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April 15, 1999

The Honourable Vince Steen
Minister of Public Works & Services
Government of Northwest Territories
Legislative Assembly
Yellowknife NT X1A 2L9

Dear Minister Steen:

*Re: Government of the Northwest Territories
and Public Works and Services*

Enclosed is a copy of my report, for your consideration.

Yours truly,



GRAHAM McLENNAN

RGM/gw
Encl.

cc: Deputy Minister Bruce Rattray (encl.)

APR 23 1999

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REPORT TO THE MINISTER
PUBLIC WORKS AND SERVICES
THE HONOURABLE VINCE STEEN

APRIL 15, 1999

by

Graham McLennan
McLENNAN ROSS

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1. INTRODUCTION

This Review was precipitated by issues raised in the Report of the Conflict of Interest Commissioner dated November 25, 1998 ("Conflicts Report"). The Conflicts Report followed a lengthy hearing held by the Conflicts Commissioner in October and November of 1998 ("Conflicts Inquiry").

The objective of the Conflicts Report was to consider conflict of interest allegations against former Premier Morin. Unfortunately, as is the case in many public inquiries, individuals who are not the subject of the inquiry can become casualties of the process.¹ As Justice Estey of the Supreme Court of Canada noted:

The inquiry process is, of course, straightforward. The difficulty at the outset, which continues throughout, is to discharge your mandate without becoming an inquisition, without becoming unduly inquisitorial and without maligning the witnesses and behaving like a New York District Attorney on television. That is the main and number one problem with the commission's technique. It is very destructive of bystanders and people who have done nothing to get in the line of fire of the commission except write a letter, receive a letter or get a phone call. The bigger the name of the witness, the more tenuous the connection which can get him into the scene.²

In this case, the activities of employees of the Department of Public Works and Services ("PWS") came under scrutiny in the Conflicts Inquiry and the resulting Conflicts Report. The issues which I have been asked to review are as follows:

- A. An examination of the process followed by Public Works and Services personnel in renewing the lease of the Lahm Ridge Tower in 1997 and whether these complied both procedurally and substantively with relevant GNWT policy guidelines and legislation;
- B. An examination of the process followed by Public Works and Services personnel in leasing space in the Fort Resolution Office Complex and whether these

¹Commissions of Inquiry, by A.P. Pross, I. Christie, J.A. Yogis, 1990, Carswell, ch. 13, p. 210, Justice Willard Estey.

²*Ibid*

complied both procedurally and substantively with the relevant GNWT policy guidelines and legislation;

- C. If the process followed did not comply with GNWT policy guidelines and legislation, to determine the reason(s) therefor; and
- D. An examination of the process followed by personnel in gathering information and preparing briefing notes for the Minister on the renewal of the Lahm Ridge Tower lease, with a view to determining why certain information ultimately provided to the Minister was, or was perceived to be, incorrect, incomplete or both.

2. BACKGROUND TO THIS REVIEW

The terms of reference for the Conflicts Inquiry and for this Review are attached as Appendices "A" and "B" to this Report. It is important to note they are significantly different.

The Conflicts Inquiry investigated the conduct of the former Premier of the Northwest Territories.

This Review focuses on the activities of former and current employees of PWS. The process followed in this Review (as outlined below) is different from the process followed in the Conflicts Inquiry. The Conflicts Commissioner received evidence under oath in a formal hearing setting. My discussions with employees, former employees of PWS and others were informal and not under oath.

3. **PROCESS FOR REVIEW**

The process that was established for this Review is outlined as follows:

- A. Introductory meeting with the liaison person at PWS.
- B. Request for and review of all relevant files of PWS.
- C. Meetings/discussions with former and current employees of PWS who may have knowledge of the issues under review.
- D. Discussions with Mr. Mrdjenovich, Mr. Bailey, and attempted discussion with Mr. Marceau.
- E. Review of the Conflicts Report.
- F. Review of relevant portions of the transcript of the Conflicts Inquiry.
- G. Review of documents in the possession of counsel for the Conflicts Commissioner.
- H. Consideration of legislation and practice in other jurisdictions with respect to leasing of real property by governments.

There were no restrictions placed on this Review. However, significant effort was required to ensure that this Review was completed within the time frame contemplated by the Minister of PWS (approximately 30 days).

4. RELEVANT LEGISLATION, REGULATION AND GUIDELINES

The relevant Northwest Territories Legislation, Regulations and Policies that are germane to the issues considered by this Review are, for the most part, straightforward. These provisions are reviewed in Appendix "C" to this Report. In summary, section 44 of the *Financial Administration Act* ("Act") requires no expenditure on behalf of the government without certification that sufficient funds are available to cover the expenditure. Section 44(2) of the Act requires expenditures in future years under contract to be in the public interest of the Northwest Territories. The Government Contracts Regulations, made pursuant to the Act, deal with contracting authorities and when formal invitation to tender processes are required.

The only provision which requires specific mention is Chapter 10, p.1, of the Accommodation Services Manual, Leasing of Improved Real Property entitled Lease Renewals which states:

The continuing need for and suitability of space must be confirmed by the Minister (or delegate) of the appropriate Department.

This policy has been interpreted by PWS to mean simply that the Minister must be generally apprised of the activities with respect to lease renewals. No one I spoke to, nor anyone who testified at the Conflicts Inquiry, suggested that prior approval or confirmation by the Minister of PWS is required before any specific lease was renewed.

5. ISSUES

A. Fort Resolution Lease

Review of Facts

The proposal for the construction of an office complex in Fort Resolution (the "Project") was under consideration by the local community and PWS for years prior to 1996³. The requirement for the GNWT to support the Project by providing a commitment to lease space was essential to the Project proceeding.

Cabinet approval of the Project in Fort Resolution was received in May of 1996⁴. The apposite Decision Paper was signed by the Minister of Public Works and Services, the Minister of Municipal and Community Affairs, the Minister of Education Culture and Employment, and the Minister of Intergovernmental and Aboriginal Affairs. The Decision Paper was a collaboration between employees from each of these departments, although PWS employees served a larger role than employees from other departments.

On page 6 of the Decision Paper, it is recommended that the Executive Council:

Direct the Department of Public Works and Services and Municipal and Community Affairs to report back the results of the negotiations to the Financial Management Board for final approval to enter into the lease, and to obtain the required funding for the project.

From May of 1996 to the summer of 1996, PWS employees continued to work with the Deninu K'ue First Nation ("DKFN"), the DK Development Corporation and the local community on details of the proposed Project. The details regarding planning, construction, and leasing were substantially complete by mid-July 1996. The completed negotiations appear to have accorded with those outlined in the Decision Paper. The Project was ready to proceed, but construction could not commence until the DK Development Corporation received a letter from the

³Doherty Interview

⁴Decision Paper, May 14/96

Government of the Northwest Territories formally accepting the proposal and committing to enter into a lease for office space in the Project.

Although not yet finally scheduled, it was expected that the next Financial Management Board ("FMB") meeting would be held in late August 1996⁵. Approval of the Fort Resolution Project was anticipated to be on the agenda.

Mr. Bailey (Secretary to Cabinet and Deputy Minister of the Executive) contacted Mr. Lovely (Deputy Minister, PWS) regarding the Fort Resolution Project on July 18, 1996. At that time, Mr. Lovely was aware that a representative from the Fort Resolution Community had contacted the Premier's office to arrange a meeting for Monday, July 22, 1996, to discuss the progress of the Project⁶. Clearly, the Fort Resolution community was anxious for the Project to proceed.

On July 18 or 19, 1996, Mr. Lovely made some investigations and concluded that the stumbling block appeared to be the issuance of a formal commitment letter from the Department of PWS that would allow the DK Development Corporation to commence construction of the Project.⁷ Mr. Lovely discussed the status of the Project with Sue Bevington (Director of Regional Support Services, PWS). Thereafter, Mr. Lovely instructed preparation of a letter dated July 19, 1996, addressed to Don Balsillie, President of the Deninu K'ue Development Corporation. Mr. Lovely believes that Ralph Shelton, the Regional Superintendent for the Fort Smith District, prepared the letter and it was signed by Sue Bevington on behalf of Mr. Lovely.⁸

⁵Briefing Note, July 19/96

⁶E-Mail Lovely to Bailey, July 19/96

⁷*Ibid*

⁸Lovely Interview

Mr. Lovely and Ms. Bevington recall discussing on July 19, 1996, the fact that Mr. Lovely did not have authority to issue this letter of intent. It was Mr. Lovely's decision that the letter would be issued notwithstanding his lack of authority. Mr. Lovely made this decision in consideration of a number of factors including:

- A. the summer construction season was short;
- B. Cabinet had approved the Project and budgeting, in principle, for this capital project;
- C. this Project would provide a significant positive impact on the Fort Resolution community;
- D. it was not certain that an FMB meeting would occur in the near future; and
- E. in the circumstances, FMB approval was a virtual certainty.

The decision by Mr. Lovely to issue the July 19, 1996, letter of intent was fully documented at the time by a Briefing Note to the Minister of PWS, as well as an e-mail to Mr. Bailey which was copied to Ms. Babiuk, Ms. Bevington and Laurie Holmes.

FMB approval of the Fort Resolution Project was obtained pursuant to the Financial Management Board Submission dated August 12, 1996. On page 2 of that document, it was specifically noted that on July 19, 1996, PWS had issued a letter of intent to the DK Development Corporation in order to facilitate the timely construction of the facility.

Discussion

There is no doubt that Mr. Lovely did not have the authority to issue the letter of intent dated July 19, 1996, confirming the negotiated lease of real property for the Project. FMB approval was required for the Project before PWS could give such a commitment.

It is noteworthy that no one took issue with Mr. Lovely's action at the time, even though it was well publicized. Further, it is not unheard of that a Department issues a letter of intent even where a negotiated lease has not received FMB approval. However, in such circumstances

the letter of intent should advise that formal FMB approval has not been obtained, but that the project or lease could proceed on the basis of the agreement negotiated with the Department.⁹

Conclusion

Mr. Lovely appears to have been acting in the best interests of the GNWT and the Fort Resolution Community in issuing the July 19, 1996, letter. He simply took the risk (which he assessed as negligible) that the FMB would approve the Project. However practical Mr. Lovely's decision was, it is not disputed that it was unauthorized and therefore cannot be condoned or encouraged.

Other than the July 19, 1996, letter of intent authorized by Mr. Lovely, the process followed by PWS personnel appears to have been in compliance with GNWT policy, guidelines and legislation.

B. Lahm Ridge Tower ("LRT")

Review of Facts

Mr. Lovely was appointed Deputy Minister of PWS in March of 1996.¹⁰ By 1996, downsizing had already occurred in some GNWT Departments and it was apparent that further downsizing would be occurring between 1996 and the date of division of the Northwest Territories (April 1, 1999). Further, it was clear that this downsizing would result in a reduction in the office space requirements of the GNWT in Yellowknife.

In late 1996, Mr. Lovely was charged with the responsibility of preparing a document for Cabinet which dealt with the general options or directions the Government could take with respect to the downsizing or rationalization of Yellowknife office space. This document became known as the Yellowknife Office Space Options Paper ("Options Paper").

⁹Doherty Interview

¹⁰Conflicts Inquiry, Lovely, Oct. 15/98, p.86

Mr. Lovely led the team that was responsible for preparation of the Options Paper. The team included the following PWS employees: Mr. Burns, Regional Manager of Projects; Mr. Nesbitt, Project Officer; Mr. Dixon, Yellowknife Regional Superintendent.

The Options Paper was not an Office Plan. It was intended that once the general direction was provided by Cabinet under the Options Paper, then work on the detailed Office Plan would commence. Although the phrases "Options Paper" and "Office Plan" were often used interchangeably in the course of the Conflict Inquiry, they are clearly different documents which are developed through different processes and have different objectives. The purpose of the Options Paper was to obtain the general direction from Cabinet on how PWS should approach rationalization of the Yellowknife Office Space for the GNWT. The purpose of the Office Plan was to provide a more detailed plan to relocate or rationalize specific departments and specific buildings.

Specifically, direction was required from Cabinet on the dynamic between Government-owned property and space leased by the Government from third parties. The impact on the Yellowknife economy was a significant factor for Cabinet to consider in addressing the Options Paper. The dynamic between GNWT-owned property and leased property was anticipated to have a major influence on the Yellowknife economy. The Options Paper did not include discussion about specific leases between the GNWT and third party landlords such as the LRT lease (other than information in the Appendices, which is discussed below).

The LRT lease was only one of a number of leases that were considered by the team working on the preparation of the Options Paper. This team also considered the properties owned by the GNWT in Yellowknife, most significantly, the Laing Building ("Laing") and the Stuart M. Hodgson Building ("SMH"). Mr. Burns¹¹, Mr. Nesbitt, Mr. Dixon and Mr. Lovely¹² have

¹¹Conflicts Inquiry, Burns, Oct. 16/98, p.116

¹²Burns, Nesbitt, Dixon, Lovely Interviews

all confirmed there were many discussions among the Options Paper team from late 1996 through to July of 1997 which included the LRT Lease. Each of these individuals have confirmed that many scenarios were considered and that a number of those scenarios contemplated renewal of the LRT lease.

The Options Paper was finalized and dated July 31, 1997. Attached to the Options Paper were Appendices. Appendix B set forth illustrations with respect to the possible impacts of option number 1 (retain owned buildings), option number 2 (sell/lease back Laing and SMH), and option number 3 (vacate/sell Laing and sell/lease back SMH). Under option 1, 2 or 3, the illustrations set forth in Appendix B contemplate that there is not a renewal of the LRT lease.

Mr. Bailey contacted Mr. Lovely around the last week of July 1997. Mr. Bailey advised that he was considering a purchase of the LRT and inquired about the renewal of the LRT lease. Although Mr. Lovely did not give Mr. Bailey a positive reception, this contact prompted Mr. Lovely to make some investigations with respect to the LRT building. Mr. Lovely sent an e-mail to Mr. Burns, copy Mr. Dixon, dated July 23, 1997. Mr. Lovely disclosed to Mr. Burns and Mr. Dixon that he had received a call from Mr. Bailey and that Mr. Bailey advised that he and Mr. Mrđjenovich were considering purchasing the LRT. Further, Mr. Lovely requested Mr. Burns' comments on the state of the LRT building and its desirability or lack of desirability as long-term office space.¹³ Mr. Burns responded the same day by e-mail with a number of observations with respect to the LRT building for Mr. Lovely's consideration.

Sometime after receiving Mr. Burns' response, Mr. Lovely concluded that renewing the LRT lease, assuming certain concerns of the tenant could be satisfied, was a good business decision for the GNWT. Accordingly, Mr. Lovely advised Mr. Dixon on July 28 that he should proceed to negotiate a renewal of the LRT lease. Mr. Dixon then contacted Mr. Pagonis, a PWS Property Manager who was very knowledgeable about the LRT building. Mr. Dixon asked Mr. Pagonis what items needed to be addressed with the owner of LRT should PWS elect to exercise

¹³E-mail Lovely to Burns, copy Dixon, July 23/97

its renewal options.¹⁴ Mr. Pagonis responded the same day by e-mail regarding the items Mr. Dixon might want to address.¹⁵

Shortly after, Mr. Lovely decided that a renewal of the LRT lease would be in the best interest of the Government. He contacted Mr. Nesbitt and asked him to revise Appendix B to the Options Paper so that it reflected the LRT lease renewal. Mr. Nesbitt advises there was no particular urgency to this request and he submitted a revised Appendix B through the ordinary channels (he believes he would have sent it to Mr. Dixon who would have sent it to Mr. Lovely).¹⁶ When Mr. Lovely received the revised Appendix B from Mr. Nesbitt, he attempted to see whether the revised Appendix B could be inserted in the Options Paper. This was not achievable so the revised Appendix B was not in the Options Paper which was considered by Cabinet.

Mr. Dixon received a telephone call from Mr. Mrdjenovich sometime around July 28 or 29. Mr. Mrdjenovich raised the issue of a ten-year renewal of the LRT lease. Mr. Dixon had no negotiations with Mr. Mrdjenovich and advised him that there could not be an extension of any lease beyond the existing renewal (which was in the range of eight years). Mr. Dixon may have also discussed the operating and maintenance expenses with Mr. Mrdjenovich, although Mr. Mrdjenovich does not recall any discussion other than whether there could be a ten-year lease renewal.¹⁷

Mr. Dixon was then contacted by the representative of the owner of the LRT, Mr. Marceau. They arranged a meeting to discuss the lease renewal for July 31, 1997. After this initial meeting, a further meeting was arranged between Mr. Marceau and Mr. Dixon for the

¹⁴E-mail Dixon to Pagonis, July 29/97

¹⁵E-mail Pagonis to Dixon July 29/97

¹⁶Nesbitt Interview

¹⁷Conflicts Inquiry, Dixon, Oct. 16/98, p.95; Mrdjenovich, Nov. 6/98, p.114

following day, August 1, 1997. When Mr. Dixon arrived for the August 1 meeting, Mr. Mrdjenovich was present, at the invitation of Mr. Marceau. Both Mr. Marceau and Mr. Mrdjenovich participated in discussions with Mr. Dixon. At the conclusion of the August 1 meeting, an arrangement in principle for a renewal of the LRT lease was reached and confirmed in a letter from Mr. Dixon to Mr. Marceau. Minor modifications were made to the agreement and those were confirmed in a letter dated August 6, 1997, from Mr. Dixon to Mr. Marceau.

Mr. Dixon reported to Mr. Lovely by e-mail dated August 5, 1997, that the LRT lease had been renewed. Given Mr. Mrdjenovich's active participation in the August 1 meeting, Mr. Dixon assumed Messrs. Bailey and Mrdjenovich were well advanced in their arrangements with Mr. Marceau to purchase the LRT building. However, Mr. Dixon remained unaware of the terms of the potential purchase arrangements between Messrs. Bailey/Mrdjenovich and Mr. Marceau. Mr. Dixon was never provided with the purchase agreement, nor any document authorizing Messrs. Bailey/Mrdjenovich to negotiate a lease renewal on behalf of Mr. Marceau.

Mr. Dixon advised other employees of PWS in the ordinary course of the renewal terms once the LRT lease renewal was negotiated. Further, once PWS was advised that a sale of the LRT had taken place, the associated documents, such as an assignment of the lease, were executed in the ordinary course. Mr. Pagonis reviewed the lease renewal documents as well as the assignment documents and provided the same to Mr. Lovely for his execution.

Discussion

The LRT lease renewal was done at market rates. The cost of the LRT renewed lease ranks approximately 7th out of 11 GNWT leases in Yellowknife.¹⁸ It does not appear, even in hindsight, as though any knowledgeable individuals take issue with the reasonableness of the business decision to renew the LRT lease.¹⁹

¹⁸Dixon Interview, p.7

¹⁹Conflicts Inquiry, Burns, Oct. 22/98, pp.116-118; Burns. Nesbitt Interviews

In my opinion, there is not credible evidence to support the conclusion that any current or former employees of PWS acted improperly or not in accordance with proper authority in the renewal of the LRT lease. Mr. Lovely decided to negotiate a renewal of the LRT lease and instructed Mr. Dixon to negotiate a renewal with the owner. Mr. Dixon followed his Deputy Minister's instructions and negotiated a renewal of the LRT lease on reasonable terms.

Notwithstanding the above conclusion, given the statements and implications in the Conflicts Report, I consider it appropriate to make the following further observations.

1. The Conflicts Report suggests that there is something suspicious about the decision to renew the LRT lease, especially in light of the Options Paper Appendix B reflecting a non-renewal of the LRT lease. The following observations are in order:
 - (a) Mr. Lovely and Mr. Dixon were completely forthright in advising other employees of PWS that they had been contacted by Messrs. Bailey or Mrdjenovich;
 - (b) Mr. Lovely and Mr. Dixon were forthright about making inquiries from other PWS employees concerning the LRT in light of the contact made by Messrs. Bailey/Mrdjenovich. There was no attempt at secrecy or concealment. In fact, the contrary is evident.
 - (c) The other PWS employees who were advised of the possible renewal of the LRT lease (Burns, Nesbitt, and Pagonis) expressed no surprise, shock, or alarm upon being advised of a decision to negotiate a renewal of the LRT lease. Mr. Burns and Mr. Nesbitt were intimately involved in the preparation of the Options Paper and were well aware of the Yellowknife Office Space situation. Indeed, Mr. Burns testified at the Conflicts Inquiry, and confirmed in his discussions with me, that the renewal of the LRT lease was considered in scenarios that were discussed by the Options Paper team. As far as I have been able to ascertain, neither the

members of the Options Paper team, nor Mr. Pagonis, even thought to question the LRT lease renewal.

- (d) Appendix B to the Options Paper was only illustrative of the magnitude of the consequences of Cabinet selecting option 1, 2 or 3. Whether Appendix B indicated that the LRT lease was renewed or not would not appear to have any impact on Cabinet deliberations or an ultimate decision on the Options Paper by Cabinet.
 - (e) What evidence there was from the Ministers of PWS who testified at the Conflicts Inquiry would lead one to conclude that they were not at all troubled or suspicious about the renewal of the LRT lease or Appendix B to the Options Paper.²⁰
2. The Conflicts Report suggests that the lease renewal negotiation between Mr. Dixon and Mr. Marceau was somehow an artificial process, the inference (apparently) being that there was some prior arrangement to renew the LRT lease between Messrs. Bailey/Mrdjenovich and PWS.²¹ Based on my review of the information available, I do not believe the negotiations between Mr. Dixon and Mr. Marceau were artificial, nor that there was some prior arrangement. I have the following observations:
- (a) Mr. Dixon was responsible for negotiating the lease in accordance with instructions from his Deputy Minister. Mr. Dixon's instructions, and the confirmation of those instructions, clearly were to negotiate with the owner. Indeed, given that Mr. Dixon was unaware of what the arrangements were between Bailey/Mrdjenovich and Mr. Marceau, and had never seen any document authorizing Bailey/Mrdjenovich to negotiate anything on behalf of Mr. Marceau,

²⁰Conflicts Inquiry, Arlooktoo, Nov. 3/98, pp.60-61

²¹Conflicts Report, pp.72-76

it would have been inappropriate for Mr. Dixon to have had lease renewal negotiations with anyone other than the owner, Mr. Marceau.

- (b) Mr. Dixon had negotiated leases or lease renewals of the Northern United Building, the Centre Square lease, and a lease for the Dogrib Community Services Board in the Nishi Khon complex in Rae. The suggestion that Mr. Dixon had never been involved in lease negotiations or lease renewal negotiations similar to the LRT lease renewal prior to July 1997²² is incorrect.

- (c) The suggestion that there was some understanding or verbal approval between Mr. Mrdjenovich and employees of PWS that there would be a renewal of the LRT lease sometime prior to July 11, 1997,²³ appears to be without foundation. This suggestion is based primarily on an undated memo from a real estate agent, Mr. Pearman, to Mr. Marceau which states: "Mike has indicated he has received verbal approval."²⁴ The evidence at the Conflicts Inquiry of all individuals who would have had any knowledge of any such arrangement indicates quite clearly there was no such arrangement. Indeed, even Mr. Pearman himself testified that Mr. Mrdjenovich did not give him any indication as to his ability to secure a renewal of the LRT lease until after lease negotiations were concluded.²⁵ It was only after Mr. Pearman was cross-examined (and I use that word advisedly) by the Conflicts Commissioner that he indicated that, because there was a sentence in his memo to this effect, it must be true.²⁶ After consideration of the evidence at the

²²Conflicts Report, p.73

²³Conflicts Report, pp.68-70

²⁴Conflicts Inquiry, Pearman, Oct. 22/98, p.43

²⁵Conflicts Inquiry, Pearman, Oct. 22/98, p.11 and p.34

²⁶Conflicts Inquiry, Pearman, Oct. 22/98 p.43

Conflicts Inquiry, and discussing this with the individuals involved, I can only conclude there was no such prior understanding or verbal approval.

- (d) The Conflicts Report appears to attach significant weight to an alleged, informal hallway chat between Mr. Dixon and Messrs. Oram and Morgan in December of 1997.²⁷ Messrs. Oram and Morgan believe that Mr. Dixon said something like the LRT lease renewal was done at the direction of "the big guy," who was identified as "Donny." Mr. Dixon does not believe he made any such statement. No matter whose recollections are more accurate, at the time of this alleged informal hallway chat, the Yellowknife community was rife with rumours and discussion about the LRT lease renewal and other somewhat related political issues. Indeed, by this time a month had elapsed since Mr. Dixon had been contacted at home by Mr. Ootes, a member of the Legislative Assembly, and asked about the LRT lease renewal. Even assuming that Mr. Dixon made such a statement, the meaning of the statement, and the weight one should give this evidence, in light of all the other evidence, leads me to conclude that:
- i. it does not, alone, or with the Pearman memo, support a conclusion that there was any prior arrangement to renew the LRT lease; and
 - ii. it does not support a conclusion that Mr. Lovely was inappropriately directed by anyone to renew the LRT lease.
- (e) Mr. Marceau's evidence could be interpreted to support the theory that there was some arrangement to renew the LRT lease before the end of July when Mr. Lovely made the decision and thereafter Mr. Dixon negotiated the renewal. Mr. Marceau's evidence at the Conflicts Inquiry was, in its best light, uncertain and,

²⁷Conflicts Inquiry, Oram, Oct. 21/98, p.38

taken in its worst light, fundamentally inconsistent. He did not recall numerous documents or incidents that were referred to him in the course of his evidence.²⁸

Mr. Marceau acknowledged that he negotiated the terms of the lease renewal of the LRT with Mr. Rankin in late 1995 (when he was 71 or 72 years of age).²⁹ Further, Mr. Marceau's evidence was that the terms he discussed with Mr. Dixon were virtually the same as the ones he had negotiated with Mr. Rankin.³⁰ Mr. Marceau acknowledges meeting with Mr. Dixon on July 31st and again on August 1, 1997. He recalls discussing the HVAC system, replacement of carpets, and operating and maintenance expenses.³¹ Yet, paradoxically, Mr. Marceau suggested, without any detailed explanation, that he felt the lease renewal negotiations were "sort of out of my hands anyway."³²

Mr. Marceau declined to co-operate with this Review. It appears from the information that I have reviewed³³ that Mr. Marceau was bitter towards the GNWT because of what transpired with respect to the LRT building.³⁴ Perhaps it was the reduction in price from \$4.4 million to \$4 million late in the process. Whatever the reason for this apparent bitterness, I can find no cause for complaint by Mr. Marceau about the conduct of Mr. Lovely or Mr. Dixon.

²⁸Conflicts Inquiry, Marceau, Oct. 21/98, p.141, for example

²⁹Conflicts Inquiry, Marceau, Oct. 21/98, p.89

³⁰Conflicts Inquiry, Marceau, Oct. 21/98, p.111

³¹Conflicts Inquiry, Oct. 21/98, p.113 and p.114

³²Conflicts Inquiry, Oct. 21/98, p.111

³³Dixon, Bailey, Mrdjenovich Interviews

³⁴Bailey, Mrdjenovich Interviews

- (f) Mr. Lovely and Mr. Dixon were not friends with Mr. Bailey or Mr. Mrdjenovich. While Mr. Lovely and Mr. Bailey were acquainted through their employment with the GNWT for many years, they were not social acquaintances. Mr. Lovely had never met Mr. Mrdjenovich until shortly before his testimony at the Conflicts Inquiry. Mr. Dixon was acquainted with Mr. Bailey by virtue of their service with the Government, but was not a social acquaintance of Mr. Bailey. Mr. Dixon knew Mr. Mrdjenovich because he worked for one of Mr. Mrdjenovich's companies briefly in the early 1980s. Mr. Dixon and Mr. Mrdjenovich were not social acquaintances. In fact, in 1994, Mr. Dixon, as part of his duties with the Business Incentive Monitoring Office, took steps to investigate whether Mr. Mrdjenovich's company, Nova Construction, continued to be qualified for the business incentive policy as a northern company.³⁵ Clearly, there was not a friendship between Lovely or Dixon and Bailey or Mrdjenovich.

Conclusion

In conclusion, and as noted above, I do not consider that Mr. Lovely or Mr. Dixon, or any other PWS employee, acted inappropriately with regard to the renewal of the LRT lease. The appropriate legislation, regulation and policies were complied with by Mr. Lovely and Mr. Dixon.

C. Ministerial Briefing Materials

Review of Facts

The ministerial briefing materials (including answers to questions raised in the Legislative Assembly) that are at issue in this Review deal with the subject of the renewal of the LRT lease.

The renewal of the LRT lease was the subject of public discussion in Yellowknife by November of 1997. Mr. Lovely and Mr. Arlooktoo, Minister of PWS, believe that an oral briefing with respect to the LRT lease renewal took place prior to the August 1997 Cabinet

³⁵Letter, Dixon to Mrdjenovich, Feb. 15/94

meeting.³⁶ Minister Arlooktoo does not appear to have been at all concerned with Mr. Lovely's decision to negotiate a renewal of the LRT lease. Upon being briefed about the renewal (together with other matters), Minister Arlooktoo believes he advised Mr. Lovely, "Well done, you made a good deal for the government."³⁷

A Briefing Note dated November 13, 1997, prepared for Minister Arlooktoo was apparently prepared by Ms. Kennedy, acting Deputy Minister. Further, it appears that Gay Kennedy had input from Ms. Bevington or someone working under Ms. Bevington's supervision. It is clear that Mr. Lovely was not in Yellowknife at the time and had no hand in preparing the November 13, 1997, Briefing Note.

Ms. Kennedy, who did not testify at the Conflicts Inquiry, advised me that she had no first-hand knowledge of the matters set forth in the November 13, 1997, Briefing Note. Further, she would have relied upon others for information, which she assumed to be accurate, and would only have edited the information so received.

Upon returning to Yellowknife, Mr. Lovely reviewed the November 13, 1997, Briefing Note. Mr. Lovely concluded that a more lengthy document would be appropriate, given the growing notoriety surrounding the LRT lease renewal. Accordingly, under his direction, a more lengthy Chronology of Events document was prepared. Mr. Dixon had some input into portions of the Chronology of Events document. The Chronology of Events document sets forth the events in a manner consistent with the summary of the lease negotiations set forth in Mr. Dixon's e-mail to Mr. Lovely of August 5, 1997.

³⁶Conflicts Inquiry, Lovely, Oct. 15/98, p.160; Arlooktoo, Nov. 3/98, p.44

³⁷Conflicts Inquiry, Arlooktoo, Nov. 3/98, pp.60-61

Jim Antoine became the Minister of PWS (among other portfolios) effective December 5, 1997.³⁸ Briefing materials were prepared for Minister Antoine when he became Minister in preparation for the Legislative Sessions in late 1997 and early 1998. Mr. Lovely was responsible for supervising this information pertaining to the LRT lease renewal for Minister Antoine. This included a document also entitled "Chronology of Events."³⁹

Minister Antoine signed a letter date stamped February 4, 1998, to all members of the Legislative Assembly regarding the LRT lease renewal. Mr. Lovely was responsible for overseeing the preparation of the information for inclusion in this letter.

In early February of 1998, questions were raised in the Legislative Assembly about the LRT lease renewal. Minister Antoine took formal notice of those questions, and answers were supplied by PWS employees under Mr. Lovely's supervision. It appears that the more contentious and public the LRT lease renewal issue became, the more control was taken by Mr. Lovely over the preparation of materials for his Minister (as one might expect a Deputy Minister to do).⁴⁰

Certainly, Mr. Dixon had input in providing information that was used to prepare some of these materials for the Ministers.⁴¹ In addition, it appears that Ms. Kennedy, Ms. Bevington and Ms. Babicki had some role in preparing the materials for Ministers Arlooktoo and Antoine.

Mr. Dixon would not have seen the final briefing materials until after they had been used by the Minister, if at all.

³⁸Conflicts Inquiry, Antoine, Nov. 3/98, p.70

³⁹Conflicts Inquiry, Antoine, Nov. 3/98, p.75

⁴⁰Kennedy Interview

⁴¹E-mail Feb. 12/98, Dixon to Babicki, copy Lovely.

Discussion

The Conflicts Report discusses and makes findings on the issue of whether or not the ministerial briefing materials were misleading.⁴² However, the terms of reference of the Conflicts Inquiry do not appear to include an investigation into this issue. In this regard, when Mr. Dixon was asked about the role he played in preparation of briefing materials for the Minister with respect to the LRT lease renewal, an objection was made by counsel that this was irrelevant to the terms of reference of the Conflicts Inquiry. This objection appears to have been accepted by counsel for the Conflicts Commissioner in his response, which indicated that he had no further questions with respect to the ministerial briefing material line of questioning for Mr. Dixon.⁴³

Indeed, there is a relative paucity of evidence at the Conflicts Inquiry that was directly focused on the ministerial briefing process and the ministerial briefing materials. Ms. Kennedy was the Director of Policy and Planning with PWS and signed the November 13, 1997, Briefing Note, as Acting Deputy Minister for Mr. Lovely. Part of Ms. Kennedy's duties included support for preparation of documents for the Minister of Public Works and Services, Cabinet, and the FMB. Ms. Kennedy did not testify at the Conflicts Inquiry. Similarly, there was no significant evidence about these briefing materials from the Ministers who testified at the Conflicts Inquiry.

There does not appear to have been any significant evidence at the Conflicts Inquiry on the typical format and general purposes of Ministerial briefing materials. Although the standard format of a briefing note may be clear,⁴⁴ the content of a briefing note can be as varied as the issues which may be dealt with in the briefing note and the personality of the Minister for whom it is prepared. However, there are general principles that are accepted by the individuals who are involved in this type of activity. Firstly, and perhaps obviously, briefing notes are intended to

⁴²Conflicts Report, pp.79-83

⁴³Conflicts Inquiry, Dixon, Oct. 16/98, p.112

⁴⁴Copy provided by Babicki

be brief. Secondly, briefing notes run a spectrum from being purely factual to being purely positional. Thirdly, with respect to answers to questions in the Legislative Assembly, aside from the above two principles, sometimes the answer will be restricted to exactly what is asked by another member of the Legislative Assembly.⁴⁵

One should not be surprised that all details with respect to an issue may not be set forth in materials provided to a Minister for briefing. One would expect this would be the rule rather than the exception. What is important is that the summary of the facts, or the position, set forth in the briefing materials be correct.

Before turning to the specific briefing materials in question, it is important to summarize the facts which are central to the briefing materials. Both Mr. Lovely and Mr. Dixon clearly understood they were negotiating the LRT lease renewal only with the existing owner, as represented by Mr. Marceau. As noted above, this understanding is confirmed by the testimony of Mr. Mrdjenovich, Mr. Bailey, Mr. Marceau, and Mr. Pearman (although the latter two are inconsistent on this subject). The understanding of Mr. Lovely and Mr. Dixon is documented in a contemporaneous e-mail between Mr. Lovely and Mr. Dixon.⁴⁶ If you accept all of this evidence (and there is no good reason not to in my opinion), then it is correct to say that the negotiations to renew the LRT lease were made between Mr. Dixon and Mr. Marceau. The fact that Messrs. Bailey and Mrdjenovich made contact with Messrs. Lovely and Dixon to make enquiries about the status of the lease and to attempt to discuss specific issues does not change the fact that Mr. Dixon (in accordance with Mr. Lovely's direction) negotiated the renewal with the owner, Mr. Marceau. Mr. Dixon refused to conduct negotiations with Messrs. Bailey or Mrdjenovich. The fact that Mr. Marceau decided to invite Mr. Mrdjenovich to one of the negotiating sessions does not make it inaccurate to state the lease renewal was negotiated with Mr. Marceau. If Messrs. Bailey and Mrdjenovich wanted to negotiate the LRT lease renewal

⁴⁵Babicki, Lovely, MacDougall Interviews

⁴⁶E-mail dated Aug. 5/97

themselves, they only had to have Mr. Marceau serve a copy of the written authorization they had prepared on PWS and conduct the negotiations themselves. Of course, this was never done.

With respect to specific ministerial briefing material that was the subject of comment in the Conflicts Report,⁴⁷ I have the following observations:

- i. November 13, 1997, Briefing Note - this was prepared without any input from Mr. Lovely and apparently without any input from Mr. Dixon. If there was an orchestrated effort to mislead anyone, which I find there was not, presumably it would have to include those who were involved in the preparation of this Briefing Note. Further, I do not find it misleading to say that Marceau approached PWS in July of 1997. Finally, whether negotiations could be described as "lengthy" is debatable and, in any event, of little significance.
- ii. January 28 Briefing Note (referred to as July 28 Briefing Note in the Conflicts Report)⁴⁸ - this appears to be an accurate summary of the facts. The lease renewal negotiated in July did provide substantial cost savings to the Department of Public Works and other government departments. The fact that the document does not make reference to any developments between January of 1997 and July of 1997 is of no consequence. Nothing that can be reasonably considered significant, for the purposes of a Briefing Note, did occur. The fact that Mr. Bailey or Mr. Mrdjenovich were not mentioned, in the context of the renewal of the LRT lease is, in my opinion, not a misleading omission in a Briefing Note.
- iii. February 4, 1998, Letter - it has been suggested that this letter is incomplete or inaccurate. A careful review of this document, and the facts surrounding the

⁴⁷Conflicts Report, pp.79-82

⁴⁸Conflicts Report, p.80

renewal of the LRT lease, lead me to conclude that this document, signed by Minister Antoine and date stamped February 4, 1998 is almost entirely accurate and is in no way substantially misleading. On page 2 there is an error with respect to the date of July 29. It was July 30, when Mr. Marceau contacted Mr. Dixon. The suggestion that there ought to have been mention of the fact that Mr. Bailey and Mr. Mrdjenovich contacted Messrs. Lovely and Dixon (who refused to negotiate a renewal with them) is a subjective, argumentative, position. It is to be recalled that this document was signed by Minister Antoine who was apparently briefed (as was his predecessor Minister Arlooktoo) on the fact that Bailey and Mrdjenovich had made contact with PWS as potential purchasers of the LRT.

- iv. Reply to oral questions from Mr. Ootes and Mrs. Groenewegen in February 1998 - it is suggested that responses to these questions ought to have included references to contact made by Messrs. Bailey and Mrdjenovich. On any reasonable view of the evidence, it would be false to suggest that Mr. Bailey was involved in negotiations to renew the LRT lease. On the other hand, it is certainly arguable that Mr. Mrdjenovich's participation in the August 1, 1997, negotiating session could have justified specific mention of his involvement. Yet for Mr. Dixon to state that he negotiated the LRT lease renewal with Mr. Mrdjenovich would have been false in Mr. Dixon's mind and expressly contrary to his Deputy Minister's instructions to negotiate a renewal with the owner, Mr. Marceau. The positive statement that Mr. Mrdjenovich was not involved in negotiations could arguably be described as inaccurate. The precise answer would have been that all negotiations were with Mr. Marceau, however, in one of the negotiating sessions Mr. Marceau invited Mr. Mrdjenovich to attend and participate on his behalf. The statement that all negotiations were in the Superintendent's office, is clearly inaccurate as the August 1, 1997, negotiating session was in Mr. Mrdjenovich's Company's boardroom.

The process followed in the preparation of these various ministerial briefing materials appears to have been the process that is normally followed in such circumstances. That is, the Deputy Minister, or Acting Deputy Minister seeks information from the most senior person who has direct knowledge of the issue. Thereafter, briefing materials are prepared under the supervision of the Deputy Minister or the Acting Deputy Minister. The information may come from more than one source. The information may be edited or rewritten by individuals who do not have direct knowledge of the issue. The final product was approved by the Deputy Minister or the Acting Deputy Minister, and in one instance, signed by the Minister.

Conclusion

I find that the information in the briefing materials was substantially correct. The errors in those materials did not result in the materials being substantially misleading. The central concern raised about the accuracy of these materials appears to be with whom did PWS conduct negotiations for the renewal of the LRT lease. On this central point the ministerial briefing materials reflect reality, that is, that negotiations were conducted with the owner, Mr. Marceau.

The responses to the questions from Mr. Ootes and Mrs. Groenewegen could have included the reference to Mr. Mrdjenovich attending the August 1st negotiating session between Mr. Dixon and Mr. Marceau. Further, these responses should have stated that one negotiating session was at the offices of Nova Construction. I am unable to determine how these inaccuracies occurred. However, the ultimate responsibility for these materials was with the Deputy Minister or acting Deputy Minister.

I find no pattern of misleading information provided to the Minister of PWS. Indeed, the uncontradicted evidence is that the Minister was advised very early on of at least Mr. Bailey's contact with PWS. The evidence does not support the conclusion that Mr. Lovely avoided responsibility for briefing materials. Quite clearly he was not even in Yellowknife when the November 13, 1997 Briefing Note was prepared and signed by the Acting Deputy Minister, Gay Kennedy. Given that briefing materials are often a collaboration of a number of individuals, some of whom are not aware of the facts on any given issue, minor factual errors will occur from

time to time. I suspect one could spend more than a lifetime debating whether Ministerial statements in any Legislative Assembly on highly political events are complete or completely accurate. In my opinion, an examination of the accuracy of ministerial briefing materials are outside the terms of reference of the Conflicts Inquiry. There was not a direct and complete examination of all evidence relevant to this issue during the course of the Conflicts Inquiry. Notwithstanding this, the Conflicts Commissioner proceeded to make findings on this issue, which have had very serious personal repercussions for some former and current PWS employees. This is exactly the type of conduct that Supreme Court of Canada Justice W. Estey and others have cautioned Commissions of Inquiry to avoid.⁴⁹

⁴⁹See p.1, fnt 1 of this Report

6. SUMMARY OF FINDINGS AND RECOMMENDATIONS

I make the following findings with respect to the issues I have been asked to review:

A. Renewal of the Lease of the Lahm Ridge Tower in 1997

I find that the lease renewal complied both procedurally and substantively with the relative GNWT policies and guidelines and legislation.

B. Leasing Commitment for the Fort Resolution Office Complex

I find that the letter of intent dated July 19, 1996, issued on the instructions of Deputy Minister Lovely did not comply procedurally or substantively with the relevant GNWT policy guidelines and legislation. Mr. Lovely did not have authority to issue the letter of intent, although I find that he was acting in what he thought was the best interests of the GNWT and the Fort Resolution Community in issuing the letter.

C. Ministerial Briefing Notes on the Renewal of the Lahm Ridge Tower Lease

I find that the information in the material prepared for the Ministers was substantially correct. I find that in response to the question proposed by Mr. Ootes and Mrs. Groenewegen, that a more accurate response would have included reference to Mr. Mrdjenovich's attendance at one negotiating session with Mr. Marceau, at the invitation of Mr. Marceau. Further, that it was inaccurate to state that all negotiations were in the Superintendent's office. I find it likely that the Ministers were orally briefed by Mr. Lovely with respect to the contact made by Messrs. Bailey and Mrdjenovich as potential purchasers of the LRT. I find that there was no concerted effort by employees of PWS to engage in "lies and half truths" in preparation of these ministerial briefing materials. The preparation of the ministerial briefing materials appear to have followed the normal processes. I find that the fact of the renewal of the LRT lease being a highly politicised and public issue at the time these ministerial briefing materials were prepared, likely lead to Mr. Lovely carefully supervising preparation of the materials to ensure that they are both correct and yet did not further fan the flame of public political controversy. This is not an easy task.

Recommendations

Other than the Fort Resolution letter of intent, I have found that the processes and policies have been substantially complied with, by PWS employees. Further, I have made a cursory review of the processes in other jurisdictions (Appendix "D") with respect to leasing of real property by governments. Having considered all of these matters I do not feel compelled to make any recommendations for improvement to any GNWT processes or policies.

7. EPILOGUE

It will be noted that my findings are not consistent with the findings, and implications, in the Conflicts Report. To a certain degree this is to be expected given that the mandates and processes are different. However, having reviewed most of the evidence and testimony that was before the Conflicts Commissioner I simply reach different conclusions than the Commissioner about the conduct of the PWS employees in the renewal of the LRT lease and the preparation of ministerial briefing materials. Much could be said about the conduct of the Conflicts Inquiry. Witnesses at that inquiry that I have spoken with have expressed the concern that the Conflicts Inquiry did not heed the words of the former Supreme Court of Canada Justice Willard Estey which were quoted above at page 1 of this Report. This may be an additional reason why my conclusions are not the same as those in the Conflicts Report.

8. ACKNOWLEDGEMENTS

I would like to acknowledge the assistance and co-operation I received in conducting this Review. Firstly I would like to thank all the individuals who agreed to discuss the issues with me. A number of them were under no obligation to revisit these issues which they feel have resulted in personal damage to them that has resulted from the Conflicts Inquiry process. Secondly, I would like to thank the employees of PWS who provided me with co-operation throughout. Thirdly, I would like to thank Stuart Chambers and Gerda Pruden of McLennan Ross who devoted many hours to assist me in preparing this Report within a relatively short time frame.

APPENDIX "A"

DEPARTMENT OF PUBLIC WORKS AND SERVICES
REVIEW OF ISSUES STEMMING FROM
THE CONFLICT OF INTEREST INQUIRY

TERMS OF REFERENCE

Authority

This review shall be carried out under the authority of the Minister of Public Works and Services, pursuant to section 61 of the *Legislative Assembly and Executive Council Act*, R.S.N.W.T. 1988 c. L-5, as amended.

Objective

The objective is to review issues raised in the Report of the Conflict of Interest Commissioner dated November 25, 1998 as they relate to the Department of Public Works and Services in its application of GNWT policies and legislation, and the provision of information to the Minister; to make recommendations for improvement of processes or implementation of new processes to avoid such issues in the future; and to make any other recommendations appropriate in the circumstances.

Subject Matters

1. An examination of process followed by Public Works and Services personnel in renewing the lease of the Lahm Ridge Tower in 1997 and whether these complied both procedurally and substantively with relevant GNWT policy guidelines and legislation;
2. An examination of the process followed by Public Works and Services personnel in leasing space in the Fort Resolution Office Complex and whether these complied both procedurally and substantively with the relevant GNWT policy guidelines and legislation;
3. If the process followed did not comply with GNWT policy guidelines and legislation, to determine the reason(s) therefor; and
4. An examination of the process followed by personnel in gathering information and preparing briefing notes for the Minister on the renewal of the Lahm Ridge Tower lease, with a view to determining why certain information ultimately provided to the Minister was, or was perceived to be incorrect, incomplete or both.

Reviewer

The Reviewer shall be an independent third party.

Information to be Provided to the Reviewer

The Department of Public Works and Services shall provide the Reviewer with access to all relevant documentation, which is not subject to privilege, copies of relevant policies and legislation, and shall provide a list of individuals who may have information relevant to these Terms of Reference.

Process

Interviews will be conducted with individuals identified by the Department and any other individuals who, in the opinion of the Reviewer, have knowledge of information relevant to these Terms of Reference.

The Reviewer may share these Terms of Reference with individuals who are interviewed.

Interviews shall be conducted in private and at a location other than the offices of Public Works and Services.

Individuals will be asked not to discuss the contents of their interviews with co-workers so that the integrity of the information gathered can be maintained.

Individuals shall be advised that their comments shall be held in confidence to the greatest extent possible, but that the information may be subject to disclosure by court order or pursuant to the *Access to Information and Protection of Privacy Act* S.N.W.T. 1994 c.20.

Individuals shall be advised that the results of the Review will become public and that some or all of the information provided to the Reviewer by them may become public as a consequence.

Report

The Reviewer shall provide a written report to the Minister of Public Works and Services. The report shall contain the Reviewer's findings and the reasons therefor; and recommendations. The review shall be completed and a written report provided by March 31, 1999 or so soon thereafter as practicable.

APPENDIX "B"

IN THE MATTER OF A COMPLAINT TO THE CONFLICT OF INTEREST
COMMISSIONER WITH RESPECT TO ALLEGED CONTRAVENTION OF PART III OF
THE LEGISLATIVE ASSEMBLY AND EXECUTIVE COUNCIL ACT BY THE MEMBER
FOR TU NEDHE

TERMS OF REFERENCE FOR INQUIRY

The Conflict of Interest Commissioner has received a complaint made pursuant to Part II of the Legislative Assembly and Executive Council Act (the "Act") dated February 16, 1968, from Jane Groenewegen in relation to the conduct of the Member for Tu Nedhe. Having received further submissions from the person making the complaint and from the Member concerned, the Commissioner hereby directs that further inquiry be made into the complaint, including the holding of public hearings pursuant to section 82 of the Act. Such further inquiry will be made in respect to the following matters complained of:

The circumstances under which the Member came to reside in the house located on property presently owned by Nova Construction (1987) Ltd. and legally described as:

Lot Twenty-eight (28) Block One Hundred Fifty One (151) Plan 2403 Yellowknife and whether the Member received any benefit as a result of the said residence being made available to him and whether the Member has by his conduct in relation to this issue contravened the Act.

The role of the Member, if any, in the 1997 decision of the Government of the Northwest Territories to extend the lease of office space in the Lahm Ridge Tower building located in Yellowknife and whether any conduct of the Member in respect to that decision contravened the Act.

The role of the Member, if any, in the awarding of contracts involving the Government of the Northwest Territories and Nova Construction (1987) Ltd. or any other company in which Milan Mrdjenovich has an interest, and whether the Members' conduct in that regard contravened the Act.

The circumstances surrounding the sale by the Member of certain property located in Fort Resolution legally described as:

Lot Twenty-three (23) Plan 58 Fort Resolution and whether the Member received a benefit as a result of the said site which contravened the Act, or whether the Members' conduct in respect to the said sale and the lease of office space by the Government of the Northwest Territories in the complex developed on said land by Deninu K'ue Development Corporation contravened the Act.

The role of the Member, if any, in the transfer of the bison herd formerly located at the Hanging Ice Ranch to the Deninu K'ue Ranch located near Fort Resolution, and whether his conduct in respect to the said transfer contravened the Act.

The role of the Member, if any, in the decision of the Government of the Northwest Territories to award a contract to Roland Bailey, or a company in which Mr. Bailey has an interest, for preparation of a report on privatization of the Petroleum Products

Division, and whether the Members' conduct in respect to such award contravened the Act.

— The conduct of the Member in respect to the Canada's Northwest Territories Government Aurora Fund (1996) and the Canada's Northwest Territories Government Aurora Fund II, and whether any such conduct contravened the Act.

Such further and other matters as may be relevant and arise from the investigation of the foregoing will be put to public inquiry.

Anne Crawford Conflict of Interest Commissioner for the Northwest Territories

APPENDIX "C"

NWT LEGISLATION/REGULATION/POLICIES

The Legislative, Regulatory and Policy provisions which are relevant to the issues in this Review are as follows:

- The *Financial Administration Act* ("Act");
- Government Contracts Regulation made pursuant to the Act;
- Accommodation Services Manual containing Policies, Directives and Procedures associated with the Leasing of Improved Real Property by the Department of Public Works and Services.

Section 44 of the Act states that no person shall incur an expenditure or enter into a contract on behalf of the Government that requires an expenditure in that fiscal year, unless an expenditure officer (a Minister or public officer) certifies that there are sufficient funds remaining from those committed to the activity to cover the expenditure, that the expenditure is consistent with the stated objectives of the activity on which the initial appropriation was based, and that any statutory conditions are met. Further, an accounting officer must certify that an expenditure officer has done the aforementioned, and also that there are sufficient funds left from the amount appropriated. Finally, the accounting officer must also certify that there is no reason why the expenditure should not occur, and that the amount of the expenditure is accurate.

Section 44(2) deals with contracts for expenditure in subsequent years. For these, the person entering into the contract must consider that the expenditure is required and that the contract is in the public interest. Also, the Minister of the relevant department must consent. Section 45 states that a contract made in contravention of section 44 is not binding on the Government unless the Deputy Minister chooses to exempt the contract. Section 46 makes it a condition of all government contracts that there be sufficient allocated funds for that expenditure in the given year.

Other than the above, however, government contracts in the NWT are governed by the *Government Contracts Regulation* ("Regulations") made pursuant to the Act, specifically s. 107(f) which authorizes the making of regulations "respecting the manner in which contracts, agreements or undertakings made by or on behalf of the Government may be made, the conditions of any such contracts including the security to be given, and respecting any matter incidental to such a contract, agreement or undertaking."

Section 2 states that these Regulations cover all government contracts other than employment contracts, and s. 3 authorizes the delegation and duties of the powers of a "contract authority" to a public officer. A contract authority is a Minister, Deputy Minister or delegate.

Section 6 prohibits anyone other than a contract authority from entering into a contract (note that the Executive Council is exempted by s. 5). Section 7 provides that the contract authority must not exceed the monetary signing limits assigned to it.

Sections 8 and 9 of the Regulation require a formal invitation to tender process for all contracts which may exceed \$5000, although there are exceptions in s. 10 for emergencies, architectural or engineering contracts under \$25,000 or any contract under \$1000, or where only one party can perform the contract. The tenderer chosen must be "responsible and responsive" and have submitted a tender which is lower than any other such tenderer. The Minister is the tiebreaker if one is needed.

Where more appropriate, in the opinion of the contract authority, a contract may be entered into instead through a request for proposals. Note that a delegate contract authority must be specifically delegated the authority to utilize this technique. The proposer selected must be responsible and offer the best potential value for the Government.

Section 24 of the Regulation specifies that the contract authority for leases of real property is the Minister or Deputy Minister of Public Works or their delegate pursuant to s. 3.

The Accommodation Services Manual, Leasing of Improved Real Property ("Manual") has relevant provisions. Chapter 10 deals with the renewal of leases. The Directive in Chapter 10 notes that the continuing need for space must be confirmed by the Minister or his delegate. Further that continuing need for the space is confirmed through the annual up-date of the 5 year office plan. The Chapter goes on to describe guidelines and procedures for renewal authority, rent negotiations, and renewal document preparation and execution.

APPENDIX "D"

REAL ESTATE LEASING PRACTICES IN OTHER JURISDICTIONS

1. **Legislation and Regulation**

Federal Government

The federal legislative framework is similar to that of the NWT, although less detailed. Section 7(c) of the Canada *Financial Administration Act* provides that the Treasury Board may act for Canada in all matters relating to, *inter alia*, "financial management, including... fees or charges for the provision of services or the use of facilities, rentals, licences, leases...". Section 41 authorizes the Governor General in Council to make regulations with respect to the conditions under which contracts may be entered into. These regulations are found in the *Government Contract Regulations*, which require a process of soliciting bids in most cases where the government enters into a contract (see s.5 - exceptions include emergencies and cases where estimated expenditure is less than \$25,000). Section 7 specifies that the process of soliciting bids shall be by giving public notice consistent with generally accepted trade practices, or by inviting bids from suppliers on a specific list of approved suppliers.

Alberta

The situation in Alberta is somewhat different. Section 2 of the *Public Works Act* empowers the Minister of Public Works, Supply and Services, the Deputy Minister or any authorized employee to enter into any contract on behalf of the Crown that "is considered necessary or advisable for the purpose of carrying out the functions, duties or powers of the Minister." One of these authorized parties must sign the contract for it to bind the Crown. Section 3 leaves it to Ministerial discretion whether or not to call for tenders by invitation or public notice, or not at all. If a tender is required, then there are certain requirements as to security, timing, notice of extension, and withdrawal. The Minister can only accept a tender other than the lowest tender with the authority of Cabinet.

However, it would appear that the key provisions are found in Schedule 12 to the *Government Organization Act*. Section 7 of this Schedule provides that the Minister is responsible for the administration, acquisition and disposal of all land held, used or occupied for

public works of the Government, as well as the construction, alteration, etc. of buildings and improvements required for public works of the Government. This is the only provision that appears applicable to the authority to enter into a lease. While there are some significant restrictions on the ability to sell or dispose of land, on the acquisition side the Minister has nearly unfettered discretion.

The Civil branch of Alberta Justice takes the position that s. 7 of Schedule 12 encompasses the authority of the Minister to enter into leases. Further, it seems that there are no formal checklists or procedures for entering into leases, other than what the various branches of Public Works have developed internally (discussed below). Also, there appear to be no contract regulation provisions in Alberta similar to those in NWT and the federal jurisdiction.

Sections 79 and 80 of the *Financial Administration Act* would also appear to be relevant. They authorize the Treasury Board to make regulations or issue directives, respectively:

1. Governing standards to be observed when contracts are entered into by or on behalf of the Crown or a Provincial agency where those contracts relate to the acquisition, management, use or disposition of property or a class of property, or the buying or selling of goods or the rendering of services by or to the Crown or a Provincial agency; and
2. Respecting the "acquisition, management, use or disposition of real or personal property by the Crown or a Provincial agency."

The only problem is, there are no published directives or regulations which appear to be relevant. There are no Treasury directives relevant to government leases. As for regulations, none appear to be relevant, although note that Alta. Reg. 282/89, s. 20(f) exempts the *Financial Administration Act* from regulation filing requirements (except for those made under two inapplicable sections). However, there are *some* published regulations, none of which are relevant.

2. The Approval Process

Federal Government

Relevant Department: Public Works and Government Services Canada ("PWGS").

The approval process is simple and informal. When a government department or agency requires leased space, a request is made of PWGS. A leasing officer meets with the client department or agency and assesses its needs, wishes, budgetary constraints, and so on.

For all new lease space requirements, one of two competitive processes is then commenced. Note that competitive processes are not used for renewals of leases where the client is happy and the leased space continues to meet all applicable standards, etc. Also, there is no competition when the lease requirements are so small or short-term that they do not merit the cost of the process.

However, in all other cases, either a tender call or two-stage tender is employed. A tender call is rarely used. It is a straightforward advertisement in local newspapers, and the award goes to the lowest tender.

More common is the two-stage tender, whereby the government makes public an Expression of Interest which sets out the general parameters of the leased space required. The leasing officer will then review responding letters from prospective landlords, and develop a list of all those that meet the parameters of the client. The leasing officer and a representative of the client will then go on a tour of all potential sites, and determine if any can be eliminated.

The next step is the provision of an invitational tender package to all remaining prospective landlords. This is the same package as is given in the tender call process. It consists of details of the leasing requirements, instructions to the offeror, a specimen lease and fit-up agreement, standards for leased space (common to all leases), and an offer form. After receipt of this package from all landlords, the leasing officer will review them and make a recommendation to the client, who must then obtain approval according to that department or agency's own internal approval process.

The leasing officer will also prepare an Investment Analysis Report, which is a very simple document outlining all of the above information and considerations. This report is presented to the appropriate official in PWGS for approval (note that when Ministerial approval is required, a two-page summary of this report is forwarded to Ottawa).

Who grants the approval in PWGS is determined by the monetary value of the transaction. There is a hierarchy of approvals. At the top is approval by the Treasury Board in Ottawa. This approval is required for leases valued over \$20 million (eg/ \$1 million a year for 20 years).

The next level is Ministerial approval, in which the above-mentioned summary is sent to the Minister's office in Ottawa. Ministerial approval is required for any leases valued over \$10 million but under \$20 million.

The next level down is the Regional Director General, who can approve leases up to \$10 million. Below the regional director there is a continuing hierarchy of regional officials who can grant approvals, each again determined by the monetary value of the lease in question.

The regional area in which Alberta is included also contains Saskatchewan, Manitoba and the NWT.

The Department does not have any formal written policies or guidelines. They rely simply on internal directives and memos.

Alberta

Relevant Department: Public Works, Supply and Services ("PWSS"):

1. Realty Services, Leasing Branch;
2. Property Development, Capital Projects Division.

The process in Alberta is somewhat more complicated, at least in part because it is divided up amongst two arms of the department.

A request for leased space for a government department or agency (again, the "client") is made by that department's Capital Projects liaison to the Capital Projects division of Property Development, which is one of the major divisions of PWSS itself (an "ADM-ship"). The leased space requested may be new leased space, or a renewal of a current lease.

If new leased space is being requested, Capital Projects prefers the request to come directly from the relevant Minister. An officer from Capital Projects will meet with the client and determine the needs of that client and the scope of the project. If possible, space currently leased but unused will be allotted to the client.

Where a renewal of the client's lease is requested, Capital Projects will determine if there is a continuing need for space and if the currently leased space continues to meet the requirements of the client, or if new space is required. Capital Projects will also investigate the inventory of currently leased and unused space to determine if one of those locations is more suitable. The key determination is cost and efficiency - for instance, it may be more cost-effective to renew a slightly more expensive lease than to move government offices.

If Capital Projects determines that a new lease is required, then the internal approval of the requesting department or agency is necessary to:

1. Obtain the space; and
2. Renovate, if necessary (this could apply to currently leased space as well).

Each department will have its own internal approval process. Generally it will be done by the ADM of the appropriate internal division, although for larger projects often Deputy Minister approval is required.

Once the internal approval of the requesting department is obtained, the Capital Projects officer must get approval from his or her supervisor to move ahead with the project. Generally, this approval is simply a matter of referral to the senior manager in the office, although for extremely large projects there is the potential for approvals to go to the Ministerial level.

After the necessary approvals are obtained, Capital Projects forwards the matter on to the Leasing Branch of the Realty Services ADM-ship. When a new lease is required, an officer of the Leasing Branch will review the requirements and limitations of the request, and then conduct informal market research and come up with several options (usually 15 to 20), which he or she will then present to Capital Projects. Representatives of Capital Projects and Leasing will meet with the client and arrange a tour of the most suitable locations, further narrowing the list.

The leasing branch will then negotiate with the remaining landlords on the basis of instructions from Capital Projects developed in consultation with the client. Note that this is NOT a formal tendering process. Generally, a public tender process will be resorted to in only two situations:

1. Where the initial market research indicates nothing readily available which meets the needs of the client; or
2. In the "select lease quotation process." This is a quasi-tender process. When a large new lease area is required (generally over 1000 square meters), the Leasing Branch will identify potential suppliers and invite them to submit quotes based on the Branch's specifications.

Once the negotiator has obtained what is in his or her opinion the best available deal, he or she will make a formal recommendation to the appropriate approving officer. The recommendation has two parts:

1. A written description and analysis of the recommended space; and
2. A market survey, to give a baseline for comparison of the recommended deal.

The lease is approved by different officials depending on the annual dollar value of the lease. Leases up to \$100,000 per year are approved by the Director of the Realty Services, Leasing Branch. This amount goes up until the highest level, leases over \$1 million per year, which must receive Ministerial approval.

Renewals of existing leases may be acquired by direct negotiation with that single landlord. However, a leasing officer will still conduct a market survey to determine what an appropriate rate for the space would be. The officer would then conduct negotiations with the landlord, and attempt to obtain a rate consistent with market values as previously determined. If such a rate cannot be obtained, the officer will recommend that the lease not be renewed. Once a negotiated rate is agreed upon, the renewed lease will be presented to the appropriate official for approval in the same manner as a new lease.