tools emerge from the research as a useful best practice in managing the procurement function. Consideration could be given to basing the City's procurement practices more formally on a risk management approach that would provide guidance to staff in PMMD and line departments. This would include the development (or adoption/modification from another jurisdiction) of risk management frameworks tailored to the needs of procurement specialists. As a best practice approach, these would be supplemented by project risk management guidelines, risk management checklists and other similar tools, as well as the identification of risk management as a competency required for procurement professionals and a focus of ongoing training.

Official Contact Point during the Competitive Process

As discussed in *Volume 1*, failure to manage communications effectively during the competitive process can pose both real and perceived risks to the integrity of the process. The best practice is to carefully and consistently manage interaction between vendors and the purchasing organization during the

competitive process. At present, however, this best practice is undermined by the lack of application to all City officials.

An approach in this area would be for the City of Toronto to commit itself to the highest standards of integrity with respect to managing communications between vendors and City officials during the competitive process, including that:

- The current practice of official contact persons during the competitive process be reinforced in the existing bylaw and related policies (recognizing that in some cases, there may be more than one official point of contact, i.e. a purchasing professional with respect to the process and the program official to respond to technical issues).
- This policy be clear that the competitive process includes all stages in the decision-making process up until such time as an award decision has been reached and announced.
- It be made clear that the policy of an official contact person for dealing with vendors applies to vendor contact with Councillors as well as administrative staff.
- It be made clear in the bylaw and accompanying policies/operational guidance materials that vendors (or their lobbyists or agents) who violate this policy will be disqualified.
- For repeated breaches of this policy, vendors be prohibited from bidding on City business for a defined period.
- Decisions with respect to vendor disqualification/prohibition be made by the CFO, with appropriate warnings and notification to the vendor as well as documentation of the reasons for the decision.
- Appeals of the CFO's decisions be submitted in writing to a panel of officials from the Auditor General's Office (as a body whose independence and integrity would be beyond question).

- City officials (including Councillors and administrative staff) be required to report material breaches of the official point of contact policy by lobbyists to the proposed City Integrity Commissioner who, upon verification, would be required to remove the individuals from the Registry.
- Compliance with this policy be referenced in the Code of Conduct for Elected Officials and in the proposed Code of Conduct for Employees (see the discussion of options and approaches in Toronto Computer Leasing Inquiry Research Paper *Conflict of Interest Volume 2*).

Complaints Handing Procedure

Currently, the City does not have a best practice approach to handling vendor complaints that ensures fairness and equity for all participants in the process and is an outward demonstration of the integrity of the process. As with the previous discussion dealing with an official point of contact during the process, the City of Toronto could consider committing itself to the highest demonstrated standards of integrity with respect to dealing with vendor complaints including:

- Clarifying in policy the expectation that all vendors are entitled to a formal debriefing from staff that provides them with feedback on why their bid was not successful.
- The development of a standard protocol/set of guidelines that staff would be expected to follow when conducting debriefings.
- The development of a formal two-stage process to manage vendor complaints about the procurement process to replace the current standing committee/deputation approach, including that:
    - All vendor complaints to elected officials and administrative staff would be referred as a matter of course to the official complaints process.

- Vendors would be required to request and participate in a formal debriefing as precondition of being able to launch a complaint.
- Complaints would be put in writing using a template to be provided and within a reasonable timeframe.
- Complaints would be adjudicated at the first level by a neutral panel of administrative staff that did not include the officials responsible for the procurement process.
- Complaints would be adjudicated at the second level by a panel of officials from the Auditor General's Office (as a body whose independence and integrity would be beyond question).
- The panel process would be conducted in a timely and expeditious manner. If the complaint was received before the contract was awarded, the contract award decision could be held until the complaint is resolved.
- Panel decisions and the reasons for those decisions (at both levels) would be communicated to the complainant in writing.
- The decision of the second panel would be considered final and not subject to further appeal within the City.
- The panel process would focus on the merits of the case and engage the complainant and other officials as the panels see fit but should not require/permit the involvement of individual Councillors or lobbyists appearing on behalf of a vendor.

This is not to suggest that individual Councillors may not have their own concerns about a particular procurement process (i.e. concerns that are unprompted by/unrelated to a particular a vendor). Again, however, there should be clear and consistent expectations with respect to how these complaints are to be processed. The approach, based on a consensus from the research and expert opinion is that:

- Councillor concerns should be brought forward in an environment of professionalism, respect, and trust between the elected and administrative levels of government.
- These concerns should be brought first to the attention of the appropriate and accountable senior administrative official e.g. the Director of PMMD or the Chief Financial Officer in the case of centrally managed procurements or senior line department officials in other cases.
- These senior staff should be given a reasonable opportunity to obtain any additional information that might be required, to review the situation, and to determine whether corrective action is required (either specific to an individual procurement or a more general change to policies and/or practices.)
- In the event that the individual Councillor and accountable senior departmental official cannot reach an agreement on the appropriate course of action, the matter should be referred to the CAO and Mayor for resolution.
- Council should encourage individual members who raise specific procurement concerns at Council meetings to first use the process described above.

Delegation

As noted in TCLI Research Paper *Municipal Governance Volume 2*, Toronto Council has generally been viewed as being particularly conservative in terms of decisions delegated to staff and in Council becoming directly involved in operational decision-making. One sees this characteristic in the current purchasing policies of the City, particularly with respect to the Bid Committee. As noted by the Auditor General:

"Currently, the Bid Committee meets on a weekly basis and has authority to award contracts up to $2.5 million, resulting from a request for quotations, proposals or tenders where the lowest bidder meeting specifications and requirements is being recommended for award. Accordingly, the Bid Committee can only award contracts where there is no discretion required."

In light of this, a central theme of the discussion of options and approaches in *Municipal Governance Volume 2* is "*ensuring that the City of Toronto's approach to delegation optimizes its effectiveness and efficiency and maximizes the benefits of having a large, professional and accountable bureaucracy*". It was noted in that paper that this involve more extensive delegation to staff within the following framework:

- *"That the philosophical (as opposed to strictly legal) starting point for delegation should be not which decisions and matters/activities can Council let go to other levels, but rather which of these are essential, either for legal reasons or reasons related to financial, strategic, or other essential areas of risk, for Council to retain."*
- *"That decisions, activities, or other matters to be delegated should be delegated to the lowest possible level in the organization, commensurate with risk. This would mean that where Council has the option of delegating an administrative matter either to a Committee or to administrative staff, in general delegation should go to staff, unless there is a compelling reason not to do so."*

It was also suggested that consideration be given to the CAO and Council instituting and placing *"greater emphasis on robust and risk-based reporting/accountability mechanisms so that Council can be assured that decisions and actions delegated to staff are executed in a manner that is consistent with Council direction as set out in policy and strategic directions.*"

With respect to procurement, the various options and approaches identified in this report, as well as those made by the Auditor General should provide Council with the assurance it would need in order to agree to more delegation of decision-making to staff, including:

- The existence of the Bid Committee as a vehicle for senior administrative officials to exercise direct accountability.
- A clearer, organization-wide quality assurance/controllership role for PMMD.
- More robust and consistent policy support to all staff (handbooks, guidelines, best practice, case studies, checklists, etc.) and greater public transparency with respect to those expectations.
- Enhanced and more consistent training and professional development standards for all staff.
- A best-in-class and fully transparent complaint handling process.
- Standard use of independent external fairness commissioners.

In light of this greater assurance, and in recognition of the City's status as one of the larger governments in Canada/North America, as well as the high standard of professionalism of its current senior management team, consideration could be given to:

- Council considering a more extensive and streamlined delegation of authority for procurement decision-making to the senior administrative staff through the Bid Committee.
- Consistent with best practices in governance, the CAO providing the Council with regular reports that would be designed to satisfy Council with respect to policy and procedural compliance and the exercise of good judgement on the part of the Bid Committee.

The revised delegation could include, at a minimum, the following:

- Contract awards above the CAO signing authority of $500,000 and up to $5 million (initially, with the intention that once Council is confident in this approach, a higher limit be set) to be made by the Bid Committee (instead of the current $2.5 million).
- This authority would apply to goods and services as well as consulting contracts, where the item is already a part of the approved budget and where the Bid Committee is satisfied that appropriate policies and processes were followed. (Contracts in excess of approved budgets would continue to require Council approval.)
- Authority/discretion for the Bid Committee to award contracts to other than the lowest bidder if:
    - Such an award is contemplated in the request document, i.e. a request for proposals that incorporates a price/value trade-off, as opposed to lowest-price, commodity based tenders.
    - The Bid Committee has legitimate and documented concerns about the capacity of the lowest bid to meet specifications/provide appropriate value-for-money. (The Bid Committee should be required to report annually to Council summarizing the situations in which these types of decisions were made.)
    - The requirement that contracts valued at over the Bid Committee's upper limit (initially $5 million) would be approved by Council.

Standing Committee Award Decision-Making

Note: the options and approaches discussed in the immediately preceding section on Delegation *would eliminate the need for Standing Committees to*

review contract awards. As such, the following discussion of Standing Committee involvement in the process should be viewed as an interim *approach.*

As noted earlier in this report, Standing Committees are often the subject of intensive lobbying when considering staff recommendations for contact awards. This includes lobbying by vendors, their paid lobbyists, and Councillors on behalf of individual proponents. As discussed in this report and in *Volume 1*, this kind of activity presents a perceived (and, on occasion, real) threat to the integrity of the procurement process.

Options discussed elsewhere in this section dealing with vendor debriefings and complaints handling are intended to address these matters to a significant extent. However, they do not deal specifically with the issue of lobbying of Standing Committees when those committees are considering staff award recommendations.

As noted in the Auditor General's report, Standing Committees at this stage should be focusing on demonstrating that "*due diligence was followed in the overall process, relative to the financial risk and complexity of the contract, as well as include all critical terms and conditions*". With this in mind, the following options should be considered:

- The primary focus of contract award discussions at Standing Committees should be between the Committee members and the staff making the recommendations with the focus being on due diligence as per the Auditor General's report.
- As part of ensuring fairness and equity, deputations from unsuccessful (or successful) vendors, their lobbyists/agents, and individual Councillors should not be permitted. Rather, complaints about the process should be directed through the official complaints procedure.

- It be clearly communicated to all vendors and their lobbyists/agents, that the prohibition on lobbying City officials during the competitive process includes all stages in the decision-making process, up to and including Standing Committee/Council consideration of staff contract award recommendations. Vendor concerns about a staff contact award recommendation should be directed to the formal complaints process.

Fairness Commissioners

The Auditor General's report notes that "*for complex, high risk/cost or high profile projects, the engagement of a fairness commissioner, on an as required basis, may provide additional assurance to senior management and Council that the process followed was open, impartial, transparent, and proper.*" The report recommended that a report on the costs and benefits of using fairness commissioners should be submitted to the Administration Committee. Management's response was that the issue would be studied and would require consultation with Councillors.

As discussed in *Procurement Volume 1*, the research, expert opinion, and practices from other jurisdictions strongly supports the use of fairness commissioners as part of demonstrating the integrity of the process not only to senior management and to elected officials, but also – and perhaps more importantly – to the vendor community. In addition, the City's current approach to procurement already countenances the use of external experts (albeit more technically oriented) "*to reflect the complexity and dollar value of the assignment.*" As such, the central issue should not be one of "whether" but rather "how and when".

With respect to larger, more complex procurements, the City could consider:

- Adopting a policy of requiring external independent fairness commissioners as a standard quality assurance feature of larger, more complex procurements.
- Providing for broad latitude in terms of the kind of roles and functions that fairness commissioners could provide (see *Procurement Volume 1, Appendix C*, page 109 for a comprehensive description of potential roles.)
- Being clear with respect to the general parametres (the "how" and "when") under which a fairness commissioner should be used (i.e. what constitutes a larger, more complex procurement).
- Within these parametres, delegating decision-making on the use of fairness commissioners in individual procurement processes to the CFO in consultation with the line department. This would include discretion to define the specific range of services in any given situation and discretion to use external fairness commissioners in situations other than larger, more complex procurements.
- Providing in that policy for the independence of fairness commissioners by establishing their accountability directly to the CFO.
- Requiring an annual report to Council that summarize the use of fairness commissioners, consistent with the policy approved by Council, general classes of issues that may have been raised by fairness commissioners, and actions that were taken to address the issues/prevent their reoccurrence.

Best and Final Offer

As discussed in *Procurement Volume 1*, the Best and Final Offer (BAFO) is essentially a two-stage procurement process, with the focus of the second stage being on either the top evaluated bidder or a short list of the top bidders. It provides an opportunity for short-listed suppliers to improve the quality of their

proposals in specific identified areas, including cost and quality. As reported, BAFO is well established and used extensively in the U.S. at the federal and state level as well as in many municipalities for both large and small/simple and complex procurements. To date, the methodology has not been used extensively in Canada.

From the research, it is apparent that this method, while unconventional in the Canadian context, has significant benefits in terms of overcoming the inherent rigidity of traditional *one shot* procurement processes. Therefore, an approach would be to pilot this model at the City of Toronto including the following:

- For the purposes of the pilot, a set of existing BAFO policies and procedures be adapted from another jurisdiction and approved by Council.
- That the model be tested on a range of different procurements, including small, medium, and larger sizes.
- That a report on the results of the pilot tests be prepared including a staff recommendation whether to adopt BAFO on a more permanent basis.

Transparency

Currently the City does not make all of its procurement related policies and supporting documents/materials available to the public, but rather only a sub-set of those documents that are viewed as being necessary for bidders to respond to request documents. From the research, it was apparent that best practice jurisdictions are committed to transparency with respect to all procurement polices and procedures. This translates into full disclosure – typically on-line – of not only legislation and formal procedural manuals, but also of supplementary materials including staff guidebooks, protocols, analytical tools, risk management tools, checklists, tip sheets, etc. This level of disclosure is viewed as having several important benefits:

- It demonstrates that the jurisdiction is committed to openness and transparency and that there are no *secret* policies or guidelines.
- It ensures that all suppliers have equal access to and understanding of City policies and procurement practices.
- It provides for a level of rigour and accountability within a jurisdiction that might not be the case otherwise.

Accordingly, the City could consider making all of its procurement related materials publicly available on its website, including policies, procedures, manuals, guidebooks, checklists, etc.

On-Line Bid Request Documents

Following on the above discussion of transparency and the use of the internet, a related issue is the use of the internet to issue bid release documents. Given the focus of this study on key risk areas, the use of on-line processes (as a means of enhancing efficiency and effectiveness as opposed to mitigating risk) did not receive extensive attention in terms of best practices.

As noted in Part 4 and as remarked by the Auditor General, the City's practice of mailing out release documents is increasingly out of date relative to other municipalities and other levels of government. Many of those jurisdictions contacted as part of this study were actually quite surprised that a jurisdiction of Toronto's size would not have already implemented an on-line/electronic process. It was further suggested that vendors themselves were usually the biggest proponents in those jurisdictions of an on-line system.

From the interviews, as discussed in the Auditor General's report, and as evidenced in management's response, there has been a historical reluctance at the City to move in this area, notwithstanding the preponderance of evidence in

its favour from other jurisdictions. The most commonly expressed concerns appear to be that small bidders do not always have access to the internet and would be disadvantaged or that the use of a third party tendering service would add additional cost, again particularly for small vendors.

To a large extent, the options and approaches discussed in this report dealing with value-for-money and the more extensive use of a three-quote approach for purchases up to $25,000 should address much of this concern. Above that level, it would appear that very many other jurisdictions have already dealt successfully with these issues from two perspectives:

That given the role/prevalence of technology in society, it is not unreasonable to expect any organization, regardless of size, that wants to do business with government to have access to the internet.

That the fees/costs associated with vendors having to download bid request documents from third-party services are relatively modest and a reasonable cost of doing business with government.

Appendix A

Process Flow Chart from the MMAH "Guide to Developing Procurement Bylaws"

Appendix B

Types of Procurements – MMAH Guide

Appendix C

Auditor General's Report – Executive Summary

Appendix D

Management Response to the Audit

A Process to Developing Your Procurement Bylaw

STAGES	SUGGESTED ACTIONS
1. Familiarize yourself with section 271 requirements of the *Municipal Act, 2001*	Review Chapter 1 of the guide
2. Review the guide to obtain advice on ways of meeting the requirements	Review the guide
3. Collect and review your municipality's/local board's bylaws, policies, procedures and practices	Determine which subjects from (a) to (h) listed in Section 271 (1) are addressed in existing documents
4. Formulate goals for your procurement processes	i) Review suggested goals and performance measures in guide (Chapter 3) ii) Review goals of comparable municipalities iii) Consult stakeholders
5. Formulate policies on types of procurement processes that will be used and refine the goals for each and the circumstances for their use	i) Review advice in guide on this matter (Chapter 4) ii) Review results of stages 3 & 4 iii) Determine the parts of the by-laws, policies, procedures, practices that have not worked or presented problems iv) Determine what revisions to existing policies are required and what new policies are required to formulate this part of the by-law/resolution
6. Formulate policies on maintaining integrity and protecting stakeholders' interests in procurement process	i) Review advice in guide on this matter (Chapter 5) ii) Review results of stages 3 & 4 iii) Determine the parts of the by-laws, policies, procedures, practices that have not worked or presented problems iv) Determine what revisions to existing policies are required and what new policies are required to formulate this part of the by-law/resolution vs. procedural manual
7. Formulate policies about reviewing and evaluating the effectiveness of the procurement processes	i) Review advice in guide on this matter (Chapter 6) ii) Review results of stages 3 & 4 iii) Determine the parts of the by-laws, policies, procedures, practices that have not worked or presented problems iv) Determine what revisions to existing policies are required and what new policies are required to formulate this part of the by-law/resolution

Table 1. Goals of Procurement Processes

Item	Competitive Process Seeking Multiple Bids or Proposals				Non-Competitive Procurement
	Request for Proposal	**Request for Tender**	**Request for Quotation**	**Informal, Low Value Procurement**	
Key goals	To implement an effective, objective, fair, open, transparent, accountable and efficient process for obtaining unique proposals designed to meet broad outcomes to a complex problem or need for which there is no clear or single solution. To select the proposal that earns the highest score and meets the requirements specified in the competition, based on qualitative, technical and pricing considerations.	To implement an effective, objective, fair, open, transparent, accountable and efficient process for obtaining competitive bids based on precisely defined requirements for which a clear or single solution exists. To accept the lowest bid meeting the requirements specified in the competition.	Same as for Request for Tender, except that bid solicitation is done primarily on an invitational basis from a pre-determined bidders list but may be supplemented with public advertising of the procurement opportunity.	To obtain competitive pricing for a one-time procurement in an expeditious and cost effective manner through phone, fax, e-mail, other similar communication method, vendor advertisements or vendor catalogues.	To allow for procurement in an efficient and timely manner without seeking competitive pricing. To provide for exceptions to the procurement requirements of interprovincial trade agreements. To also provide for any additional exceptions stipulated in the municipality's or local board's purchasing bylaw/resolution or policies, providing that they are not in contravention of the interprovincial trade agreements.

Table 2. Descriptive Features of Procurement Processes

Item	Competitive Process Seeking Multiple Bids or Proposals				Non-Competitive Procurement
	Request for Proposal	**Request for Tender**	**Request for Quotation**	**Informal, Low Value Procurement**	
Sealed bids or sealed proposals required	Always			Not Applicable	
Issue a Request for Information or a Request for Expressions of Interest/Pre-qualification prior to or in conjunction with a call for bids or proposals	Moderate to High Likelihood	Low to Moderate Likelihood		Not Applicable (needs statement may still be required)	
Call for bids or proposals advertised	Done in accordance with requirements of interprovincial trade agreements when estimated procurement value is $100,000 or more; otherwise, done sometimes.	Always	Same as for Request for Proposal	Not Applicable	
Formal process used to pre-qualify bidders/ proponents (i.e. Request for Pre-qualification)	Moderate to High Likelihood		Low Likelihood	Not Applicable	
Seek bids or proposals from known bidders/ proponents (Bidders List)	Always	Low to Moderate Likelihood	Always	Moderate to High Likelihood	

Table 2. Descriptive Features of Procurement Processes (Cont'd)

Item	Competitive Process Seeking Multiple Bids or Proposals				Non-Competitive Procurement
	Request for Proposal	**Request for Tender**	**Request for Quotation**	**Informal, Low Value Procurement**	
Two-envelope[1] or similar multi-stage approach used	Moderate to High Likelihood	Not Applicable			
Bids or proposals opened and announced at a public meeting (excluding proprietary information)	Low to Moderate Likelihood	Always	Moderate to High Likelihood	Not Applicable	
Type of agreement with supplier	Purchase order, legally executed agreement, or blanket contract (standing agreement/offer).			Purchase by cash, purchase order, or credit card.	Cash, purchase order, credit card, legally executed agreement, or blanket contract (standing agreement/offer).
May include In-house bidding in addition to external bidding	Yes			Not applicable	

[1] In the two-envelope approach, qualitative and technical information is evaluated first and pricing information in a separate envelope is evaluated thereafter only if the qualitative and technical information meet a minimum score requirement predetermined by the municipality/local board. For more details, see Appendix 5.

Table 3. Circumstances for Use of Procurement Processes

Item	Competitive Process Seeking Multiple Bids or Proposals				Non-Competitive Procurement
	Request for Proposal	**Request for Tender**	**Request for Quotation**	**Informal, Low Value Procurement**	
Dollar value of procurement	Low to High Value	Medium to High Value	Low to Medium Value	Low Value	Any value, subject to proper authorization and to requirements of the interprovincial trade agreements
Purchaser has a clear or single solution in mind and precisely defines technical requirements for evaluating bids or proposals	Rarely	Always			
In evaluating bids/proposals from qualified bidders, price is the primary factor and is not negotiated	Low to Moderate Likelihood	Always			Not Applicable

EXECUTIVE SUMMARY

This report responds to Toronto City Council's request for a comprehensive review of purchasing processes within the City.

The objectives of the review were to assess the procurement function in the City to determine whether the various activities, processes and policies are fair, open, transparent, cost-effective and value added. The review looked at:

- the organizational structure of the Finance Department's Purchasing and Materials Management Division (Purchasing Division);

- the roles and responsibilities of the Purchasing Division and operating departments in the procurement process;

- the adequacy of the Purchasing and Financial Control by-laws;

- the integrity, efficiency and cost effectiveness of the procurement process; and

- administrative controls and management information.

In conducting this review, we held a number of focus groups sessions with staff from both operating departments and the Purchasing Division. This approach was important in terms of identifying issues and opportunities for improvement. In addition to consulting with staff, we also conducted surveys of procurement practices in other jurisdictions, researched and identified key success factors related to procurement activities, and reviewed documents and records as we deemed necessary.

It is important to note that this was not a review of the Purchasing Division alone, but rather a review of procurement activities in general. While the Purchasing Division plays an important role in purchasing goods and services in the City, it is not the only player in the overall procurement process. Departments also play a key role in the process, which stretches from identifying and planning requirements to the evaluation and award of contracts.

The City of Toronto operates a number of programs across the City that deliver a variety of services to the public. The diversity of services offered and the different operating needs of departments, makes the development of standard procurement policies and the delivery of effective procurement services a challenging task. It is therefore essential that the procurement by-laws and policies are supported by key values and principles that staff understand and can default to in those instances where professional judgement must be exercised. It is also important that appropriate controls are imposed on the overall process to enhance transparency, openness and accountability with respect to procurement decisions, particularly where the decisions fall outside the standard rules or are somewhat subjective in nature.

Over the last three to four years, management has established and City Council has adopted a number of policies and implemented various initiatives to strengthen procurement processes and better ensure that the City conducts its affairs in a fair, open and transparent manner. These policies and initiatives include:

- Code of Conduct policy for members of Council
- Conflict of Interest policy for City staff, as well as the distribution of this policy to City suppliers
- Lobbyist Disclosure Policy and voluntary lobbyist registry
- Fraud Policy, as well as a Fraud and Waste Hotline
- Information Technology Acquisition Process
- Policy for the Selection and Hiring of Professional and Consulting Services
- Purchasing Division's Web site, that provides purchasing related information and by-laws

In addition to the above, our review has identified other areas to further improve the City's procurement processes. These are discussed below.

For procurement processes to be effective there must be co-operation, as well as an understanding of and a commitment to the various components of the process on the part of both the Purchasing Division and departmental staff.

Our review found a lack of clarity with respect to roles, responsibilities, and requirements that must be adhered to in the various procurement processes. This has contributed to unnecessary delays in the procurement of goods and services, frustration on the part of Purchasing and departmental staff, and an unproductive use of staff time. It also exposes the City to the risk that proper processes may not be followed consistently by all staff. There is therefore a need to clarify the respective roles and responsibilities of the Purchasing Division and departments, and assign clear accountability for each component in the procurement process. By-laws and policies must also be clear, simple, practical, easy-to-understand and communicated to all applicable staff. In this regard, certain parts of the City's purchasing and financial control by-laws require clarification or amendment. In addition, clear guidelines and procedures need to be developed to guide staff, and necessary training provided, to ensure staff understand the requirements for each type of procurement process.

The City's Purchasing Division has a difficult task of performing a dual function of service and control. The Division provides service and advice to departments, ensures due process is followed, and brings non-compliance matters to the attention of the respective departmental senior manager or department head. It is, however, the department heads' responsibility to

ensure procurement policies are understood and adhered to by their respective staff, and that checks and balances exist to prevent and detect non-compliance.
Our focus group sessions found that departments view the Purchasing Division staff as transaction oriented, and as enforcers instead of facilitators. Recent events involving certain City contracts have understandably heightened this behaviour on the part of the Division. The Purchasing Division has advised that because of the lack of clarity as to who is responsible for enforcing policies and by-laws, it has fallen on the Purchasing Division to ensure compliance and a result, its customer service role has suffered.

While process oversight is an essential component in the overall procurement process control framework, effectively servicing and facilitating the procurement needs of departments within a well-defined and clear policy/process framework is an equally important role for the Purchasing Division. The importance of departmental co-operation in this regard must also not be overlooked, as operating departments can facilitate and assist Purchasing in providing efficient customer service by properly planning and identifying the nature, specifications and timing of their goods and services needs.

The current commodity-based organization structure of the Purchasing Division was recommended by an outside consultant after amalgamation, and was approved by the Chief Administrative Officer and Executive Management Team at the time. Since that time, the City has evolved and harmonized many of its operations, and conditions and expectations have changed. It would therefore be appropriate to revisit the Purchasing Division's organizational structure to determine whether other models would be more effective in enhancing customer service and meeting the Division's mandate, taking into account the diverse operational needs and requirements of departments, and with the benefit of experience since amalgamation.

Since amalgamation, the Purchasing Division has experienced a high rate of staff turnover. This high turnover combined with difficulties in recruiting qualified purchasing professionals, has resulted in the Division losing significant procurement experience and expertise, which it has not been able to effectively replace. The Purchasing Division is working with the City's Human Resources Division to address this problem. However, in addition to retaining and recruiting qualified staff, the Purchasing Division must also ensure its current staff has the necessary knowledge and expertise to effectively enable the Division to carry out its customer service, advice and oversight responsibilities. In this regard, skills gaps should be identified and the necessary training provided.

The Purchasing Division's current processes are very labour and paper intensive. There are therefore opportunities to streamline some of the processes and improve customer service. The introduction of purchase cards to facilitate the purchase of low value items, while resulting in some additional work for the Purchasing Division to manage the program, would reduce the number of departmental purchase orders issued as well as related administrative and accounts payable requirements. Expanding the use of blanket contracts to meet both corporate and department specific needs, and establishing parameters and criteria to assist Purchasing staff in using less formal procurement processes, would also contribute to the more timely and efficient provision of goods and services to departments. In addition, making greater use of information

technology to enable suppliers to download call and request documents off the City's internet Web site, would help eliminate the current paper intensive processes.

The Purchasing Division currently operates nine stores across the City that supply various supplies and equipment to departments. The cost ($2.1 million) to operate these stores appears high in relation to the value of goods ($8.9 million) that flow through the stores to departments. In addition to the nine stores operated by the Purchasing Division, there are over 80 other locations, managed by City departments that also stock various materials and supplies. There is a need to review and rationalize the City stores operation, particularly if purchase cards are implemented and the use of blanket contracts is expanded. In this regard, we agree with staff's position that any rationalization review should also include the over 80 stores operated by departments. The Chief Financial Officer and Treasurer has been requested to report to the Administration Committee on the rationalization of City stores, and should include the stores operated by departments in the review.

Maintaining fair and transparent procurement processes are critical to protecting the integrity of and public confidence in the processes. Transparency means that City Committees and Council are provided accurate and complete information to allow for proper consideration of procurement transactions that they are expected to approve. Transparency also requires that each step in the procurement process is properly documented and retained such that it allows for and can withstand scrutiny by the public and other parties independent of the transaction or process. Clear guidelines for staff, supported by advice from Purchasing Division staff as appropriate, would help promote compliance with this important requirement. As a general rule, the greater the subjectivity in conducting an evaluation and making a decision, the more transparent the process must be and the more important conflict of interest and code of conduct become. As previously mentioned, the City has developed a number of policies to ensure the City conducts its affairs in a fair, ethical and transparent manner. However, there is a need to reinforce and formalize some current practices to ensure staff understand and apply the requirements consistently across the City.

The purchasing and financial control by-laws delegate certain authorities, within prescribed limits to staff, the bid committee and standing committees. Transparency with respect to decisions that Council has delegated to staff, could be enhanced by having the Purchasing Division report to Council annually on, among other things, single source purchases over $7,500 that did not go through a competitive process, single source purchases as a percentage of total purchases, and all instances where purchase orders have been issued after the fact.

The City is currently considering the appointment of an integrity commissioner to further enhance integrity in its processes and investigate complaints. In addition, the use of an external consultant (fairness commissioner), on an as-required basis, to shadow the bid process for certain large, high risk and/or complex request for proposals, quotations or tenders, could provide senior management and Council with an increased level of assurance on the fairness of the process. The cost and benefits of using outside expertise for this purpose, and the criteria for determining when this expertise should be engaged, should be explored further.

Finally, it is important that appropriate results based performance indicators be established to measure the performance of the Purchasing Division in carrying out its program objectives on an ongoing basis, as well as establishing appropriate benchmarks to measure the success of the implementation of action recommended in this report.
The recommendations in this report address the need to streamline current processes, expedite initiatives in progress or on hold, and clarify, reinforce and formalize current practices.

On September 30, 2002, the Toronto Computer Leasing Inquiry commenced. The mandate of this Inquiry is to look into all aspects of leasing contracts for computers and related software between the City of Toronto and MFP Financial Services and between the City and Oracle Corporation. In October 2002, City Council voted to expand the Inquiry's mandate to investigate a number of issues related to consultants retained by the City of Toronto and the former City of North York, with respect to the development and implementation of the City's property tax system (TMACS). The Commissioner of both these inquiries, Madam Justice Denise Bellamy has been asked to make any recommendations which she may deem appropriate and in the public interest. Accordingly, there may be recommendations that arise from the Inquiries that could affect the City's procurement processes, as well as related policies. The timing of the Commissioner's report and recommendations is not known at this time. It is our view, however, that the development of an implementation plan and action on recommendations in the Auditor General's report should not be delayed, recognizing that some policies or procedures may be revised further once the Commissioner's recommendations are made public.

Successful implementation of the recommendations in this report will require significant time and effort. Staff cannot be expected to carry out their day to day duties and at the same time, work on implementing the recommendations in this report. Consequently, if action on the recommendations is to occur in a timely manner, then dedicated resources must be assigned to oversee and implement the action required. Appointing a project manager to develop an implementation plan and oversee the implementation, as well as the assignment of specific resources to deal with legal, information technology and other requirements, is strongly recommended.

RECOMMENDATIONS

It is recommended that:

1. The Chief Financial Officer and Treasurer, in consultation with Commissioners, develop service level agreements for the procurement process:

   (i) that clearly define the roles, responsibilities, authorities and accountability of the Purchasing and Materials Management Division and departments for each step in the process, including the responsibility for ensuring compliance with the various policies;

   (ii) that outline the standards and expectations, with respect to the level of service, turnaround time and lead time required; and

   (iii) ensure such requirements are communicated and understood by all applicable staff, and the necessary training is provided to staff in this regard.

2. The Chief Financial Officer and Treasurer and Commissioners ensure that:

   (i) appropriate controls are in place to effectively mitigate the risks in the procurement process;

   (ii) mechanisms exist to prevent and detect situations of non-compliance;

   (iii) all applicable staff understand and are aware of their roles and responsibilities, and requirements that must be followed in the respective procurement process, as well as the consequences for not meeting their responsibilities or adhering to policies and procedures; and

   (iv) compliance with procurement procedures is incorporated into the staff performance review process.

3. The Chief Financial Officer and Treasurer, in consultation with the Commissioner of Corporate Services, report to the Administration Committee by January 2004 on any revisions to the organizational structure of the Purchasing and Materials Management Division, such report to include:

   (i) an examination of the various organizational structure models;

   (ii) a determination as to whether the Client Services group of the Purchasing and Materials Management Division should be merged with the Purchasing Services Unit; and

   (iii) clarification of the roles and responsibilities of each unit, the number, type and mix of positions required, and any resulting resource implications.

4. The Chief Financial Officer and Treasurer, in his report to the Administration Committee on the rationalization of all City stores, take into account:

   (i) what materials, supplies and equipment should be stocked in City stores, including those operated by departments;

   (ii) the impact of the use of procurement cards and the increased use of blanket contracts to supply goods currently stocked by City Stores;

   (iii) the impact on staff levels;

   (iv) the opportunity costs of land and building on which the current stores are located, as well as funds tied up in inventory; and

   (v) the overall benefits and cost savings resulting from the rationalization of the City stores operation.

5. The Chief Financial Officer and Treasurer, in consultation with the Commissioner of Corporate Services:

   (i) identify the skills and expertise required by Purchasing and Materials Management Division staff to effectively meet the Division's business and customer service objectives;

   (ii) assess the skill set and competency level of current staff;

   (iii) develop a training and development program that ensures staff have the necessary customer service and technical expertise to effectively perform their responsibilities; and

   (iv) determine the causes of the Purchasing and Materials Management Division's high staff turnover rate, and take the necessary corrective action to remedy this problem.

6. The Chief Financial Officer and Treasurer develop:

   (i) results based performance indicators for the Purchasing and Materials Management Division that measure the results and effectiveness of its activities; and

   (ii) benchmarks to measure the success of the implementation of the recommendations in this report.

7. The Chief Financial Officer and Treasurer:

   (i) expedite the development of a Purchasing Manual, develop clear and concise procedures to guide both the Purchasing Division and departmental staff in each type of procurement process, and ensure that the requirements of the Municipal Act, 2001 are incorporated into the City's Municipal Code and policies, as required;

   (ii) in conjunction with Commissioners, ensure that the procedures and guidelines are communicated to all staff with procurement responsibilities, and that the necessary training is provided, such that staff are aware of, understand and comply with the requirements;

   (iii) develop a process to periodically review and update the Toronto Municipal Code chapters 71 (Financial Control) and 195 (Purchasing), as well as purchasing policies and procedures as required; and

   (iv) incorporate procurement procedures/guidelines, applicable forms and "Frequently Asked Questions and Answers", for each type of procurement process on the Purchasing Division's Web site.

8. The Chief Administrative Officer, in consultation with the City Solicitor, the Chief Financial Officer and Treasurer and Commissioners, review and make the necessary revisions to the Toronto Municipal Code and/or policies to clarify the following:

   (i) the appropriate level of delegation for emergency purchases, below the Commissioner level, as well as any conditions or parameters for such delegation;

   (ii) the authorities required for the award of multi-year contracts and contracts that straddle from one year to another, for both capital and operating expenditures;

   (iii) any appropriate revisions to the extent of Commissioners' authority to approve over-expenditures for contracts under $500,000, and the necessary reporting requirements;

   (iv) the approval requirements for over-expenditures pertaining to operating contracts;

   (v) the parameters and criteria under which the Commissioners should be able to authorize additional expenditures under a contract as a result of unforeseen circumstances or conditions, or to take the necessary action to complete a contractor's unfulfilled contractual obligations in a timely manner, including any after the fact reporting requirements in this regard; and

   (vi) the types of expenditures that do not require a purchasing document to support payment to the respective organization, including any appropriate parameters or limitations relating to these expenditures.

9. Commissioners, in consultation with the Chief Financial Officer and Treasurer, revise their respective delegation of financial signing authority schedules, such that requests to increase the previously authorized dollar value on purchase orders and contracts, requires the approval of the original authorizer's immediate manager as soon as the additional work required becomes known.

10. The Chief Financial Officer and Treasurer report to the Administration Committee on the potential repeal of the Canadian Content Policy, and any related implications.

11. The Chief Financial Officer and Treasurer, in consultation with the City Clerk, develop a composite report format, by September 2003, for the award of contracts by the Bid Committee.

12. The Chief Financial Officer and Treasurer develop a dollar threshold limit above which responses to Request for Quotations must be opened by the Bid Committee.

13. The Chief Financial Officer and Treasurer:

    (i) verify on a random basis, mathematical extensions on tenders received, regardless of whether the department identified an error or not;

    (ii) in consultation with the City Solicitor incorporate in the Purchasing Manual, as well as in all call/request documents, the protocol and policies for the correction of mathematical errors contained in supplier submissions and how tenders and bids with mathematical errors will be treated;

    (iii) communicate with vendors on a regular basis, to emphasize the importance of ensuring bids are accurate and complete, and include all mandatory information, monitor bids and proposals received for any error patterns, and, in consultation with the City Solicitor, determine whether any protocol or mechanisms can be implemented to deal with problematic vendors;

    (iv) develop a standard template for bids/proposals, such that the location of mandatory documentation and information at bid openings is facilitated; and

    (v) in consultation with the City Solicitor, review the call/request documents such that critical information requirements and consequences for non-compliance are clear, in particular those situations under which a bid/proposal will be declared informal.

14. The Chief Administrative Officer:

    (i) develop a policy that formalizes the requirement to prohibit consulting firms who were involved in preparing the call/request from bidding on the respective project; and
    (ii) ensure this requirement is communicated to all applicable staff and vendors.

15. The Chief Financial Officer and Treasurer, in consultation with Commissioners, ensure that all City staff involved in the procurement process have the knowledge and are properly trained to manage and participate in the process, and develop directives and guidelines such that:

    (i) call/request methods used are appropriate, an effective evaluation methodology is designed for all requests, that the evaluation is performed by more than one person, as appropriate, that the composition, knowledge and expertise of the evaluation team is reflective of the complexity and dollar value of the assignment, and that outside expertise is retained as required for complex and high risk procurement transactions, to ensure that a sound business decision is made and properly justified;

    (ii) the proposal evaluation criteria are disclosed in the request document, the relative weights are pre-determined and documented, that price be assigned a minimum weight of 25 per cent, consistent with the City's Hiring and Selection of Consulting Services Policy, and that criteria be developed for any exceptions to these requirements;

    (iii) the Purchasing and Materials Management Division is involved, in proposal evaluations for those projects above a pre-determined dollar threshold limit or based on other criteria, as determined by the Chief Financial Officer and Treasurer, to monitor, provide guidance and ensure due process is followed;

    (iv) proposal evaluations are performed independently and that each evaluation team member, whether a staff member or an outside consultant, is required to sign a conflict of interest declaration:

        - disclosing any entertainment, gifts, or other benefits, in cash or in kind, received from proponents or their representatives;

        - certifying that he or she conducted the evaluation in a fair and objective manner, and free from any conflict of interest or undue influence;

    (v) the Chief Financial Officer and Treasurer develop a policy of "no informal contact" between department staff involved in the procurement process and the potential suppliers, and establish guidelines to assist staff in determining proper conduct and limitations with respect to communication and contact with potential suppliers; and

    (vi) the City's call/request documents stipulate that staff directly or indirectly involved in the evaluation and decision making process are not permitted to accept any gifts, entertainment or other benefits, and that the supplier's bid/proposal may be rejected if it fails to comply with this requirement.

16. The Chief Financial Officer and Treasurer, in consultation with the City Clerk, report to the Administration Committee on the level of documentation required to support procurement decisions and the responsibility for the retention of such documentation.

17. The Chief Financial Officer and Treasurer post the results of all contract awards, which exceed the Departmental Purchase Order limit, on the City's Web site, including appropriate information on all bids and proposals received.

18. The Chief Financial Officer and Treasurer develop a template for contract award reports that clearly presents key information to committees and Council, including information such as:

    - the bid/proposal solicitation method
    - evaluation criteria, including weight assigned to each factor
    - composition and technical knowledge of evaluation team
    - justification for contract award
    - length of the contract, including any renewal options
    - total value of contract
    - total value of any contingencies in contract
    - key terms and conditions in the contract.

19. The Chief Administrative Officer:

    (i) ensure that City staff sign an annual declaration acknowledging that they understand and agree to the terms and conditions contained in the City's Conflict of Interest policy, as well as the consequences of non compliance;

    (ii) send an annual notice to all City staff reiterating the City's Conflict of Interest policy;

    (iii) on an annual basis, forward the Code of Conduct for Members of Council, Conflict of Interest Policy and the Fraud Policy to the Ethics Steering Committee, requesting their direction on whether these policies are clear and current, and recommend any revisions to Council for approval; and

    (iv) amend the Lobbyist Disclosure Policy such that the policy applies to all City purchases regardless of dollar amount, so that it is consistent with the voluntary lobbyist registry.

20. The Chief Administrative Officer, in consultation with the Chief Financial Officer and Treasurer, report to the Administration Committee by September 2003, on:

    (i) the costs and benefits of using an external consultant (Fairness Commissioner) on certain City projects, to shadow and attest to the fairness and appropriateness of the procurement process;

    (ii) the criteria to be used to determine when an external consultant (Fairness Commissioner) should be engaged; and

    (iii) the reporting relationship for this role.

21. Commissioners:

    (i) identify their procurement needs, including the volumes of goods and services required, specifications and deliverables, and the timing of such requirements; and

    (ii) ensure that this information is communicated to the Purchasing and Materials Management Division and City Legal on a timely basis, allowing for sufficient lead time, such that both the Purchasing and Materials Management Division and City Legal can schedule their respective resources to meet departmental timelines.

22. The Chief Financial Officer and Treasurer:

    (i) post on the City's Intranet a library of previously developed specifications;

    (ii) develop specifications templates and guidelines which provide information to staff on the nature, type and level of detail required for specifications; and

    (iii) establish partnerships with other jurisdictions for the sharing of specifications information.

23. Commissioners, in consultation with the Chief Financial Officer and Treasurer, establish mechanisms in their respective program areas to ensure that specifications and deliverables in Requests for Quotations, Proposals and Tenders, are clear and complete.

24. The Chief Financial Officer and Treasurer:

    (i) ensure that departments are notified of any changes to call/request documents before the request or call is issued; and

    (ii) in consultation with departments, make the determination with respect to any changes to the closing date specified in a call/request document.

25. The Chief Financial Officer and Treasurer review and report to the Administration Committee by September 2003, on:

    (i) discontinuing the practice of mailing out call/request documents to suppliers;

    (ii) utilizing the City's Internet Web site or other electronic tendering services, as appropriate, to advertise contract opportunities with the City, and allow interested vendors to download the call/request document;

    (iii) the purpose, cost and benefits of maintaining a Bidders List in its current form;

    (iv) the cost savings and revenue implications resulting from changes to the current procurement solicitation process; and

    (v) an appropriate and effective communication plan to inform suppliers of any changes to the current procurement solicitation process and requirements.

26. The Commissioner, Corporate Services, take the necessary action to expedite implementation of procurement initiatives that require information technology assistance and support.

27. The Chief Financial Officer and Treasurer establish clear parameters and criteria to guide Purchasing and Materials Management Division staff in using less formal procurement processes to obtain price quotations or proposals, taking into consideration the time given to suppliers to respond to calls or requests, the method by which responses are received, and the number of suppliers from which bids or proposals are solicited.

28. The Chief Financial Officer and Treasurer:

    (i) expedite the implementation of purchasing cards in City operations, using a phased-in approach;

    (ii) develop the necessary policies and procedures with respect to the issuance, use and control of credit and purchasing cards, including consequences for misuse of the cards;

    (iii) in consultation with Commissioners, ensure that necessary training is provided to all departmental staff responsible for the use and management of the purchasing cards; and

    (iv) report to the Administration Committee by January 2004, on the status of the purchasing card program, including any costs to administer the program and any benefits realized.

29. Commissioners:

    (i) monitor the use of single source purchases in their respective departments with the view to reducing the need to purchase goods and services without going through a competitive process; and

    (ii) in consultation with the Purchasing and Materials Management Division, properly plan their requirements in order to reduce the single sourcing of purchases.

30. The Chief Financial Officer and Treasurer:

    (i) in consultation with Commissioners, develop a list of sole source goods and services (e.g., TTC tokens, utilities, etc.) that can be processed without completing a sole (single) source request form;

    (ii) report annually to the Administration Committee outlining, by department:

    - all single source purchases exceeding the Departmental Purchase Order limit and reasons therefor;

    - percentage of purchase orders processed through the Purchasing Division using single source as justification;

    - all instances where purchase orders have been issued after the fact; and

    (iii) post on the City's Web site, all single source contract awards in excess of $7,500.

31. The Chief Financial Officer and Treasurer:

    (i) monitor purchasing activity, including Departmental Purchase Orders issued by departments, and work with departments to identify opportunities to consolidate the procurement of common goods and services;

    (ii) in consultation with departments, be more proactive in identifying potential opportunities to utilize blanket contract agreements for goods and services, to more efficiently meet the needs of departments, including emergency requirements;

    (iii) further explore opportunities to enter into co-operative purchasing agreements with the City's Agencies, Boards and Commissions, other municipalities, public organizations, and other levels of government.

32. The Commissioner of Corporate Services, in consultation with the Chief Financial Officer and Treasurer, report to the Administration Committee by March 2004 with respect to the effectiveness of the Information Technology Acquisition procedures.

33. The Chief Financial Officer and Treasurer, in consultation with Commissioners, re-establish a Purchasing Client Reference Group to deal with procurement issues.

34. The City Solicitor, in consultation with the Chief Financial Officer and Treasurer, and Commissioners:

    (i) develop criteria and guidelines outlining the circumstances in which a formal contract is required; and

    (ii) develop a standard contract template to be used and executed by departments for straightforward purchases, and where there is no negotiation involved with respect to the terms and conditions in the bid document.

35. The Chief Financial Officer and Treasurer, in consultation with the City Solicitor develop:

    (i) a corporate policy that outlines when Bid Bonds and Performance Bonds are required and the type of security that is acceptable; and

    (ii) a process to determine the dollar value of the security requested, taking into account the nature of goods or services to be provided, the magnitude of the contract and the risks involved, to ensure that the interests of the City are adequately protected.

36. The Chief Administrative Officer, in consultation with the City Solicitor:

    (i) clarify the roles and responsibilities of City Legal, the Chief Financial Officer and Treasurer, City Clerk and Commissioners in the contract execution process and ensure that the responsibilities and rationale are clearly communicated to all staff involved; and

    (ii) develop mechanisms and assign clear responsibility for ensuring the decisions of Bid Committee, Standing Committee and Council are accurately reflected in the purchase order or contract, and that the necessary authority exists to enter into the agreement.

37. The Chief Administrative Officer, in consultation with the Chief Financial Officer and City Clerk, establish a central repository for all contract signing and other procurement authorities delegated to departmental staff.

38. The Chief Financial Officer and Treasurer:

    (i) report to the Administration Committee by September 2003 on the control mechanisms in place or to be implemented to prevent contracts from being over-spent, including the benefits and resource implications of processing contract release orders, both at the dollar value and commodity level, and explore other

viable options, such as potential system modifications to achieve this objective; and

(ii) develop appropriate interim mechanisms to prevent contracts from being over-spent.

39. The Chief Financial Officer and Treasurer in consultation with Commissioners, identify the procurement information needs of the Purchasing and Materials Management Division and departments, and take the necessary action to cost-effectively obtain the information required, in order to enable the effective management of procurement activities.

40. The Chief Financial Officer and Treasurer:

(i) in consultation with departments, establish separate blanket contracts for each individual department in accordance with the terms and conditions provided in the master agreement for the respective goods and services; and

(ii) establish mechanisms to prevent department specific blanket contracts from being accessed by other departments.

41. The Chief Financial Officer and Treasurer:

(i) ensure that all purchase orders and contracts issued specify the prices and/or rates to be charged; and

(ii) request suppliers to provide adequate details on the invoices, specifying the rates/prices charged and goods/services provided.

42. The proposed Water and Wastewater Committee be governed under the Toronto Municipal Code, Chapters 71 (Financial Control) and 195 (Purchasing), and be delegated the same level of contract award and procurement authority as other standing committees in the City.

43. The Chief Financial Officer and Treasurer report to the Administration Committee by July 2003 on:

(i) a prescribed time line and or standard payment term for the payment of all City accounts; and

(ii) action taken or to be taken to ensure that accounts are paid within the prescribed time line, including any changes in processes and resources required.

Appendix B

Procurement Processes Review – City of Toronto
Summary of Recommendations and Management's Response

Recommendation	Management's Response
1. The Chief Financial Officer and Treasurer, in consultation with Commissioners, develop service level agreements for the procurement process: (i) that clearly define the roles, responsibilities, authorities and accountability of the Purchasing and Materials Management Division and departments for each step in the process, including the responsibility for ensuring compliance with the various policies; (ii) that outline the standards and expectations, with respect to the level of service, turnaround time and lead time required; and (iii) ensure such requirements are communicated and understood by all applicable staff, and the necessary training is provided to staff in this regard.	Agreed. However, it must be emphasized that roles and responsibilities of the Purchasing Division and the departments must be first clearly defined corporately before finalizing service level agreements.
2. The Chief Financial Officer and Treasurer and Commissioners ensure that: (i) appropriate controls are in place to effectively mitigate the risks in the procurement process; (ii) mechanisms exist to prevent and detect situations of non compliance; (iii) all applicable staff understand and are aware of their roles and responsibilities, and requirements that must be followed in the respective procurement process, as well as the consequences for not meeting their responsibilities or adhering to policies and procedures; and (iv) compliance with procurement procedures is incorporated into the staff performance review process.	The CAO and all members of the Executive Management Team (EMT) have implemented a number of initiatives since 2000 to mitigate risks in the procurement process. These include amendments to the purchasing by-law, a Conflict of Interest policy, the requirement for business cases when hiring outside consultants and several other steps. The City's senior management group regularly communicates the priority that they place on these controls to staff. Departments will receive more guidance on implementing such controls and mechanisms to ensure consistency across the organization. It should also be noted that the current Office Support Services Unit of Community and Neighbourhood Services (CNS) has been very effective in ensuring CNS purchase requests forwarded to the Purchasing Division in accordance with By-laws and Policies which allows for faster processing of requests from CNS. EMT is in agreement that the CNS Unit is the model which could be utilized across the Corporation.

Procurement Processes Review – City of Toronto
Summary of Recommendations and Management's Response

Recommendation	Management's Response
3. The Chief Financial Officer and Treasurer, in consultation with the Commissioner of Corporate Services, report to the Administration Committee by January 2004 on any revisions to the organizational structure of the Purchasing and Materials Management Division, such report to include: (i) an examination of the various organizational structure models; (ii) a determination as to whether the Client Services group of the Purchasing and Materials Management Division should be merged with the Purchasing Services Unit; and (iii) clarification of the roles and responsibilities of each unit, the number, type and mix of positions required, and any resulting resource implications.	The current organizational structure is based on the recommendations of an outside consultant (Johnson Smith International), hired at amalgamation, and input from City departments. The proposed structure was reviewed and approved by EMT and the CAO. In order to satisfy the requirements of providing a client service focus to the Purchasing Division and reduce staff at the same time, it was determined that the best solution was to create commodity based Purchasing Units with a separate Client Services Unit. The outside consultant concluded that a portfolio-based structure would require more staff, result in a duplication of duties, and would hinder standardization. The January 2004 report to Administration Committee on organizational structure will include an examination of portfolio, commodity-based and hybrid models. Consultations will be held with departments on the recommended structure. It should be noted that the Toronto District School Board was structured on a portfolio basis and has reverted to a commodity-based structure with a client services section, similar to the current Purchasing Division structure. Departments have requested that any reorganization should not be done at the expense of specific commodity expertise. It is anticipated that staff will report further in 2004 on the implementation of further recommendations for improvement stemming from the MFP inquiry.

Procurement Processes Review – City of Toronto
Summary of Recommendations and Management's Response

Recommendation	Management's Response
4. The Chief Financial Officer and Treasurer, in his report to the Administration Committee on the rationalization of all city stores, take into account: (i) what materials, supplies and equipment should be stocked in City stores, including those operated by departments; (ii) the impact of the use of procurement cards and the increased use of blanket contracts to supply goods currently stocked by City Stores; (iii) the impact on staff levels; (iv) the opportunity costs of land and building on which the current stores are located, as well as funds tied up in inventory; and (v) the overall benefits and cost savings resulting from the rationalization of the City stores operation.	A report on the rationalization of all City stores will be submitted in late 2004. This report will clearly define the corporate and program service requirements of the more than 80 locations across the City. The CFO and Treasurer will report on the progress of this initiative during the presentation on the 2003 work plan to Policy and Finance Committee.
5. The Chief Financial Officer and Treasurer, in consultation with the Commissioner of Corporate Services: (i) identify the skills and expertise required by Purchasing and Materials Management Division staff to effectively meet the Division's business and customer service objectives; (ii) assess the skill set and competency level of current staff; (iii) develop a training and development program that ensures staff have the necessary customer service and technical expertise to effectively perform their responsibilities; and (iv) determine the causes of the Purchasing and Materials Management Division's high staff turnover rate, and take the necessary corrective action to remedy this problem.	The CFO is assured that Purchasing Division staff meet the professional and technical requirements to carry out their duties (i.e., Professional Certification or equivalent, communication skills, knowledge of By-laws and policies, etc.) as professional purchasing staff. Training issues within the Purchasing Division are more appropriately focussed on customer service, not the competency and qualifications of staff. However, given that the majority of purchases are made by departments under the DPO limit, departments such as Urban Development Services have requested that training programs be developed for staff performing purchasing duties in departments. Finance management staff recognize the turnover issue and have been working with the City's Human Resources Division to develop strategies to address the turnover rate. It is expected that this review of organizational structure, job responsibilities and compensation levels will lead to a more stable work force.

Procurement Processes Review – City of Toronto
Summary of Recommendations and Management's Response

Recommendation	Management's Response
6. The Chief Financial Officer and Treasurer develop: (i) results based performance indicators for the Purchasing and Materials Management Division that measure the results and effectiveness of its activities; and (ii) benchmarks to measure the success of the implementation of the recommendations in this report.	City staff have been tracking performance indicators set by the Centre for Advanced Purchasing Studies (CAPS), the North American benchmarking body for purchasing performance. Purchasing staff also track additional effectiveness and customer service indicators such as customer service questionnaires, average time to resolve customer complaints and stores order fill rate, etc. The Chief Financial Officer's 2003 work plan includes the development of these performance based indicators for future business planning and for use in service level agreements.
7. The Chief Financial Officer and Treasurer: (i) expedite the development of a Purchasing Manual, develop clear and concise procedures to guide both the Purchasing Division and departmental staff in each type of procurement process, and ensure that the requirements of the Municipal Act, 2001 are incorporated into the City's Municipal Code and policies, as required; (ii) in conjunction with Commissioners, ensure that the procedures and guidelines are communicated to all staff with procurement responsibilities, and that the necessary training is provided, such that staff are aware of, understand and comply with the requirements; (iii) develop a process to periodically review and update the Toronto Municipal Code chapters 71 (Financial Control) and 195 (Purchasing), as well as purchasing policies and procedures as required; and (iv) incorporate procurement procedures/guidelines, applicable forms and "Frequently Asked Questions and Answers" for each type of procurement process on the Purchasing Division's Web site.	The Purchasing Division has already prepared a preliminary draft of a Purchasing Manual. It is expected that this manual will be in circulation in 2003. The Purchasing Division will issue plain language policy and procedure bulletins on key procurement processes as required, e.g. Request for Proposals (RFPs), tenders, Purchase Orders, etc.

Procurement Processes Review – City of Toronto
Summary of Recommendations and Management's Response

	Recommendation	Management's Response
8.	The Chief Administrative Officer, in consultation with the City Solicitor, the Chief Financial Officer and Treasurer and Commissioners, review and make the necessary revisions to the Toronto Municipal Code and/or policies to clarify the following: (i) the appropriate level of delegation for emergency purchases, below the Commissioner level, as well as any conditions or parameters for such delegation; (ii) the authorities required for the award of multi-year contracts and contracts that straddle from one year to another, for both capital and operating expenditures; (iii) any appropriate revisions to the extent of Commissioners' authority to approve over-expenditures for contracts under $500,000, and the necessary reporting requirements; (iv) the approval requirements for over-expenditures pertaining to operating contracts; (v) the parameters and criteria under which the Commissioners should be able to authorize additional expenditures under a contract as a result of unforeseen circumstances or conditions, or to take the necessary action to complete a contractor's unfulfilled contractual obligations in a timely manner, including any after the fact reporting requirements in this regard; and (vi) the types of expenditures that do not require a purchasing document to support payment to the respective organization, including any appropriate parameters or limitations relating to these expenditures.	Agreed.

Appendix B

Procurement Processes Review – City of Toronto
Summary of Recommendations and Management's Response

	Recommendation	Management's Response
9.	Commissioners, in consultation with the Chief Financial Officer and Treasurer, revise their respective delegation of financial signing authority schedules, such that requests to increase the previously authorized dollar value on purchase orders and contracts, requires the approval of the original authorizer's immediate manager as soon as the additional work required becomes known.	Agreed.
10.	The Chief Financial Officer and Treasurer report to the Administration Committee on the potential repeal of the Canadian Content Policy, and any related implications.	Agreed.
11.	The Chief Financial Officer and Treasurer, in consultation with the City Clerk, develop a composite report format, by September 2003, for the award of contracts by the Bid Committee.	Will consult with the City Clerk as recommended.
12.	The Chief Financial Officer and Treasurer develop a dollar threshold limit above which responses to Request for Quotations must be opened by the Bid Committee.	Agreed.
13.	The Chief Financial Officer and Treasurer: (i) verify on a random basis, mathematical extensions on tenders received, regardless of whether the department identified an error or not; (ii) in consultation with the City Solicitor incorporate in the Purchasing Manual, as well as in all call/request documents, the protocol and policies for the correction of mathematical errors contained in supplier submissions and how tenders and bids with mathematical errors will be treated;	Agreed. The Purchasing Division will work with Legal Services to implement this recommendation.

Procurement Processes Review – City of Toronto
Summary of Recommendations and Management's Response

Recommendation	Management's Response
(iii) communicate with vendors on a regular basis, to emphasize the importance of ensuring bids are accurate and complete, and include all mandatory information, monitor bids and proposals received for any error patterns, and, in consultation with the City Solicitor, determine whether any protocol or mechanisms can be implemented to deal with problematic vendors; (iv) develop a standard template for bids/proposals, such that the location of mandatory documentation and information at bid openings is facilitated; and (v) in consultation with the City Solicitor, review the call/request documents such that critical information requirements and consequences for non-compliance are clear, in particular those situations under which a bid/proposal will be declared informal.	
14. The Chief Administrative Officer: (i) develop a policy that formalizes the requirement to prohibit consulting firms who were involved in preparing a call/request from bidding on the respective project; and (ii) ensure this requirement is communicated to all applicable staff and vendors.	Departments do prohibit consulting firms or vendors who were involved in preparing a Request for Proposals or other bid request documents from bidding on the respective project and related bid request. A corporate directive, formalizing this requirement as suggested by the Auditor, will be issued to all applicable staff and vendors.
15. The Chief Financial Officer and Treasurer, in consultation with Commissioners, ensure that all City staff involved in the procurement process have the knowledge and are properly trained to manage and participate in the process, and develop directives and guidelines such that:	

Procurement Processes Review – City of Toronto
Summary of Recommendations and Management's Response

Recommendation		Management's Response
(i)	call/request methods used are appropriate, an effective evaluation methodology is designed for all requests, that the evaluation is performed by more than one person, as appropriate, that the composition, knowledge and expertise of the evaluation team is reflective of the complexity and dollar value of the assignment, and that outside expertise is retained as required for complex and high risk procurement transactions, to ensure that a sound business decision is made and properly justified;	The City's present evaluation method for bid requests does include utilization of expert technical staff (more than one person) to reflect the complexity and dollar value of the assignment. The acquisition of outside expertise for complex and high risk procurement transactions will be done with Standing Committee and/or Council input.
(ii)	the proposal evaluation criteria are disclosed in the request document, the relative weights are pre-determined and documented, that price be assigned a minimum weight of 25 percent, consistent with the City's Hiring and Selection of Consulting Services Policy, and that criteria be developed for any exceptions to these requirements;	As the Auditor points out, the City's current policy requires that price be assigned a minimum 25 percent weight in the hiring of outside consultants. Practice shows that the 25 percent weight given to the price factor is generally followed by departments in Request for Proposals. The City will formalize this policy.
(iii)	the Purchasing and Materials Management Division is involved, in proposal evaluations for those projects above a pre-determined dollar threshold limit or based on other criteria, as determined by the Chief Financial Officer and Treasurer, to monitor, provide guidance and ensure due process is followed;	Purchasing Division staff should only be involved in advising on the purchasing process. In addition, other financial analysis expertise will most likely be required for large contracts and will include other division staff from Finance.
(iv)	proposal evaluations are performed independently and that each evaluation team member, whether a staff member or an outside consultant, is required to sign a conflict of interest declaration: - disclosing any entertainment, gifts, or other benefits, in cash or in kind, received from proponents or their representatives; - certifying that he or she conducted the evaluation in a fair and objective manner, and free from any conflict of interest or undue influence;	The Municipal Code, Chapter 195 (Purchasing), requires that all staff involved in the procurement process must abide by the purchasing ethics established by the National Institute of Government Purchasing. In addition, the City of Toronto's Conflict of Interest Policy expressly addresses this issue. The Purchasing Division will work with Legal Services to develop a sign off form for all appropriate City staff.

Procurement Processes Review – City of Toronto
Summary of Recommendations and Management's Response

Recommendation	Management's Response
(v) the Chief Financial Officer and Treasurer develop a policy of "no informal contact" between department staff involved in the procurement process and the potential suppliers, and establish guidelines to assist staff in determining proper conduct and limitations with respect to communication and contact with potential suppliers; and	A policy on the type of communication and contact, and information that can be given will be developed. Legal Services will assist in developing this Policy.
(vi) the City's call/request documents stipulate that staff directly or indirectly involved in the evaluation and decision making process are not permitted to accept any gifts, entertainment or other benefits, and that the supplier's bid/proposal may be rejected if it fails to comply with this requirement.	A survey conducted throughout the GTA indicates that no municipality has adopted a policy of "no communication with bidders" once a Call has closed.
16. The Chief Financial Officer and Treasurer, in consultation with the City Clerk, report to the Administration Committee on the level of documentation required to support procurement decisions and the responsibility for the retention of such documentation.	The CFO and Treasurer will submit such a report with the assistance of Legal Services and the City Clerk.
17. The Chief Financial Officer and Treasurer post the results of all contract awards, which exceed the Departmental Purchase Order limit, on the City's Web site, including appropriate information on all bids and proposals received.	The Purchasing Division will begin posting the required information on the City's Web site in 2003.
18. The Chief Financial Officer and Treasurer develop a template for contract award reports that clearly presents key information to committees and Council, including information such as: - the bid/proposal solicitation method - evaluation criteria, including weight assigned to each factor - composition and technical knowledge of evaluation team - justification for contract award - length of the contract, including any renewal options - total value of contract - total value of any contingencies in contract - key terms and conditions in the contract.	Staff reports pertaining to contract awards generally include all or most of the information highlighted by the Auditor. To ensure compliance, staff will develop a new template for contract award reports that more clearly presents the required information to Committees and Council.

Procurement Processes Review – City of Toronto
Summary of Recommendations and Management's Response

Recommendation			Management's Response
19.	The Chief Administrative Officer:		
	(i)	ensure that City staff sign an annual declaration acknowledging that they understand and agree to the terms and conditions contained in the City's Conflict of Interest policy, as well as the consequences of non compliance;	Since 2002, the CAO has required the Conflict of Interest declaration to be signed by Commissioners and their direct reports. In 2003, the CAO directed Commissioners to roll this out to the manager level.
	(ii)	send an annual notice to all City staff reiterating the City's Conflict of Interest policy;	Additionally in 2002, the following memos were sent by the CAO relating to fraud, conflict of interest and/or accountability:
	(iii)	on an annual basis, forward the Code of Conduct for Members of Council, Conflict of Interest Policy and the Fraud Policy to the Ethics Steering Committee, requesting their direction on whether these policies are clear and current, and recommend any revisions to Council for approval; and	Approval of permanent fraud policy hotline (Dec 9/02) Conflict/Christmas gifts (Dec 5/02) Internal Management controls (Sept 20/02) Budget approvals and priorities/accountability (Mar 13/02) Financial Accountability, fraud policy and hotline (Mar 8/02) MFP, Oracle and management controls (Feb 11/02) Implementing Auditor's report re consultants (Jan 7/02) In 2002, the CAO communicated to all City staff about the Conflict of Interest Policy. In addition, the Purchasing Division already sends an annual notice to all Purchasing Division staff and the CFO and Treasurer also sends an annual notice to all Finance staff regarding this policy. The City Clerk will forward applicable policies to the Ethics Committee on an annual basis for their information and any action deemed appropriate.
	(iv)	amend the Lobbyist Disclosure Policy such that the policy applies to all City purchases regardless of dollar amount, so that it is consistent with the voluntary lobbyist registry.	Agreed. However, it should be noted that any awards made by the Bid Committee and staff are to the lowest bidder meeting specifications, where no objections to the award have been received. These awards are generally not subject to lobbying.

Procurement Processes Review – City of Toronto
Summary of Recommendations and Management's Response

Recommendation	Management's Response
20. The Chief Administrative Officer, in consultation with the Chief Financial Officer and Treasurer, report to the Administration Committee by September 2003, on: (i) the costs and benefits of using an external consultant (Fairness Commissioner) on certain City projects, to shadow and attest to the fairness and appropriateness of the procurement process; (ii) the criteria to be used to determine when an external consultant (Fairness Commissioner) should be engaged; and (iii) the reporting relationship for this role.	This issue will require further study and consultation with Councillors. The CAO and CFO will report to Policy and Finance Committee on the criteria, costs and benefits with respect to the appointment of a Fairness Commissioner.
21. Commissioners: (i) identify their procurement needs, including the volumes of goods and services required, specifications and deliverables, and the timing of such requirements; and (ii) ensure that this information is communicated to the Purchasing and Materials Management Division and City Legal on a timely basis, allowing for sufficient lead time, such that both the Purchasing and Materials Management Division and City Legal can schedule their respective resources to meet departmental timelines.	Agreed.
22. The Chief Financial Officer and Treasurer: (i) post on the City's Intranet a library of previously developed specifications; (ii) develop specifications templates and guidelines which provide information to staff on the nature, type and level of detail required for specifications; and	Regarding (i) and (ii), the City has developed specifications for the vast majority of ongoing program requirements. These are available from departments and the Purchasing Division. The Purchasing Division and departmental staff will work co-operatively to collect and post these specifications on the Intranet site for use by City staff in preparing RFPs, RFQs and tenders. The Purchasing Division and I&T staff will work together to develop the best method of posting RFPs, RFQs and tenders to the City's external Web site.

Procurement Processes Review – City of Toronto
Summary of Recommendations and Management's Response

Recommendation	Management's Response
(iii) establish partnerships with other jurisdictions for the sharing of specifications information.	The City is already involved in partnerships, as per item (iii), with Universities Purchasing Group, the Toronto District School Board, the GTA Purchasing Group, the Police Purchasing Co-operative and others across North America. Often co-ordinated by the Purchasing Division, some of these have resulted in the sharing of specifications. The Purchasing Division will continue to establish more partnerships.
23. Commissioners, in consultation with the Chief Financial Officer and Treasurer, establish mechanisms in their respective program areas to ensure that specifications and deliverables in Requests for Quotations, Proposals and Tenders, are clear and complete.	Agreed.
24. The Chief Financial Officer and Treasurer: (i) ensure that departments are notified of any changes to call/request documents before the request or call is issued; and (ii) in consultation with departments, make the determination with respect to any changes to the closing date specified in a call/request document.	The Purchasing Division presently works with departments on refining bid request documents to ensure that these documents reflect all requirements. The division will ensure that final changes are communicated to departments prior to release.
25. The Chief Financial Officer and Treasurer review and report to the Administration Committee by September 2003, on: (i) discontinuing the practice of mailing out call/request documents to suppliers;	This recommendation has significant implications for suppliers who tend to bid on small City projects. Further review and consultation with bidders would be appropriate. Also, the suggested alternatives outlined in the report may result in cost increases for suppliers when bidding on City business opportunities.

Procurement Processes Review – City of Toronto
Summary of Recommendations and Management's Response

	Recommendation	Management's Response
	(ii) utilizing the City's Internet Web site or other electronic tendering services, as appropriate, to advertise contract opportunities with the City, and allow interested vendors to download the call/request document;	The Purchasing Division has researched the use of MERX. Using systems such as MERX could result in increased suppliers' cost to do business with the City. The use of MERX and other electronic bidding systems will be reviewed and staff will report to Committee in September 2003.
	(iii) the purpose, cost and benefits of maintaining a Bidders List in its current form;	Staff will report back to Council, documenting the implications of imposing new fees on bidders and the potential revenue loss to the City in Bidders list and Tender document fees.
	(iv) the cost savings and revenue implications resulting from changes to the current procurement solicitation process; and	The current process allows for a fair and open competition for bidders for all City business opportunities in that contract opportunities are advertised on the Internet site. However, documents cannot be downloaded. Consideration will have to be given to how best to deal with suppliers who do not possess the technology to download documents.
	(v) an appropriate and effective communication plan to inform suppliers of any changes to the current procurement solicitation process and requirements.	If the previous recommendation is adopted, a comprehensive communication plan to inform suppliers will be developed and implemented.
26.	The Commissioner, Corporate Services, take the necessary action to expedite implementation of procurement initiatives that require information technology assistance and support.	Staff supports this recommendation in principle. The technology needs of the purchasing process should be prioritized relative to the other I&T initiatives currently underway or in the planning stage.

Procurement Processes Review – City of Toronto
Summary of Recommendations and Management's Response

Recommendation	Management's Response
27. The Chief Financial Officer and Treasurer establish clear parameters and criteria to guide Purchasing and Materials Management Division staff in using less formal procurement processes to obtain price quotations or proposals, taking into consideration the time given to suppliers to respond to calls or requests, the method by which responses are received, and the number of suppliers from which bids or proposals are solicited.	The current process allows for a fair and open competition for all City business opportunities. If this recommendation is implemented, a policy would need to be developed as all bidders expect to continue to compete on City business. Given the objectives of fair and open competition, clear guidelines will have to be developed to avoid any possible misunderstandings in restricting the number of bidders. Other GTA municipalities also allow 15 days minimum for a call to be in the market, as is the current practice with the Purchasing Division.
28. The Chief Financial Officer and Treasurer: (i) expedite the implementation of purchasing cards in City operations, using a phased-in approach; (ii) develop the necessary policies and procedures with respect to the issuance, use and control of credit and purchasing cards, including consequences for misuse of the cards; (iii) in consultation with Commissioners, ensure that necessary training is provided to all departmental staff responsible for the use and management of the purchasing cards; and (iv) report to the Administration Committee by January 2004, on the status of the purchasing card program, including any costs to administer the program and any benefits realized.	Agreed. Preliminary planning for the Implementation of a P-Card was completed in early 2002. Staff are planning the first pilot in 2003, with city-wide implementation in 2003/2004. It is anticipated that the use of P-cards will streamline departmental purchasing activity and the accounts payable process.

Procurement Processes Review – City of Toronto
Summary of Recommendations and Management's Response

Recommendation	Management's Response
29. Commissioners: (i) monitor the use of single source purchases in their respective departments with the view to reducing the need to purchase goods and services without going through a competitive process; and (ii) in consultation with the Purchasing and Materials Management Division, properly plan their requirements in order to reduce the single sourcing of purchases.	The Purchasing Division supplies departments with quarterly reports on sole (single)-sourcing activities as a tool which may help departments reduce these activities.
30. The Chief Financial Officer and Treasurer: (i) in consultation with Commissioners, develop a list of sole source goods and services (e.g., TTC tokens, utilities, etc.) that can be processed without completing a sole (single) source request form; (ii) report annually to the Administration Committee outlining, by department: - all single source purchases exceeding the Departmental Purchase Order limit and reasons therefor; - percentage of purchase orders processed through the Purchasing Division using single source as justification; - all instances where purchase orders have been issued after the fact; and (iii) post on the City's Web site, all single source contract awards in excess of $7,500.	In 2002, approximately 4 per cent of the dollar value of contract awards ($42.5M out of $982.5M) were from sole and single source contracts. These contracts fulfill the requirements of Chapter 195 (Purchasing) of the Municipal Code. If Council adopts this recommendation, these contracts will be listed separately on the City's Web site.

Procurement Processes Review – City of Toronto
Summary of Recommendations and Management's Response

Recommendation	Management's Response
31. The Chief Financial Officer and Treasurer: (i) monitor purchasing activity, including Departmental Purchase Orders issued by departments, and work with departments to identify opportunities to consolidate the procurement of common goods and services; (ii) in consultation with departments, be more proactive in identifying potential opportunities to utilize blanket contract agreements for goods and services, to more efficiently meet the needs of departments, including emergency requirements; (iii) further explore opportunities to enter into co-operative purchasing agreements with the City's Agencies, Boards and Commissions, other municipalities, public organizations, and other levels of government.	Since amalgamation, departmental and Purchasing Division staff have worked cooperatively to identify opportunities to consolidate common procurement initiatives. Staff will continue to pursue more opportunities to utilize blanket contract agreements to more efficiently meet the needs of departments, including emergency requirements. Staff will also continue to canvass departments for opportunities to consolidate departmental purchases. As noted above, opportunities have already been, and continue to be explored by the Purchasing Division. Currently, the Purchasing Division is involved in purchasing partnerships with the Universities Purchasing Group, the Police Co-op Purchasing Group, and continues to make joint purchases with Toronto Zoo, Toronto Transit Commission and the Toronto District School Board. In addition, the Purchasing Division is assisting Works & Emergency Services in forming a joint purchasing group with other jurisdictions to jointly purchase items needed for emergency operations. The Purchasing Division also chairs the GTA Purchasing Group. However, the group members have decided that the major focus of the group is to be information sharing and there has been no joint purchases made to date. It should be noted that since the Purchasing Division is one of the largest government purchasing bodies in Canada, City volumes for purchases are much higher than other participants and the City therefore receives little benefit from participation in joint purchases. Benefits are experienced by small purchasing bodies who participate as they get bulk price discounts by adding their requirements to the City's requirements.

Procurement Processes Review – City of Toronto
Summary of Recommendations and Management's Response

	Recommendation	Management's Response
32.	The Commissioner of Corporate Services, in consultation with the Chief Financial Officer and Treasurer, report to the Administration Committee by March 2004 with respect to the effectiveness of the Information Technology Acquisition procedures.	Agreed.
33.	The Chief Financial Officer and Treasurer, in consultation with Commissioners, re-establish a Purchasing Client Reference Group to deal with procurement issues.	A Purchasing Client Reference Group was established in 1999 and met regularly until the summer of 2002. Staff turnover temporarily halted meetings. Staff agree that this group is an opportunity to assist in implementing the recommendations of this report and will take steps to re-establish the Group.
34.	The City Solicitor, in consultation with the Chief Financial Officer and Treasurer, and Commissioners: (i) develop criteria and guidelines outlining the circumstances in which a formal contract is required; and (ii) develop a standard contract template to be used and executed by departments for straightforward purchases, and where there is no negotiation involved with respect to the terms and conditions in the bid document.	Agreed.
35.	The Chief Financial Officer and Treasurer, in consultation with the City Solicitor develop: (i) a corporate policy that outlines when Bid Bonds and Performance Bonds are required and the type of security that is acceptable; and (ii) a process to determine the dollar value of the security requested, taking into account the nature of goods or services to be provided, the magnitude of the contract and the risks involved, to ensure that the interests of the City are adequately protected.	Agreed. Departments, Purchasing Division and Risk Management review the nature of purchases to determine the type of bonding requirements. The Auditor is correct in pointing out that this process requires better coordination to ensure that the interests of the City are adequately protected and a policy will be developed.

Procurement Processes Review – City of Toronto
Summary of Recommendations and Management's Response

Recommendation	Management's Response
36. The Chief Administrative Officer, in consultation with the City Solicitor:	
(i) clarify the roles and responsibilities of City Legal, the Chief Financial Officer and Treasurer, City Clerk, and Commissioners in the contract execution process and ensure that the responsibilities and rationale are clearly communicated to all staff involved; and	These clarifications will be contained in the Purchasing Bulletins and in the Purchasing Manual.
(ii) develop mechanisms and assign clear responsibility for ensuring the decisions of Bid Committee, Standing Committee and Council are accurately reflected in the purchase order or contract, and that the necessary authority exists to enter into the agreement.	Purchasing Division staff has been instructed to ensure that decisions of Committees/Council are reflected in the PO's or blanket contracts to ensure that authority exists to enter into an agreement. Mechanisms will be developed to ensure that there are checks in place to ensure that this is done.
37. The Chief Administrative Officer, in consultation with the Chief Financial Officer and City Clerk, establish a central repository for all contract signing and other procurement authorities delegated to departmental staff.	Agreed.
38. The Chief Financial Officer and Treasurer:	The CFO and Treasurer, in co-operation with Department Heads, have implemented reports/warning messages in the Financial Information System to monitor/control contract expenditures exceeding 80 per cent of the original contract amount. Further contract system monitoring initiatives are underway in order to prevent contract over expenditures. Staff will report on the progress of this initiative to Administration Committee in September 2003.
(i) report to the Administration Committee by September 2003 on the control mechanisms in place or to be implemented to prevent contracts from being over-spent, including the benefits and resource implications of processing contract release orders, both at the dollar value and commodity level, and explore other viable options, such as potential system modifications to achieve this objective; and	
(ii) develop appropriate interim mechanisms to prevent contracts from being over-spent.	

Procurement Processes Review – City of Toronto
Summary of Recommendations and Management's Response

Recommendation	Management's Response
39. The Chief Financial Officer and Treasurer, in consultation with Commissioners, identify the procurement information needs of the Purchasing and Materials Management Division and departments, and take the necessary action to cost-effectively obtain the information required, in order to enable the effective management of procurement activities.	Agreed.
40. The Chief Financial Officer and Treasurer: (i) in consultation with departments, establish separate blanket contracts for each individual department in accordance with the terms and conditions provided in the master agreement for the respective goods and services; and (ii) establish mechanisms to prevent department specific blanket contracts from being accessed by other departments.	The CFO and Treasurer is presently working with departments to utilize the City's existing financial systems to assist departments in better managing the allocations of blanket contracts.
41. The Chief Financial Officer and Treasurer: (i) ensure that all purchase orders and contracts issued specify the prices and/or rates to be charged; and (ii) request suppliers to provide adequate details on the invoices, specifying the rates/prices charged and goods/services provided.	We agree. However, there are limited situations where this might occur, e. g. repairs. It is normal practice to ensure that all of the above is attained. In a small minority of cases this is difficult because the amount or type of service required is unknown, but purchase orders and contracts all contain a dollar limit.
42. The proposed Water and Wastewater Committee be governed under the Toronto Municipal Code, Chapters 71 (Financial Control) and 195 (Purchasing), and be delegated the same level of contract award and procurement authority as other standing committees in the City.	Agreed.

Appendix B

Procurement Processes Review – City of Toronto
Summary of Recommendations and Management's Response

Recommendation	Management's Response
43. The Chief Financial Officer and Treasurer report to the Administration Committee by July 2003 on: (i) a prescribed time line and or standard payment term for the payment of all City accounts; and (ii) action taken or to be taken to ensure that accounts are paid within the prescribed time line, including any changes in processes and resources required.	Agreed. The Finance Department has made some improvements in reducing outstanding accounts payable, and increasing payments made within 30-60 days. In addition, an enhanced accounts payable process (3-way matching) is being implemented, which along with the P-Card implementation, will significantly reduce the number and time line for payment of accounts in 2003.

G:\AUD\2003\Reports\FINANCE\Purchasing\Procurement Appendix B FINAL - March 31, 2003.doc