



“When You Talk - We Listen!”



TOWN OF COLLINGWOOD

JUDICIAL INQUIRY

Before:

Associate Chief Justice Frank Marrocco

Held at:

Collingwood Town Hall

Council Chambers

97 Hurontario Street

Collingwood, Ontario

November 29th, 2019

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1 --- Upon commencing at 10:06 a.m.

2

3 THE HONOURABLE FRANK MARROCCO: Well,
4 good morning. And I just want to repeat what I said
5 yesterday, but for the benefit of this panel.

6 Thank you very much for agreeing to
7 come here and contribute your knowledge and expertise.
8 It's -- and it'll undoubtedly be helpful to us. And
9 it's -- it would take us, as I said yesterday, just an
10 endless amount of time to acquire the information that
11 you already have, so thank you again. All right.
12 Let's go.

13

14 MUNICIPAL BOARDS and CORPORATIONS PANEL:

15 MARY ELLEN BENCH

16 WENDY WALBERG

17

18 DISCUSSION

19 MS. KATE MCGRANN: Just by way of
20 brief introduction before I -- I turn the attention
21 over to our panelists, who will be making a -- a
22 presentation this morning, we're joined by Wendy
23 Walberg.

24 Ms. Walberg has been the city solicitor
25 for the City of Toronto since 2017. She has both an

1 LLB and an LLM in administrative law from Osgoode Hall
2 Law School. She is certified by the Law Society of
3 Ontario as a specialist in municipal law. And during
4 her career, she has provided legal advice on, amongst
5 other things, the Toronto -- City of Toronto Act
6 Review, numerous matters involving board governance.

7 We're also joined by Mary Ellen Bench.
8 Ms. Bench served as the city solicitor for the City of
9 Mississauga for eighteen (18) years prior to her
10 retirement in May 2019. She is certified by the Law
11 Society as a specialist in municipal law, and received
12 the designation of certified in-house counsel from the
13 Rotman School of Management.

14 While serving as Mississauga's city
15 solicitor, Ms. Bench provided advice to city Council
16 and staff on a full range of municipal matters,
17 including the City's relationship with its electrical
18 utility, Enersource, with the other shareholders in
19 Enersource, Borealis, and with regard to the merger
20 and acquisition of said -- several hydroelectric
21 utilities, to form a Electra, as well as on other
22 corporate relationships.

23 These panels will be speaking to
24 municipal boards and corporations. And with that, I
25 will turn the attention over to them for their

1 presentations. Thank you.

2 MS. WENDY WALBERG: Thank you. Just
3 right click to move it?

4

5 (BRIEF PAUSE)

6

7 MS. WENDY WALBERG: So the fir --
8 first slide just gives some context to us.
9 Municipalities are responsible and accountable
10 government -- governments with respect to matters
11 within their jurisdiction; that's expressly set out in
12 the Municipal Act.

13 And certainly, we all understand that
14 municipalities are created by provincial governments,
15 but they do operate very independently in the
16 statutory framework. An addition to Section 2 really
17 establishes that.

18 Municipal powers are exercised by
19 Council. It's important not to lose sight of that.
20 While most of the actions of municipalities are -- are
21 taken through staff or agencies, in fact, all of the
22 powers originate with Council, so everything is
23 delegated from Council.

24 The statute gives municipalities
25 natural person powers, and in a nutshell, those --

1 that's the power to do things like buying and selling
2 land, incorporating a corporation, hiring and
3 dismissing staff.

4 One (1) of the things that
5 municipalities can do is establish municipal service
6 boards. And we'll talk a little bit more about that
7 later, but that is one (1) of the -- the vehicles for
8 -- through which municipalities exercise their power,
9 and it -- it involves delegation, as I mentioned
10 earlier.

11 They also have specific powers to
12 establish corporations, and this is something that is,
13 you know, prior to the legislative reform in -- in
14 2006, mun -- municipalities did have some
15 corporations, but they were all the subject of special
16 legislation. This actually gave a broad -- more
17 general power to establish corporations through -- but
18 in accordance with restrictions that are in -- in a
19 regulation. So there are quite a few rules about what
20 municipalities can and cannot do when they establish a
21 corporation.

22 And then, of course, municipalities
23 also derive authority to own corporations from other
24 legislations, such as the Electricity Act.

25

1 (BRIEF PAUSE)

2

3 MS. WENDY WALBERG: These are just
4 some examples of the sorts of corporations that
5 municipalities can incorporate. The two (2) most
6 common vehicles are the Ontario Business Corporations
7 Act and the Ontario Corporations Act, which is for
8 not-for-profit corporations. And municipalities
9 incorporate corporations to do all kinds of things on
10 their behalf.

11 The next couple of points are examples
12 of the sorts of -- the sorts of areas of
13 responsibility and jurisdiction given to corporations
14 frequently: economic development corporations, tourism
15 corporations. In Toronto, we have corporations that
16 actually manage facilities, such as Casa Loma and the
17 Mastercard Centre. There are some provisions that
18 allow municipalities to have holding companies, and --
19 and there are, as I said, quite a few rules about what
20 municipalities can and cannot do through a
21 corporation.

22 For example, the -- the corporation
23 must be given the responsibility to provide a service
24 that the municipality could itself provide. So a
25 municipality can't, through the use of a corporation

1 as a vehicle, do something that could not otherwise
2 do.

3 Municipalities can form corporations
4 with other public sector entities. Public sector
5 entity is a defined term, and in fact, there are a
6 couple of instances where municipalities have obtained
7 authority to create a corporation with something that
8 didn't fall within that definition. For example,
9 Toronto obtained a -- an amendment to the regulation
10 in order to be able to incorporate the Pan Am Aquatic
11 Centre with the University of Toronto.

12 And then, of course, local distribution
13 companies are an example of a corporation that can be
14 incorporated through the Ontario Electricity Act.

15

16 (BRIEF PAUSE)

17

18 MS. MARY ELLEN BENCH: So building on
19 what Wendy said, when we look at the role of the
20 municipality and corporations, the main regulation is
21 Ontario Regulation 599 of 2006. It authorizes
22 municipalities to appoint an individual or is -- a --
23 a group of individuals to incorporate. It provides
24 authority for the municipality to nominate or
25 authorize persons to be on the Board of Directors.

1 So nominations could be from outside of
2 the municipal organization, or it could be
3 councillors, or it could be staff members. It -- they
4 can nominate or authorize persons to act as a member
5 of a corporation. So that's when we're talking not-
6 for-profit corporations as opposed to for-profit. It
7 also limits the activities that municipalities can
8 have in certain areas.

9 And this one (1) talks a little bit
10 about municipal boards as well as corporations, but
11 dealing with long-term care facilities, dealing with
12 libraries, those kinds of things.

13 It contains rules on financial
14 assistance that municipalities can provide to its
15 corporations. So Section 106 of the Municipal Act
16 prohibits municipalities from giving financial
17 assistance to commercial corporations, so Ontario
18 Business Act corporations, and through this regulation
19 you can get around that so that you can provide assets
20 and assistance to a corporation that is run by the
21 municipality.

22 It also identifies that these
23 corporations are, for the most part, considered local
24 boards for purposes of legislation, the key ones that
25 impact municipalities being the Municipal Conflict of

1 Interest Act, which relates to councillors' roles, and
2 also the Municipal Freedom of Information and
3 Protection of Privacy Act, so that the whole public
4 accountability framework that is established in the
5 Municipal Act, in the -- in the MFIPPA rules, is
6 carried forward.

7 So if we could go to the next. Thanks.
8 When we talk about municipal LDC corporations, the
9 Electricity Act of 1998 transferred assets that
10 municipalities had in their old hydro corpor -- hydro
11 commissions to OBCA corporations, and there is
12 regulatory oversight by the Ontario Energy Board that
13 approves any kind of change in the corporate
14 structure, so mergers, acquisitions, amalgamations.

15 It -- as an OBCA corporation, there is
16 oversight by the Board of Directors and the
17 shareholders' agreement or the board's organizational
18 bylaws will set out a lot of what the roles and
19 responsibilities will be for the individual members
20 who are part of that. So they can all be treated the
21 same, or when municipal staff, municipal councillors
22 are on that, there could be some different rules
23 around that that -- that is something that there's a
24 lot of -- a lot of breadth around.

25 As a municipality, the municipality

1 will usually vote on major matters, like mergers,
2 acquisitions, that change the corporate structure,
3 make it something different. Otherwise, the
4 municipality receives dividends and provides the rules
5 as we've talked about in terms of nominating people to
6 the Board of Directors. It -- the corporations are
7 arm's length from municipalities, so the
8 municipalities are not involved in the day-to-day
9 operations.

10 MS. WENDY WALBERG: There's a
11 distinction between municipal service boards and
12 municipal corporations, and it's not always obvious to
13 -- to the public. For example, the Toronto Transit
14 Commission is not a corporation. It is, in fact, a
15 municipal service board.

16 The Municipal Act authorizes council to
17 delegate all or parts of its powers related to any
18 municipal services to a municipal service board, so
19 effectively anything a municipal council can do, it
20 can do through a municipal service board by creating
21 the board and delegating to that board responsibility
22 for a particular service or function.

23 They are -- in the legislation, they
24 are a body's corporate, so they are separate legal
25 entities and can enter into contracts in their own

1 name, but they are also agents of the municipality, so
2 everything they do is on behalf of the municipality.

3 There are lots of examples of municipal
4 service boards. I'm going to use some Toronto
5 examples because they're the ones I'm most familiar
6 with, but the -- the Zoo Board, the Toronto Transit
7 Commission, the theatres are all managed through a
8 municipal service board, Exhibition Place is managed
9 through a municipal service board, and the Parking
10 Authority is a municipal service board. Others are
11 public utilities. Some municipalities have a Waste
12 Management Board and -- and so on. Effectively, any
13 service a municipality can provide, it -- it may
14 choose to do through a municipal service board.

15 Municipalities have a great deal of
16 ability to control municipal service boards. They can
17 require the boards to follow city policies and
18 procedures and can dissolve them. If there is
19 specific legislation relating to one (1) of those
20 boards, a council decision can actually trump
21 legislation. That's the only time I've ever seen
22 something like that.

23 And if council does choose to dissolve
24 a municipal service board, it assumes all the -- all
25 the liabilities and -- and assets.

1 Next slide, please.

2

3 (BRIEF PAUSE)

4

5 MS. WENDY WALBERG: Membership on the
6 boards is generally a mix of subject matter experts
7 and municipal councillors. This -- they each bring
8 unique perspectives to the board, and, you know,
9 certainly that's the awareness of the industry best
10 practices, as well as the local government big
11 picture.

12 In my experience, the selection process
13 for board membership is -- is generally robust with a
14 broad application -- broad invitation for
15 applications, review of resumes, and interview
16 process, recommendations through a -- a nomination
17 committee, and appointment finally by -- by the
18 council itself. And the duties of members of these
19 sorts of boards and corporate boards are -- are very
20 similar. Next slide, please.

21 MS. MARY ELLEN BENCH: So when looking
22 for best practices for public sector corporations, I
23 couldn't find anything that specifically addressed
24 municipal corporations, but I found a paper from the
25 Ivey School of Energy Policy and Management Centre

1 called Best Practice Principles of Governance for
2 Crown Corporations, and those principles I think apply
3 equally to municipal level corporations as well.

4 One (1) thing I wanted to -- to point
5 out in terms of municipal corporations is that the
6 Municipal Conflict of Interest Act does recognize that
7 councillors have a role in these corporations, which I
8 think is important because it -- it, to me, validates
9 that -- that there -- that this practice is -- is
10 proper.

11 And in some municipalities it is staff,
12 sometimes it's councillors, sometimes it's a mixture
13 of both. It depends on the nature of the corporation
14 and the purpose going forward, if they're just
15 overseeing assets or if they've got a major strategic
16 decision-making role.

17 So when looking at these matters, this
18 paper recommended four (4) principles on board
19 selection that I thought were important to bring
20 forward. One (1) merit-based selection, so that it's
21 objective based on skills and qualifications, which is
22 to Wendy's point about having subject matter experts
23 involved, and likewise outside of Toronto there tend
24 to be a lot of interest in being part of these
25 corporations.

1 There are a lot of individuals who have
2 a lot of expertise that they want to share with their
3 -- their local governments. So finding qualified
4 individuals has -- has never been a problem in
5 Mississauga, and from what I hear from others.

6 As an accountable government, public
7 sector corporations must be transparent as well.
8 Transparent and accountable are the two (2) key
9 principles that govern municipalities. They must be
10 consistent in terms of how the appointment process is
11 applied so that there -- you have a -- a clear matrix
12 of roles and responsibilities that you are -- are
13 trying to fill, you have a process that everybody
14 knows about. There's no changing that process halfway
15 through.

16 And integrity, individuals must be --
17 must have the right principles coming forward when
18 they move into the public service, and again that
19 hasn't been a -- an finding individuals.

20 So if we go on, in terms of best
21 practices and the procedures, the Ivey Business School
22 paper recommends a skilled matrix to identify
23 experience and competencies for individual boards, and
24 this tends to be a common practice that is done.
25 Staggered appointments to ensure continuity and

1 experience, that there be appropriate orientation and
2 training for all board members, whether they're new
3 appointments or whether they're renewed appointments.

4 Including the role of the Board and the
5 expectations for individual directors, which in public
6 sector corporations where you do have a blend of board
7 members between subject matter experts and municipal
8 staff or councillors, role clarity is very important.

9 The majority should be independent from
10 management, and public services and elected officials,
11 they know -- do bring knowledge of government
12 priorities, but they have to, at the same time, be
13 aware of potential oversight conflicts, and
14 consideration must be given to their eligibility and
15 involvement in in camera sessions and voting.

16 So again, those are -- are points that
17 I think from our experience is -- is something that is
18 looked at very seriously, but it was set out nicely in
19 this paper.

20 MS. WENDY WALBERG: The Municipal
21 Conflict of Interest Act imposes certain ethical
22 obligations upon members of council, members of local
23 boards, and the corp -- corporate boards as well,
24 owned by municipalities.

25 And recently -- well, in the last

1 fifteen (15) years or so, municipalities have all had
2 to develop a code of conduct for municipal councillors
3 and members of local boards.

4 As well, and this is very recently, the
5 legislation has included a -- now includes a
6 requirement for a policy pertaining to the council-
7 staff relationship.

8 And I mean, that's -- that phrase is a
9 bit -- it's a bit vague, in my view. But the way --
10 the way that evolved was that our municipal ombudsman
11 recommended a public service act for municipal staff,
12 similar to the Provincial Public Service Act.

13 And we looked at it and decided that we
14 didn't -- didn't actually need a statute, that we had
15 authority under our legislation, as do all
16 municipalities, to -- to do this through a bylaw and
17 develop a public service bylaw.

18 The -- the recommendation that
19 precipitated this was about defining the relationship
20 between council and staff. However, the bylaw does
21 more than that as -- as does the municipal -- or the
22 Public Service Act, the provincial one, and as do
23 other public service ethical frameworks in other
24 jurisdictions that -- that we identified when we were
25 developing ours.

1 It deals with conflict of interest,
2 political activity and wrongdoing investigations, and
3 it has a reprisal protection section.

4 We do a lot of training for staff on
5 the public service bylaw and there's -- there's
6 mandatory training, it's part of our on-boarding.

7 And it certainly -- along with the
8 municipal code of conduct, it contributes to sort of
9 normalizing the discourse around ethics and in -- in
10 my view that's -- that's a very important step in
11 developing and nurturing an ethical culture.

12 MS. MARY ELLEN BENCH: And on that
13 point I can also say that I looked at the Toronto
14 public sector bylaw when establishing the council
15 staff policy for the City of Mississauga, and I've
16 talked to a number of other municipalities. I don't
17 think anybody else has as comprehensive a bylaw as
18 Toronto.

19 But having said that, we tend to have
20 policies that cover the same areas. It's just you'll
21 find them in four (4) or five (5) different places, as
22 opposed to all in one (1).

23 So dealing with -- with staff conduct,
24 dealing with election procedures, dealing with those
25 kinds of issues, conflicts that they're all dealt

1 with, but as I said, they're not -- not packaged as --
2 as in one place, like Toronto's is.

3 So in terms of -- of many of these
4 corporations and municipal boards, they're arm's
5 length from the municipality in terms of day-to-day
6 operations.

7 But council can, by resolution,
8 communicate a public interest. Council speaks as one
9 (1) voice through the entire of council. It -- an
10 individual councillor does not speak for the
11 collective, so matters have to go through the -- the
12 formal council chamber process.

13 And when compliance is a concern in a
14 business corporation, like any other shareholder, the
15 city has the same right to issue a shareholder's
16 direction and require the corporation to take certain
17 actions.

18 And in those cases then, the city is
19 responsible for the fallout that happens as a result
20 of exercising that authority, but they still have that
21 role.

22 Those are the key things that we wanted
23 to point out when we were asked about a presentation.

24 MS. KATE MCGRANN: Thank you very much
25 for that.

1 And I'm actually going to ask that the
2 slides remain on the screen and maybe we can return to
3 slide 1 for now, because I -- I'd like to go back to a
4 couple of the slides and ask you some more detailed
5 questions.

6 My first question for you is: With
7 respect to municipal corporations, are there
8 differences between municipal corporations and
9 privately-held or publically traded corporations from
10 a shareholder perspective?

11 MS. MARY ELLEN BENCH: I would say no.
12 They follow the same structure, they're under the same
13 piece of legislation and have the same rules.

14 Where there would be differences would
15 be in terms of who we can invite to participate in the
16 corporation. We can't -- we can't have private sector
17 businesses coming in as a -- like, we can't sell part
18 of the corporation to private sector business the same
19 way.

20 MS. WENDY WALBERG: And, of course,
21 there's the whole frame -- the legislative framework
22 around the way municipalities generally conduct
23 themselves, so they are different, as a shareholder
24 than a private shareholder.

25 MS. KATE MCGRANN: In discussing

1 municipally-owned corporations as compared to
2 municipal boards, you had referenced municipally-owned
3 corporations being arm's length from the municipality
4 as compared to municipal boards acting as agents of
5 the municipality.

6 For people who aren't familiar with the
7 term "arm's length" or the concept of -- of a board
8 being an agent, I wonder if you could just provide us
9 with a more details explanation of what you mean by
10 those two (2) things and the difference between the
11 two (2) of them?

12 MS. WENDY WALBERG: So, generally
13 speaking, and -- and there are a lot of variations on
14 this theme, but generally speaking, a corporation
15 would operate in -- more independently and as Mary
16 Ellen mentioned, the shareholder direction is the way
17 of communicating with the corporation.

18 The boards -- the municipal service
19 boards themselves, they often are required to follow
20 policies and procedures of the municipality. They
21 more regularly report.

22 They operate -- and again, there are a
23 lot of variations on this theme, because I have to say
24 I -- I'm familiar with some that operate very
25 independently and others that -- that are almost --

1 they're doing something that could be done by a city
2 division or department and they're just one step
3 removed.

4 I know that's not a very clear answer,
5 but it is -- it's because there are so many variations
6 on the theme.

7 MS. KATE MCGRANN: No, I think that is
8 helpful, thank you.

9 Where a municipality has an interest in
10 a -- a corporation or owns a corporation, in your
11 experience, what kind of information, training or
12 resources would be useful to make available to
13 council, particularly new members of council who are
14 coming on board to help understand their role and the
15 functioning of the corporation?

16 MS. MARY ELLEN BENCH: So training at
17 the -- at the council side of the table, as opposed to
18 at the corporation side?

19 MS. KATE MCGRANN: I'm going to ask
20 you about the corporation side in a second, but if we
21 could start with the council side, that would be
22 great.

23 MS. MARY ELLEN BENCH: So, on the
24 council side I think every municipality pretty much
25 has a councillor orientation program that councillors

1 must attend that -- that sets out all of those.

2 Well, it deals with the operations of
3 the municipal corporation in terms of departments and
4 who does what, but it also deals with the various
5 assets held by the corporation, whether it's boards,
6 commissions or corporations and what their role would
7 be, how many councillors are appointed to each one,
8 what the purpose of the corporation is, what the role
9 is of individuals who are on the board, what the
10 qualifications are for individuals to be on the Board.

11 So, they do get a fairly comprehensive
12 training package. They also get a very comprehensive
13 training package in terms of conflict and what the
14 municipal conflict of interest says, what the council
15 code of conduct says, how the two (2) work together,
16 what to do, who to contact if you've got a question
17 when you're not sure in different positions.

18 MS. WENDY WALBERG: And -- and just to
19 be -- be a very big picture about it, I think it's the
20 same with anyone in any new position. It's really
21 important to have a thorough understanding of your
22 role and the responsibilities that come with it.

23 MS. KATE MCGRANN: Are there any
24 additional considerations when it comes to information
25 training and resources made available to staff in a

1 municipality where there's a municipally-owned
2 corporation?

3 MS. MARY ELLEN BENCH: Well, staff who
4 interact with that corporation would certainly have
5 training and -- and would have knowledge. The legal
6 department tends to be involved with all of these
7 corporations quite -- at the finance department
8 usually, operational departments, depending on the
9 subject matter of the -- that the corporation is set
10 up for.

11 And, yes, those staff and -- and
12 internal resources, like the legal department, are
13 there to ensure that they've got somebody to go to
14 answer their questions.

15 MS. KATE MCGRANN: Turning to the
16 composition of the Board of Directors of a
17 municipally-owned corporation and the selection
18 process for new directors which you spoke to in your
19 presentation, I wonder if you could provide a little
20 bit more information about what a selection process
21 can look like.

22 And -- and what I mean by that is, for
23 example, what aspects of that selection process could
24 be public, who could be involved in the selection
25 committee, what are -- what are ways that

1 municipalities can approach that selection process to
2 ensure that the transparency and consistency that you
3 spoke to is -- is maintained?

4 MS. WENDY WALBERG: In terms of
5 involving the public, certainly council would -- it
6 would -- these appointments are council appointments,
7 so that it comes back to the principle of what can
8 council delegate and what will council choose to
9 delegate.

10 A municipal council could certainly
11 choose to delegate the responsibility of vetting
12 applications and interviewing candidates to a
13 committee of staff or a committee of councillors or a
14 committee of members of the public or a mix of any of
15 those.

16 MS. KATE MCGRANN: And you had noted
17 that the -- the ultimate appointment of directors to
18 the Board is -- is something that council does.

19 In your experience, is that appointment
20 -- process or the final appointment normally done in
21 public?

22 MS. WENDY WALBERG: Just -- just to be
23 clear, not -- not every appointment to every
24 corporation at the Board is -- is done by council. I
25 don't want to say that generally. But when -- when

1 they are reasonable for making the appointments, then
2 they could delegate the vetting and -- and nomination
3 process to a body.

4 MS. MARY ELLEN BENCH: Yeah. So, the
5 -- as Wendy said, the -- the -- it could be somebody
6 else who's doing the vetting. Generally, it's a
7 standard ad that goes out, and people respond to it,
8 setting out what criteria and qualifications.

9 In Mississauga, one (1), for example,
10 is always that you live within the municipality.

11 We're looking for local. I think Toronto has
12 something similar. It's -- it's getting that input.

13 But the questions are -- are standard.
14 Everyone is ranked on a matrix. From my experience, a
15 lot of the vetting process is done in camera because
16 it's personal information about an identifiable
17 individual.

18 But once council considers the
19 appointments and affirms who it would like to move
20 forward, then that information is a public resolution.

21 MS. WENDY WALBERG: And if any
22 information -- any personal information were to become
23 public, the -- the municipality would have had to have
24 notified those who were applying that -- because the
25 municipal freedom of information legislation requires

1 this.

2 So if, for example, the municipality
3 wanted to make certain things public at -- at certain
4 points, then there would have to have been a
5 notification in the context of the process that anyone
6 applying would have had to, by making their
7 application, agree to, other than the fact of the
8 appointment at the very end which would be public.

9 THE HONOURABLE FRANK MARROCCO: I've
10 been thinking about this for a minute, so it's a bit
11 out of context, but I wonder if you could help me a
12 bit with the -- the shareholder's direction that you
13 mentioned.

14 What -- what can typically -- what --
15 what can be the subject of a shareholder's direction
16 or what typically is the subject of a shareholder's
17 direction?

18 MS. WENDY WALBERG: I'll go back to
19 the public service bylaw example that I referred to
20 earlier where the municipality adopted its own public
21 service bylaw.

22 There was some language in the council
23 decision document at that time directing municipal
24 boards and -- and corporations to develop something
25 along those lines.

1 There -- there's not a specific format
2 that the municipality uses for the shareholder
3 direction routinely, but that was a -- so any
4 direction by council through a council decision
5 document. And, in that case, they were required to
6 develop certain policies and procedures.

7 THE HONOURABLE FRANK MARROCCO: So --
8 so, council is the shareholder. And council, through
9 a decision document, sends a message to the directors
10 of the corporation?

11 MS. WENDY WALBERG: That's correct.

12 THE HONOURABLE FRANK MARROCCO: And is
13 that binding on the directors?

14 MS. WENDY WALBERG: That direction
15 would be, yes. If it's worded as a request, then --
16 then no. And, as Mary Ellen said, the council then is
17 responsible for any fallout from the directors
18 following that direction, so council steps into the
19 shoes of the Board, actually.

20 The -- the example that I used would
21 not have any sort of risk of liability, obviously, but
22 that is -- that is there, that -- that concept.

23 THE HONOURABLE FRANK MARROCCO: So, if
24 you wanted the corporation to obtain a valuation of
25 itself, council, through a decision document, would

1 direct -- could direct -- I wouldn't -- could direct
2 the directors to do that.

3 Is that -- is that the way that would
4 typically -- is that the way it would hap -- it could
5 happen?

6 MS. MARY ELLEN BENCH: It could
7 happen, yes.

8 THE HONOURABLE FRANK MARROCCO: And
9 then, if the dir -- if the -- if the directors didn't
10 -- didn't want to carry out the direction, then I
11 guess they either resign or -- or how -- how do --
12 what happens in -- in the unlikely situation that the
13 directors don't want to do it; they just resign,
14 replaced by somebody else, or what -- what would you
15 expect would happen?

16 MS. MARY ELLEN BENCH: I've never
17 personally seen that, but my expectation would be
18 either they would resign or council would remove them
19 because in an appointment bylaw, there's always a
20 clause at the bottom that makes it clear that they
21 serve at the pleasure of council and they can be
22 removed, or council could choose to ignore their
23 response and just move forward, allow them to move
24 forward.

25 THE HONOURABLE FRANK MARROCCO: Is

1 there any re -- is there any restriction on what can
2 be the subject matter of a shareholder's direction
3 that you're aware of?

4 MS. MARY ELLEN BENCH: Not that I'm
5 aware of.

6 MS. WENDY WALBERG: Not that I'm aware
7 of.

8 THE HONOURABLE FRANK MARROCCO: Okay.
9 Thank you.

10 MS. KATE MCGRANN: I'm going to ask
11 that we turn to slide 9 of your presentation, turning
12 back for a second to the process of selecting
13 directors to sit on the board of a municipal
14 corporation.

15 The first bullet point on your slide
16 speaks to using a skills matrix to identify experience
17 and competencies of individual directors and of the
18 Board.

19 I just wonder if you could explain in a
20 little bit more detail what is meant by the -- the
21 concept of a skills matrix?

22 MS. MARY ELLEN BENCH: So, depending
23 on the purpose of the corporation, you may want
24 somebody with a particular financial background. You
25 may want somebody with an auditing background. You

1 may want somebody with a human resources background or
2 a legal background.

3 You don't want to have a board that
4 everybody's got the same experience. You want to make
5 sure that you've got a balance so that your board can
6 serve all the interests of the corporation and can
7 assess when there are issues with the corporation
8 moving forward.

9 So, by putting in a skills matrix, you
10 -- you make sure that you've got that right balance of
11 everybody.

12 MS. WENDY WALBERG: Can I go back to
13 the last question about whether there are limitations
14 on what a shareholder could put into a shareholder
15 direction?

16 There may be limitations within the
17 statutory framework applicable to the corporation
18 itself, particularly one (1) that's not incorporated
19 under the Municipal Act, that limit its ability to
20 comply. And I -- I'm -- certainly, I -- I -- I do not
21 consider myself an expert in corporate law, so I
22 wanted to put that caveat on there --

23 THE HONOURABLE FRANK MARROCCO: So --
24 so you wouldn't -- you --

25 MS. WENDY WALBERG: -- because there

1 can be, in -- through -- through the other statute,
2 not through the -- the City of Toronto Act --

3 THE HONOURABLE FRANK MARROCCO: Okay.

4 MS. WENDY WALBERG: -- the Municipal
5 Act itself.

6 THE HONOURABLE FRANK MARROCCO: So if
7 the -- if the corporation's incorporated under the
8 Ontario Business Corporations Act and there's a
9 limitation in that Act, I --

10 MS. WENDY WALBERG: Or -- or the
11 Electricity Act, for example.

12 THE HONOURABLE FRANK MARROCCO: --
13 forget -- forget the example, then that would restrict
14 -- that would restrict the ability --

15 MS. WENDY WALBERG: M-hm.

16 THE HONOURABLE FRANK MARROCCO: -- mun
17 -- the council to direct --

18 MS. WENDY WALBERG: Council could
19 direct, but it may -- I just don't want to be too
20 definitive in my response.

21 THE HONOURABLE FRANK MARROCCO: Right.

22 MS. WENDY WALBERG: It -- it may limit
23 the ability of the corporation to comply.

24 THE HONOURABLE FRANK MARROCCO: All
25 right. Okay.

1 MS. KATE MCGRANN: You've spoken to
2 the role of council in -- in the conduct of the
3 business of municipally-owned corporations.

4 Could you speak to the role of the city
5 solicitor in council's involvement in the conduct of
6 municipally-owned corporations generally?

7 MS. WENDY WALBERG: As city solicitor,
8 I'm -- I'm counsel to -- I'm legal counsel to city
9 council, and that means that I provide legal advice to
10 city staff who are implementing the will of Council in
11 their day-to-day work, to council -- to council as a
12 whole, to its committees, and various local boards.
13 So I would represent council in its -- in its dealings
14 with the corporation, and there are some instances
15 where, as city solicitor, I can also provide advice to
16 the corporations.

17 But those are -- those are some --
18 again, I wouldn't want to provide a blanket answer
19 suggesting that I can always do that, right, because
20 there are lots of instances where I don't and can't.

21 MS. MARY ELLEN BENCH: And that's been
22 my experience as well, occasionally, to the
23 corporations, especially, depending on their purpose,
24 and if they -- they're small, they don't have a big
25 budget, they don't have a big staff. In some

1 municipalities, the city solicitor is the general
2 counsel to some of these corporations, if they're a
3 corporation to run an arts centre or a tourism
4 corporation or something like this that is tied very
5 closely to the operations of the municipality.

6 MS. KATE MCGRANN: Okay, so it sounds
7 like, in part, the role is dictated by the nature of
8 the corporation itself and -- and the business that
9 it's in. Is that fair?

10 MS. MARY ELLEN BENCH: And the -- and
11 what council sees as the role of staff, yeah. It goes
12 back to that role clarity.

13 MS. WENDY WALBERG: Yeah. We have to
14 look at our -- our own -- our own roles, right?

15 MS. MARY ELLEN BENCH: M-hm.

16 MS. WENDY WALBERG: It's very
17 important for us to -- to always be mindful of those,
18 whether there's conflict, whether there's -- whether
19 the interests are -- are completely aligned, for
20 example --

21 THE HONOURABLE FRANK MARROCCO: A -- a
22 -- a --

23 MS. WENDY WALBERG: -- and whether we
24 have permission, and what the LPIC implications are,
25 and that sort of thing.

1 THE HONOURABLE FRANK MARROCCO:

2 Apropos rules, often elected council members end up ex
3 officio becoming board memb -- I wouldn't say 'often',
4 but I -- this -- this -- this happens.

5 In -- in your experience, how do you
6 manage -- how would you manage the con -- is there any
7 difference between the way they have to manage
8 potential conflicts, any difference between them and
9 ordinary people who find themselves in a conflict?

10 Are there special considerations that
11 apply or anything of that nature? You're -- you're --
12 you're a municipal councillor, and ex officio, you
13 find yourself on a board --

14 MS. WENDY WALBERG: M-hm.

15 THE HONOURABLE FRANK MARROCCO: -- of
16 a municipally-owned corporation, and the --

17 MS. WENDY WALBERG: As -- as Mary
18 Ellen mentioned, the Municipal Conflict of Interest
19 Act does recognize that this happens, and it does
20 create an exception for those situations.

21 THE HONOURABLE FRANK MARROCCO: What's
22 the nat -- do -- are you able to comment on the nature
23 of the -- how -- how it manages the exception?

24 MS. WENDY WALBERG: So as -- as -- and
25 correct me if I'm wrong, here, this is just off the

1 top of my head -- but -- but a conflict can arise if a
2 member of one (1) board -- if a member is a -- a -- if
3 a body that a member belongs to has a pecuniary
4 interest and -- and council's voting on something
5 pertaining to that body, for example.

6 THE HONOURABLE FRANK MARROCCO: Right.

7 MS. WENDY WALBERG: So the -- the
8 legislation rec -- recognizes that members of council
9 will be on the boards of some of these bodies and the
10 council will be making decision about them, and it
11 carves that out as an exception.

12 THE HONOURABLE FRANK MARROCCO: I see.
13 Other than that, you're subject to the same --

14 MS. WENDY WALBERG: The legislation
15 applies --

16 THE HONOURABLE FRANK MARROCCO: --
17 conflicts problems as everybody else.

18 MS. MARY ELLEN BENCH: Common-law
19 conflicts, yeah.

20 MS. WENDY WALBERG: Yes, absolutely.
21 M-hm.

22 MS. MARY ELLEN BENCH: I guess the
23 other -- the other main area it applies is if a
24 councillor is paid a per diem to sit on one (1) of
25 these corporations; that doesn't breach the pecuniary

1 interest rules for council.

2 MS. WENDY WALBERG: M-hm.

3 MS. KATE MCGRANN: I have some
4 questions about how members of council or staff who
5 sit as directors on the board of a municipally-owned
6 corporation can manage the duties that they owe to the
7 corporation as director, to the town in their role as
8 councillor or staff.

9 And to ground that discussion, I wonder
10 if you could just explain the difference between the
11 duties owed in each of those roles, the municipal role
12 on the one hand -- councillor, staff -- director on
13 the other, as part of the board of directors.

14 MS. WENDY WALBERG: So any -- any
15 director has duties of loyalty, duty -- and the duty
16 of care, and the municipal councillor's duty --
17 actually, there's -- there's a good case -- the
18 Toronto Party case talks a little bit about that, the
19 fiduciary duty of members of Council.

20 In my experience, councillors are --
21 are adept at wearing the two (2) hats. In my role,
22 I'm -- I'm prohibited from giving advice to
23 councillors on conflict of interest, so I'm not
24 prepared to really say more than that.

25 MS. MARY ELLEN BENCH: And in today's

1 world, with the changes to the Municipal Act, that's
2 the role of the integrity commissioner, to be that
3 sounding board and to be there for all municipalities
4 so that they have that person councillors can go to.

5 And when it's a staff person, then
6 sometimes legal will get involved in terms of
7 assessing, like, whether there's a conflict, and
8 sometimes even then you have to say, Well, you're
9 going to have to talk to your own personal counsel.
10 And there are indemnification bylaws, usually, that
11 cover that off. And again, it goes back to role
12 clarity.

13 MS. KATE MCGRANN: Just to clarify the
14 information that you've just given us, when a -- when
15 a councillor or staff member is sitting as a director,
16 you said that they owed a duty of loyalty and care,
17 and that duty is owed to the corporation.

18 Have I got that right?

19 MS. WENDY WALBERG: Any -- any board
20 member has those duties, yes.

21 MS. KATE MCGRANN: Okay. And then in
22 their municipal role, the duties that you've discussed
23 are owed to the municipality.

24 MS. WENDY WALBERG: To the electorate,
25 yeah.

1 MS. KATE MCGRANN: Thank you. If a --
2 if a municipi -- if a municipal actor, a council member
3 or staff, is acting as a director and they've got
4 questions about a conflict of the two (2) duties that
5 they owe -- one (1) to the corporation on the one (1)
6 hand, to the electorate on the other -- who should
7 they ask advice from in terms of balancing or -- or
8 navigating that potential conflict?

9 MS. MARY ELLEN BENCH: Depends on
10 where the conflict arises. If it arises in the form
11 of their responsibilities at the municipality, then
12 they would go to the integrity commissioner. If it
13 arises in terms of their responsibilities to the
14 corporation, then they would go to the corporation
15 general counsel.

16 MS. KATE MCGRANN: Okay. I have a
17 couple more questions, but I believe that counsel has
18 a question, so I'm just going to take a pause.

19 MR. WILLIAM MCDOWELL: So I'm just
20 wondering if we could pull up Section 4 of the
21 Municipal Conflict of Interest Act. I just want to --

22 MS. WENDY WALBERG: Yes.

23 MR. WILLIAM MCDOWELL: -- make sure
24 we're talking about the same thing.

25 MS. WENDY WALBERG: Yes.

1 (BRIEF PAUSE)

2

3 MR. WILLIAM MCDOWELL: Okay, so if we
4 go to 4 -- I think it's 4(h). So this is the list of
5 exceptions. So -- so is it 4(h) that carves out the
6 problem that would otherwise arise where you've got a
7 member of council sitting as a director of a -- of a
8 municipal corporation -- a -- another municipal
9 corporation?

10

11 (BRIEF PAUSE)

12

13 MS. WENDY WALBERG: Yes.

14 MR. WILLIAM MCDOWELL: Okay. All
15 right. Sorry. I just wanted to make sure that's the
16 provision, Ms. Walberg, that you were referring to?

17

18 (BRIEF PAUSE)

19

20 MS. WENDY WALBERG: Oh, it is. Yes.

21 MR. WILLIAM MCDOWELL: Okay.

22 MS. WENDY WALBERG: Yes.

23 MR. WILLIAM MCDOWELL: Great. Thanks.

24 MS. KATE MCGRANN: I'm going to switch
25 focus for a second away from Boards of Directors and

1 municipally-owned corporations and ask a slightly
2 different question.

3 Are there circumstances in which
4 municipal staff or councillors can hold an executive
5 position with a municipally-owned corporation? So act
6 also as a chief executive officer or CFO or otherwise,
7 are there circumstances in which that is advisable or
8 allowable?

9 MS. MARY ELLEN BENCH: It's allowable,
10 and I've seen it happen with a number of corporations.
11 For example, the Living Arts Centre Board at -- at
12 Mississauga is -- currently has a -- a staff member.

13 Generally when municipal staff are in
14 that role, the expectations are clearly set out, and
15 you pick someone who's got subject matter expertise,
16 municipal expertise, but understands what their
17 relationship is in terms of dealing with the
18 corporation, dealing with the role with the
19 municipality.

20 So I would see it almost like they're
21 in an administrative role as opposed to a strategic
22 role, where I've seen it anyway.

23 MS. KATE MCGRANN: You said that
24 the role should be clearly set out. Where would that
25 be set out? In a job description or -- how would that

1 be accomplished?

2 MS. MARY ELLEN BENCH: It would be
3 accomplished in whatever document the municipality
4 uses to put them in that position in that place so
5 that they know who they report to, how often they
6 report, what items they need to report on. They're --
7 they're not making the strategic business decisions.
8 Their loyalty is to the municipal corporation, unless
9 they're told otherwise.

10 MS. KATE MCGRANN: Can you help us
11 understand why it's important that a person who is
12 taking on multiple roles like that shouldn't be in a
13 position to be making strategic business decisions?

14 Why it's important that -- why it's
15 more advisable they'd be in a administrative role?

16 MS. MARY ELLEN BENCH: From my
17 perspective, I see it as -- as administrative because
18 it -- at a -- unlike a Board, a Board is -- their job
19 is to be the strategic policy direction part of the
20 corporation. The role of staff is to carry out those
21 responsibilities and -- and move them forward. And
22 most municipalities do have bylaws that deal with
23 conflict of interest, deal with what your job
24 responsibilities are.

25 So you have a primary job. If you're

1 later appointed to a Board because of your primary
2 job, you need to understand how those two (2) fit, and
3 to me, it -- it fits into more of an administrative
4 type responsibility in the -- the Boards that I've
5 seen it happen in.

6 MS. KATE MCGRANN: Are there are any
7 other steps that ought to be taken in addition to
8 ensuring that the role is clearly communicated and
9 defined where an individual is going to be taking on
10 multiple roles in the way that we're discussing?

11 MS. MARY ELLEN BENCH: I mentioned
12 that there should be clear reporting expectations --
13 how those things work, whether it's on a quarterly
14 basis, whether it's on a -- a weekly basis, it -- it
15 depends totally on the nature of the -- of the
16 responsibility. But it's the whole transparent and
17 accountable are the two -- transparent and accountable
18 to the municipality.

19 MS. KATE MCGRANN: Shifting focus
20 again, I'd like to talk a little bit about the
21 instance in which a town or town council is
22 considering divesting itself of a municipally-owned
23 corporation.

24 In that situation, what is the -- what
25 is the role of town council? What are -- what role do

1 they play in that type of a process?

2 MS. MARY ELLEN BENCH: Well, they are
3 the shareholder, so they must determine. So they are
4 the one who gathers the information. They look at the
5 pros and cons of selling an asset. Quite often, there
6 would be a -- a financial analysis done as to the
7 evaluation of the corporation and -- and the pros and
8 cons of selling the asset.

9 There would also at -- at the town
10 level be perhaps public meetings to determine whether
11 the public is interested in -- in moving ahead. And
12 then the ultimate decision is -- is made by the -- the
13 town.

14 MS. KATE MCGRANN: What is the role of
15 the corporation's Board of Directors in a situation
16 when council is considering divesting itself of an
17 asset like this?

18 MS. MARY ELLEN BENCH: For the most
19 part, they're a resource to the city staff who are
20 providing the information and advice to council. So
21 it's where the -- the city manager or financier,
22 whoever is -- is leading the -- the municipal side
23 of -- of providing information to council, they would
24 be a resource. They would not have a -- a direct
25 role.

1 MS. KATE MCGRANN: And similarly, what
2 is the role of the staff of the municipally-owned
3 corporation in a situation where council is
4 considering divesting itself of an asset?

5 MS. WENDY WALBERG: It would be
6 assisting the corporation in performing its role.

7 MS. KATE MCGRANN: Okay. Thank you.
8 Does the city solicitor have a role to play where
9 council is considering divesting itself of a
10 municipally-owned corporation?

11 MS. MARY ELLEN BENCH: I would say
12 yes. I think the city solicitor needs to be involved
13 in the process right from the beginning to make sure
14 that all of the necessary rules are followed and
15 provide advice and guidance and direction to council
16 to municipality throughout the process.

17 MS. WENDY WALBERG: I would agree with
18 that.

19 MS. KATE MCGRANN: Okay. I'm looking
20 at the time. I wonder if we might just take a brief
21 break at this point.

22 THE HONOURABLE FRANK MARROCCO: All
23 right. We'll take ten (10) minutes.

24 MS. KATE MCGRANN: Thank you very
25 much.

1

2 --- Upon recessing at 11:03 a.m.

3 --- Upon resuming at 11:14 a.m.

4

5 MS. KATE MCGRANN: I understand that
6 Mr. McDowell wanted to address one (1) thing and
7 wanted to have reference to a document in doing so.

8 The doc ID, just for our reference, is
9 CJI114543.

10 MR. WILLIAM MCDOWELL: So,
11 Commissioner, you'd asked the question what happens if
12 there's a divergence between city council and members
13 of a board of municipally-owned corporations.

14 There is this case, Walker v. Toronto,
15 which dealt with the old Harbour Commission and the
16 Harbour Commissioners where the Commissioners had a
17 view that they knew what was best for the Harbour
18 Commission and the city had a different view.

19 This dealt with the waterfront lands
20 and the short answer was they serve at pleasure and
21 they simply get replaced.

22 So that's just for your notes and --

23 THE HONOURABLE FRANK MARROCCO: Okay,
24 thank you.

25 MS. KATE MCGRANN: I wanted to turn

1 back to something that we had talked about before the
2 break, and that was the notion that in some
3 circumstances a single lawyer may act both as -- as
4 counsel to the town council, or lawyer to town
5 council, so we don't confuse terms, and also as
6 general counsel for a municipally-owned corporation.

7 I wonder if you could speak generally
8 to any additional considerations that would come into
9 play for someone in that dual role, if the town or a
10 municipality is considering divesting itself of its
11 ownership of the corporation.

12 MS. MARY ELLEN BENCH: I can see a lot
13 of disclaimers being necessary.

14 You have to -- like, we're governed by
15 Law Society rules, so you have to take those into
16 account first and foremost, and your responsibilities
17 to your primary employer when you're -- when you come
18 into the job as -- as city solicitor or town
19 solicitor.

20 I have seen those situations and again,
21 I -- I always see the municipal corporation as being
22 the primary. I've never been GC to a corporation
23 because it's something that personally I'm -- well,
24 not as comfortable with how you manage both of them.

25 But I have seen it work effectively in

1 a number of places, so it's hard to talk about more
2 specifically.

3 THE HONOURABLE FRANK MARROCCO: There
4 is -- it strikes me that it's a theme and -- and I'd
5 like to know whether you agree with it or not, because
6 I -- I don't want to convey the impression that I've
7 concluded this, but it -- I am -- it does seem that a
8 clarity of the roles that people are playing is -- is
9 fundamental to managing municipal situations and the
10 variety of activities that municipalities engage in.

11 And I'd just like to -- I just wonder
12 if -- if that makes sense to you or if you have --
13 what your observations are individually on that.

14 MS. WENDY WALBERG: I agree. I agree
15 and certainly as -- as legal counsel our role is -- is
16 largely defined by the Law Society.

17 We have one (1) solicitor-client
18 relationship, it's with city council, and everything
19 else we do flows from that, because the work we do for
20 a local board or a -- a department head is all flowing
21 from that one (1) solicitor-client relationship.

22 So for us, our role really relates
23 directly back to the Law Society roles. And -- and
24 the statutes do provide some guidance, not --
25 certainly not -- not particularly detailed, but there

1 is guidance in the legislation.

2 The legislation sets out the role of
3 the public service. It sets out the role of council
4 as a whole. There's nothing about the role of the
5 individual councillor, it's -- really only recognizes
6 council as a whole.

7 And the legislation also addresses the
8 role of the head of council and the role of various
9 statutory officials. Those are fairly -- the
10 statutory officials roles are actually fairly clearly
11 defined in legislation.

12 Many in the City of Toronto Act,
13 there's a Building Code Act and, you know, various
14 other statutes that define the roles of specific
15 officials of a municipality.

16 The chief administrative officer's role
17 is referenced in the statute as well, not a lot of
18 detail there, but it is referenced in the legislation.

19 I always go back to that as a starting
20 point, that's really the foundation for the roles and
21 then municipalities can provide additional role
22 definition through delegation of responsibilities to
23 various individuals, in -- including in some cases to
24 individual members of council who may be committee
25 chairs or asked to take on -- on a role on a board,

1 for example.

2 MS. MARY ELLEN BENCH: So, I agree
3 with what Wendy said.

4 And going back to the other question, I
5 think for -- for lawyers, because of our training, we,
6 I think have a -- an easier time than some other staff
7 might have in terms of those roles and because of our
8 Law Society rules that we have to follow as well.

9 And so the whole -- like, for -- for
10 staff, for others involved in that, the whole role of
11 clarity is key. It's fundamental to understanding
12 what your relationship is, what are -- what are the
13 expectations in terms of responsibilities.

14 So I've talked about more
15 administrative operational kind of responsibilities as
16 opposed to strategic or policy responsibilities for
17 staff when they're wearing two (2) hats in terms of
18 the municipal corporation and a subsidiary or a
19 separate corporation that's owned by the municipality.

20 You need to have that role of clarity,
21 the reporting relationship and -- and that will
22 certainly help -- help guide you and direct you in
23 terms of how you fulfill your functions, in addition
24 to the municipal policies that talk about when you've
25 got a conflict and what your specific roles and

1 responsibilities are.

2 THE HONOURABLE FRANK MARROCCO: And --

3 MS. WENDY WALBERG: My last -- I'm
4 sorry.

5 THE HONOURABLE FRANK MARROCCO: Go
6 ahead, please.

7 MS. WENDY WALBERG: Bylaws can
8 certainly help to define roles as well. In some
9 cases, a municipal service board will have a bylaw
10 that sets out its responsibilities and certain duties
11 that are imposed up on it, such as following
12 particular reporting procedures regarding finances,
13 for example.

14 And also bylaws can define roles of
15 specific city staff, department heads, for example,
16 and individuals like, for example, a city clerk rely
17 largely on statute to define their role, not just the
18 Municipal Act, but also Municipal Elections Act and
19 various other statutes.

20 THE HONOURABLE FRANK MARROCCO: In --
21 in your experiences when you don't have -- what --
22 what are the risks that you're avoiding by having a --
23 a clarity of the respective roles of individuals and
24 corporation -- municipal corporations in a -- when
25 you're engaged in an activity?

1 What are -- in your experience, what
2 happens when that isn't -- when the roles are not
3 clear? Where the roles are clear, but the carrying
4 out of the role is not clear.

5 MS. WENDY WALBERG: It's certainly
6 very difficult for people trying to do their jobs if
7 the roles aren't clear.

8 MS. MARY ELLEN BENCH: Yeah, if the
9 roles aren't clear, you've got freedom to --

10 MS. WENDY WALBERG: Conflict.

11 MS. MARY ELLEN BENCH: Yeah. Decide
12 how you're going to carry it out yourself.

13 And we can't -- you may or may not be
14 going in the direction that council want you to go in.

15 So, without that clarity you're not
16 going to --

17 MS. WENDY WALBERG: When I say
18 "potential conflict," I'm -- I'm not meaning conflict
19 of interest so much as -- as conflict between
20 individuals involved in the same thing, because
21 everybody might think one particular responsibility
22 belongs to them, for example.

23 THE HONOURABLE FRANK MARROCCO: Right.
24 Thank you.

25 MS. KATE MCGRANN: Due largely to the

1 fact that your presentation was quite thorough and
2 complete, I -- I actually don't have any more
3 questions for you.

4 I look over to my friends from the
5 Town.

6 MR. WILLIAM MCDOWELL: No. Thanks
7 very much, I -- Mr. Breedon has some expertise in this
8 area and I was hoping to prompt him to ask something,
9 but -- but that was a very comprehensive presentation.
10 Thanks.

11 THE HONOURABLE FRANK MARROCCO: No, it
12 -- it really was and it -- it's very helpful. And as
13 I said at the beginning, thank you so much for
14 contributing your -- your time and effort to what
15 we're -- we're doing. It's extremely helpful to me
16 and -- and I'm sure it will be when I'm -- when I'm
17 trying to figure out what I'm supposed to say here.

18 So, thank you.

19 MS. WENDY WALBERG: It was my
20 pleasure. Thank you.

21 MS. MARY ELLEN BENCH: Likewise.
22 Thank you.

23 THE HONOURABLE FRANK MARROCCO: We
24 stand down until -- when's the next panel?

25 MR. MAX LIBMAN: 2:00 p.m.

1 THE HONOURABLE FRANK MARROCCO: 2:00

2 p.m.

3

4 --- Upon recessing at 11:24 a.m.

5 --- Upon resuming at 2:02 p.m.

6

7 PROCUREMENT PANEL:

8

MARIAN MACDONALD

9

MICHAEL PACHOLOK

10

11 DISCUSSION

12

MR. MAX LIBMAN: This afternoon's

13 panel will be on procurement in the municipal context.

14 I will give a brief introduction of our panelists

15 before asking them to proceed with their presentation.

16

We have Marian MacDonald. Ms.

17 MacDonald was the assistant deputy minister of Supply

18 Chain Ontario for ten (10) years, from 1998 to 2018.

19 During her tenure, Ms. MacDonald led a team of more

20 than one hundred and eighty (180) procurement

21 professionals, overseeing \$6 billion in annual

22 spending, and was responsible for developing and

23 implementing procurement policies and processes in the

24 Ontario public service and broader public sector.

25

She provided strategic advice to

1 management, Board, or cabinet on large-scale, complex
2 procurements, and was an expert advisor for various
3 trade negotiations, including the Canadian Free Trade
4 Agreement, the Canada European Union Comprehensive
5 Trade Agreement, and the Trade and Cooperation
6 Agreement between Ontario and Quebec.

7 We also have with us Mike Pacholok.
8 Mr. Pacholok became the chief purchasing officer for
9 the City of Toronto in 2012, with oversight of close
10 to \$2 billion spent on goods and services per year.
11 In the role of chief purchasing officer, Mr. Pacholok
12 leads a professional staff of approximately one
13 hundred and forty (140), and has been instrumental in
14 leading large-scale procurement transformations within
15 the City.

16 Prior to his current position, Mr.
17 Pacholok was a municipal lawyer with the City's legal
18 services department, providing legal advice on the
19 public procurement process to the purchasing and
20 materials management division, and legal advice on
21 environmental matters, contracts, and other municipal
22 matters to the City's solid waste management services.

23 I turn it over now to our panelists.

24 MS. MARIAN MACDONALD: Thank you.

25 MR. MICHAEL PACHOLOK: Thank you very

1 much. So I'm going to start the -- the presentation,
2 and we didn't feel that we're go through every single
3 slide, but give an opportunity to hit some of the high
4 points, and then turn it over to questions.

5 So I think what's critical is to talk
6 about what is the purpose of having a procurement
7 policy? And fundamentally, it is to ensure that
8 publicly funded goods and services are acquired
9 through a process that's open, fair, and transparent.
10 That's really critical, especially as public
11 procurement law often imposes duties of fairness and -
12 - and transparency onto government procurement.

13 The oth -- other component that is
14 really critical is to maintain the integrity of the
15 procurement process by choosing the most appropriate
16 procurement method and to achieve best value for money
17 through a competitive process -- competitive
18 procurement process or the allowable non-competitive
19 processes. And the procurement policy should also
20 outline roles, responsibilities, and accountability
21 throughout the process. All of this is in the vein to
22 achieve open, fair, and transparency.

23 For a municipality, as I'm sure the --
24 the panel Inquiry knows, is that we only have a -- one
25 (1) section in the Municipal Act, or in the City of

1 Toronto Act, for -- for myself, where it says that we
2 must have a procurement policy, but no -- no
3 guidelines.

4 So municipalities should probably turn
5 to the broader public sector directive as a -- as the
6 best practice, as well as the -- some trade
7 agreements, like the Comprehensive Economic Trade
8 Agreement and the Canadian Free Trade Agreement both
9 have very in-depth procurement chapters that help set
10 out the obligations in a public procurement setting.
11 And in both those cases, those are actually trade
12 agreements that now apply to municipalities as
13 compared to trade agreements from -- from earlier.

14 At a high level, procurement processes
15 should attain a number of things. I'm not going to
16 read this whole list, but as I said, roles and
17 responsibilities is a key one. Planning is actually
18 quite critical to ensure success in a procurement
19 process. Explaining the various methods of
20 procurement, and when a competitive processes is -- is
21 desired, and a noncompetitive procurement could be
22 allowed.

23 Those also require the authority levels
24 for proving those kind of processes and approving the
25 awards for those processes. There should be measures

1 that deal with items like prohibition on lobbying,
2 what to do with donations and sponsorships, and that
3 also ties into things like conflict of interest, and
4 ensuring that there's a clear code of ethics for both
5 the purchaser, the buying team, and for suppliers.

6 And the -- what rounds it out usually
7 is -- is the contract and supplier performance. These
8 are key components. You can set up a very good
9 procurement, but then you also need to manage the --
10 the contract that arises from it properly as well.

11 And over to Marian to talk about
12 responsibly.

13 MS. MARIAN MACDONALD: Thanks, Mike.
14 It -- in the procurement process, there are always
15 multiple parties. At a minimum, there is -- there is
16 two (2), the party buying, and the party selling. And
17 there are clear roles and responsibilities that are
18 allocated to each of those parties in public sector
19 procurement.

20 There also tends to be other -- other
21 folks who are involved, politicians, councillors. In
22 my case, it was members of Parliament. And often you
23 have a purchasing department who will then work with a
24 buying department.

25 So clearly, a lot of people have vetted

1 interest in the procurement process. Probably the
2 most singular important thing, I think, for all of the
3 parties involved is around that same principle of open
4 and transparency, and avoiding and identifying any
5 potential conflicts of interest that they might have
6 in the process.

7 Your procurement staff, though, are
8 there to help recommend the most appropriate
9 procurement method, help you to oversee the process,
10 work with your department staff to plan, gather market
11 data, where market data is needed to support a
12 procurement, and rely on department staff to be that
13 key expert on what the actual business need is, and
14 then try to translate that into -- into requirements
15 that go into your procurement document.

16 The other critical part for department
17 staff is the ongoing contract management. Working
18 with the vendor who has been selected, the supplier,
19 politicians probably have, in some ways, a least role
20 in the procurement process beyond, I think, setting
21 out, perhaps, and approving an overall procurement
22 plan and approving procurements that fall within their
23 own delegation of authority.

24 But before that, they would also work
25 to set budget. You know, typically you don't procure

1 without your budget being set, so they have an
2 important role there. But generally I think in the
3 public sector, political staff remain arm's length
4 from the procurement process. Once it's started, they
5 step back, then they let the process be followed.

6 And then lastly are vendors who are a
7 very big part of this -- suppliers or vendors. I use
8 the terms somewhat interchangeably. It is important
9 that they be involved in the procurement process for
10 certain -- for certain procurements that are complex.
11 It may be, in fact, important to engage them in pre-
12 procurement discussions, so that you understand their
13 capabilities. There's nothing worse than putting a
14 lot of effort in taking something to the marketplace
15 only to find out the marketplace is unable to respond.

16 They have to respond to those
17 opportunities, so having a clear understanding of what
18 you need is also important for them, and their ability
19 to understand your procurement processes, what they
20 can and what they cannot do throughout the process.
21 So those are very high level. And we'll carry on.

22 Planning. Mike touched a little bit on
23 planning, and that's something in my tenure that I
24 probably spoke about frequently. Procurement planning
25 is probably the single most important thing any public

1 sector can do, the development of either an annual
2 plan, a semiannual plan, however you want to put a
3 time frame around it, making it part of a budget
4 conversation so that in the -- in the course of your
5 day, in the course of your work, there are no
6 surprises. There's -- there's -- that come out.

7 Urgency, or -- or failure to plan, is
8 not something we consider to be an allowable reason to
9 go a noncompetitive route. So having that planning
10 document in hand and knowing what's coming in front of
11 you, helps you to -- to meet your procurement policy,
12 helps you to achieve that competitive and -- and --
13 process, and it also helps you determine your sourcing
14 strategy.

15 Who is out there? Who's providing it?
16 Are there other procurement vehicles already in place
17 that you can leverage, whether it's the Province of
18 Ontario Vendor of Record Program, federal standing
19 agreements, other municipalities, that cooperative
20 procurement opportunity? But also understand your
21 marketplace.

22 So just highlighting a few things about
23 competitive procurement, your -- your procurement
24 policy should be flexible to determine the appropriate
25 competitive procurement vehicle, and there are a range

1 of -- of approaches to competitive procurement.

2 You can call a request for tenders,
3 request for quotation, request for proposals. I won't
4 go through the list, but there's multiple vehicles
5 that you can use to achieve a competitive procurement,
6 and that includes just sending a request to multiple
7 vendors in writing and asking them for their best bid
8 and their best offering, and for low value
9 procurements, that's also the best -- sometimes the
10 best way to go out to market.

11 There are some requirements under trade
12 agreements, though, that dictate when you have to go
13 to that full open market, and generally that's a
14 hundred thousand dollars across the various trade
15 agreements, but we always follow the most trade
16 liberalizing agreement, so where they are not aligned,
17 and we took a lot of efforts to try to make them
18 aligned, but there's still a little bit of a
19 misalignment between them. Always deal with the most
20 trade liberalizing.

21 Be clear on how you're going to accept
22 and then evaluate your bids and proposals. Set out --
23 out your expectations on how procurements are going to
24 be developed free of discrimination, set out your
25 delegation of authority framework based on your

1 procurement values and your methods, and set out how
2 long you're actually going to let the market respond
3 to your procurement.

4 And that one is actually more critical
5 than -- than we sometimes realize, because if you --
6 if you conduct an open competitive tender but you do
7 not leave it in the marketplace with sufficient time
8 for your suppliers to -- to bid -- to put a good
9 viable bid together, it -- it actually can be a form
10 of noncompetitive procurement, but dressed up like a
11 competitive procurement.

12 So as much as that doesn't seem like
13 it's a critical point, it is -- it is something that
14 is important enough that it was actually negotiated
15 into multiple trade agreements on how long you have to
16 leave certain procurements out in the marketplace.

17 Another aspect of -- of competitive
18 procurement which is a best practice is, during your
19 procurement period, invoke what we used to call in the
20 province a black-out period that surrounds either the
21 -- the time immediately prior to a procurement, during
22 a pure -- procurement, where you stop talking to your
23 vendor community so that you are not seen to have them
24 bias you or you be -- or vice versa.

25 Make a single point of contact, so make

1 it easy for your vendors to understand that there is
2 only one (1) person that they can speak to during that
3 entire process, and prohibit them from offering
4 donations and sponsorships while there is an active
5 procurement going on.

6 We had a process in the province where
7 when enquiries like that came through, we would vet
8 those against our active procurement list and then
9 send the word back, whether or not conversation should
10 take place or conversation should be paused until the
11 procurement is done.

12 And I think the other most important
13 thing, and this is important for suppliers, is allow
14 pre-award conversations to take place to anticipate
15 any potential bid disputes that might come up in your
16 process.

17 MR. MICHAEL PACHOLOK: Another
18 important component to the procurement processes is
19 also explain the obligations with respect to conflicts
20 of interest. Conflicts of interest and unfair
21 advantages can occur at many different spots between
22 staff, politicians, and vendors, so we all -- all of
23 the parties have an obligation to be aware of
24 potential conflicts and to bring them forward at the
25 appropriate time.

1 For example, staff, you know, should be
2 disclosing if they know a company bidding has a family
3 member on -- on -- working there, and see if they need
4 to be removed from the process so that there doesn't
5 appear to be any issues of how the -- how the process
6 is ultimately done.

7 Vendors also have to bear this in mind.
8 Sometimes vendor's consultants are brought on to do
9 some work for a municipality and then that work is
10 going to be part of a -- a future larger -- larger
11 piece of procurement, and the question is, you know,
12 did they assist in the development of that subsequent
13 document and -- and should they be excluded on that
14 basis.

15 And also -- and, you know, in my
16 experience, former public sector's employees often --
17 sometimes they retire or they leave the -- their place
18 of employment and go to work for some of the vendors,
19 so the question is making sure that -- there is
20 nothing obviously wrong with a company hiring an
21 employee from a municipality or -- or from government,
22 but understanding that they should still disclose that
23 when they're bidding on work from that employee's
24 former employer in case that has created a potential
25 conflict of interest.

1 It doesn't necessarily mean that vendor
2 would be excluded, but it would -- it would trigger a
3 review by the procurement office to investigate and
4 determine, did that person -- was that person involved
5 in that procurement in some way? Did they -- would
6 they have knowledge that could help that vendor and
7 give them an unfair advantage? But maybe they don't.
8 Maybe they were from a completely different department
9 and so the -- the -- there is no issue whatsoever, but
10 give that opportunity to -- to advise.

11 And the -- and -- and conflicts of
12 interest is not a one-time situation. It's actually
13 ongoing. Conflicts can arise during the process and
14 then during a contract, so the obligation to identify
15 conflicts of interest has to be maintained, and when
16 it comes up it has to be -- there has to be a
17 mechanism to address them.

18 With respect to noncompetitive
19 procurement, and, you know, I was -- Marian and I were
20 deliberate in choosing the phrase "noncompetitive"
21 because there's a distinction between single source
22 and sole source, single source being where there's
23 actually multiple people in the market and they -- and
24 someone chooses one, as compared to sole source where
25 there is only one (1) person in the market.

1 The procurement policy should be very
2 clear on what those allowable exceptions for
3 noncompetitive procurement are and what del -- what
4 level of authority you will need in order to move
5 forward with that procurement.

6 One (1) good practice to help address
7 concerns, especially with a single-source situation,
8 or, sorry -- yeah, with a single-source situation, is
9 an advanced contract award notice where the government
10 entity actually posts in advance that they plan to do
11 a noncompetitive procurement with that supplier and
12 gives the market an opportunity to -- to indicate that
13 there is actually the opportunity for a competition
14 there.

15 Otherwise, staff in the procurement
16 make sure they do their due diligence because the
17 noncompetitives really need to have a higher level of
18 scrutiny than competitive process.

19 And it's important for open and
20 transparency to do that, and to also be very clear and
21 even post information online even after the award is -
22 - the contracts have been executed so that people are
23 aware of the situation.

24 Some allowable exceptions are, you
25 know, emergencies, obviously, monopoly, proprietary

1 rights, warranty. And then, you know, confidentiality
2 is -- is also something to consider.

3 As Marian said, the lack of planning or
4 insufficient planning is -- you know, is not a good
5 reason to a noncompetitive procurement. And, you
6 know, to the extent that's all possible, we should be
7 planning to avoid such situations.

8 Very briefly, unsolicited proposals.
9 Obviously, there are lots of great ideas that the
10 marketplace can provide to a municipality or to a
11 government.

12 It was best to have at least one (1)
13 point of contact for that and, also, to set up clearly
14 what the process would be. You could link it with an
15 advance contract notice.

16 If you think that the proposal has
17 merit, then you could the market you're going to
18 proceed with that. Or you could do something known as
19 a Swiss challenge in which you take the proposal that
20 you've received, and you put it back out to market and
21 see if other people could provide a better -- better
22 proposal than the one (1) you received.

23 In the case of Swiss challenges, what
24 usually happens in that scenario is, if someone comes
25 in with a different -- with a better proposal, the

1 originating person who first came with the unsolicited
2 proposal will have the opportunity to beat -- or match
3 or beat the -- the better deal.

4 But, again, it's all in regards to
5 maintaining an open process so that everyone
6 understands what is going on and the rules with --
7 associated with it.

8 Very, very quickly the very busy slide.
9 Contractor and supplier performance management is
10 actually quite critical. The competitive process is
11 often criticized by picking when you do a low bid
12 situation and that low bidder ends up perhaps
13 performing poorly.

14 The pro -- procurement process is one
15 (1) component of that. If we do not set up the
16 contract properly in the -- in the call document when
17 we issue it, and then do not actually manage the
18 contract, it will undermine the procurement process.

19 So, the department involved needs to
20 ensure that they're ready and able to actually manage
21 that contract and take the appropriate steps to deal
22 with a poor performing contractor.

23 MS. MARIAN MACDONALD: And I would
24 just add, the other reason your procurement documents
25 must be clear on this is -- is I -- I think a lot of

1 people are not -- don't recognize that your
2 procurement, your tendered document, actually forms
3 part of the contract.

4 So, you know, anything you say in that
5 initiating document will follow you through -- right
6 through to the end of the contract term.

7 MR. MICHAEL PACHOLOK: Code of ethics,
8 we've kind of already been discussing it indirectly.
9 This is where we want to be clear the rules for
10 municipal staff in the departments as well as in the
11 purchasing department and as well as politicians.

12 Usually, with respect to purchasing
13 with buyers, the supply chain organizations in Canada
14 often say you shouldn't even accept a nominal gift,
15 they should -- so there's no acceptance of gift --
16 gifts whatsoever.

17 But the code of ethics is also im --
18 important for the venders, as well. You know, we want
19 venders to make sure that they're not misrepresenting
20 what they put forward, that they are not going to
21 intimidate or threaten any of the staff to -- to try
22 to get a contract or to offer a gift and, of course,
23 to avoid collusion.

24 And the last thing I guess we'll say --
25 speak to is just other best practices. And this

1 really kind of ties back to what might be best value a
2 municipality.

3 When you start building in other
4 concepts of just beyond price, you might be looking at
5 things like environmental procurement policies where
6 you want to ensure that there's a -- that the product
7 or service you're buying meets environmental goal,
8 like climate change or other things like ethical
9 procurement, ensuring that there's no slave labour.

10 All of these things will change the
11 nature of what best value is, and -- and we'll move
12 beyond just the idea of lowest price wins. And that's
13 critical for a municipality because it's not -- it's
14 really important to use the taxpayer's dollars
15 appropriately.

16 But, as a municipality, you can take --
17 form a wide range of things because it's very
18 important to some municipalities for environmental
19 reasons or to ensure that we encouraging supply chain
20 diversity or other things like that.

21 So, best value, this is where council
22 has an opportunity to kind of set what best values
23 should be through adopting other procurement policies
24 such as these ones. Okay. Thank you very much.

25 MR. MAX LIBMAN: Thank you very much

1 for that. So, you -- you mentioned at various points
2 throughout your presentation certain stages of the
3 procurement process.

4 I was wondering if you could just help
5 us go through, for a large construction or
6 infrastructure project, what is the -- what are the
7 typical stages of the entire process?

8 MR. MICHAEL PACHOLOK: So, in the
9 large scale, probably -- you'd often have a
10 predesigned phase where you're going to do various,
11 like, site-specific work or you're trying to do
12 studies or you may be engaging the -- the community
13 with respect to approaches.

14 Following that, there's often -- and
15 this depends on -- so, this might depend on exactly
16 the process you want to use, but you could do a design
17 phase, at which you might actually pre-qualify your --
18 the designers that you would like to have do the work.

19 And that will then, of course, set up
20 the design for whatever the infrastructure you're
21 trying to -- trying to ultimately build. And if you -
22 - and if you do the most traditional way, what then
23 happens is you would take that design and you'd put
24 out for another procurement process which, again,
25 could have a pre-qualification stage to start first,

1 and then followed by a construction tender, but
2 there's variations of the theme.

3 So, you could do a design build, and so
4 you -- you collapse the -- the steps in-between by
5 hiring someone who will do the design work and the
6 construction. And then you can get even more
7 complicated with P3 models and you can bring in
8 financing oper -- situations, and then operations
9 management -- or maintenance.

10 So, there's lots of different ways that
11 you can go about doing procurement for a large scale
12 infrastructure. And during all those phases you're
13 going to want to think about what other resources are
14 you going to need to assist you, including external
15 legal staff or fairness monitors or engaging
16 consultants who help with community engagement; it
17 just depends on the nature of the actual procurement.

18 MS. MARIAN MACDONALD: I would just
19 add, critical to those projects is your planning and
20 your decision-making before you go out to market. So,
21 make those decisions on are -- do you want them -- do
22 you want a vendor to simply design a building, and
23 then build the building, or do you want them also
24 engaged in operating the building.

25 So, have all of those decisions. Those

1 decisions have to be made before you go out to the
2 marketplace so that you're both communicating to the
3 supplier what they're bidding on, but also knowing how
4 you're going to evaluate that.

5 MR. MAX LIBMAN: So, we've spoken a
6 fair amount about the importance of openness and
7 transparency throughout the process. What parts of
8 the steps that you just described are typically done
9 in private or in the context of an in camera session
10 or something along those lines and what stages are
11 generally done in public?

12 MS. MARIAN MACDONALD: I -- I think it
13 comes -- I think it depends on -- on the nature of the
14 procurement. I think that there are -- if you have to
15 do land acquisition as part of a project, that
16 sometimes is done in camera. And the decision-making
17 around that is done in camera so that the costs of
18 your land don't suddenly -- aren't suddenly much
19 higher than you initially anticipated.

20 But after that, at the point your
21 procurement documents -- documents in the public domain,
22 it's a full and open and transparent process. The
23 only exception to that is if -- if there were issues
24 of confidentiality that you wanted to maintain.

25 So, if you were building a secure

1 building, a secure courthouse, some aspects of
2 security, you may tie down some of your -- your
3 process so that it's only open to the vendors who are
4 participating.

5 And they can -- you can ask them to
6 sign letters of intent, letters of conflict of
7 interest, that they won't violate letters of
8 confidentiality. But typically, I think the process
9 can be and should be fully open and transparent.

10 MR. MAX LIBMAN: Thank you. I want to
11 shift gears just to speak a bit about the different
12 roles that Council and staff play over the course of a
13 procurement process.

14 When we're in the middle of a
15 procurement process that involves a major municipal
16 asset, what's the difference between Council and
17 staff's role when it comes to that very initial phase
18 of identifying the need that the municipality has that
19 will eventually be fulfilled by the procurement
20 process?

21 MR. MICHAEL PACHOLOK: I think in the
22 initial phase, Council as a whole has an -- has an
23 opportunity to help shape what the need might be,
24 including what the -- and it's particularly the
25 budget.

1 And this could come forth in a couple
2 of ways, so -- so Council may -- councillor through
3 Council may have some ideas for staff to consider
4 in -- in order to do that. And so staff might have to
5 go away, and then take those ideas, and come forth
6 with what the budget could be.

7 But Council does have a role in helping
8 those initial stages to kind of understand what staff
9 should then go forward and try to procure. If Council
10 says the budget cannot exceed a certain amount of
11 money, then we -- like the staff need to understand
12 what -- what that roles of engagement are before they
13 can do further work.

14 MS. MARIAN MACDONALD: I think as well
15 that there are points in the procurement process to --
16 to that point where there may need to be check-ins.

17 MR. MAX LIBMAN: Right.

18 MS. MARIAN MACDONALD: So as you're
19 scoping your work and your initial estimating signals
20 that it may exceed the budget, then I think there's an
21 opportunity to go back and say, we have to re-scope,
22 or we have to have more money.

23 Certainly once your bids close and they
24 are opened, if they exceed the allocated budget,
25 before you proceed you may need to go back to your

1 councillors on those decisions.

2 MR. MAX LIBMAN: Thank you. So kind
3 of -- sticking with the theme of the difference
4 between Council and staff's role but moving a bit
5 further down in the process, once the need has been
6 identified and we're moving on to identifying and
7 assessing the options that could potentially fulfill
8 that need, in that case what's the difference between
9 Council's role and staff's role?

10 MS. MARIAN MACDONALD: In my opinion,
11 Council should not have a role in that decision. I
12 think at that point, you should be relying on your
13 procurement bylaws and following those procurement
14 bylaws that should have set out every potential
15 procurement opportunity.

16 I think there are reasons and -- and,
17 you know, large infrastructure programs are -- are
18 typically going to fall within your trade agreement
19 obligations, so you -- you have both -- not just your
20 procurement bylaw requirements; you have procurement
21 law that has to be followed in that process. And so I
22 would default in that case to your staff always.

23 MR. MICHAEL PACHOLOK: Yeah. I -- I
24 would agree that -- that once a -- once the need's
25 been identified, the next step is for staff to -- to

1 follow through using the procurement bylaw that's been
2 approved to -- to guide them on how they will go out
3 to market.

4 Now, Council may have a -- prior to the
5 issuance, Council may have an interest in maybe the
6 form of procurement. So, for example, when you're --
7 when you're talking about a -- a P-3, Council might
8 have a more -- may want to approve the use of a P-3
9 given the nature of -- especially when you incorporate
10 the finance and operating model.

11 So that they understand or give the
12 right direction to staff to then proceed with the
13 procurement process that they at the high level will
14 understand. But -- but when they -- so that's just
15 setting the -- the process.

16 They should not be getting involved in
17 the selection of vendors or the selection or -- and of
18 what -- you know, getting down to, like, what the, you
19 know, paint colour could be. Like there has to be a
20 separation.

21 You know, directing staff to build a --
22 buildings to meet a certain Council green standard
23 is -- is fine. We want to -- we want to keep
24 Council's decisions at that high level where they're
25 providing guidance to meet the -- that -- reflect what

1 the -- what that municipality wants to achieve in --
2 in what they -- in what they're doing.

3 MR. MAX LIBMAN: What's the importance
4 of maintaining the separation of roles?

5 MR. MICHAEL PACHOLOK: I -- I think
6 the -- you know, coming from Toronto -- so when we
7 went through the Bellamy Inquiry, Justice Bellamy kind
8 of laid it out pretty -- pretty clearly.

9 Like the -- the -- if a Council -- a
10 councillor or the mayor could look like they're
11 influencing the process, then it changes the nature of
12 the -- of the procurement process. It's less the open
13 fair and transparent rules, and there's an opportunity
14 for it to become political and be used as leverage.

15 So politicians in that regard need
16 to -- that's why they should step back because they
17 have that strong ethical duty to ensure that they do
18 not look like they've influenced a process that has
19 been designed to follow certain rules.

20 So that's -- I -- that's primary
21 rationale for why there should be the separation of --
22 between the -- the political level and staff.

23 MS. MARIAN MACDONALD: I think it
24 speaks to the integrity of the process to keep the
25 separation there.

1 MR. WILLIAM MCDOWELL: Could I just
2 jump in with a question here? What about the issue
3 about the timing of a particular procurement?

4 So, I mean, it depends on the context.
5 If you've a minority government and, you know, the
6 party in power wants to have something to put in the
7 window for the next election, we've got the portrait
8 gallery up and running in our brief term.

9 To what extent do you think that issues
10 about timing of procurement all by themselves should
11 be insulated from the process?

12 MS. MARIAN MACDONALD: So that's where
13 procurement planning becomes integral, but you're
14 absolutely right. You may have a new government come
15 in who have new priorities, and they may have
16 timelines. But they're also coming into legacy
17 procurement policies. They are coming into very
18 defined processes through -- and trade agreement
19 obligations.

20 And one (1) of the roles of a public
21 servant as a staff person is -- is to speak that
22 truth, and it is to say, we simply cannot build that
23 in the time frame you're looking for and follow the
24 process and end.

25 At that point in time, it does become a

1 political decision. Do they want to overrule their
2 own procurement policy guidelines? Do they want to
3 take the risk of violating a trade agreement? But our
4 advice would always be, let the process be followed,
5 and let the process be followed as you can.

6 Now, certainly we could try to
7 accelerate some of the phases of it to meet a required
8 timeline, but it would not be something that I would
9 recommend if I thought it would come to a less than
10 successful outcome.

11 MR. MAX LIBMAN: So we were -- we were
12 speaking about the arm's length that Council needs to
13 keep from staff during many portions of the
14 procurement process.

15 In an instant where a particular
16 councillor just happens to come across an idea that he
17 or she thinks may help fulfill a need that has been
18 identified by the municipality, how can that
19 councillor bring forward the suggestion? And how can
20 that suggestion be appropriately accommodated within a
21 proper procurement process?

22 MR. MICHAEL PACHOLOK: Well, I think
23 the councillor will always have the ability to bring
24 forth an idea through Council for staff to consider.
25 I think it's a -- it's a challenge to assume that the

1 idea can then simply be applied into the context of
2 the procurement process. There should always be the
3 allowance to staff to -- to be able to provide an
4 analysis, and they may need to report back to Council
5 on -- on how they've arrived at the -- their
6 conclusions.

7 But we -- but in order to ensure that
8 the -- that the idea can fit in within the process,
9 you need to give staff that opportunity. Like, I -- I
10 don't want to suggest that -- that councillors cannot
11 meet with vendors. I think it's just about -- it's
12 about when the timing is. So during the procurement
13 process, that's when, you know, we -- they need to not
14 be meeting with the vendors.

15 But councillors have -- you know, they
16 have constituents that they -- that they're going to
17 speak with. They -- they will learn about suppliers
18 in their -- in their area that wants to make sure that
19 they understand how they could do business with that
20 government amenity, and councillors should -- should
21 be able to redirect -- like a supplier comes forward
22 like that back to the procurement folks for
23 discussion, but then that's it.

24 So not to say you should do business
25 with them but help guide them to the right people who

1 will then tell them about the process.

2

3 MS. MARIAN MACDONALD: I think it
4 becomes really critical. For me, I would treat that
5 almost as an unsolicited proposal that's been brought
6 forward, and so as you develop procurement policies,
7 your policy on unsolicited proposals should likely
8 also consider these ideas coming in through council,
9 as well as through staff.

10 MR. MAX LIBMAN: When a procurement
11 process is being formulated by staff and there are
12 competing concepts or ideas about the very nature of
13 the procurement process and the substance of it, what
14 are the best ways to deal with these competing ideas?

15 MS. MARIAN MACDONALD: Max, can you
16 elaborate a little more on that?

17 MR. MAX LIBMAN: I suppose I'm
18 thinking of a situation where, you know, say, a -- a
19 need in the municipality in the -- you know, with
20 regards to, you know, certain maintenance facilities
21 has been identified, and there are sort of broad --
22 broad choices that you can undertake in terms of
23 addressing those facil -- and say, you know, for a
24 construction procurement, there are different kinds of
25 buildings you can look at.

1 How should staff deal with competing
2 ideas about, for example -- you know, if you're going
3 to end up focussing the procurement process on one (1)
4 specific kind of building, how should those competing
5 ideas be dealt with at that phase?

6 MS. MARIAN MACDONALD: So I -- I think
7 that before you even get to the procurement process,
8 those conversations should be resolved. It is very
9 difficult for a procurement staff to wade through
10 different direction coming from department staff, so
11 if we go back to the roles and responsibilities we
12 talked about, I -- I think the confirmation of the way
13 the business is going to be acquired or the way the
14 business is needed, going -- going back to is it
15 designing, is it building, is it operating? What are
16 -- what is it that the business needs? They need to
17 be defined by the department heads and not left to
18 your procurement staff.

19 The -- the -- the -- but the
20 conversation is two (2) way, so the procurement staff
21 can certainly help set out options on how a process
22 may unfold, whether it's multi-phased. But ultimately
23 the department heads need to have that determined.

24 There is, though, from time to time --
25 and -- and public sector procurement tends to be needs

1 based, so we take documents out to the marketplace and
2 say, We need this. From time to time, we may not know
3 what we actually need, but the procurement process
4 allows for that as well.

5 We can actually set out a requirement
6 that says, We need a storage facility for big
7 equipment. So rather than saying we need a -- you
8 know, a 40 x 50 foot building with a roof, we can just
9 say, We need a storage facility. And the vendor
10 community can then respond with potential solutions.
11 So it -- it comes down to if you know your needs,
12 define them; if you don't know, go out to the
13 marketplace. Ask the marketplace.

14 MR. MAX LIBMAN: In making directions
15 as to the nature of a procurement process, what limits
16 can council typically place on the options for staff
17 to investigate? And I'm thinking specifically about
18 things like the length of the process, the costs and
19 materials, and things like that.

20 MS. MARIAN MACDONALD: So costs,
21 materials -- absolutely, I think, within a council's
22 purview to set a budget for a project initiative and
23 operation. Council's ability to dictate the length a
24 procurement is in the marketplace -- I'd say it's
25 fairly limited. First of all, there are trade

1 agreement obligations that define the length of time a
2 procurement should be in the marketplace. And then
3 secondly, it should likely be defined as well in your
4 procurement policies.

5 As soon as, again, you start to change
6 what that length of time in the marketplace, it -- it
7 can affect your outcome. If your vendors cannot
8 absorb, understand your needs, respond, you're not
9 going to have a good procurement. You're not going to
10 have a good outcome.

11 And I was always a strong advocate for
12 our supplier community. Many of them are small
13 businesses. They're doing their day jobs, and they're
14 working on these proposals in the evenings, on the
15 weekends. I think -- I think we have to recognize who
16 our supplier marketplace is and make sure that we are
17 giving them the sufficient time they -- they need to
18 respond.

19 MR. MICHAEL PACHOLOK: And I would
20 just say -- add that when council's considering how a
21 budget -- and -- and -- and maybe they're not
22 considering the time of the procurement, but the
23 deadline with respect to meeting the -- the
24 infrastructure build, right?

25 Staff also have an obligation to kind

1 of help council understand and provide the best
2 advice, that if they demand a very aggressive time
3 line, what that might mean in terms of how the market
4 will react. Either the market may not be able to
5 react at all, or prices may accelerate because of that
6 restriction, and that then may have an impact on -- on
7 budget.

8 So council -- council needs to have the
9 right advice on -- on some of these items to make sure
10 that they don't inadvertently create a -- a scenario
11 where staff end up in a situation where they're coming
12 back to -- to council saying, We got -- we can get it
13 done in the time you want, but now it's -- it's ten
14 (10) times the price. Like, they need to -- they need
15 to understand what the ramifications are of -- of
16 putting those -- those conditions on a procurement
17 process.

18 MR. MAX LIBMAN: In cases in which
19 council has set a relatively short time line for a
20 procurement process, how can those kinds of time lines
21 be accommodated within the process?

22 MR. MICHAEL PACHOLOK: Well -- well,
23 ultima -- it ultimately depends on exactly what that
24 is, so, you know, Marian spoke of trade agreements,
25 so, you know, if the -- if what they're looking for

1 doesn't trigger a trade agreement, then -- then the
2 time lines might be more flexible, depending on how
3 the overarching process -- procurement process was
4 actually set up and approved by council.

5 While they could consider non-
6 competitive, again, we're trying -- to the point of
7 what we're trying to achieve or what we're trying to
8 suggest as best practices is proper planning. We
9 really need to try to find a way to not get into a
10 situation where council is asking for something that
11 then defeats that -- that purpose.

12 Or they're going to have to, then,
13 probably -- to Marian's poin -- earlier point -- also
14 decide to override something that they've -- they've
15 said in the procurement process, if they're -- if
16 they're forcing, because they've chosen or however
17 it's happened, where a non-competitive is the only way
18 to -- to achieve that, they might need to then have
19 the approval that -- and understanding that that meant
20 that they're outside of what they've already approved
21 in terms of the procurement process.

22 And again, that should be very clearly
23 set out in a report or what so that, you know, no one
24 -- no one in the public, no one in the supplier
25 community is -- is caught off-guard by that, and that

1 way there -- there's obli -- opportunities for them to
2 -- to speak to their -- their councillors and -- and
3 raise their concerns.

4 MR. MAX LIBMAN: Turning to
5 communications between staff and council and
6 suppliers, during some of those -- the earlier stages
7 of a process when there can be communication between
8 council and suppliers and staff and suppliers, what
9 are the specific boundaries of what these
10 communications typically look like, both with regards
11 to council and with regards to staff?

12 MS. MARIAN MACDONALD: I think it
13 depends on exactly when the conversation is taking
14 place. If it is truly just in a blue-skying
15 conversation about a potential municipal need, I think
16 those conversations can be -- can be very open.

17 I think you can also have very open
18 conversations where suppliers come in and pitch their
19 business to you. That was actually a very big part of
20 my job was to meet with our -- our supplier community
21 and find out what they had to offer.

22 So I think there's a great deal of
23 latitude in the pre-procurement phase for those types
24 of conversations. I would recommend, though, a -- a
25 lobbyist registry if -- if, in fact, they are true

1 precursors to a procurement process. If they're
2 conversations that are the true precursors, I would
3 probably follow a lobbyist registry model.

4 We would not meet with any vendors
5 without checking the Ontario Lobbyist Registry first.
6 We had protocols in place for our minister's office to
7 notify us when they were asked to meet with vendors,
8 and again, the first thing we would do is make sure
9 there was nothing active. The second thing we would
10 do is say, Talk to them about this, but don't talk to
11 them about that.

12 And quite often, we would make
13 recommendations that they do formal notifications, so
14 get it in writing as part of the meeting invitation
15 that we will not talk about 'X' or 'Y'. I mean, a lot
16 of our suppliers deal in multiple commodities. They
17 provide multiple services. So just saying, We won't
18 talk to anybody, it doesn't work. So -- so there --
19 but there are very easy ways to segment and -- and to
20 keep the conversations.

21 As you get closer to the procurement
22 process, then it needs to be more defined. And again,
23 we had a blackout period that started prior to the
24 procurement. Once we -- once we had all of our
25 approval in place, once we were locked, once we were

1 loaded, we just invoked a blackout period and sorry,
2 we're not having any more of these conversations.
3 There is opportunity in the procurement process for
4 conversations to take place.

5 MR. WILLIAM MCDOWELL: Quick question
6 of clarification. When you say "nothing active," that
7 there's no active procurement?

8 MS. MARIAN MACDONALD: That's right.

9 MR. WILLIAM MCDOWELL: Right. So that
10 you don't risk, you know, the improper input in the --

11 MS. MARIAN MACDONALD: That's right.

12 MR. WILLIAM MCDOWELL: Okay, thanks.

13 MR. MAX LIBMAN: And in a similar
14 vein, what are some of the other risks that -- that
15 we're trying to mitigate against when we institute a
16 blackout period?

17 MR. MICHAEL PACHOLOK: Well, we're
18 trying to mitigate against someone, you know, getting
19 an unfair advantage because the blackout period
20 actually doesn't just apply to the -- the politicians,
21 it also applies to the department staff.

22 We want the -- we want the focus to be
23 with the procurement staff so that as official points
24 of contact, you know, they're speaking or they're
25 responding in writing about how the process will work,

1 or how changes to a procurement document will be done,
2 or answering other questions.

3 That way, again, it helps make sure --
4 like, questions that come in should always be answered
5 in writing so that you can -- you can have that open
6 and transparent process, but also so that the pro --
7 the people running the process are the ones in
8 control.

9 We don't want a department staff to
10 inadvertently explain what the evaluation criteria,
11 how it will work, and then -- or saying, you know,
12 this is what we're really looking for and giving that
13 company an unfair advantage as opposed -- against
14 anyone else.

15 So that -- that's part -- that's what
16 we're getting at when we want to lock that down during
17 the process. And even with -- with politicians, it's
18 so that they're still maintaining this concept that
19 they're -- they're not there to be able to influence,
20 and when there's an act of procurement, their initial
21 reaction should -- their reaction to the vendor should
22 be, no, no, there's an official point of contact,
23 contact them, they are the ones that need to provide
24 the right answers for your questions.

25 MS. MARIAN MACDONALD: For me, it's

1 also just a protection against bias.

2 Our suppliers do come to us with really
3 good ideas sometimes, but sometimes those good ideas
4 could lead to proprietary solutions.

5 So when you meet with them in those
6 last days of putting your procurement together,
7 putting your business needs together, you know, there
8 is that whether it's conscious or unconscious, there's
9 that -- that potential that you are -- you are going
10 to bring that idea, that last idea you heard into your
11 procurement documents and inadvertently sometimes it's
12 potentially bias. So by removing that risk, it
13 doesn't happen.

14 MR. MAX LIBMAN: Turning to the notion
15 of sole-source procurement, you spoke a little bit
16 about how there are specific circumstances in which
17 sole source procurement might be appropriate.

18 Are there risks associated with
19 proceeding with a sole source procurement process?

20 MS. MARIAN MACDONALD: If you follow
21 your policies and you align with your trade agreement
22 obligations, I would say there's -- there's -- you
23 mitigate risk.

24 There's always risk in procurement.
25 But the reality is non-competitive procurements

1 happen, they need to happen. There is good reasons
2 why they happen.

3 There could be an emergency situation,
4 you have a threat to public health, you need to buy
5 vaccines. We're not going to go out to a tender in a
6 marketplace, we're going to go and we're going to get
7 them.

8 There may be only one (1) vendor in the
9 marketplace who can do this. That's very allowable,
10 that's what we, Mike and I as -- as a bit procurement
11 purists, that's what we call sole-sourcing.

12 The danger is when you do what we call
13 single sourcing. It's where there are multiple
14 suppliers in the marketplace and you have chosen one
15 (1). That's where the biggest risk in the non-
16 competitive procurement process comes from in my -- in
17 my opinion. That is where you become at risk of trade
18 agreement violations, and while at the municipal level
19 with some exceptions, trade agreement violations and
20 trade agreement arguments aren't happening. They were
21 certainly starting to happen at the provincial level,
22 and I think if you're a large transit buying
23 municipality you probably would be very familiar with
24 -- with that trade agreement's challenges.

25 But it -- it is where there's multiple

1 suppliers and you make a choice. I'm choosing this
2 one (1) without having that open transparent process,
3 that's I think where you -- you get into trouble.

4 So follow your process, follow your
5 delegation of authority framework and I think you
6 mitigate the risks associated.

7 THE HONOURABLE FRANK MARROCCO: If I
8 can just interject for a minute.

9 Sometimes it seems can -- can -- can it
10 occur that I guess -- I guess a dispute breaks out
11 about or there's a disagreement about how many
12 different suppliers there are of -- of the product.

13 You -- you -- you know, I'm the only
14 one who supplies this in the pink colour and someone
15 else says, well, that doesn't matter, actually, there
16 are people who supply it, they just don't supply it in
17 that colour.

18 I mean, how do you -- how do you deal
19 with that kind of a -- of a problem? I hope I'm
20 expressing it --

21 MS. MARIAN MACDONALD: I'm kind of
22 chuckling because -- you are absolutely.

23 And that -- that goes back to your
24 procurement planning and it goes back to your business
25 needs and it goes back to the conversation between

1 your procurement staff and your department staff.

2 So we frequently would have ministries
3 who are very insistent that they needed a name brand
4 product, because they already had a name brand product
5 and they needed it for compatibility.

6 Part of the job of the procurement
7 officer, or the purchasing officer is to tease that
8 out. And maybe you don't need something that's pink,
9 maybe blue suffices.

10 So the business need conversation and
11 that clear understanding of what you need and -- and
12 go back again to how are you going to use this.

13 But there is a way to tease that out in
14 the marketplace and -- and the formal language that's
15 used in our trade agreements is something called the
16 advance contract award notice, and Mike mentioned that
17 earlier.

18 That is a very helpful tool, it's a
19 formal tool, you can put that out into the marketplace
20 and you can ask the marketplace to respond to that.
21 And then you do get the opportunity to evaluate that,
22 and whether they're not -- that they need your -- they
23 can meet your needs.

24 But the first conversation has to be
25 start -- do you need something pink or is something

1 blue okay.

2 THE HONOURABLE FRANK MARROCCO: So --
3 so apart from the internal conversation, you can
4 actually -- as part of your tendering -- part of your
5 procurement process, your actual procurement process,
6 ask the marketplace whether the colour makes a
7 difference or not.

8 Is -- is that what you're saying?

9 MR. MICHAEL PACHOLOK: Well, I think
10 you can -- you can put it out that you're --

11 THE HONOURABLE FRANK MARROCCO: It's
12 kind of a silly example, I'm sorry, but I just want to
13 --

14 MR. MICHAEL PACHOLOK: No, no, not
15 necessarily. You -- you basically put a notice to the
16 market saying you're -- you're contemplating entering
17 into that contract with this vendor for this service.
18 To give the market the opportunity to say they're not
19 the only ones that can do it.

20 So it's not -- it's not a formal
21 competitive process, but it's a -- it's a notice that
22 can help make sure that if there's other players in
23 the marketplace that they come forward.

24 I wouldn't necessarily use it without
25 doing some level of due diligence first anyways, but

1 in case for some reason you're -- your due diligence
2 didn't result in -- in finding that answer, like, that
3 still provides you one (1) more step where, again,
4 everyone is aware, it's open, the public gets to know
5 that you're up -- that's your plan, the -- the
6 suppliers get to know that that's the plan so that
7 there's that opportunity to come forward and say hey,
8 I can actually supply this.

9 And if -- if they don't, then it helps
10 later on when they -- when the contract's been
11 executed. So there's been opportunities, we tried,
12 and -- and okay, so maybe the -- the next time --
13 because again, the other thing about procurement is
14 that it really has the iterative and -- and we've got
15 to learn from what happened.

16 So even if we do advance notice, no one
17 else comes forward, you enter into that contract,
18 someone later comes forward, you say that's great,
19 this contract will come at an end at some point and
20 I'll be able to go out with a competitive process now
21 that I've learned more.

22 MR. WILLIAM MCDOWELL: Can I just
23 pursue this a little bit.

24 So take an example from military
25 procurement, you know, the -- the Humvee that we all

1 know, those are the big, heavy Jeeps.

2 So if you're going to the marketplace,
3 do you say we intend to make a contract award for 50
4 Humvees, but then you go on and say and they have the
5 following attributes, and the one that's always cited
6 is that you can go 120 kilometres an hour and make a
7 sharp turn and it won't tip over.

8 Do you tell the marketplace that so the
9 marketplace knows the particular quality that is
10 important to you, or do you just say we're going to
11 make an award for this product, we'll leave it to the
12 marketplace to do all the research and what it is the
13 product is all about.

14 MS. MARIAN MACDONALD: I think it's
15 absolutely fair for you to tell the marketplace what
16 your overall requirements are. In your example, I
17 wouldn't go to the marketplace and ask for Humvees.

18 I would go out to the marketplace and
19 say I need a vehicle that goes 120 kilometres an hour
20 or I need a vehicle that can make sharp right turns --

21 MR. WILLIAM MCDOWELL: M-hm.

22 MS. MARIAN MACDONALD: -- I need a
23 vehicle that doesn't need ongoing maintenance. I need
24 a vehicle that ne -- absolutely. Those are your
25 business needs, your business re -- those become the

1 procurement requirements.

2 Let the marketplace then come to you.

3 MR. WILLIAM MCDOWELL: Right. So, the
4 market -- so, let's just follow this through. So, the
5 marketplace can come back and say, well, you know
6 what, it's not actually that important that you have
7 to be able to make the sharp turns.

8 But let's imagine -- take it one (1)
9 step further because, you know, let's imagine that the
10 military's bought a whole bunch of the same vehicles
11 and that's really what they want.

12 In -- in saying we intend to sole
13 source, do you, nevertheless, describe the particular
14 attributes so that the marketplace knows what it is it
15 has to address, or do you just say, well, you know...?

16 MS. MARIAN MACDONALD: At the point
17 you've released your procurement documents and you
18 said you need a vehicle that makes sharp right turns,
19 you're -- you're wedded, in my opinion. You -- you
20 have made that decision. You've gone to your
21 marketplace.

22 Yes, suppliers are going to come in and
23 say, no, you don't, mind just doesn't make quite that
24 turn you want but it makes a different turn, but
25 you've already made that decision. You made that

1 decision in your planning.

2 And, hopefully, you may have engaged
3 your supplier community before you made that
4 requirement, so you knew whether or not the
5 marketplace could, in fact, deliver against those
6 requirements.

7 But once they're -- once your -- once
8 your procurement requirements are in the marketplace,
9 you're pretty locked to them. The exception is, is
10 that, in most procurement processes, we have an
11 opportunity for questions and answers.

12 MR. WILLIAM MCDOWELL: Right.

13 MS. MARIAN MACDONALD: And we have an
14 opportunity to issue clarifications to the procurement
15 document. So, if you issue your open competitive
16 procurement and all of your potential vendors come
17 back and say, you know what, we -- we can't make pink
18 ones, we --

19 MR. WILLIAM MCDOWELL: Right.

20 MS. MARIAN MACDONALD: -- but we can
21 make blue ones or we can't do a 90-degree right turn,
22 but we can do an 80-degree, you may then issue an
23 addendum to your procurement documents that modify
24 your specifications.

25 MR. WILLIAM MCDOWELL: On account of

1 what you know from the marketplace now?

2 MS. MARIAN MACDONALD: That's right.
3 So, you've still considered the open marketplace, and
4 now you're -- and then you're taking it back to the
5 open marketplace, so everybody has that opportunity,
6 and you tell them all at the same time. You use an
7 addendum process. You deliver it the same way out
8 into the marketplace through your Biddingo and -- and
9 -- or whatever tendering system that you're using.

10 MR. WILLIAM MCDOWELL: So, in the --
11 then another sort of related question. In the pre-
12 procurement discussions where you've got suppliers
13 coming and talking to you and saying, look, hey, this
14 is great, how much do you rely on what they tell you
15 about the attributes of their product?

16 Because it seems to me there's a danger
17 where the supplier is saying we're the only ones who
18 can do 'X'. And you can then become wedded to that
19 and they can distort things if there isn't enough due
20 diligence at that point before you go into the -- the
21 process.

22 Is that fair?

23 MS. MARIAN MACDONALD: It -- it is
24 fair. And let's be honest, our supplier community
25 tends to know more about their products than -- than

1 we know.

2 So, that ability though to understand
3 it, the ability to collect that information, it -- it
4 really goes back to -- to following the process that
5 you have in place for those conversations.

6 You know, Mike talked briefly about --
7 on something that is large and complex. You may want
8 to bring in external expertise to advise you on what
9 the marketplace can do.

10 I know consultants, you know, can --
11 can -- everybody go, well, we don't need consultants.
12 Well, sometimes you do. Public sector procurement, in
13 particular, we purchase everything.

14 In -- in the Province of Ontario, we --
15 we purchased everything from bow ties to boats to
16 planes to helicopters, you know, to -- to food, so.
17 And I had a team of a hundred and eighty (180) people
18 doing \$6 billion.

19 You can -- your -- your procurement
20 people are not going to be specialists in everything
21 that a public sector might to buy. And so, we would
22 bring in expert advice to help us with that
23 conversation and to help us navigate that community
24 from time to time.

25 MR. WILLIAM MCDOWELL: Okay. Thanks.

1 I was going to pull us down another rabbit hole there,
2 so I think I'll pass it back.

3 THE HONOURABLE FRANK MARROCCO: No.
4 Did you want to ask another question?

5 MR. WILLIAM MCDOWELL: Well, I guess
6 the -- the question --

7 THE HONOURABLE FRANK MARROCCO: I -- I
8 knew -- I knew he did. I spend a lot of time with Mr.
9 McDowell and can tell when he's about to ask a
10 question.

11 MR. WILLIAM MCDOWELL: Well, I guess
12 the question is -- and -- and you may or may not be
13 able to -- either of you, to speak to this quickly,
14 but how common outside the -- like, the emergent
15 situation, like, the -- the homeless shelters in -- in
16 Toronto or the -- the question of the vaccine.

17 How often in non-emergent situations is
18 sole sourcing at the levels of government -- single
19 sourcing is the --

20 MS. MARIAN MACDONALD: Just use
21 noncompetitive. We just use --

22 MR. WILLIAM MCDOWELL: Noncompetitive
23 --

24 MS. MARIAN MACDONALD: --
25 noncompetitive.

1 MR. WILLIAM MCDOWELL: I mean, but how
2 common is that phenomenon in -- in the governments
3 that you've worked for?

4 MS. MARIAN MACDONALD: It's -- it's
5 not uncommon but, typically, it follows one (1) of the
6 allowable reasons. And for the province, we had to
7 actually fill in a lot of trade agreement reporting
8 that's in the public domain as to what we did.

9 But, typically, if it didn't fall under
10 one (1) of the allowable reasons, we would recommend
11 going with an open competitive process. I would say
12 those situations were more extraordinary than
13 ordinary.

14 MR. MICHAEL PACHOLOK: If I could just
15 add, like, I don't have the stats on -- off the top of
16 my head, but roughly, you know, the city -- we would
17 always report every year on the pra -- past year's
18 noncompetitive activity, and it usually would range in
19 about the 5 percent of our overall spend, give or take
20 a year.

21 So, it's -- to Marian's point, it's not
22 that it's uncommon. It's when it happens, we need to
23 make sure we're trying to take extra steps to document
24 and -- and -- the rationale's behind it to -- to make
25 sure that we're -- we're following all the rules and

1 being very clear about how the -- why we landed with
2 those decisions.

3 MR. WILLIAM MCDOWELL: Were there --
4 were there products that recurred in that 5 percent
5 year over year, any examples you could give us?

6 MR. MICHAEL PACHOLOK: Well, so IT --
7 IT, generally speaking, ends up with a lot of
8 proprietary, when you've locked yourself into a
9 particular software.

10 You know, everyone uses Microsoft. So,
11 while you can certainly switch to other -- but, you
12 know, you get -- there's certain IT ones that are --
13 that are very repetitive in nature.

14 And that's when you need to take a
15 different -- you also need to then think about your --
16 your approach to that procurement and be more
17 strategic about where you know you -- you've locked
18 yourself into a procurement or with a relationship
19 with Microsoft that you need to negotiate in a
20 different style and try to negotiate the best deal so
21 you can still go back to I'm getting the best value
22 for -- for the taxpayer dollar.

23 MS. MARIAN MACDONALD: We would often
24 ask the question of what are you going to do when this
25 contract ends, particularly for IT purchases, and

1 really try to make our departments be really
2 realistic, that this is not actually a ten (10) year
3 contract, this is probably a twenty-five (25) year
4 investment that you're making, so go to the
5 marketplace for the whole investment. Be clear to the
6 marketplace.

7 Tell them, if you win this, while this
8 contract is ten (10) years, the reality is you may be
9 doing this for another fifteen (15). You know, rip
10 and replace costs of technology are huge.

11 So, we set up these -- we set up these
12 short-term contracts. And then we've created a
13 situation of needing to go to a noncompetitive
14 procurement, so go back to your planning process,
15 foresee that, ask those questions, ask what are we
16 going to do next and -- and set up your procurement so
17 that you can go back to that vendor again.

18 So, be very clear. It's all about
19 openness and transparency. There's a lot more that
20 you can do in the competitive process than I think
21 people realize.

22 But it is absolutely fair to say we're
23 going out for this time period, but if you win and you
24 keep delivering and you're delivering well and you're
25 meeting our benchmarks, you're meeting our value for

1 money, you know what, we may do another ten (10)
2 extension, but every vendor bidding knows that going
3 in.

4 MR. WILLIAM MCDOWELL: Thank you.

5 MR. MAX LIBMAN: Is there a role that
6 legal advice can play in staff's decision to go
7 forward with a noncompetitive procurement process?

8 MS. MARIAN MACDONALD: So, Max is a
9 lawyer. I wouldn't do any procurement without legal
10 counsel. So, I did not have legal counsel imbedded in
11 my -- in my department, but we were their number 1
12 client in terms of volume of work.

13 We had legal repre -- legal counsel
14 involved in -- in all of the procurements that we do.
15 They bring a perspective and a viewpoint that I think,
16 as department head or procurement staff, you can
17 sometimes miss.

18 They can recognize areas in your --
19 even in your specifica -- and don't bring them in just
20 when you're negotiating the contract, bring them in
21 when you're developing your procurement documents
22 because they can be unbelievably helpful in
23 highlighting potential risks. And then your job as
24 procurement staff is to weigh those risks.

25 And so quite often, I would have legal

1 counsel say there is a risk of doing that, and we'd
2 say, you know what, it's an acceptable risk, and we're
3 going to take it. But I was always happy to have them
4 at the table pointing that out to us, and they -- they
5 helped us immensely time over time.

6 MR. MICHAEL PACHOLOK: I -- I would
7 agree. Like in my -- in my role, I'm -- I'm no longer
8 practicing, but it has definitely been -- it's very
9 helpful to have the background.

10 For municipalities, like clearly they,
11 too, will buy a -- a wide range, and so it may not be
12 practical for legal to be involved in every -- every
13 aspect there, but there's ways to, you know, try to
14 engage legal to provide, you know, templated contract
15 terms that could be applicable for a certain range of
16 contracts.

17 And you need -- you might need legal in
18 two (2) different -- two (2) different ways. One, you
19 might just need it on the procurement process itself
20 to help ensure that you're getting advice with respect
21 to maintaining the open and fairness and transparency
22 of the process, especially when it comes to disputes
23 that may arise with the bidders.

24 But you also might need -- and the
25 department might need the -- the lawyer to provide

1 advice with respect to the contract. And you have
2 to -- you'll have to again think through the process,
3 you know, when you're -- even -- even at this -- in
4 Toronto, we -- we don't necessarily have lawyers on
5 every file, so -- but we -- we've established a
6 process where we -- we know when we should engage them
7 and when we should be able to rely on -- on things
8 that they provided to us in the past.

9 But they're really ultimately a
10 critical resources to have on hand 'cause the
11 procurement process even with lots of -- even with
12 setting out the process, you can still find yourself
13 in trying to interpret certain areas, especially when
14 you develop the procumbent documents.

15 And Marian said, you know, those --
16 those are effectively legal documents. So when you've
17 set up a -- you know, someone could inadvertently put
18 a comma in the wrong spot, and that will lead to a
19 dispute. So you're going to -- you need to be able to
20 turn to someone to provide some advice with respect to
21 that.

22 MS. MARIAN MACDONALD: Very early --

23 THE HONOURABLE FRANK MARROCCO: If I
24 just -- would you imagine during a major procurement
25 without legal assistance?

1 MS. MARIAN MACDONALD: No.

2 MR. MICHAEL PACHOLOK: No. I want
3 them in as early as possible as Marian has said.

4 THE HONOURABLE FRANK MARROCCO: All
5 right.

6 MS. MARIAN MACDONALD: No, I wouldn't
7 at all. I was once -- early in my career, I was told
8 procurement is a synonym for litigation, and I always
9 took that to heart.

10 MR. MAX LIBMAN: How do you respond to
11 the notion that the benefits of a competitive
12 procurement process may be outweighed by the cost of
13 the process or the amount of time that the process
14 takes?

15 MS. MARIAN MACDONALD: So that's an
16 argument I heard a great deal, and I think that from
17 time to time, there might be some truth in that. But
18 best value isn't always about cost, and transparency
19 always isn't about cost.

20 But that's why you have processes for
21 lower value procurement. So a competitive procurement
22 process could be an invitational. It could be
23 submitting a request to three (3) vendors. Do it in
24 writing. You're still meeting that test of
25 competitiveness.

1 So we would always argue back that if
2 you're using the right procurement vehicle, if you've
3 done the right procurement planning, you're not going
4 to see those costs that weigh -- and when you don't do
5 that and when you do accelerate process, when you
6 sidestep, when you don't follow your own processes,
7 quite frankly, it gets you into trouble.

8 I would always tell my department heads
9 that if they would spend 80 percent of their time on
10 planning and 20 percent on the procurement, we would
11 be done fairly quick. We -- we would have a good
12 clean process. Unfortunately, it's usually 20 percent
13 on planning and 80 percent on procurement, and then we
14 get into an iterative approach sometimes.

15 I -- I -- so I have some sympathy for
16 that argument, particularly around low value, but then
17 just make sure your -- your procurement policy -- your
18 delegation of authority -- addresses that. But
19 overall, I -- I never really had a lot of sympathy for
20 that particular argument.

21 MR. MICHAEL PACHOLOK: And that -- you
22 know, I'll just add -- it -- procurement is a very --
23 it's a good retrospect sport to be able to say we
24 could have done that faster or we could have gotten a
25 better price.

1 And what's often -- because it's not
2 necessarily easy to explain. Like when you're
3 building a -- a building, you're setting up
4 requirements, and you've chosen certain -- you want to
5 meet a certain environmental standard; you want to
6 apply a fair wage rate; you want to engage union
7 contractors. But you could always do the same job
8 without any of that, and you'll come out with a
9 different result.

10 So, you know, to have to be able to
11 explain what was the -- what was the driving best
12 value concept that you were going for, and that's, you
13 know, often driven by the -- the policies that the
14 Council has directed staff to follow.

15 But there's always going to be the
16 ability to say I could have done it differently, and
17 it's -- you have to appreciate that it's not getting
18 the absolutely best value when you go to market. It
19 is trying to get the best value, and sometimes,
20 depending on the marketplace, you know, we may get
21 a -- a different deal than if we had done it earlier
22 or -- or later, or there's just market forces that
23 we -- we might not see.

24 But again, you're trying to -- you buy
25 by the -- the principles of your policy, and you

1 follow that. Like, you're -- that you are putting
2 forth your best efforts to achieve that best value in
3 the time frame that -- that is required.

4 MR. MAX LIBMAN: In cases where staff
5 has a concern about the parameters set by council for
6 the completion of a procurement process, how can these
7 concerns be addressed, and how can staff address these
8 concerns?

9 MS. MARIAN MACDONALD: So I think --
10 again, go back to your -- your processes. I think
11 that there has to be that ability for that two-way
12 conversation to take place. Again whether it's a
13 planning process, whether it's part of your budgeting
14 process -- but our job is to sometimes say this can or
15 cannot be done.

16 So you absolutely have to have that
17 ability for that conversation to take place, and it
18 needs -- it's sometimes a difficult conversation. So,
19 you know, being very clear when you -- you sit at
20 Management Board of Cabinet and you tell them things
21 they don't want to hear, it's a very uncomfortable
22 place to be sometimes, but that is the nature of our
23 jobs. It is -- it is the nature of the work that we
24 do, and as public servants, you know, we have policies
25 that we need to process.

1 So I would just say for that, Max, make
2 sure your -- your processes allow for that to happen
3 and that there's a procedure outlined for the
4 conversation to take place.

5 MR. MAX LIBMAN: You spoke a bit
6 earlier about fairness monitors, and I was wondering
7 if you could just elaborate a little bit and speak to
8 the role of a fairness monitor over the course of a
9 procurement process.

10 MR. MICHAEL PACHOLOK: So a fairness
11 monitor or sometimes called a fairness commissioner is
12 a -- is a third party that can be brought on to help
13 monitor the procurement process to ensure that it's
14 abiding by the processes that have been set out. It
15 could provide guidance on if there's something in the
16 documentation that might be considered a
17 discriminatory or biased and could provide some
18 good -- best practices.

19 And it's -- it's another way,
20 especially on large scale procurements, where you can
21 help shed light on -- on the process and -- and have
22 someone else look at it and say, you know, the process
23 was still done in accordance with the rules, and was
24 done fairly, and meets the -- the fairness and
25 transparency goals that you've achieved.

1 So it's another -- it's another way to
2 help protect the process and to ensure that it has
3 integrity.

4 MR. MAX LIBMAN: Great. With regards
5 to other kinds of professional consultants, in general
6 what are some of the other ways that professional
7 consultants can add value to a procurement process?

8 MS. MARIAN MACDONALD: So I'll go back
9 earlier -- to earlier comments. I think -- I think
10 sometimes external consultants can be invaluable in
11 helping you truly understand the marketplace and who
12 is in the marketplace, but also to identify who's done
13 this before you and are there best practices that you
14 can adopt or bring in from another jurisdiction. And
15 that doesn't necessarily need to be a Canadian
16 jurisdiction; it can be a global jurisdiction.

17 We frequently did that kind of
18 environmental scanning to take advantage of -- of the
19 pains and the opportunities of others before us.

20 MR. MAX LIBMAN: In -- so in a
21 situation where a professional consultant is asked to
22 help advise on the design of a procurement process,
23 but that consultant is also in the business of -- of
24 providing products that the procurement process will
25 go on to seek, are these kinds of consultants

1 typically also permitted to submit a bid once the
2 process is put out?

3 MS. MARIAN MACDONALD: We would -- we
4 would in the procurement document say if you are
5 providing service A, you will not be permitted to
6 provide service B.

7 So we would create that separation, and
8 then the supplier or the consultant would have to make
9 a choice.

10 MR. MAX LIBMAN: And once a
11 consultant's -- the result of a consultant's work or a
12 consultant's report comes back to staff, how can it be
13 ensured that the views of consultants are accurately
14 sent on to council?

15 MR. MICHAEL PACHOLOK: Well, I think
16 one of the -- one of the ways and it -- I guess
17 obviously it might depend on exactly what you've
18 retained the consultant for is, you know, they
19 provided a report then you -- you attach that report
20 to the staff report. And that staff shouldn't just
21 summarizing their view of the consultant's report.

22 So if the report -- if the consultant's
23 report is too long and has -- you know, you might need
24 to get them to provide an executive summary to ensure
25 that council is hearing from them.

1 In certain cases when we, you know,
2 even with fairness monitors we -- we'll bring them to
3 the committee room so that if there's questions that -
4 - that are maybe beyond staff's ability to answer,
5 that they're also available to speak directly and
6 answer the question directly to the councillors.

7 MR. MAX LIBMAN: You spoke a bit
8 earlier about a code of ethics for vendors and some of
9 the responsibilities that are generally assigned to
10 vendors over the course of a procurement process.

11 How are these responsibilities
12 enforced?

13 MR. MICHAEL PACHOLOK: So in the case
14 of Toronto we -- we actually require the -- the
15 supplier to declare that they will abide by our
16 supplier code of conduct whenever they submit to a
17 procurement process.

18 And we're clear that if they do not,
19 that might lead to the termination of whatever
20 resulting contract that they won.

21 It also may result in, depending on the
22 severity or the -- of the -- of the breach, for them
23 to be suspended from doing business with the -- with
24 the city.

25 So again, the process should clearly

1 lay out some of the consequences of breaches of the
2 supplier code of conduct.

3 MR. RYAN BREEDON: Can I just
4 interject?

5 Do you then build that into the actual
6 contracts that are awarded? So some standard form
7 language that says that if you discover after the fact
8 that this was breached, that the city has the ability
9 to terminate or take whatever action?

10 MR. MICHAEL PACHOLOK: Yes.

11 MS. MARIAN MACDONALD: Yes.

12 MR. MAX LIBMAN: How can -- how can a
13 town manage complaints submitted by an unsuccessful
14 bidder at the end of a procurement process?

15 MR. MICHAEL PACHOLOK: Well, through
16 the -- again, there should be something in the process
17 and -- about how that will be dealt with.

18 So -- and -- and actually, there's I
19 think some -- some direction in the trade agreements
20 with respect to disputes like that.

21 But I think they should -- should be,
22 again, funnelled back to staff to deal with so that
23 you don't have councillors trying to overturn what has
24 otherwise been done properly.

25 But there may be, you know, depending

1 on the -- the municipalities capabilities, you know,
2 other accountability officers could also be put into
3 place to help in case there's some concern with the
4 procurement department themselves. So like, an
5 auditor general or an integrity commissioner. But --
6 but at first instance, a supplier should be redirected
7 back to the purchasing department.

8 They should be offered a debriefing,
9 that's good practice so they understand why they may
10 not have been successful. And that way we're trying
11 to keep it within the process and not change it into a
12 different type of discussion.

13 MS. MARIAN MACDONALD: My experience
14 with -- with suppliers is that while they -- when they
15 bid, they hate to lose, but if you can bring them in,
16 do that debriefing with them, make them understand
17 where their submission and why their submission wasn't
18 successful, that goes a long way. It's just having
19 that conversation with them.

20 It's been -- it was my experience in
21 the province very, very few of our procurements went
22 into a bid dispute process. Very, very few. Less
23 than 1 percent. And -- and that's -- and I'm rounding
24 up.

25 That may have changed in the eighteen

1 (18) months since I've left, but it -- it's about,
2 again, having that honest conversation so if you don't
3 have a debriefing process as part of the process, I
4 would recommend that.

5 MR. MAX LIBMAN: What can a town do in
6 the event that it discovers a problem during either an
7 ongoing or recently concluded procurement process that
8 may jeopardize the fairness of the process or the
9 perceived fairness of the process?

10 MR. MICHAEL PACHOLOK: So, in the case
11 of Toronto we actually set up a -- a post-award
12 dispute process where we actually also say that if
13 there was some sort of egregious breach of the -- of
14 the procurement process, we'll still have the
15 capability of cancelling the resulting contract and
16 award.

17 Things happen, so we're -- again, it's
18 about being clear with -- with the suppliers what the
19 -- what the rules would be with respect to that, so
20 that they understand, even the one who -- who won and
21 then the contract needs to be cancelled, that there's
22 still that -- that ability to -- to do that and that
23 then that also in turn has to be clearly spelled out
24 in the contract that there's that -- there's still
25 that ability to terminate.

1 MR. MAX LIBMAN: Okay. And one (1)
2 final question. What are the practical or commercial
3 effects to a town if there is a perception that a
4 procurement process was unfair?

5 MR. MICHAEL PACHOLOK: Well, I think -
6 - municipalities want to ensure that they're open for
7 business and that they're getting the -- that the
8 residents and taxpayers can feel they're getting best
9 value.

10 So obviously if there's a -- an issue,
11 that starts undermining that -- that relationship and
12 that desire and -- and so procurement staff need to
13 ensure that they're taking best steps to maintain that
14 process, because we do not -- we don't -- we don't
15 want businesses to -- to want to not do business with
16 the city.

17 Like, it -- it'll lead to high -- it
18 could, you know, if it reduces the vendor pool for --
19 in some way, it'll lead to higher prices, it'll lead
20 to less innovation.

21 So ultimately, we -- we -- we want to
22 ensure that the process is being seen as achieving its
23 goals and, you know, the staff may also need to make
24 sure that they're demonstrating that they're reviewing
25 and learning from past mistakes to make sure the

1 supplier community knows that, because even to
2 Marian's point, suppliers will still not be happy
3 losing, but if we can demonstrate that we're
4 maintaining that -- that process and -- and learning
5 from our mistakes, you know, we should ideally keep
6 people's interests in -- in bidding on municipal work.

7 MS. MARIAN MACDONALD: I think it also
8 just makes all of your processes open to more
9 scrutiny, potentially open to more challenges,
10 potentially open to more bid disputes.

11 It makes having those honest debriefing
12 conversations, I think, a little bit harder for staff
13 if there is a perception that I wasn't going to win
14 this anyways, because the fix was in.

15 It just makes for a very, very
16 difficult process and -- and to Mike's point,
17 ultimately that will defer vendors from bidding in
18 your community and I -- I again the fewer vendors,
19 higher prices.

20 MR. MAX LIBMAN: Thank you. Those are
21 all my questions.

22 THE HONOURABLE FRANK MARROCCO: Well,
23 thank you both for really a very interesting hour and
24 a half, it's extremely helpful. So thank you both for
25 doing this.

1 And we are adjourned until Monday at
2 ten o'clock.

3

4 --- Upon adjourning at 3:28 p.m.

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7 Certified Correct,

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11 Wendy Woodworth, Ms.

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