# ONTARIO COURT OF JUSTICE

**B E T W E E N :**

**HER MAJESTY THE QUEEN**

**— AND —**

**DAVID LIVINGSTON AND LAURA MILLER**

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Before Justice T. R. Lipson
Reasons for Judgment released on January 19, 2018

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**T. Lemon, S. Egan and I. Bell ……. for the Crown**
**B. Gover, F. Schumann and P. Hrick ..... for David Livingston**
**S. Hutchison, M. Borooah and G. Edelson……. for Laura Miller**

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***Lipson J.:***

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## REASONS FOR JUDGMENT

## *PART I: INTRODUCTION*

**[1]** When this trial commenced, David Livingston and Laura Miller faced charges of *Breach of Trust by a Public Official, Commit Mischief to Data* and *Unauthorized Use of a Computer*. They pled not guilty.

**[2]** After closing its case, the Crown abandoned the charge of *Breach of Trust by a Public Official* because, in its view, there was no reasonable prospect of conviction. That count was dismissed.

**[3]** The defendants moved for a directed verdict on the remaining counts. After hearing submissions, I ruled that the count of *Commit Mischief to Data* should proceed as *Attempt to Commit Mischief to Data.* The motion for a directed verdict on the count of *Unauthorized Use of a Computer* was dismissed.

**[4]** The remaining two counts allege the following: *that Mr. Livingston and Ms. Miller, during the period Jan. 24 – March 20, 2013, wilfully attempted to commit mischief in relation to data by attempting to delete data from the computers of the Office of the Premier of Ontario, thereby committing an indictable offence contrary to s. 430(5)(a) of the Criminal Code; and that during the same time frame, they fraudulently and without colour of right, used or caused to be used, directly or indirectly, a computer system with intent to commit the offence of mischief in relation to data under s. 430(5), thereby committing an indictable offence contrary to s. 342.1.*

**[5]** Between May 2012 and February 2013, David Livingston was Chief of Staff in the Office of the Premier (OPO). Laura Miller was his Deputy Chief of Staff with responsibilities for communications and strategy.

**[6]** There is no dispute that the defendants enlisted Ms. Miller's partner, Peter Faist, to erase data from the hard drives of computers used by certain staff in the OPO, as well as their own. On January 24, 2013, Mr. Faist attempted to install a wiping software on Ms. Miller's computer. He did not succeed because she lacked the necessary administrative rights permitting the application of this software. As a result, Mr. Livingston sought and obtained those rights from the Secretary of Cabinet, Peter Wallace.

**[7]** During the first week of February 2013**,** Mr. Faist wiped the hard drives of 20 computers in the OPO that were selected by the defendants**.** The wiping was indiscriminate and without regard to content. There was, however, no admissible forensic evidence presented by the prosecution to indicate what, if any, data was eliminated from those computer hard drives.

**[8]** My analysis and findings apply to both counts. Each offence charged requires proof of a similar *mens rea,* or criminal intent. The main issue on the *Attempt to Commit Mischief to Data* count is whether the Crown has proven beyond a reasonable doubt that the defendants attempted to destroy data wilfully and without legal justification, excuse or colour of right. The main issues on the count of *Unauthorized Use of a Computer* is whether the Crown has proven beyond a reasonable doubt that the defendants acted with intent to commit the offence of *Mischief to Data* and that they did so fraudulently and without colour of right.

**[9]** Counsel for the Crown submits that the real question to be answered in this case is why the two defendants directed the wiping of 20 computers in the OPO. The Crown asserts they did so to ensure that no records responsive to either a *Freedom of Information and Protection of Privacy Act* request or a future Production Order from the Legislature remained on the computers they selected for wiping. The Crown further submits that Mr. Livingston dishonestly obtained administrative rights by deliberately misinforming Mr. Wallace about the reason why he needed these administrative rights and the manner in which he wished to use them.

**[10]** Counsel for Mr. Livingston and Ms. Miller submit that they were justifiably concerned about personal information and Liberal Party documents remaining on the computer hard drives of departing OPO staff, as well as on their own. They say that there were good reasons for lacking confidence in the ability of government IT services to reliably clean the hard drives. That is why they engaged Mr. Faist to perform this task.

**[11]** Counsel contend that when it became clear to Mr. Livingston that Mr. Wallace's permission was necessary to do this, he sought and obtained such permission. Further, they submit, Mr. Wallace was aware that Mr. Faist might be used for this task but he raised no objection. In sum, counsel submit that neither defendant contemplated nor committed a crime.

## *PART II: OVERVIEW OF THE EVIDENCE*

**[12]** An overview of the evidence is set out in a timeline meant to capture and provide context to relevant events, testimony and e-mails in this case. The timeline follows the "Background Evidence" section below.

### A. ***BACKGROUND EVIDENCE***

#### *(i) The Relationship between the Office of the Premier and Cabinet Office*

**[13]** Mr. Livingston was in charge of the Office of the Premier. The staff in that office are not members of the Ontario Public Service. In the parlance of government, they are "exempt staff". Their job is to undertake the political work of the Premier.

**[14]** Peter Wallace**,** Secretary of the Cabinet, was the main witness for the prosecution. He was head of the Ontario Public Service and Clerk of the Executive Council. He was also in charge of the Cabinet Office (CO)

**[15]** Mr. Wallace explained that the Cabinet Office is the "ministry" of the Office of the Premier that is comprised entirely of civil servants who are members of the Ontario Public Service. They often have the government experience and continuity that OPO staff generally lack.

**[16]** The Cabinet Office provides policy and logistical support to the Premier. It also offers administrative support to the Office of the Premier. While the OPO has control over hiring staff and setting their salary level, responsibility for paying those salaries falls to the Cabinet Office.

**[17]** The Cabinet Office undertakes other aspects of daily administration, such as providing vehicles and credit cards. In addition, it supplies all physical assets to OPO staff, including computers and Blackberries. The assets are the property of the provincial Government.

**[18]** Information Technology services are made available through the Cabinet Office. Computers in the Premier's Office are maintained by the Cabinet Office's IT service, referred to as "POCO [Premier's Office and Cabinet Office] IT". There were some occasions, however, where outside IT contractors were retained to work on the computers.

**[19]** Both Cabinet Office and OPO report to the Premier, but not to one another. Cabinet Office provides direct advice to the Premier. Mr. Wallace said he met with Mr. Livingston "nearly every day" in addition to set weekly meetings.

**[20]** Mr. Wallace explained that the OPO staff was not under the control of the Cabinet Office. They reported to the Premier's Chief of Staff. The Cabinet Office gives advice to the OPO but does not direct it. Mr. Wallace explained that while there is no absolute ability for the Premier's Office to direct the Cabinet Office to do something, the Cabinet Office would generally follow the OPO's instructions. In the case of a disagreement, the OPO would take the matter to the Premier for resolution.

**[21]** Senior public servants from the Cabinet Office and other Ministries testified in this trial. At the time of these events, Linda Jackson was the Assistant Deputy Minister and Chief Administrative Officer in the Corporate Planning and Services Division of the Cabinet Office. Ms. Jackson reported to Peter Wallace. Among its many responsibilities,

her division was responsible for providing training for OPO staff and for the procurement of outside contractors to do work in the Office of the Premier. She attended a meeting convened by Mr. Wallace in January 2013 to determine whether administrative rights should be granted to Mr. Livingston to access OPO computers. She was also asked by police investigators to determine whether a procurement process had ever taken place to use Mr. Faist to wipe the hard drives of OPO computers.

**[22]** David Nicholl is and was the Chief Information and Information Technology Officer for the Government of Ontario at the time of these events. He reported to the Secretary of Treasury, who, in turn, reported to Mr. Wallace. Mr. Nicholl is in charge of a cluster of government IT services, including POCO IT. He has known Mr. Livingston since they were both employed by the Toronto-Dominion Bank in the early 1990s. They had also worked together on a number of projects when Mr. Livingston was the head of Infrastructure Ontario, a position he held for several years prior to becoming the Premier's Chief of Staff.

**[23]** Two lawyers employed in the Cabinet Office testified at this trial. William Bromm was Legal Counsel and Special Advisor to the Office of the Secretary of the Cabinet. He reported directly to Mr. Wallace. Don Fawcett was Senior Counsel and Team Leader of the Privacy Law Group in Government Services. His group in the Cabinet Office is responsible for providing legal advice with respect to the *Freedom of Information and Protection and Privacy Act* and the *Archives and Record Keeping Act*. Mr. Fawcett provided legal advice to Mr. Nicholl regarding Mr. Livingston's request for administrative rights. He also assisted Mr. Bromm in drafting a memo that was prepared for Mr.

Livingston about business records retention. Mr. Fawcett was present when Mr. Nicholl discussed this issue with Mr. Livingston on January 31, 2013.

**[24]** Steen Hume was the Director and Executive Assistant to the Secretary of Cabinet. It was Mr. Hume who informed Mr. Wallace of a passing comment made by Mr. Livingston that he was considering using Peter Faist to clean the hard drives in the OPO. He was not called as a witness by the Crown or either defendant.

### *(ii) Documents and E-mails on OPO computers*

**[25]** There was evidence that OPO staff members could access two areas of network storage on their computers: a "G" drive, which contained shared folders that multiple staffers could access and an "H" drive that held a personal folder that only they could access.

**[26]** Several government guidance documents entered into evidence counselled OPO staff to save work documents only on network drives, and expressly discouraged them from keeping the information on their computer's hard drive or "C" drive.[1]

**[27]** Both David Nicholl and William Bromm testified that they expected any records of long-term business value would be saved on network drives, not on hard drives. Since 2011, the default-save location on OPO desktops was the network. POCO IT technicians encouraged OPO staff to use the "H" drive. Saving files to the C drive, while technically possible, was not a recommended or preferred approach for the reason that files saved to one of the network drives were backed up nightly, whereas the C drives were not. Staff

[1] Exhibits 7, 14

were also reminded of their record-keeping obligations, which included moving retainable records to the network drives.

**[28]** The Crown called two of the twenty OPO staff whose computer hard drives were wiped. Alexandra Gair, Administrative Assistant to Ms. Miller, said she could not remember exactly where she saved documents, stating "I think it would sometimes be on my desktop." Beyond her resume, she could not recall what other documents she kept on her desk top. Rebecca MacKenzie, who at one time worked in "Issues Management" division in the OPO, said she and her team had a strict practice of saving all final work product to the shared G drive. She never saved anything of consequence to her hard drive, and told the court that the only documents saved to her own computer would have been final products created and sent by others.

**[29]** The "original" or primary version of OPO e-mails resided on a network server, not on the computer hard drive. Rolf Gitt was a team leader in POCO IT at the time. He told the court that some user-created files were saved on the C drive and that e-mail attachments could be inadvertently saved on the hard drives. Personal Storage Tables or "PST" folders that contained e-mails were also sometimes saved on the C drive.

**[30]** Another form of e-mail archive file, called an "OST" file, was automatically created by the Microsoft Outlook software on POCO computers. The OST file was designed to be a local copy of a user's e-mail account, in order to reduce the need for data to be transmitted over the network. The OST file resided on the hard drive, but if it was deleted or if a new computer was used to access the same e-mail account, the server copy of the e-mails would not be affected. At this point, the system would automatically create

a new OST file and start duplicating the account again. It is uncontested that e-mails primarily resided on, and were backed up to e-mail servers, not hard drives.

### *(iii) Retention and Destruction of OPO records, including e-mails*

**[31]** Some OPO records, including e-mails, are required to be retained pursuant to the *Premier's Office Records Schedule*, established under the *Archives and Record Keeping Act, 2006, S.O. 2006, c. 34, Sched.* It states the following:

> ***MANAGING RETENTION AND DISPOSAL OF RECORDS***
>
> The official government records created and maintained by and for the Premier's Office are important government resources, critical to supporting and documenting official decision-making and the government's relations with the public. Often they include the sole copy or authoritative version of a record documenting a decision made, information received, or action taken-information crucial to knowing what steps were taken in response to an important government policy or program issue. Some documentation may also need to be retained to meet potential long term legal and archival needs. Retention of these records is critical to enable prompt access when needed and ensure that documentation of official decisions is preserved in a consolidated form. Properly managed retention and disposal of these files are critical.
>
> ***RECORDS TO WHICH THIS SECHEDULE APPLIES***
>
> This schedule applies to all records (unless specifically excluded by this schedule) created, maintained or used by the **Premier, Parliamentary Assistant(s) or their staff** in the course of managing and administering the Premier's government responsibilities.
>
> The records of the Premier's Office are the property of the Crown. They include records and data in all media, paper and electronic, including electronic mail. They relate directly to the Premier's and Parliamentary Assistant's government responsibilities and are distinct from their personal papers, constituency files and party records." [2]

[2] Exhibit 15, Tab "H"

**[32]** The *Schedule* sets out the kinds of records that are mandatorily retained, including: "records of internal deliberations involving the Premier and the Premier's staff on matters relating to the Premier's or Parliamentary Assistant's official responsibilities" and "notes and files created and held by the Premier's, Parliamentary Assistant's and other Premier's Office staff regarding the day to day actions, activities and responsibilities of Premier, Parliamentary Assistant(s) and staff".

**[33]** The *Schedule* establishes a disposition process in the Premier's Office in the event of a change of premier. The impugned conduct of the defendants allegedly occurred during a transition period between Premiers. Under the *Schedule* records relating to the administration of the Premier's Office, such as Premier's Office correspondence files and business planning and budget files, are to be transferred to the Archives of Ontario. Similarly, policy and program files developed in the Premier's Office are also to be transferred to the Archives.

**[34]** The *Schedule* explicitly states that certain kinds of e-mails are not required to be retained and should be deleted to avoid over-burdening the e-mail system. It instructs OPS staff to cull and delete e-mails containing "transitory records", intra-ministry e-mails where they were not the original sender, in addition to e-mails outside the ministry where others have primary functional responsibility for the matter involved. Transitory records are defined as "records of no ongoing value". These would include records which "represent no significant steps" in showing how government policies or programs were developed and implemented. Private personal records and e-mails are not required to be retained and should be deleted. Other non-retainable documents are political records, such

as constituency files or party records, including caucus files, party leadership files and election campaign records.

**[35]** A directive, entitled "The Fine Art of Destruction: Weeding Out Transitory Records" that contained similar information was also introduced into evidence.[3] This directive is intended to guide Ontario government workers with regard to the retention and disposal of their records. In particular, it assists staffers in determining when a record can be considered transitory. It instructs that transitory records should be deleted when no longer required, and that regularly deleting records is important. This directive also states that when working on a project, a secretary should be appointed to keep a complete set of records, so that "information copies distributed to other parties may be safely discarded as transitory".

**[36]** The *Freedom of Information* legislative scheme does not impose any obligation to retain records before an FOI request is received but, "business records" under the *Premier's Office Records Schedule*, are required to be retained. Public servants are entitled to delete transitory records until an FOI request is received, at which point they have to search and produce everything that they have.

**[37]** Senior government IT specialists, called as witnesses, agreed that the correct and effective way of deleting an e-mail permanently required a simple two-step process called "double deleting". One deletes the e-mail first and then deletes the e-mail from the "Deleted Items" folder. Similar guidance is also found in the *E-mail Guidelines for the OPS*.[4]

[3] Exhibit 5
[4] Exhibit 7, at 11-12

### *(iv) E-mail accounts and hard drives of departing OPO staff*

**[38]** The basic policy around wiping a hard drive is found in the Ministry of Government Services' policy, entitled "Operating Procedures for Disposal, Loss and Incident Reporting of Computerized Devices." The policy states that the normal approach to "sanitizing computerized assets" is to wipe the computer's hard drive using industry-accepted tools by an "approved vendor." Upon completion of the process, the vendor must issue a Sanitization Report that is to be retained by the Ministry for three years. The policy details that hard drives must be sanitized in one of two ways: by overwriting the hard drives or, if they cannot be overwritten, destroyed. The policy goes on to state that "wiping should follow the National Computer Security Center Standard. For a hard disk that contains high sensitivity information, the 'three time erasure' option must be selected".[5]

**[39]** There was conflicting evidence on whether this policy was followed for computers in the Office of the Premier. Mr. Gitt testified that his POCO IT team did have a wiping tool which they used occasionally. Their preference was to replace the hard drive when an employee left, rather than wipe it. POCO IT would have a service technician come on-site and do a physical destruction of the hard drive that was then removed. Ms. Jackson, who investigated this issue herself, agreed with the suggestion on cross-examination that there was evident uncertainty, even among POCO IT staff, about whether POCO IT would wipe the hard drives once they had been removed from the computers.

[5] Exhibit 3, Tab 11

**[40]** With respect to e-mail accounts, Ms. Jackson and Mr. Bromm testified that it was established procedure in the years prior to the transition period from Premier McGuinty to Premier Wynne that an OPO e-mail account would be deleted upon the departure of an employee. Ms. Jackson explained that the hope was that the employees would manage their records appropriately prior to their departure, and then their accounts would be deleted. The Cabinet Office controlled when e-mail accounts were deleted, and had the authority to do so. Purging the account meant that the account, and its e-mails, would be permanently deleted.

**[41]** Mr. Bromm testified that there was an established procedure with regard to transition: first, the departing office would be reminded of their record-keeping obligations under the *Archives and Record Keeping Act*, and were given a contact person in the Cabinet Office, in addition to a memorandum that explained what to do if they required more information. The POCO IT crew would then take the computers and the other equipment used by the office and prepare those computers for use by the next office. That usually involved going through the equipment, wiping the hard drives and making sure there were no records on the hard drives. The e-mail accounts themselves were permanently deleted or "decommissioned."

### *(v) Occasional frustration within the OPO with POCO IT*

**[42]** Thom Stenson was in charge of POCO IT at the time of these events. His team of technicians provided IT services to all members of POCO, "including desktop support, blackberries, printers, network support as well as e-mail support". Mr. Stenson testified that POCO IT had between 300-350 "clients" across POCO. Because his team was em-

bedded in POCO, his technicians were able to provide a higher standard of service than was found in the rest of the Ontario Public Service. He described the role of POCO IT as providing "direct desktop support for the senior folks in cabinet and Office of the Premier. We ran a help desk line. If they had a problem, we came and solved whatever problems. We would do software upgrades for them and support printers, scanners and things like that."

**[43]** Mr. Gitt testified that his team provided three "tiers" of service. One tier was a help desk just for POCO staff. A second tier involved on-site desktop assistance. Tier 3 covered "back end infrastructure", for example, if someone were unable to access his or her network drive. Mr. Gitt, in fact, built all the servers and infrastructure for POCO. He described the agency as "more efficient", with less waiting time than in the rest of government generally. He testified that OPO staff had a program on their computers**,** called "Citrix", which allowed them to connect to the Liberal Party or Liberal Party computer networks. Mr. Gitt said that both POCO IT and the Liberal Party provided technical support for Citrix users.

**[44]** There was evidence that some within POCO experienced frustration dealing with POCO IT. Linda Jackson said that it wasn't always responsive or effective as the OPO might like**,** and that some OPO staffers had expressed dissatisfaction with POCO IT to her. In his evidence, Mr. Wallace adopted a statement he made to the police that, "IT around here…is not particularly responsive, doesn't always know what it's doing"**,** and that Mr. Livingston was "royally pissed off with IT." Ms. Alexandra Gair, Ms. Miller's

Executive Assistant, testified to miscommunications with POCO IT, and said that they could be frustrating to deal with.

**[45]** There was evidence that on occasion, some OPO staff had difficulty permanently deleting e-mails, that e-mail accounts were not decommissioned properly and that some hard drives of departing OPO staff were not wiped completely.

## *B. TIMELINE OF RELEVANT EVENTS,TESTIMONY AND E-MAILS*

The following timeline is intended as an overview of the evidence presented in this trial. It captures chronologically significant events, testimony and e-mails.[6]

**MAY 2012**

David Livingston becomes Chief of Staff to the Premier of Ontario.

In the summer and fall of 2012, a decision by the Government of Ontario to cancel a plan to build and relocate the Oakville and Mississauga gas-fired power plants dominates political discussion at Queen's Park. The gas plant decision is a major issue in the October 2011 election that results in a Liberal minority government under Premier McGuinty. Because there is minority government, members from the Opposition parties control Standing Committees in the Legislature.

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[6] See:"Search Warrant E-Mails, volumes 1 and 2 (Exhibit 22); "Chronology of Events: Review of Issues Related to the Cancellation and Relocation of the Oakville and Mississauga Gas Plants" (Exhibit 23); "Production Order E-Mails" (Exhibit 33); "Compendium of E-Mails – Peter Faist" (Exhibit 38); "Compendium of Exhibits – David Nicholl" (Exhibit 15)

**May 1:** Minister of Energy Chris Bentley is called to appear before the Standing Committee on Estimates inquiring into the government's decision to cancel and relocate the gas plants.

**May 9:** The Minister appears before the Committee. He faces questions on the gas plant closures and their associated costs. He declines to answer questions, citing solicitor-client privilege, litigation privilege and the commercial sensitivity of ongoing negotiations.

**May 16:** The Committee orders the Minister, the Ministry of Energy and the Ontario Power Authority to produce all correspondence related to the Oakville and Mississauga gas plants. The Committee sets a deadline of May 30.

Mr. Bromm provided advice to Mr. Wallace and the OPO that committees operate under parliamentary privilege**,** which affords the legal power to compel the production of relevant documents. It is a power they can exercise by passing a motion on their own without requiring a motion from the House.

In his testimony, Mr. Bromm explained that when documents are disclosed to a committee, it decides whether to make them public. If it so decides, there is no recourse, nor is there any form of privilege, such as solicitor-client privilege, that can stop the committee from releasing documents. Further, once the documents are released, there are no conditions attached. They are fully accessible to the public and the media can publish them.

**May 30:** The Minister sends the Chair of the Committee a letter advising that he declines to produce the records requested because of solicitor-client privilege and their commercial sensitivity.

***JUNE-JULY 2012***

**June 5:** The Opposition tables a motion to report the Minister of Energy to the House for a "possible matter of contempt and a breach of the ancient parliamentary right of privilege" because he refuses to comply with the Production Order from the Committee.

Mr. Bromm explained that Standing Committees can only report the refusal to provide the requested documents. The House then takes it up as a matter for debate and decides whether the refusal amounts to contempt. There was no debate in the House at this point in time.

**July 9:** The Government announces a settlement with the proponents of the Mississauga gas plant.

**July 11:** Mr. Bentley provides the Committee with partial disclosure of documents related to the Mississauga gas plant. He declines to disclose some documents that he claims are protected by solicitor-client privilege. He does not provide any documents concerning the Oakville gas plant**,** claiming solicitor-client privilege, as well as the confidentiality and commercial sensitivity of ongoing negotiations. The Minister was unable to inform the Committee whether it was the Premier who decided to cancel the proposed Mississauga gas plant prior to the 2011 election.

During the month of July, there are several e-mail exchanges between senior members of the OPO, including the defendants, discussing communications strategies available to the Minister of Energy to manage the Standing Committee Production Order issue**,** as well as the looming contempt motion against him. David Phillips, Chief of Staff to the House Leader, participates in a number of these e-mail discussions. Some of the e-mails refer to the gas plant file by its government code name "Vapour" or "Vapour Lock". [7]

***AUGUST 2012***

***Mr. Wallace discusses record retention with Mr. Livingston and Mr. Livingston discusses deleting e-mails with Mr. Nicholl***

Mr. Wallace testified that the issue of retention of gas plant-related documents was a "dominant", "highly visible" and "central focus of discussion'' in the Cabinet Office and Office of the Premier. This was a time of "considerable tension". The Secretary was "extremely concerned" that records in the possession of the OPO relating to the gas plants would not be retained.

The Production Order from the Standing Committee was directed to the Minister of Energy, the Ministry of Energy and the Ontario Power Authority, a government agency. Both the Ministry and the Power Authority had responded with what Wallace termed "a massive amount of disclosure". However the Minister of Energy and his office had

[7] Exhibit 22, Tabs 1-33; Exhibit 33, Tabs 1-10

advised the Committee that they had no responsive records. Mr. Wallace believed that this was not the case.

The Secretary spoke to this concern directly in his evidence. He testified that he was "acutely worried that the Office of the Premier and, through them, the Minister of Energy, is not in compliance with a legally binding order". He went on to say that as the head of the Ontario Public Service, "…it's obviously a position of extreme discomfort to me to have a situation in which a Minister is not in compliance with a legal requirement…This was an extraordinarily powerful issue in the Legislature and the Standing Committee… was working towards a contempt finding".

Mr. Wallace solicited legal opinions from lawyers within and outside of government on whether the disclosure sought by the Standing Committee was "fully required". The "universally clear answer" received was that it was. He told the court he understood that "from a legal perspective there was absolutely no choice but to provide full disclosure to the Committee". He wanted to ensure that the OPO "had the benefit of our understanding of the authority of the Standing Committee and the need to respond with best efforts to the request for information."

The Secretary then asked his legal counsel, Mr. Bromm, to prepare three memoranda to assist him for a briefing he wished to have with Mr. Livingston. The first memo concerned the legal authority of a Committee of the Legislative Assembly to require the government to produce records. The second memo described the options available to the government to address Production Orders of a Committee. The third set out the legal re-

quirements related to the retention, deletion and subsequent search of government records.

Mr. Bromm testified that since July, Mr. Wallace had become increasingly concerned that the Minister of Energy may be found in contempt. He noted that, "that's particularly difficult in a minority parliament because it was only two years earlier that the federal government had been found in contempt for the failure to disclose documents…As a result of being found in contempt, there was a non-confidence motion and the government fell…so [Mr. Wallace] was understandably concerned that there was a particular path [the Minister] was on that might be dangerous…and he wanted to be absolutely certain that everyone understood what could occur when this matter was reported." Hence the reason he was asked to draft the memoranda.

**August 1:** Mr. Wallace and Mr. Livingston meet.

The Secretary described their conversation as "tense". He said: "I provided him the gist of the three pieces, and, as was already well known, there was a legal obligation to disclose, that there is a way of disclosing that could protect some impacts of the public interest and that there was an obligation to retain any relevant records". He did not think that Mr. Livingston found the conversation "particularly useful" because the defendant's response was, "That's political bullshit".

Later that day, Mr. Livingston e-mails Ms. Miller, David Gene and David Phillips to say that he spoke to Mr. Wallace and that the Secretary would be providing him with

"something on Committee process and retention policies", which he would share once it was received.[8]

Mr. Wallace testified that in early August he had another conversation with Mr. Livingston who "wanted to understand that if an e-mail were deleted...was there a way of ensuring that that e-mail was not captured in an archival type of process. He understood that e-mails, when initially deleted, may not actually disappear from the system, but may default to a trash box or some other holding pattern or mechanism within the software program and that might become backed up because the Government of Ontario, in conjunction with all other large organizations produces periodic backup tapes for continuity purposes...essentially what he wanted to know is how to ensure the documents deleted were not inadvertently captured by the backup tapes." Mr. Wallace suggested he consult someone who was familiar with the "mechanics" of the e-mail system.

Mr. Livingston then spoke to David Nicholl, Corporate Chief Information Officer of Ontario. He expressed concern that people who had left OPO in the past had found that their e-mail accounts were still open when they returned to work in the OPO sometime later. He asked Mr. Nicholl how e-mails could be permanently deleted.

Mr. Nicholl explained the protocols for decommissioning the e-mail accounts of departing staffers. He also told Mr. Livingston about the mechanics of e-mail deletion, in particular, the two steps required to properly delete e-mails, often referred to as "double deleting", that is, deleting the e-mail first from your inbox or sent messages, and then deleting the e-mail from the "deleted e-mails" folder.

[8] Exhibit 22, Tab 3.

Mr. Nicholl also explained how the backup tape system worked. The backup tapes were not for archival purposes, but rather for system-restore purposes. If an e-mail was still in existence when the backup tape was made, that is, it had not been double deleted, it would be backed up for a minimum of 14 days.

***Mr. Livingston e-mails his Deputy Chiefs of Staff on August 9 about "double-deleting"***

**August 9:** Mr. Livingston e-mails David Phillips, Chief of Staff to the Government House Leader and the OPO Deputy Chiefs of Staff, including Ms. Miller, about "double deleting" their e-mails. He writes:

> "I don't really have a strong desire to be e-mail monitor for the Premier's Office, but I have talked to David Nicholl since our staff meeting and have learned a couple of things that I will leave to you to manage for yourselves and with your staff:
>
> 1. If e-mails are "double deleted" (meaning deleted from and [sic] Inbox and Delete file), then they are gone and cannot be retrieved. This means for any reason – if it happens in error and an attempt is made to recover an e-mail, it will be unsuccessful.
> 2. Premier's Office e-mails are "backed up" for 2 weeks in case of a systems breakdown and there is a need to re-cover essential data. What this means to the double de-letes is that if the double delete does not happen the day an e-mail is received, then a copy of that e-mail will be in the back up for 2 weeks notwithstanding it is now permanently gone from the system. However, back ups are not part of the system that is accessed for FOI pur-poses so they have never been used to satisfy an FOI re-quest. As such, I don't think we need to worry about this back up process.
> 3. If an e-mail that is double deleted has been forwarded, then the Sent file will also have to be deleted. However, if the e-mail was sent inside the system to someone who did not double delete, then it is still accessible at the

other end. If it was forwarded inside the OPS, then even a double deleted file at the other end will still be accessible for a short period of time (perhaps a couple of weeks).

4. Finally, when someone leaves the organization, if their e-mail address is not cancelled, then any e-mails they may have received will be on line and available. Emily is going to work with HR to delete addresses for those that have left, make sure any e-mails hanging around are double deleted and develop a process to make sure this happens as a matter of course when people leave going forward.

Having said all this, nothing is more confidential than talking rather than writing!

I hope this is clear and helpful. Please let me know if it isn't. Please also figure out how you want to communicate this to your staff.

Thanks.

David"[9]

At least one recipient, John Brodhead, Deputy Chief of Staff, Policy and Cabinet Affairs, arranges for key portions of the e-mail, including the reference to the backup tapes and the FOI process to be transmitted to other OPO staff members. Emily Jephcott, Executive Assistant to Deputy Chief of Staff, Policy and Cabinet Affairs, forwards the contents of the double delete message to other policy colleagues in the OPO. One of those individuals responds "Just reading this, so no more triple delete?" Ms. Jephcott responds "Apparently not! I've stopped taking the extra step."[10]

**August 27:** The report of the Standing Committee is tabled in the House. In accordance with Legislative Assembly protocol, an Opposition member asked the Speaker to rule on

[9] Exhibit 22, Tab 35
[10] Exhibit 22, Tabs 37, 38, 41

whether the Minister of Energy's refusal to comply with the order of the Committee is a *prima facie* case of contempt or a breach of privilege.

Mr. Bromm has a discussion with Mr. Livingston and others. He testified that "a bunch of people were outside my office talking about whether committees could force a Minister to produce any documents…I explained the privileges of the House again and that they could force a Minister to produce any documents they thought relevant". Mr. Bromm recalled that Mr. Livingston thought that particular power was "ridiculous" Mr. Bromm conceded in cross-examination that Mr. Livingston "wouldn't have been alone in thinking this".

***SEPTEMBER 2012***

During late August and throughout September, OPO staff, including the defendants, send, receive or are copied on e-mails concerning communication strategies to manage the contempt motion against the Minister of Energy as well as other gas plant related issues.[11]

**September 11:** Mr. Livingston e-mails Minister of Energy Bentley offering to reach out to "senior people inside Trans Canada" (one of the proponents of the Oakville gas plant contract)…I can see value in doing so and there is no reason why a meeting needs to be a negotiation within a negotiation."

[11] Exhibit 22 Tabs 41-65

**September 13:** The Speaker rules that the Minister of Energy committed a *prima facie* breach of privilege but suspends his ruling to provide time for the House Leaders to negotiate a resolution.

**September 15:** The Standing Committee on Public Accounts passes a motion directing the Auditor General to review the costs associated with the cancellation and relocation of the Mississauga gas plant.

**September 24:** There is an announcement of a settlement between the government and the proponents of the Oakville gas plant. The Minister of Energy and Ontario Power Authority file a disclosure package of gas plant-related documents with the Clerk of the House.

**September 25:** The Speaker makes a second ruling on the contempt motion. He finds that because the Opposition parties claim that the Production Order has not been fulfilled to their satisfaction, the House remains seized of the matter. As a result, the Speaker finds that a *prima facie* case of privilege/contempt continues to exist despite the fact that the Minister has produced documents. Parliamentary convention requires that any question of breach of a privilege or a contempt by a Member of the House be reviewed by a Standing Committee of the Legislature. The Opposition member who brought the original contempt motion against the Minister of Energy moves to refer the alleged breach of privilege/contempt matter to the Standing Committee on Finance and Economic Affairs.

***OCTOBER 2012***

**October 2:** The Legislature adopts the motion to refer the contempt issue to the Standing Committee on Finance and Economic Affairs.

David Livingston and David Phillips e-mail each other about whether the contempt process could continue after prorogation or another election. On October 3, Mr. Livingston forwards this e-mail exchange to Ms. Miller.[12]

**October 4:** A list of potential witnesses to be called by Opposition members of the Standing Committee for the gas plant hearings is released. The list includes David Livingston and Laura Miller. Ms. Miller comments in an e-mail "No Dave Gene. Fascinating." Mr. Gene was OPO Deputy Chief of Staff, Operations.[13]

**October 10:** An FOI request is received by OPO officials, including the defendants, for e-mails, memos and calendar invitations that make reference to "Project Vapour" or "Project Vapor" during the calendar years 2010, 2011 and 2012. This request was with respect to the Oakville Plant. Mr. Bromm testified that Project Vapour or Vapor was the project name for the relocation of the Oakville Plant and that "Project Vapour Lock" referred to the project to relocate the Mississauga gas plant. Mr. Wallace confirmed that it is common for code-names to be used in government to refer to sensitive business matters that require a high level of confidentiality.

After receiving the request, the Cabinet FOI Coordinator and a designated person in the OPO identified relevant custodians and put together search instructions. All the custodians, including Mr. Livingston and Ms. Miller, had responded that they had noth-

[12] Exhibit 22, Tabs 68-69
[13] Exhibit 22, Tab 69

ing responsive, except one person, who delivered records that fell outside the date range in the request. [14]

The requester, learning of the "nothing responsive" answer, appealed the matter. In response to the appeal, the Cabinet Office decided that the OPO should reconfirm the search, with more detailed instructions and included another OPO member in the list of custodians. This was done and the answer was still that nothing responsive had been located.

**October 12:** The Ontario Power Authority and Ministry of Energy release a further 20,000 documents related to the cancelled gas plants. This is just a few weeks after the Minister informed the Legislature that *all* documents relating to the gas plants had been made public. News stories included in an e-mail circulated among OPO staff, report that the Opposition parties were calling for the resignation of the Minister of Energy. Ms. Miller e-mails her colleagues saying "Well we were prepared for Armageddon. Neala, you sending this to the boss."[15]

**October 13**: Mr. Livingston e-mails Ms. Miller, asking whether she thinks he should reach out to certain journalists "on gas plants to add further weight to our position (as another senior source so to speak)?"[16]

[14] Exhibit 22, Tabs 70-71, 86
[15] Exhibit 22, Tab 72
[16] Exhibit 22, Tab 73

**On October 15:** Premier McGuinty announces his resignation and prorogues the Legislature. Prorogation automatically terminates all business of the Legislature, including the work of the Standing Committee looking into the gas plant issues.

**October 16:** Ms. Miller e-mails a colleague to indicate that a particular journalist is inquiring about whether prior to his resignation, the Premier held meetings on how to manage the gas plant issue and whether he resigned and prorogued the House in order "to make the issue disappear" for the Minister of Energy.[17]

**October 17 - October 24**: Ms. Miller sends, receives or is copied on e-mails regarding gas plant issues, including compliance with FOI requests and communications strategy to deal with media.[18]

**October 24**: Ms. Miller responds by e-mail to the October 10 FOI request with "I have conducted a search. I have no responsive e-mails."[19]

**October 26**: Mr. Livingston e-mails Don Guy, a former Chief of Staff to the Premier, about the government possibly pursuing a judicial reference in relation to pending gas plant investigations. Livingston attaches a memo, dated October 14, prepared by Mr. Phillips, titled *Confidential Advice to Premier - Proposal re: Judicial Reference*.[20]

[17] Exhibit 22, Tab 74
[18] Exhibit 22 Tabs 78-85
[19] Exhibit22, Tab 86
[20] Exhibit 22, Tab 69, 87

**October 29:** Mr. Livingston e-mails Mr. Brodhead, OPO Deputy Chief of Staff, Policy and Cabinet Affairs to say "Getting the Gas Plant Agreement with Trans Canada signed should go on the Category 1 Priority List. The deadline is December. Thanks."[21]

Later that day, Mr. Phillips e-mails Mr. Livingston, copying Ms. Miller, with "an overview of some of our legal and parliamentary procedural options regarding the threats made against Minister Bentley and the allegations made against Premier McGuinty in recent weeks re gas plants." This attached memo is titled *Legal Options Re: Opposition Tactics Relating to Relocation of Oakville and Mississauga Gas Plants*. Mr. Phillips suggests one option is a reference to the Court of Appeal for Ontario regarding the use of parliamentary privilege. Another is launching a civil action against the Leader of the Opposition for the tort of defamation against the Premier.[22]

***NOVEMBER-DECEMBER 2012***

**November 7:** The Office of the Premier responds to the latest FOI request**,** stating that records in relation to "Project Vapour" did not exist.

**November 9**: Rebecca Mackenzie e-mails Ms. Miller and other OPO colleagues a news article. An NDP member of the Legislature has accused the Premier's Office of "extraordinary stonewalling" after the FOI request relating to "Project Vapour" resulted in no documents being produced. The member says that previously released e-mails from the Premier's Office "prove without a doubt" there are more documents about the cancelled gas plants. Ms. Miller replies "How are we responding?" To which Ms. Mackenzie an-

[21] Exhibit 33, Tab 12
[22] Exhibit 22, Tab 88

swers: "The e-mails the NDP have put forward are between former staff. Their inboxes are deleted when they leave government." Ms. Miller then asks**,** "Do we have someone to go on camera to say that?" [23]

During this period, the OPO receives FOI requests pertaining to issues other than the gas plants. On November 9, Ms. Miller asks for and receives a slide deck**,** titled *Prorogation and Document Production - Strategic Options***,** prepared by staff of the Government House Leader as "confidential advice to the Office of the Premier". That presentation deals with the timing of the release of records associated with the Ornge air ambulance and eHealth controversies. [24]

**November 9:** Ms. Miller e-mails Mr. Livingston "FOI This" and then refers to an Opposition member as "an asshole". Mr. Livingston responds "LOL! This one will never get the Double Delete." [25]

**November 15:** There is an e-mail exchange with colleagues where Ms. Miller asks why she received a particular e-mail. One staffer replies "Wait, just saw it. Roger. Have been dealing with it by phone." Another staff member replies "Sorry about that – was trying to get you guys asap. Talked to Dave. Will delete my copies". [26]

**November 16:** A Notice of Appeal relating to the October FOI request regarding "Project Vapour" is filed asking for a review of the response from the Office of the Premier.

[23] Exhibit 22, Tab 90
[24] Exhibit 22, Tab 91
[25] Exhibit 22, Tab 93
[26] Exhibit 22, Tabs 95-98

**November 22:** The OPO receives a second FOI request which states**,** "A political party has requested access to e-mails internal to the Cabinet Office and/or the Office of the Premier in respect of responding to FOI Request 12/39 (records regarding Project Vapour/Vapor) and the subsequent media response." OPO staff, including Ms. Miller and Mr. Livingston, are asked to conduct their searches for the period of October 9 to November 15, 2012, and to send their results by November 30. There were responsive documents collected from some OPO staff in respect of this request that were produced. [27]

**December 3:** Mr. Livingston circulates a transition plan regarding the office, its staff, security, residence and miscellaneous matters with respect to the outgoing Premier. [28]

***Mr. Bromm and Ms. Jackson of the Cabinet Office decide to secretly "freeze" all e-mail accounts of departing OPO staff***

In his testimony, William Bromm described the usual procedure for decommissioning e-mail accounts of departing staff of the OPO during a transition period: "We have a process where our IT individuals would take the computers…and would wipe the hard drives …making sure there were no records on the hard drives." E-mail accounts of departing staff are "basically deleted".

In late November or early December, Mr. Bromm and Ms. Jackson decided not to follow the usual practice and to treat e-mail accounts differently during the transition from Premier McGuinty to Premier Wynne. As Mr. Bromm explained, "instead of deleting the accounts, they would suspend the accounts. "[The account] would no longer send

[27] Exhibit 22, Tabs 99-102
[28] Exhibit 22, Tab 103

or receive e-mail but whatever content was in the account on the day the staff member departed would be frozen, and if we were ordered to conduct a search in January, we could unfreeze that account and search it." Ms. Jackson added that "whatever was in that e-mail account on the day it was frozen and would still be there when it was turned on the next time." However, as Mr. Bromm explained, "individuals were still left with their accounts up until [the day they left] and could manage their account in accordance with their records requirements…but…if they had deleted everything, what we had frozen was an empty account." According to Ms. Jackson, Mr. Bromm had approached her with the idea in light of the number of FOI requests before the Cabinet Office and the OPO.

Mr. Bromm justified this decision. Both he and Ms. Jackson were acutely aware of the outstanding FOI requests with regard to the gas plant transactions. "We decided it would be difficult to explain in the face of an FOI appeal in particular that we followed our normal process and completely deleted and decommissioned e-mail accounts from individuals who might actually have records relevant to an appeal." Another FOI request with different search terms would, as well, require another search. He said: "We were uncomfortable if we decommissioned and deleted all of these accounts because as part of the appeal process if we were ordered to do a new search, it would have been very awkward for the Secretary of the Cabinet to say 'oh, we deleted all these accounts'."

Mr. Bromm testified that even though the Legislature had prorogued, and the business of the Standing Committees of Estimates and Finance and Economic Affairs was finished, "there was a risk that in the new parliament, the matter would be revived, and that as part of that revival, all of the questions about producing documents could

come up and we would not want a Secretary or a Premier to say we are not in a position to do a search because all of those accounts have been deleted." Mr. Bromm further explained that in order to avoid a government trying to get out from under a point of privilege by proroguing the Legislature, a member could revive the point of privilege in the next session.

Mr. Bromm testified that neither he nor Ms. Jackson disclosed the change of policy to the defendants or any departing OPO staff because, "we did not want to be put in a position not to be able to do it."

Mr. Bromm also said that, "in the discussion with [Premier] McGuinty, there was discussion about… [making] sure that the records of his administration were to be treated as records of a separate administration from Premier Wynne's administration".

***JANUARY 2013***

**January 15:** The Office of the Premier receives a new FOI request for "access to all records sent or received in the period January 1, 2012 through October 1, 2012 by the Premier, the Premier's office, consultants to the Premier's office, or advisors to the Premier's Office relating to the construction, contracting, relocation, or any other arrangements associated with the gas-fired plants once contracted for development in Oakville by the firm TransCanada Energy or related entities and also Mississauga by the firm Eastern Power or related entities". Members of the OPO are asked to respond by January

17. Mr. Livingston receives the request at 6:48 p.m. At 7:17 p.m. he responded "Nothing here". Ms. Miller responds on January 24 to say that she has no records. [29]

Other OPO staff produce responsive records which are gathered and sent to the Cabinet Office before January 31. [30]

***Peter Faist is hired by the Liberal Party Caucus to wipe the hard drives of computers in the OPO***

Peter Faist is Ms. Miller's partner. They were living together in 2012 and 2013. Mr. Faist was self-employed as an IT consultant. Around the beginning of January, 2013**,** Ms. Miller asked him whether he knew anyone who could "clean the personal data off of the machines in the office". Mr. Faist offered to do the job.

**January 9:** Dave Gene was the Deputy Chief of Staff, Operations in the OPO. Mr. Gene, using his Liberal Party e-mail address, sends an e-mail to Mr. Faist asking**,** "Hey were you looking into wiping our computers?" [31]

Mr. Faist then met with Mr. Gene at Queen's Park to discuss whether the task was "feasible". He agreed in cross-examination with the suggestion that Mr. Gene asked him "to wipe personal data off of some of the computers of departing staff of the Office of the Premier." The job would involve wiping the hard drives of approximately 20 computers.

[29] Exhibit 22, Tabs 104-110
[30] Exhibit 20, Tab 13
[31] Exhibit. 38, Tab 1

**January 10:** Mr. Faist purchases software called "WipeDrive SystemSaver" manufactured by a firm called WhiteCanyon. The cost of the software was $39.95. Mr. Faist testified that it is designed to clean data without harming the operating system of a computer. [32]

**January 21:** Mr. Faist e-mails Mr. Gene to ask, "we doing this?" Mr. Gene replies, "This week I will chat with Laura today." Mr. Faist then e-mails Ms. Miller to say "I suspect it won't have much impact on your day to day ops. It doesn't impact your e-mail. Just make sure you backup all your files to an external usb key. If you need one, I can provide those too." [33]

**January 23:** Mr. Faist e-mails Mr. Gene, asking, "When do you want me to start? Getting close. fair bit of work". [34]

**January 24:** Mr. Faist successfully tests the "WipeDrive" software on his own computer system.

Ms. Miller e-mails Mr. Gene, copying Mr. Livingston, with the subject line "Pete's Project". She writes, "takes 3-4 hours per desk. He can start tomorrow on the three of ours if that's ok." Mr. Livingston replies, copying Wendy Wai, his Executive Assistant, "Good by me. Thanks!" Ms. Wai then asks "Do I need to block time in David's calendar? Can you enlighten me as to what the project is about?" Ms. Miller responds "Pls. I need time when he's not at his desk." [35]

[32] Exhibit 38, Tab 3
[33] Exhibit 38, Tabs 5-6
[34] Exhibit 38, Tabs 4-6
[35] Exhibit 22, Tab 107

On January 24, Mr. Faist tests "WipeDrive" on Ms. Miller's work computer at Queen's Park. The test proves unsuccessful because Ms. Miller lacks the kind of administrative access that would permit the installation of this software. He testified "I recall saying something to Laura like I'd have to get permission to do this because you don't have the appropriate rights on this machine…the appropriate access is a better term".

This kind of access was referred to by various witnesses at different times during the trial as "administrative rights" or "local administrative rights" or "administrative access" or "administrative passwords". While the terminology may differ, it is clear that what was really required was authorization.

Mr. Faist testified that had the WipeDrive SystemSaver not required administrative rights, he would have continued to use the software to wipe the hard drives of computers in the OPO.

***Mr. Livingston requests Mr. Wallace's authorization to wipe OPO hard drives***

Following Mr. Faist's failed attempt on January 24 to wipe Ms. Miller's computer hard drive, Mr. Livingston sought to obtain the necessary administrative rights from the Secretary of Cabinet, Mr. Wallace. Granting a "normal user" administrative rights over multiple computers was highly exceptional and required authorization from Mr. Wallace. Mr. Stenson testified that in all of his 27 years in the Ontario Public Service, he had never provided this kind of administrative access to someone who was not in IT. Mr. Stenson and Mr. Gitt both testified that this was an "unusual request". Mr. Nicholl told the court that he had never heard of a similar request of this nature. Mr. Wallace said that,

in the circumstances of the transition, he reserved to himself the authority to make that decision. He made clear that no one else had the authority to grant these rights.

On or about January 24, Mr. Livingston told the Secretary that he was interested in "obtaining access to administrative passwords that would allow him to clean or overwrite hard drives" in the OPO. Mr. Livingston informed him that there was "personal information" available on the hard drives and that he wanted to make sure "it was cleaned up." Mr. Wallace advised Mr. Livingston that "if he was planning to overwrite his hard drives or planning to leave a situation in which there were no records associated with the former Office of the Premier – this was at the point of transition – that it would be very concerning, and I indicated to him that…the only type of organization that didn't keep records was a criminal organization." The Secretary said he felt that Mr. Livingston did not find this observation to be "particularly helpful".

Mr. Wallace went on to testify that in this discussion, Mr. Livingston never indicated who in the OPO would be using these administrative rights, nor did he provide any further information regarding their intended use.

**January 25:** Mr. Livingston has a telephone conversation with David Nicholl.

Mr. Nicholl testified that Mr. Livingston raised the same concern he did in their August, 2012 conversation about e-mail accounts of departing staff remaining open. Mr. Livingston wanted to prevent this from happening again. Mr. Nicholl attempted to reassure him "that things were working well and that Terri Lang (from OPO Corporate Planning and Services) and the Cabinet Office were on top of things."

Mr. Livingston then asked Mr. Nicholl "for the ability to get an administrative login ID and password for the Premier's Office". Mr. Nicholl advised him that only the Cabinet Office could authorize such a request. He was told that he would need to speak to Linda Jackson, the Assistant Deputy Minister, who "speaks for Peter Wallace", and Scott Thompson, one of the Secretary's deputy ministers.

Mr. Nicholl described the conversation with Mr. Livingston as "all in the context of clearing up and preparing for a new team coming in." He did not recall the defendant advising who in the OPO would be using the administrative password. What Mr. Livingston did say was that he wanted the e-mail accounts of departing staffers properly removed, and that OPO departing staff did not want confidential information "lying around on their computers".

Mr. Nicholl agreed in cross-examination that at the time, he considered Mr. Livingston's request to be reasonable. When asked during examination-in-chief about the documents, the defendant was concerned with, Mr. Nicholl remarked "he was concerned about the e-mails left behind". He also agreed with the suggestion made in cross-examination that his concern was around protecting confidential information. Mr. Nicholl adopted a statement made to investigators that he understood that the items to be cleared off of the hard drives would be personal documents.

Later that day, Ms. Miller e-mails Mr. Livingston inquiring**,** "Any luck with the admin code?" Mr. Livingston replies, "Not yet. All roads lead through Linda Jackson,

including getting access to our e-mail accounts terminated. I am now working though Scott [Thompson] and Peter [Wallace]. I will keep you posted." [36]

***Mr. Wallace learns that "an outsider" might be wiping the hard drives of OPO computers***

Mr. Wallace testified that he did not know that Peter Faist would be wiping the hard drives of computers in the Office of the Premier. However, he acknowledged that his executive assistant, Steen Hume, told him that Mr. Livingston had "made a passing comment to Hume that**,** "there might be potential to bring in somebody from the outside…indicated it might the life partner of Laura Miller."

Mr. Wallace was emphatic that he "placed no weight on this whatsoever. It was simply something that I took – deeply with regret in retrospect – but it is something that I took as a passing comment that was so far beyond the norms and established behaviours of the Government of Ontario and my prior interaction with the Office of the Premier, that I placed no weight on it. In [Mr. Livingston's] direct conversation with me, he had not mentioned it. There had been no other conversations relayed to me of the potential for an outsider… [I]t did not occur to me that anyone could actually do that." Mr. Wallace testified that the Ontario Public Service provided "wraparound IT service" to the OPO and that the "notion" of an "outsider" performing this kind of task was "simply not something that penetrated my consciousness".

[36] Exhibit 22, Tab 110

In cross-examination, Mr. Wallace reiterated, "I did not know, nor did I place any weight whatsoever on the possibility that an external individual would be brought in. That was not brought to my attention in the conversation by Mr. Livingston. Had that been brought to my attention, I most certainly would have flagged that…We took it as a passing frustration. It was simply so far outside our understanding that somebody would actually do that, frankly we did not take it seriously."

Mr. Wallace acknowledged that he was aware that Mr. Livingston was frustrated with the Cabinet Office IT section. He agreed with a comment he made in a statement to police that "IT around here…is not particularly responsive, doesn't always know what it's doing." He did not ask Mr. Hume to clarify Mr. Livingston's statement about using Ms. Miller's partner, nor do so himself.

Mr. Hume was not called as a witness in this trial.

***Mr. Wallace convenes a meeting of senior public servants to consider Mr. Livingston's request***

**January 30**, **2:00 p.m**. Mr. Wallace convenes a meeting of senior public servants to discuss Mr. Livingston's request for administrative access to computers in the OPO. In attendance are Mr. Hume, Mr. Bromm, Ms. Jackson, Associate Secretary of Cabinet Scott Thompson and Mr. Nicholl. Mr. Wallace said that he and the others regarded Mr. Livingston's request as "extraordinary", particularly since it came during a time of transition between Premiers and "after a period of time in which the issues asso-

ciated with the gas plant disclosure had been front and centre in the Ontario political debate for …over a year."

In his testimony, Mr. Wallace described the previous months as "a deeply sad and very difficult time", when "an extraordinarily successful premiership was limping to an end and the issues associated with the termination or resignation [of the Premier] did revolve around the gas plants and the decision-making process associated with those. So this is a period of extraordinary sensitivity around the issue of document disclosure."

Mr. Bromm told the court that record-keeping obligations were of acute concern at this time. Only two years earlier, the federal government had been found in contempt for failing to disclose documents related the Afghan detainee issue, and as result of being found in contempt, a non-confidence motion was brought and the government fell.

Mr. Wallace did not wish to grant Mr. Livingston any type of administrative access that was unprecedented. He was "very concerned" about Mr. Livingston's request and asked Mr. Nicholl to inquire whether there were "administrative passwords already in the possession of the Office of the Premier".

Mr. Wallace and Ms. Jackson testified that there was no "technical discussion" at the meeting as to the nature of the administrative access that Livingston was requesting. Mr. Wallace understood only that it would "allow whoever had it to essentially treat their computer as if it were their own computer and that they would be able to install software or otherwise manipulate the information… this would allow somebody to basically have the powers over at least one machine that the corporate IT powers would normally have.

In a practical sense, allow somebody to install software or delete things from the computer."

Following the meeting, Mr. Wallace learned from David Nicholl that seven OPO staff already had local administrative rights. What Mr. Wallace did not know was that those OPO staff members had administrative rights for a very limited purpose – to install a specific application called "Open Text", a tracking program used to organize correspondence to the Premier. Mr. Wallace did not know**,** nor was he ever informed that this administrative right did not allow a user to access multiple computers in the OPO. Only the local IT team had that kind of access.

Mr. Nicholl met with Mr. Stenson and Mr. Gitt. Mr. Nicholl told Stenson to "start putting his mind to a potential go-ahead on admin rights." In his 18 years with POCO IT, this was Mr. Gitt's first interaction with Mr. Nicholl. He recalled that Mr. Nicholl put several questions to him before asking, "I don't need to know how to do this, but if I give you a group of people and a group of computers, could you give admin rights to those people?" Mr. Gitt said the issue seemed "fairly urgent" and that this was not your usual request. He went on to say, "this is a fundamental change in the infrastructure configuration for desktops in the OPS….It's certainly more complex than a standard request." He wondered, "why couldn't they just ask our team to do [it]…we already have that access and are capable of doing it."

There was important information that Mr. Wallace did not receive before making his decision. This is seen in an e-mail from Thom Stenson to Linda Jackson, dated March 20, 2013. It reads: "At the request of staff and with the approval of their managers, we

can provide desktop Admin access for specific accounts to specific desktops. There are typically two situations that arise where this would be the case: 1) The Correspondence Unit OpenText application requires that staff have Admin access to their particular desktop in order for it to function properly…. 2) The second typical case where desktop Admin rights are assigned, is where staff need to install and configure specialised software on their own desktop….Again this access is restricted to their own desktop and no others".[37] In similar vein, Mr. Nicholl testified that, "we're reluctant to give administrative rights because it allows people to bring software onto the desktops."

Mr. Wallace decided to grant the administrative rights requested by Mr. Livingston. As Mr. Bromm described in his testimony: "there was a discussion [at the January 30th meeting] about what the Secretary could do: would it be proper to refuse to provide something that it appeared already existed in the [OPO]? The decision made was there was no basis on which the secretary could or should refuse to provide the password because [the OPO] already had people with those administrative rights."

Mr. Wallace testified that when he made his decision, he thought that the password would be given to a staff member of the OPO. His belief was that the OPO staff would have the ability to access "their own computer and potentially more than one …and they would be able to alter, retain, manipulate and delete the information associated with the hard drive". He said that did not know or believe that someone from outside the public service would be brought in to access OPO computers. To his knowledge, the OPO had never used an "external resource to alter government of Ontario assets". He told

[37] Exhibit 3, Tab 14

the court that because of the considerable sensitivity of OPO documents, such work could only be done by Ontario Public Service members or by contractors procured through established bidding and security protocols. He also said that he was unaware of any prior attempt by an "outsider" to access the hard drive of an OPO staff member. Mr. Wallace said that had he known any of this, he would have never granted Mr. Livingston's request for administrative rights.

**5:39 p.m.** Ms. Miller e-mails Mr. Livingston, asking, "Any luck with the code?" Mr. Livingston replies "Not yet. Steen is on it and as of yesterday, he felt we may get it but somebody from IT may stand and watch what we do to make sure nothing was done to contaminate files or programmes outside of those on the desktops being dealt with. I guess that's the concern - the fact that having the code get us access to systems other than our own".

**January 31**: **10:20 a.m.** Mr. Livingston e-mails Ms. Miller: "We have broken through. CO has facilitated and I will be talking to David Nicholl this afternoon about how to actually get the codes and move forward."

Mr. Wallace testified he did not feel "remotely comfortable" granting the access rights. Because of his discomfort, he instructed his counsel, Mr. Bromm, to create a "background memo" for Mr. Livingston that would set out the obligations of the OPO with respect to records management. Mr. Bromm prepared this memo with the assistance of Don Fawcett, Senior Counsel and Team leader of the Access and Privacy Law Group at the Ministry of Government Services. Mr. Nicholl conveyed the advice contained in the memo to Mr. Livingston in a telephone call on January 31. Mr. Fawcett was with Mr.

Nicholl when he spoke to Mr. Livingston. Mr. Nicholl also included the contents of the memo in an e-mail he sent to Mr. Livingston after the telephone call. In this e-mail Mr. Nicholl cautions Mr. Livingston**,** as follows:

> "I understand that at the present time there is an FOI matter related to your office that is currently under appeal. As a result, my recommendation would be to preserve the e-mail accounts and records of any individuals involved in that matter until the appeal process is complete. This will avoid any allegation that your office improperly deleted records knowing that a matter was under appeal...Similar steps should be taken for any outstanding FOI requests for documents in the Premier's Office. Your office can work with Jamie Forrest, the Cabinet Office FOI coordinator, to identify the appropriate individuals...[T]here is an outstanding Order of the Legislative Assembly with respect to the production of records related to the closure of the Oakville and Mississauga power plants. In light of the risk that this matter could be raised in the House in a new Session, steps should be taken to search for and preserve any records related to these matters, and to document those steps in writing, to again avoid any allegation that records were improperly deleted.
>
> William Bromm, Legal Counsel in Cabinet Office, has confirmed that there are no active records holds related any outstanding litigation against the Crown. However, there is an outstanding Order of the Legislative Assembly with respect to the production of records related to the closure of the Oakville and Mississauga power plants. In light of the risk that this matter could be raised in the House in a new Session, steps should be taken to search for and preserve any records related to these matters, and to document those steps in writing, to again avoid any allegation that records were improperly deleted."

Mr. Nicholl was clear in this e-mail that before taking any steps to erase "any records maintained on [departing Premier's Office staff's] computer hard drives":

> "[C]are must be taken to ensure compliance with the Archives and Recordkeeping Act and applicable record schedules to preserve business records of the government of Ontario….The Premier's Office Records Schedule provides for the destruction of only 'transitory records', which are records that have no long term business value. The Premier's Office Records Schedule establishes a disposition process of records in the Premier's Office in the event of a Change of Premier. Under the Schedule, records relating to the administration of the Premier's office, such as Premier's Office correspondence files and business planning and budget files are to be transferred to the Archives of Ontario. Similarly, policy and program files developed in the Premier's office are also to be transferred to the Ar-

> chives….However, if you believe that individuals in your office have generated substantive records related to a government of Ontario transaction that will not be maintained through these practices, steps should be taken to print and preserve those files through the Office of the Secretary of the Cabinet prior to deletion."

A copy of the 1999 Premier's Office Records Schedule was appended to the e-mail "for Mr. Livingston's reference." Mr. Nicholl signed off on the e-mail with: "I would be happy to discuss or assist with any of these issues".

Mr. Nichol did not tell Mr. Livingston that his department had its own wiping tool, nor that they had a process for reformatting computer hard drives. He explained under cross-examination that the "happy to assist" was meant to be all-encompassing, that is, "if he needed technical help, it was there."

Mr. Bromm explained that the memo was designed to remind Mr. Livingston of three points: 1) a reminder about the government's record-keeping obligations generally in accordance with the *Archives and Record Keeping Act*, and specifically, that business records of the government will be maintained even during a transition; 2) to make sure that any records relevant to an FOI request are properly maintained before any other records are deleted; and 3) to inform Mr. Livingston that there was not only an outstanding order to produce records, but that when a new session of Parliament began, a member of the opposition would likely revive the issue. Put simply, Mr. Bromm's message was: "keep certain records before you make any decisions about deleting others."

Mr. Nicholl testified that at the conclusion of the telephone call, Mr. Livingston told him that "he would pass it over to his admin area to take care of it…moved on pretty quickly to Wendy Wai and that she would deal with this".

Later that day, Mr. Nicholl instructs Mr. Gitt and Mr. Stenson from POCO IT to provide administrative rights to Ms. Wai. Using her username and password, she would be able to access all of the computers in the OPO. As Thom Stenson explained in an e-mail to Linda Jackson and Terri Lang on March 20, 2013, "The Admin Rights assigned to Wendy applied to all [OPO] desktops. Essentially, if Wendy logged onto any desktop, she would have full rights to look at and change any data or software stored on the local C: drive. This type of Admin access is normally restricted to specific IT accounts which are used to configure and maintain desktops".[38]

Mr. Gitt testified that he had never before heard of this kind of request. As well, he was surprised to learn that Ms. Wai was the individual selected to have these rights. He knew Ms. Wai, and was of the view that "she was not comfortable with computers and was very quick to call us".

With these administrative rights, Ms. Wai would have access to some 80-90 computers in the OPO. In his 27 years of public service, Mr. Stenson had never seen anyone, apart from IT personnel, provided with this kind of administrative access. He commented that, "from a security standpoint, it breaks the protocol of not allowing clients to be able to access other people's data on computers…that's not the way network security works". He believed that Ms. Wai did not possess "even modest technical knowledge".

***FEBRUARY 2013***

[38] Exhibit 3, Tab 14

**February 1:** Mr. Livingston e-mails Ms. Wai, copying Ms. Miller and Dave Gene. He asks Ms. Wai to be the "point of contact" for the setup of administrative access to desktops in the OPO. He instructs her to telephone Mr. Nicholl to obtain the administrative access and then work with Mr. Faist so that "[Mr. Faist] can perform the work requested of him". As well, Mr. Livingston explains that she may have to stay with Mr. Faist while he does his work. Ms. Wai then e-mails Ms. Miller to tell her she will be speaking with Mr. Nicholl on Monday February 4, 2013.[39]

Minutes later, Mr. Livingston and Ms. Miller have an e-mail exchange in which the two decide upon a list of individuals in the OPO whose computers should be wiped. Mr. Livingston asks Ms. Miller**:** "And he is wiping files for you, me, DG [Dave Gene, OPO Deputy Chief of Staff, Operations], DP [Dave Phillips], DR [Debra Roberts, OPO Deputy Chief of Staff, Public Appointments and Human Resources] and JB [John Brodhead, Deputy chief of Staff, Policy and Cabinet Affairs]"? Ms. Miller replies: "WM [Wendy McCann, OPO Executive Director, Communications], LK [Leon Korbee, Executive Director, Strategy and Marketing], Regional Staff, NB [Neala Barton, Director of Media Relations and Issues Management]".[40]

***"Pete's Project"***

In some of her e-mails during the period of January 24-30, Ms. Miller used the subject line "Pete's Project" to refer to the plan of using Mr. Faist to erase data from the hard drives of computers in the OPO.

[39] Exhibit 22, Tabs 117, 120
[40] Exhibit 22, Tab 118

**February 4:** Mr. Faist e-mails Ms. Wai to see when he can start the job. Ms. Wai replies that the Cabinet Office IT is setting up "access rights" for her and that she would notify him. Later that day, Ms. Wai e-mails Mr. Faist to say that, "everything is set up and ready to go. I just need to log in as myself at each desktop and you should be able to do your part. They have asked me if I needed any assistance which I have gracefully declined". Mr. Faist then advises her that he can start the next day. She replies that she will make arrangements for him to pass through building security.[41]

Wendy McCann, Executive Director, Communications e-mails Ms. Miller**,** copying Mr. Livingston**:** "Is Pete or someone else wiping our computer hard drives"? Ms. Miller replies: "Not all comms (communications) staff however. Just you, Neala, and Leon".[42]

**February 5***:*Mr. Faist begins cleaning the hard drives of OPO computers. When he begins, the software is not working as intended. He e-mails Ms. Miller with the subject line**,** "things aren't going well". Ms. Miller replies, "uh oh". She asks, "Can you wipe and reinstall O/S (operating system) [with] the admin [password]"?[43]

**February 6-7:** Mr. Faist continued to wipe the hard drives of the selected OPO computers on February 6 and 7. He is assisted by Ms. Wai and Ms. Alexandra Gair, Ms. Miller's assistant. He wiped hard drives at the two OPO locations, the 6th floor of the Whitney Block and the 2nd floor of the Legislative Building.

[41] Exhibit 38, Tab 9-10
[42] Exhibit 22, Tab 124
[43] Exhibit 38, Tab 11

Mr. Faist testified that Ms. Gair had a "yellow sticky note" with a list of the user names of computers selected for wiping. Ms. Gair or Ms. Wai would guide Mr. Faist to those computers. Ms. Gair asked Mr. Faist what they should tell the users about why they were there. Mr. Faist testified that, "I told her that we should tell everybody what we were doing". He did not know whether the OPO computer users knew beforehand why he was there or what he was doing.

Mr. Faist instructed Ms. Gair how to use the wiping software. On February 7, she worked on some of the hard drives by herself. Mr. Faist said that it took approximately three hours for the software to run its course on each computer. He testified that most of the users were not present when he did his work. The wiping process was the same whether the user was present or not. Mr. Faist never tried to determine what kind of documents were being stored on the hard drives he wiped. He said the application would "erase anything that didn't belong to the operating system". No one gave him any direction about taking precautions with respect to any records stored on the hard drives. He said that he told people who were at their computers to save what they needed before he applied the software.

When Mr. Faist had difficulties with the software, he contacted WhiteCanyon support, and even e-mailed the developer of the software. The developer replied that WipeDrive was "only ever designed with the consumer customers in mind…domain connected computers were never really the target use case".

Mr. Faist had no contact with POCO IT during this process. He never participated in a government procurement process**,** nor was he required to submit to a security

clearance process.[44] Ms. Jackson was clear in her testimony that any time a service was required that the government did not have the resources to deliver, a procurement process subject to the principles outlined in the *Management Board of Cabinet Procurement Directive* would be followed.[45] However, Ms. Jackson also agreed**,** on cross-examination, that the procurement process does not have to include a competition, and it is appropriate to single source a contract or acquisition.

The Liberal Caucus Service paid Mr. Faist $9,750, plus $1,276.50 GST, for his work, which he described in his invoice as "Consulting and Implementation Services".[46] Ms. Jackson agreed in cross-examination that $10,000 would, according to the dollar values found in the procurement policy in place at the time, be considered a small amount.

Ms. Gair testified that Ms. Miller asked her to "be the keeper" of a piece of paper with the administrative password and Wendy Wai's user name and to give it to Mr. Faist to do his work. On February 5, Ms. Gair "signed Mr. Faist in with security", took him to Ms. Miller's computer and gave him the piece of paper.

Ms. Gair said that at first, "I was not exactly clear what he was doing but I figured it was something to do with the job". She understood Mr. Faist was there to clear the hard drives of the computers and that she was there to assist him in completing his job. She had a list provided by Ms. Miller of the computers to be wiped.

[44] Exhibit 38, Tabs 13, 15-19
[45] Exhibit 3, Tab 1
[46] Exhibit 20, Tabs 14-16

On the first day, she took Mr. Faist to various computers. On February 7, Mr. Faist gave her an activation code and a USB key containing the software. He instructed her on how to apply it. She never saw Mr. Faist provide a USB key to any of the computer users to save their data, nor did she ever provide a USB key to others. She never reviewed files contained in the hard drives prior to running the wiping software.

Rebecca MacKenzie is currently the Premier's Director of Communications. In 2012, she worked in the OPO on "issues management". In the fall of 2012, she worked for a brief period in communications at the Ministry of Energy. After Premier McGuinty's resignation, she took an unpaid leave to work on a Liberal leadership candidate's campaign.

Ms. MacKenzie returned to the OPO on February 7 to "speak to HR and sign some paperwork". She discovered her office had been relocated. She saw Ms. Miller, Mr. Faist and Ms. Gair together talking. Someone advised her that "they needed to do some work on [her] computer". She was asked "not touch her computer for 40 minutes". She recalled a CD-ROM being inserted into her computer. She was asked to log in, which she did, and then left for a short time.

When Ms. MacKenzie returned, she had forgotten the "instruction to not touch the keyboard". Ms. Gair then restarted the process. Ms. MacKenzie could not recall the nature of the work being done on her computer. She did not give anyone permission to do so. Ms. Gair said that prior to taking her leave of absence, she had saved her personal files by either e-mailing them to herself or preserved them on a USB stick.

**February 8:** Ms. Gair also wiped a computer on Friday February 8, 2013**,** when Mr. Faist was not present. She was one of the only staff in the office. There was a snowstorm, but she had received telephone calls from Mr. Faist and Ms. Miller asking her to come in and complete the wiping of the hard drive of the final computer on the list.

Ms. Gair saved a couple of her personal files, including her resume, which she e-mailed to herself. She also testified that during her time in the OPO, she had frustrating experiences with the Cabinet IT staff when problems arose, especially in relation to her computer's Citrix program that allowed one to access a network connection to Liberal Party Caucus resources. On February 8, an OPO staff member e-mailed Ms. Gair telling her that, "I can't use Citrix anymore"? Ms. Gair forwarded this e-mail to Mr. Faist saying, "I'm here. Neala's [Barton] comp is fine now. I don't know anything about Citrix."

It is admitted that on computers where WhiteCanyon SystemSaver is installed and run to completion, the program permanently deletes any files in any user profiles that are selected for deletion in the process of running the program.[47] There is a further admission that**,** "of the 632,000 files deleted on the OPO computers, a total of no more than 400 were user created files. User-created files are files knowingly saved to the hard drive by a computer user".[48]

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A new session in the House begins and the point of privilege is revived. The Speaker makes a ruling allowing the member who rose on the point of privilege to move for a mo-

[47] Exhibit 31
[48] Exhibit 31

tion to refer the question of contempt to the Standing Committee on Justice Policy. The Committee then begins to hold hearings.

## *PART III: POSITIONS OF THE PARTIES*

### *A. Overview of the Crown's Position*

**[46]** The Crown submits that Mr. Livingston and Ms. Miller enlisted and directed Mr. Faist to wipe data from twenty computers in the Office of the Premier. It says they did so in order to ensure that no records responsive to either an FOI request or a future Production Order of the Legislature remained on those computers. It submits that they had no authorization or colour of right to do so. It points out that the hard drives and the data contained therein, with the exception of personal data and Liberal Party documents, were the property of the government of Ontario. Moreover, the Crown says, the wiping done by Mr. Faist was indiscriminate and that any files kept on those hard drives were eliminated without regard to content or record-keeping obligations.

**[47]** The Crown contends that Mr. Livingston deceived Mr. Wallace into granting him administrative access to the computers. The prosecution notes that Mr. Wallace was unequivocal that he would have never given his permission had he known the true state of affairs that existed at the time. As well, the Crown says, Mr. Wallace did not know that the access sought by the defendant would be used by a non-Ontario Public Service employee who was neither security-cleared, nor contracted through a proper procurement process.

**[48]** The prosecution makes reference to the fact that Mr. Wallace did not also know that Mr. Faist had already made a first attempt to access an OPO computer. Nor did he know that Faist would have continued wiping the hard drives had he not been prevented from doing so by insufficient administrative access. The Crown emphasizes that at the time of the granting administrative rights, Mr. Wallace was unaware that Mr. Faist, a non-OPS employee, would perform the wiping using an administrative password granted to an OPS employee. The Crown contends that in orchestrating this attempt to erase records, the defendants acted fraudulently and without colour of right.

**[49]** The Crown submits it is apparent that the defendants believed there were retainable records which were politically sensitive and a source of potential embarrassment on the hard drives they selected for wiping. The Crown suggests that both defendants had a motive to destroy records related to the gas plants in order to avoid having them captured by an FOI request or a future Production Order of a Standing Committee of the Legislature.

**[50]** The Crown says Mr. Livingston revealed an intent to destroy such data as early as August 2012, with the "double delete" e-mail sent to his deputies on August 9, an intent, that may be inferred, as well, by the defendant's inquiries made to Mr. Wallace and Mr. Nicholl about permanently deleting e-mails. The Crown submits that the wiping of the hard drives was the "second prong" of a strategy to eliminate data. The Crown contends that the defendants chose the computers of certain users because they believed those individuals were party to numerous e-mail exchanges related to issues surrounding the gas plant controversy, and that they likely had retainable records on their hard drives.

**[51]** The Crown submits that the e-mail trail shows the defendants were aware that at the time Mr. Faist attempted to destroy data, there was an outstanding FOI request**,** as well as a pending appeal of an FOI request. The defendants knew, the Crown says, that it was problematic that they themselves had responded to these requests by indicating they had no records, having done so on October 10, 2012, November 22, 2012, and January 15, 2013. The Crown submits that by using an outsider, rather than POCO IT, the defendants were able to control the process and bypass any policies or instructions that POCO IT would require them to follow with regard to the destruction of hard drives and their contents.

**[52]** The Crown argues that it defies both common sense and logic that the "nuclear approach" adopted by the defendants of wiping the hard drives was targeting only "personal data". The prosecution asks the court to consider the wider political context at that time, which was dominated by the controversy about the Liberal government's decision to cancel and relocate the gas plants. The Crown suggests that the Standing Committee Production Order and the *prima facie* contempt findings against the Minister of Energy preoccupied Mr. Livingston, Ms. Miller and other senior OPO staff, evidenced by the extensive e-mail trail. This evidence shows, the Crown says, that the defendants were both aware of and concerned about the document retention and production issues connected to the gas plants. Mr. Livingston and Ms. Miller must have been aware that future records searches on their own and senior OPO computers was more than a mere possibility.

**[53]** The Crown submits that it also defies common sense that the Liberal Party Caucus would pay Mr. Faist an $11,000 fee to erase personal data from certain OPO comput-

ers. The Crown says, in addition, that it is not reasonable to conclude that Faist was hired solely because the defendants lacked confidence in the competence of POCO IT to perform the relatively simple and routine task of collecting and wiping the hard drives of departing OPO staff. At the same time, the Crown points out that there is no dispute that the defendants failed to take any steps to ensure that retainable records were preserved on the hard drives during the wiping process. The Crown says this failure is inconsistent with the benign purpose Mr. Livingston represented to the Secretary that the wiping was intended to delete only "personal information".

**[54]** In summary, the Crown submits that the totality of the evidence proves beyond a reasonable doubt that both defendants had neither justification, nor colour of right to wipe the hard drives. The prosecution notes that the wiping took place against the backdrop of a tumultuous period in the Office of the Premier. Records and correspondence relating to the gas plants were being sought. The Crown emphasizes that the defendants were made aware of their record retention responsibilities in the context of this controversy, but, nonetheless, took action to permanently delete records they believed to be potentially responsive to FOI requests and future Legislative Committee Production of Documents Orders.

**[55]** The prosecution submits that the defendants took extraordinary steps to erase data from the hard drives of those individuals they believed had retainable records. This included dishonestly obtaining permission for administrative access from Mr. Wallace. In light of all this, the Crown submits that the only reasonable inference available on the evidence is that the defendants attempted to destroy data without authority and without col-

our of right. The Crown asks that Mr. Livingston and Ms. Miller be found guilty on both counts.

### *B. Overview of the Defendants' Position*

**[56]** Counsel for the defendants submit that the Crown has not proven beyond a reasonable doubt that the cleaning of the hard drives was an effort to destroy retainable records. They submit that the evidence does not support such an inference, but rather shows that the cleaning of the hard drives was an entirely appropriate step to ensure that personal (including party and political) data was safely removed from the computers of departing OPO staff. They suggest that there is nothing beyond coincidence in time to connect the political controversy surrounding the gas plant matters to the cleaning of the hard drives in February 2013. Counsel point to Mr. Wallace's testimony that the gas plant issue was not a "pressing concern" when he made his decision to grant Mr. Livingston administrative access.

**[57]** The defence argues that in arranging for the cleaning of the hard drives of departing staffers, while leaving the computers of remaining staff untouched, neither Mr. Livingston nor Ms. Miller intended to delete documents that were legally required to be retained and not stored elsewhere. There is no evidence, they say, that any of the cleaned hard drives contained data relevant to the prosecution case or other business-related material. Counsel submit that, in the circumstances, it cannot, therefore, be reasonable to infer that either Mr. Livingston or Ms. Miller believed that the hard drives contained such documents, in the complete absence of any direct evidence showing that they had such a belief. They assert that such an inference cannot be drawn beyond a reasonable doubt.

**[58]** Both personal and political documents were on OPO computer hard drives. The defence says it was both reasonable and permissible to delete them securely. Personal files could include personal correspondence, resumes, photographs, banking documents and tax returns. Some e-mails could have no long-term business value, but be politically or personally embarrassing. Counsel point out, as well, that the computer users could be using the Citrix software to remotely access resources of the Liberal Caucus and the Liberal Party. It follows, they suggest, that Citrix documents could well be saved on the local hard drives of departing OPO staff, who should have such data permanently deleted.

**[59]** OPO documents, by contrast, were on the network servers, not on hard drives, especially so in relation to departing staff. The defence says there was no attempt by the defendants to access the network drives. They note that while e-mails resided on servers, there was no evidence of an attempt on their part to gain access to the e-mail servers. In any case, the cleaning of the hard drives did not affect the e-mails. Counsel submit that, on the evidence, there was no one who would have been motivated to "cover up" any documents originating in the OPO. Furthermore, they say that only departing staffers were affected. Counsel suggest that OPO staffers knew what Mr. Faist was doing and that, in this regard, both Ms. Gair and Mr. Faist told them to save any personal documents they wished.

**[60]** The defence says it is significant that most staffers identified by the Cabinet Office as potentially having responsive FOI records related to the gas plant issues were not affected, whereas by contrast, most staffers that were affected, were not identified by the Cabinet Office as potentially having responsive FOI records on their hard drives.

**[61]** Counsel submit that, on the evidence, there is no inference of dishonesty on the part of the defendants in engaging Mr. Faist, nor in how Mr. Livingstone obtained administrative access from Mr. Wallace. They say that once it became apparent that administrative access was required, Mr. Livingston approached David Nicholl and Peter Wallace, two of the most senior public servants in government, and asked for it. Counsel stress that he not only told them the OPO wanted to remove personal data from the computers of departing staffers, but, of importance, separately informed Mr. Hume that Mr. Faist would be engaged to do the job.

**[62]** They submit that Mr. Livingston had a reasonable expectation that this information would be passed on to the Secretary. Counsel emphasize that after receiving this information, in addition to input from other senior public servants, Mr. Wallace made the decision to grant Mr. Livingston's request, following upon which he provided advice to the defendant through Mr. Nicholl. It is pointed out by counsel that in none of that advice was it ever suggested that a non-OPS employee not be used, nor that the computers not be cleaned.

**[63]** The defence suggests that Mr. Faist was used because government in-house IT was regarded by some in the OPO, including by Mr. Wallace, as not always being responsive, competent or reliable. They say that using him was especially necessary because of the limited time available prior to the incoming OPO staff moving in. They submit that the defendants used Mr. Faist because he was known to them and available to provide the required services in the busy days of transition, and that there was no attempt to conceal Mr. Faist's work from staff in the OPO.

**[64]** Counsel point out that when Mr. Faist came to perform his work, he was signed in at the security desk under his own name, his entry was duly recorded in the security system and he was escorted throughout the OPO by Ms. Gair. They observe that his responsibilities were carried out during business hours with many people around, including OPP members of the Premier's security detail. They note that there was never a suggestion that Mr. Faist was to keep his work secret or mislead people about what he was doing. They say that no one in the OPO objected to his working on any computer and that he advised some staffers to save their documents to a USB key or e-mail. In sum, counsel submit that Mr. Faist's conduct was fully inconsistent with an attempt to delete documents that were legally required to be retained, and inconsistent, as well, with a belief on the part of the defendants that they were not authorized to act as they did.

**[65]** Counsel for the defendants submit that on the entirety of the evidence, the only reasonable inference to be drawn is that departing OPO staff were concerned about personal and political data being securely deleted, and that Mr. Livingston and Ms. Miller proceeded in a transparent fashion to take reasonable steps to address that concern, while remaining entirely within the bounds of their legal obligations. They submit that the defendants should be found not guilty on both counts.

## *PART IV: RELEVANT LEGAL PRINCIPLES*

### *The Presumption of Innocence*

**[66]** The primary and overarching principle in every criminal trial is the presumption of innocence. This is the most fundamental principle of our criminal justice system. It is

essential to understand that this presumption of innocence is not a favour or charity extended to the defendants in this particular case. To be presumed innocent until proven guilty by the evidence presented in a court of law, is the fundamental right of every person accused of criminal conduct.

***Proof beyond a Reasonable Doubt***

**[67]** Interwoven with the presumption of innocence is the standard of proof required to displace that presumption. To secure a conviction in a criminal case, the Crown must establish each essential element of the charge against the defendant to a point of "proof beyond reasonable doubt". This standard of proof is very exacting. It is a standard far beyond the civil threshold of proof on a balance of probabilities.

**[68]** The law recognizes a spectrum of degrees of proof. The police lay charges on the basis of "reasonable grounds to believe" that an offence has been committed. Prosecutions only proceed to trial if the case meets the Crown's screening standard of there being "a reasonable prospect of conviction". In civil litigation, a plaintiff need only establish their case on a "balance of probabilities". To defeat a motion for a directed verdict, the Crown need only lead some evidence on each essential element of the offence. However to support a conviction in a criminal case, the strength of evidence must go much farther and establish the Crown's case to a point of proof beyond a reasonable doubt. This is not a standard of absolute or scientific certainty, but it is a standard that certainly approaches that. Anything less entitles a defendant to the full benefit of the presumption of innocence and a dismissal of the charge. The expression proof "beyond a reasonable doubt" has no precise definition, but it is well understood. The Supreme Court of Canada

outlined a suggested model jury charge in *R. v. Lifchus*[49]. This is the definitive guide for criminal trial courts in Canada. It is worth setting out here verbatim:

> • The term "beyond a reasonable doubt" has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning.
>
> • A reasonable doubt is not an imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence.
>
> • Even if you believe the accused is probably guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the Crown has failed to satisfy you of the guilt of the accused beyond a reasonable doubt.
>
> • On the other hand, you must remember that it is virtually impossible to prove anything to an absolute certainty and the Crown is not required to do so. Such a standard of proof is impossibly high.
>
> • In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilt beyond a reasonable doubt.

**[69]** I instruct myself accordingly.

## *The Assessment of Credibility of Witnesses*

**[70]** In considering the evidence of witnesses, a court may believe all, none, or some of the evidence of a witness. A trier of fact is entitled to accept parts of a witness's evidence and reject other parts. And a trier of fact can apply different weight to different parts of the evidence of a witness that the trier of fact has accepted. Every assessment of credibility involves a consideration of both the truthfulness and reliability of a witness's

[49] 1997 CanLII 319 (SCC), [1997] 3 S.C.R. 320.

evidence. No witness enjoys a presumption of honesty. There is no formal set of rules in the criminal law for the assessment of credibility, but there is an instructive general framework that is often given to jurors. In *R. v. Filion,*[50] Justice Mossip provided a summary of this framework:

- Does the witness seem honest? Is there any particular reason why the witness should not be telling the truth or that his/her evidence would not be reliable?
- Does the witness have an interest in the outcome of the case, or any reason to give evidence that is more favourable to one side than to the other? Does the witness seem to have a good memory?
- Does any inability or difficulty that the witness has in remembering events seem genuine, or does it seem made up as an excuse to avoid answering questions? Does the witnesses' testimony seem reasonable and consistent as she/he gives it? Is it similar to or different from what other witnesses say about the same events? Did the witness say or do so something different on an earlier occasion?
- Do any inconsistencies in the witness' evidence make the main points of the testimony more or less believable and reliable? Is the inconsistency about something important, or a minor detail? Does it seem like an honest mistake? Is it a deliberate lie? Is the inconsistency because the witness said something different, or because she/he failed to mention something? Is there any explanation for it? Does it make sense?
- The manner in which a witness testifies may be a factor, and it may not, depending on other variables with respect to a particular witness.

**[71]** In *R. v. D.D.S.*[51] Justice Saunders of the Nova Scotia Court of Appeal offered this important observation regarding the assessment of credibility:

> [I]t would be wise to consider what has been said about the trier's place and responsibility in the search for truth. Centuries of case law remind us that there is no formula with which to uncover deceit or rank credibility. There is no crucible for truth, as if pieces of evidence, a dash of procedure, and a measure of principle mixed together by seasoned judicial stirring will yield proof of veracity. Human nature, common sense and life's experience are indispensable when assessing

[50] [2003] O.J. No. 3419 (S.C.J.) at para 27
[51] [2006] N.S.J. No. 103 (N.S.C.A.)

> creditworthiness, but they cannot be the only guide posts. Demeanour too can be a factor taken into account by the trier of fact when testing the evidence, but standing alone it is hardly determinative. Experience tells us that one of the best tools to determine credibility and reliability is the painstaking, careful and repeated testing of the evidence to see how it stacks up. How does the witness's account stand in harmony with the other evidence pertaining to it, while applying the appropriate standard of proof in a civil or a criminal case?

## *Circumstantial Evidence*

**[72]** There are two types of evidence in any criminal trial. One is direct evidence. This is evidence from the testimony of witnesses that directly proves a fact in issue. The other type of evidence is circumstantial evidence. In a trial such as this, circumstantial evidence can come from not only the testimony of witnesses but also documents, including e-mails, filed as exhibits. From the circumstantial evidence, the court is asked to draw an inference proving a fact in issue. An inference must not be a mere guess or suspicion, however shrewd that guess may be. An inference is much stronger than conjecture or speculation. If there are no proven facts from which an inference can logically be drawn, it is impossible to draw an inference. Both direct and circumstantial evidence are admissible as a means of proof. Sometimes circumstantial evidence is more persuasive than direct evidence. The evidence of one witness may contradict that of another, but the circumstances of an event may not be in dispute.

**[73]** The Crown has presented a circumstantial case against the defendants and urges the court to conclude beyond a reasonable doubt that Mr. Livingston and Ms. Miller had the required intent to destroy data without authorization or colour of right. There is no direct evidence that they had such an intent. Since the Crown's case depends on circum-

stantial evidence, the court must be satisfied beyond a reasonable doubt that the only reasonable inference that can be drawn from the circumstantial evidence is that the defendants are guilty.

**[74]** As the trier of fact, I am required to determine whether the circumstantial evidence, viewed logically and in light of human experience, is reasonably capable of supporting an inference other than the defendants are guilty. In deciding whether there are other reasonable inferences, I am required to distinguish between plausible theories of innocence, which do not have to be based on proven fact, and speculation.

**[75]** *R. v. Villaroman*[52]is the leading authority on the use of circumstantial evidence and its relationship to proof beyond a reasonable doubt. Justice Cromwell set out the following principles governing the use of circumstantial evidence to establish guilt beyond a reasonable doubt:

- There is a special concern inherent in the inferential reasoning from circumstantial evidence. The concern is that the trier of fact may unconsciously 'fill in the blanks' or bridge the gaps in the evidence to support the inference the Crown invites it to draw.

- The risk inherent in circumstantial evidence is the danger inherent in jumping to unwarranted conclusions.

- Where proof of one or more elements of the offence depends solely or largely on circumstantial evidence, it will generally be helpful to the jury to be cautioned

[52] 2016 SCC 33

about too readily drawing inferences of guilt. No particular language is required. Telling the jury that an inference of guilt drawn from circumstantial evidence should be the only reasonable inference that such evidence permits will often be a succinct and accurate way of helping the jury to guard against the risk of "filling in the blanks" by too quickly overlooking reasonable alternative references.

- In assessing circumstantial evidence, inferences consistent with innocence do not have to arise from proven facts. Requiring proven facts to support explanations other than guilt wrongly puts an obligation on an accused to prove facts and is contrary to the rule that whether there is a reasonable doubt is assessed by considering all of the evidence. If there are reasonable inferences other than guilt, the Crown's evidence does not meet the standard of proof beyond a reasonable doubt.

- A certain gap in the evidence may result in inferences other than guilt. But those inferences must be reasonable given the evidence and the absence of evidence, assessed logically, and in light of human experience and common sense.

- The Crown will need to negative reasonable possibilities but does not need to negative every possible conjecture, no matter how irrational or fanciful, which might be consistent with the innocence of the accused. The Crown is required to negative any inferences that are based on logic and experience applied to the evidence or the absence of evidence, not on speculation. Alternative inferences must be reasonable, not just possible.

**[76]** As the trier of fact, I am guided in my assessment of the evidence by those instructions and principles.

## *PART IV: OFFENCE PROVISIONS, ELEMENTS OF EACH OFFENCE*

### *Mischief in relation to data*

> **430 (1.1)** Every one commits mischief who wilfully
>
> (a) destroys or alters data;
>
> (b) renders data meaningless, useless or ineffective;
>
> (c) obstructs, interrupts or interferes with the lawful use of data; or
>
> (d) obstructs, interrupts or interferes with any person in the lawful use of data or denies access to data to any person who is entitled to access thereto.
>
> […]
>
> (5) Every one who commits mischief in relation to data
>
> (a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years; or
>
> (b) is guilty of an offence punishable on summary conviction.
>
> […]
>
> (8) In this section, *data* has the same meaning as in section 342.1.
>
> R.S., 1985, c. C-46, s. 430; R.S., 1985, c. 27 (1st Supp.), s. 57; 1994, c. 44, s. 28; 2001, c. 41, s. 12; 2005, c. 40, s. 3. (Version of section 430 from 2005-11-25 to 2014-06-18)

### *Unauthorized use of computer*

> **342.1** (1) Every one who, fraudulently and without colour of right,
>
> […]
>
> (c) uses or causes to be used, directly or indirectly, a computer system with intent to commit an offence under paragraph (a) or (b) or an offence under section 430 in relation to data or a computer system, or
>
> […]
>
> is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years, or is guilty of an offence punishable on summary conviction.

> (2) In this section,
>
> […]
>
> *computer system* means a device that, or a group of interconnected or related devices one or more of which,
>
> (a) contains computer programs or other data, and
>
> (b) pursuant to computer programs,
>
> (i) performs logic and control, and
>
> (ii) may perform any other function; (*ordinateur*)
>
> *data* means representations of information or of concepts that are being prepared or have been prepared in a form suitable for use in a computer system; (*données*)
>
> […]
>
> R.S., 1985, c. 27 (1st Supp.), s. 45; 1997, c. 18, s. 18 (Version of section 342.1 from 2003-01-01 to 2015-03-08)

## *Elements of the Offence: Attempt Commit Mischief to Data*

**[77]** The Crown is required prove that the defendants wilfully attempted to destroy computer data. Data is defined in s. 341.1(2) of the *Criminal Code*. There is no dispute that data would include e-mails, documents in an e-mail, word documents, documents on a computer and text messages.

**[78]** The Crown is also required to prove that the defendants wilfully committed the act. The term "wilfully" as it relates to committing mischief to data is defined at s. 429(1) of the *Code*:

> Everyone who causes the occurrence of an event by doing an act or by omitting to do an act that it is his duty to do, knowing that the act or omission will probably cause the occurrence of the event and being reckless whether the event occurs or not, shall be deemed for the purpose of this Part, wilfully to have caused the occurrence of the event.

**[79]** Put simply, the Crown must prove that the defendants committed the act under section 430(1.1) while with knowledge or recklessness in relation to the consequences that data would be destroyed.

**[80]** Section 429(2), qualifies s. 429(1) by stating that:

> No person shall be convicted of an offence under sections 430 to 446 where he proves that he acted with legal justification or excuse and with colour of right.

**[81]** The "and" between excuse and colour of right should be read as an "or".[53]

**[82]** Here, the Crown must prove that the attempted destruction of the data was done by the defendants without legal justification or excuse or colour of right. The Crown must prove that the defendants did not have actual permission or authority to do the act in question and that they had no colour of right to do that act. Colour of right refers to a defendant's honest belief, even if mistaken or unreasonable, that he or she was legally permitted or authorized to do the act in question.

**[83]** At the conclusion of the Crown's case, I determined that the original count of commit mischief to data be replaced with one alleging an attempt. I found that on the admissible evidence adduced, it would be speculative to conclude that data relevant to the prosecution case was destroyed. I found that to infer that the deleted files, in fact, did contain business or work-related material would, at best, amount to an educated guess.

**[84]** Attempted mischief to data requires actual intent and purpose and not just recklessness. Although s. 429(1) provides that the completed offence can be made out with recklessness, recklessness does not suffice for liability grounded in attempt. That is be-

[53] *R. v. Creaghan* (1982), 1 C.C.C. (3d) 449 (Ont. C.A.)

cause s. 24 of the *Criminal Code*, the provision creating the offence of attempt, requires an intent to commit the offence and a purpose of carrying out that intention:

> "Every one who, *having an intent to commit an offence*, does or omits to do anything *for the purpose of carrying out the intention* is guilty of an attempt to commit the offence…" (emphasis added).

**[85]** This interpretation finds support in appellate decisions such as *R. v. Ancio*, [54]*R. v. Janetas* (sub nom *R. v. P.J.*) [55]at para 30 and *R. v. Sarrazin*, [56]at para 48. These cases hold that to be found guilty of attempt, the accused must have had the actual intent to commit the completed offence and that proof of recklessness is not sufficient.

**[86]** The cases also make clear that an attempt to do the factually impossible is an attempt that encounters an intervening obstacle**,** and as a result cannot be completed. *United States v. Dynar*[57], and other authorities, make it clear that such an act is still an attempt for the purposes of s. 24(1). The section states that a person can be guilty of attempt "whether or not it was possible under the circumstances to commit the offence". What matters is whether the accused had the intent to commit the crime and went beyond mere preparation to do so.

## *Elements of the Offence: Unauthorized Use of a Computer*

**[87]** The Crown must prove:

1. That the accused used or caused to be used, directly or indirectly a computer system with intent to commit the offence of mischief to data; and

[54] [1984] 1 SCR 225,
[55] (2003), 172 CCC (3d) 97 (Ont CA)
[56] 2010 ONCA 577
[57] (1997), 115 C.C.C. (3d) 481 (S.C.C.)

2. That the accused did so fraudulently and without colour of right.

**[88]** To fall within the scope of s. 342.1, the defendants' use of the computer must have been unauthorized, and the accused must have known that it was unauthorized. However, more is required. In *R. v. Parent*[58], the Quebec Court of Appeal held that the "fraudulently" requirement is an independent part of the *actus reus* of the offence and requires behaviour that a reasonable person in the circumstances of the defendant would consider a "dishonest activity." As the court in *Parent* explained, the voluntary use of a computer "for prohibited purposes is clearly a dishonest act."[59] As is the case in the other charge of attempt commit mischief, this offence also requires proof beyond a reasonable doubt of an intent to commit mischief to data.

**[89]** The Crown says that Mr. Livingston deliberately concealed important information from Mr. Wallace when seeking his permission for administrative rights to OPO computers. It is clear that, in the right circumstances, an omission can constitute "other fraudulent means" for the purpose of committing fraud**,** contrary to s. 380 of the *Criminal Code*. The non-disclosure must be of an important fact. The accused must know that it is important to the person he is dealing with. As well**,** the omission must render the course of dealing**,** one that reasonable people would stigmatize as dishonest. In *R. v Theroulx*[60], the Court also took care to distinguish dishonesty from mere "carelessness", "improvidence", or even "sharp practice":

> The requirement of intentional fraudulent action excludes mere negligent misrepresentation. It also excludes improvident business

[58] 2012 QCCA 1653 (CanLII) at para. 37
[59] Ibid at para. 36
[60] [1993] 2 SCR 5 at p 26

> conduct or conduct which is sharp in the sense of taking advantage of a business opportunity to the detriment of someone less astute. The accused must intentionally deceive, lie or commit some other fraudulent act for the offence to be established. Neither a negligent misstatement, nor a sharp business practice, will suffice, because in neither case will the required intent to deprive by fraudulent means be present. A statement made carelessly, even if it is untrue, will not amount to an intentional falsehood, subjectively appreciated. Nor will any seizing of a business opportunity which is not motivated by a person's subjective intent to deprive by cheating or misleading others amount to an instance of fraud. Again, an act of deceit which is made carelessly without any expectation of consequences, as for example, an innocent prank or a statement made in debate which is not intended to be acted upon, would not amount to fraud because the accused would have no knowledge that the prank would put the property of those who heard it at risk. We are left then with deliberately practised fraudulent acts which, in the knowledge of the accused, actually put the property of others at risk. Such conduct may be appropriately criminalized, in my view.

## *PART V: ANALYSIS*

**[90]** Why did David Livingston and Laura Miller direct the wiping of twenty computers in the Office of the Premier? And why would the Liberal Party Caucus pay Peter Faist, a non-public servant, approximately $11,000, to wipe data from the hard drives of certain OPO staff?

**[91]** The Crown's answer to both of these questions is that the defendants wanted to ensure that no records, responsive to either an FOI request or a future Production Order from a Legislative Standing Committee, could be retrieved from those computers.

**[92]** The defendants say their intent was benign, transparent and appropriate. Their concern was to permanently erase any personal information and Liberal Party documents from the hard drives of computers of departing OPO staff.

**[93]** I approach my assessment of the evidence bearing in mind that the Crown must prove its case beyond a reasonable doubt. I must consider the totality of the evidence. Because the prosecution's case depends largely on circumstantial evidence, to justify a conviction, that evidence should be such that it excludes any other reasonable alternative. Circumstantial evidence does not have to totally exclude all other conceivable inferences. It means that the court should not act on alternative interpretations of the circumstances that it considers to be unreasonable. Alternative inferences must be reasonable, not just possible.

**[94]** My analysis and findings apply to both counts. Each offence charged requires proof of a similar *mens rea* or criminal intent. The central issue on the *Attempt to Commit Mischief to Data* count is whether the Crown has proven beyond a reasonable doubt that the defendants attempted to destroy data wilfully and without legal justification, excuse or colour of right. The main issues on the count of *Unauthorized Use of a Computer* is whether the Crown has proven beyond a reasonable doubt that the defendants acted with intent to commit the offence of *Mischief to Data* and that they did so fraudulently and without colour of right.

### *(i) "All gas plants all the time"[61]: The political backdrop is relevant*

**[95]** The decision by the Government of Ontario to cancel and relocate the Oakville and Mississauga gas plants dominated political discussion at Queen's Park in the summer and fall of 2012, and early winter of 2013. It was during this period that Mr. Livingston

[61] Exhibit 22, Tab 30. David Phillips forwards Ms. Miller an email discussion of July 19, 2012 where this comment is made describing the prominence of the gas plant issue before the Standing Committee on Estimates and Finances

was Chief of Staff to the Premier. Ms. Miller was Deputy Chief of Staff, Communications and Strategy.

**[96]** Shortly after Mr. Livingston began his tenure as Chief Of Staff, the Standing Committee on Estimates ordered the Minister of Energy, the Ministry of Energy and the Ontario Power Authority to produce all correspondence and records related to the gas plant decision. In June 2012, the Opposition tabled a motion to hold the Minister of Energy in contempt for non-compliance with the Standing Committee's Production Order. While there was evidence in this trial about other political fires burning, no issues were more challenging or dangerous to the minority Liberal government than those related to the gas plant controversy.

**[97]** The evidence is clear that the political priorities of the defendants during this turbulent period were twofold: crisis management and damage control. They worked closely with their counterparts in the Offices of the Minister of Energy, the Minister of Finance, and the Government House Leader, as well as other political allies, in order to minimize the fallout from the Minister of Energy's refusal to produce gas plant documents to the Standing Committee.

**[98]** The e-mail evidence demonstrates that the defendants, particularly Ms. Miller, developed government communications strategies, including speaking points for both the Minister of Energy and the Premier, to address and deflect the strong criticism coming from the Opposition parties and the media. Mr. Livingston provided input and direction to others in government with respect to the ongoing gas plant negotiations and the contempt motion against the Minister of Energy. Despite the efforts of Mr. Livingston and

Ms. Miller to save their leader and his administration, events turned out poorly. By the end of 2012, the gas plant controversy led to the resignation of Premier McGuinty, the prorogation of the Legislature and to the Minister of Energy facing a finding of contempt in the Legislature. Further, as Mr. Nicholl warned Mr. Livingston in his January 31, 2013 e-mail, there was "a risk that the [gas plant records Production Order] matter could be raised in the House in a new session".

**[99]** This was the grim political backdrop that existed at the time Mr. Livingston sought Mr. Wallace's permission to access multiple computers in the Office of the Premier. Mr. Wallace testified that at the point he was considering whether or not to give Mr. Livingston his permission, "the issues associated with the gas plant disclosure had been front and centre in the Ontario political debate for…over a year." The Secretary described the previous months as a "deeply sad and very difficult time" when "an extraordinarily successful premiership was limping to an end and the issues associated with the… resignation [of the Premier] did revolve around the gas plants and the decision-making process associated with those." While his immediate priority in late January, 2013 was to coordinate the transition to a new Premier, the Secretary remained very concerned about the willingness of Mr. Livingston and his OPO colleagues to comply with their record retention obligations.

**[100]** The political context, set out above, is an essential part of the circumstantial evidence relevant to an inferential drawing of a motive for Mr. Livingston to gain access to data in multiple computers in the Office of the Premier in the last days of the McGuinty government.

***(ii) The defendants composed, received or were copied on e-mails constituting business records***

**[101]** Mr. Livingston and Ms. Miller played key roles in "managing the message" for the McGuinty government when it came to the gas plant controversy. The e-mail trail, set out in Exhibits 22 and 33, shows that the defendants and their colleagues in the OPO were in charge of strategizing, or as others might call it, "spinning" the government's response to strong criticism coming from the Opposition parties and the media. The Office of the Premier was clearly the nerve centre of the administration in this endeavour, charged with containing the political fall-out from the decision to cancel the gas plant, its related costs and the decision by the Minister of Energy to not disclose gas plant documents to the Standing Committee. The defendants participated in e-mail discussions which chronicle the steps in the government's decision-making in this regard.

**[102]** Pursuant to the *Premier's Office Records Schedule*, most of these e-mails constitute retainable records. To apply the language found in the *Schedule*, they document "what steps were taken in response to an important government policy or program issue". The *Schedule* also states, in addition, that, "some documentation may also need to be retained to meet potential long term and archival needs". The gas plant e-mails and their attachments are "records of internal deliberations involving the Premier and the Premier's Staff on matters relating to the Premier's responsibilities". They are "notes and files created and held by ...the Premier's Office staff regarding the day-to-day actions, activities and responsibilities of the Premier, Parliamentary Assistant and staff."

**[103]** The relevant gas plant e-mails and their attachments are internal government communications of a highly sensitive and confidential nature. They are extremely candid and some were potentially embarrassing in nature. These communications were never intended to be made public at the time they were created or, in fact, ever.

**[104]** Certainly the defendants expected them to remain internal when they wrote, received or were copied on them. Most of the search warrant and Production Order e-mails filed as exhibits constitute discussions of government policy at the highest level. They are records created by the defendants and other OPO employees relating to government decisions, including records of decisions made in the course of their official government responsibilities. The *Schedule* also requires that government records "be organized, maintained and stored separately from records relating to the Premier's and Parliamentary Assistants' official government policy".

**[105]** In submissions, counsel for the defendants argued that none of the e-mails found in Exhibit 22 were required to be retained because they were either "political", duplicative (that is, required to be saved by someone else) or transitory.

**[106]** The *Schedule* does exempt certain "political" records relating to "the Premier's Or Parliamentary Assistant's involvement within their political party or their activities as Members of Provincial Parliament", on the basis that such records are not Ontario government records. However, this exemption does not apply to records created by political staff within the OPO in the course of fulfilling their duties as government employees. Specific examples of exempted records, provided in the *Schedule*, include "constituency files" and "party records". "Party records" are defined as caucus files, party convention

files, party leadership files, riding nomination records and "election campaign files and publications". The e-mails in Exhibits 22 and 33 do not involve "constituency files" or "party records".

**[107]** The defence points to official government guidance that non-retainable records should be deleted as soon as possible to avoid burdening the e-mail system and making important information hard to find. OPS personnel are instructed to diligently cull and delete transitory e-mails,[62] intra-ministry e-mails where they were not the original sender,[63] and e-mails from outside the ministry where others have primary functional responsibility for the matter involved.[64] The defence relies upon this evidence to say that any files or e-mails that were contained on the computers that were wiped were either non-responsive or would not, under standard retention rules, have required retention.

**[108]** The defence analysis of the e-mails, filed in Exhibit 22, misconstrues their relevance. In the directed verdict ruling, I found that there was no evidence that these specific e-mails were actually located on the hard drives at the time they were wiped, even though they would have been on the hard drives at some point. The relevance of these e-mails is that they demonstrate that the defendants were party to confidential and sensitive communications dealing with the management of the gas plant controversy. The defendants knew prior to the wiping of the hard drives, that these e-mails existed and could be on the hard drives of others in the OPO.

[62] The Fine Art of Destruction, Exhibit 5; and E-mail Guidelines for the OPS, Exhibit 7 at 16-17.
[63] *Ibid* at 19 and 31.
[64] *Ibid*.

**[109]** I am unable to conclude that the defendants had an honest belief that every member of the OPO followed government policies on e-mail deletion to the letter. There is no evidence which suggests that the defendants ever used classifications of "transitory", "political" or "duplicative" to justify the deletion of e-mails. Nor did Mr. Livingston ever inform others in the OPO about government policies regarding the deletion of these kinds of e-mails. It defies common sense and reality to suggest that the wholesale wiping of specifically selected OPO hard drives was a measured and careful response to the intricate policies around the destruction of transitory or duplicative records. The software program used by Mr. Faist was designed to accomplish one thing: wipe the contents of the hard drives indiscriminately without damaging the operating system.

### *(iii) Mr. Livingston demonstrated little patience for the powers of the Standing Committee to compel the production of records*

**[110]** In the summer of 2012, according to Mr. Wallace, the issue of the retention of gas plant-related documents dominated discussion in the OPO and the Cabinet Office. Several e-mail exchanges, part of Exhibit 22, provide ample support for his observation. The Secretary was "acutely worried that the Office of the Premier and, through them, the Minister of Energy, [was] not in compliance with a legally binding order". Mr. Wallace asked his counsel, Mr. Bromm, to fully advise him on the powers of the Standing Committee to compel production of relevant records, so that he could brief Mr. Livingston about the Minister's obligation to retain relevant records. Mr. Wallace recalled that during a "tense" conversation in 2012, Mr. Livingston's only response when reminded of the OPO's legal obligation to disclose was "that's political bullshit".

**[111]** Understandably, Mr. Livingston was concerned that the release of commercially sensitive documents could jeopardize ongoing negotiations and prejudice the government's position in reaching a settlement with regard to the cancelled Oakville gas plant. In late August, Mr. Bromm had an informal discussion with Mr. Livingston and others. By this point, the political temperature had risen considerably. On August 27th, an Opposition member had asked the Speaker to rule on whether the Minister of Energy's refusal to comply with the Order of the Committee constituted a *prima facie* case of contempt. Mr. Bromm reiterated to Mr. Livingston that the Standing Committee could "force a Minister to produce any documents they thought relevant". He recalled Mr. Livingston saying he thought that particular power was "ridiculous".

**[112]** Throughout 2012, it would have been painfully obvious to Mr. Livingston that the Standing Committee's authority to compel the production of business records and to exact meaningful consequences for non-compliance was formidable. The defendants went on to spend much of their time in the fall of that year both managing the gas plant issues with other colleagues within government and preparing communication pieces for Liberal Party politicians to assist them in dealing with the media and the public.

**[113]** Mr. Livingston expressed obvious disdain for the authority of the Standing Committee's to compel production of records. This is some of the circumstantial evidence relevant to motive as well as intent to eliminate any evidence of politically sensitive communications within the OPO concerning the gas plant controversy in the event of a future Production Order.

***(iv) While Mr. Wallace warned Mr. Livingston to retain e-mails and other files constituting records, Mr. Livingston was more interested in deleting them***

**[114]** Further evidence of an intention on the part of Mr. Livingston to destroy data of retainable records may be found in the defendant's August 9 "double delete" e-mail to his senior staff. This e-mail addressed avoiding responses to FOI requests, in particular, and cannot be understood as mere information about how to delete and what deleting actually does.

**[115]** On August 1, 2012, Mr. Wallace advised Mr. Livingston to heed his record retention obligations. The evidence establishes that Mr. Livingston was rather more interested in deleting records, particularly e-mails. He approached Mr. Wallace inquiring about how e-mails could be permanently deleted.

**[116]** Mr. Wallace suggested that Mr. Livingston speak to someone familiar with the mechanics of the e-mail system. As a result, Mr. Livingston approached Mr. Nicholl, who explained the protocols for decommissioning e-mail accounts of departing OPO staff. Mr. Nicholl also informed Mr. Livingston about "double deleting" e-mails and how the back-up tapes for recovering e-mails worked. Mr. Livingston was clearly concerned about, and in my view of the evidence, turning his mind to how e-mails and their attachments, could be destroyed.

**[117]** Approximately one week after these discussions, Mr. Livingston sent instructions on "double deleting" to his Deputy Chiefs of Staff and asked them to communicate

this information to their own staff. In this e-mail,[65] he informed them that e-mails might be caught by the backup process, even if double-deleted, but that the e-mail backup tapes "are not part of the system that is accessed for FOI purposes". He went on to say, "I don't think we need to worry about this backup process".

**[118]** I agree with the Crown that on the evidence as a whole, it is not possible to read this e-mail as anything other than a direction from Mr. Livingston to his staff to permanently delete potentially FOI-responsive e-mails. Certainly an inference can easily be drawn that both defendants took to the practice of double deleting e-mails as a matter of course, since each responded to FOI requests received on October 10, 2012, November 22, 2012 and January 15, 2013 with no FOI-responsive records. On November 9, in reply to an e-mail from Ms. Miller that contained an epithet about an Opposition member that jokingly read "FOI this", Mr. Livingston responded, "LOL! This one will never get the Double Delete".[66]

**[119]** The *Freedom of Information* legislative scheme does not impose any obligation to retain records before an FOI request is received but, "business records" under the *Premier's Office Records Schedule,* as discussed earlier, are required to be retained. The August 9 "double delete" e-mail is some evidence of Mr. Livingston's general distaste for keeping relevant documents, whether they be responsive to an FOI request or pursuant to the *Records Keeping Act*. That e-mail, in my view, is also relevant to Mr. Livingston's intent in wiping OPO hard drives in early 2103.

[65] Exhibit 22, Tab 35
[66] Exhibit 22, Tab 93

**[120]** By early 2013, FOI requests existed and were directed at the OPO for gas plant records. The defendants and their staff were required to be conducting careful searches, including searches of their computer hard drives, for any records that might be responsive to these requests. Yet it was during this same time period that Mr. Livingston and Ms. Miller were arranging for the indiscriminate wiping of the local hard drives that potentially contained records responsive to these requests.

***(v) The Cabinet Office did not trust Mr. Livingston and the OPO to retain e-mails responsive to an FOI request or a future Standing Committee Production Order***

**[121]** Prior to the transition period from Premier McGuinty to Premier Wynne, the normal process for decommissioning e-mail accounts of departing OPO staff was to delete them. The contents of those accounts would also be deleted. In late 2012, Mr. Bromm and Ms. Jackson of the Cabinet Office decided to "freeze" or disable them instead, meaning the accounts and their contents would be available for future searches if needed. Mr. Bromm and Ms. Jackson wanted to ensure that any records responsive to existing or future FOI requests would be available on the e-mail accounts of departing employees.

**[122]** Mr. Bromm told the court: "We decided it would be difficult to explain in the face of an FOI appeal, in particular, that we followed our normal process and completely deleted…e-mail accounts from individuals who might actually have records relevant to an appeal". The other reason, he said, was the real risk that that in a new session of the Legislature, the records production issue would be revived "and we would not want a Secretary or a Premier to say we are not in a position to do a search because all of those

accounts would be deleted". He also explained that Premier McGuinty wanted to make sure that the records of his administration were to be treated as records of a separate administration from that of the incoming Premier. Mr. Wallace also testified that Premier McGuinty made it clear that he wanted to treat his transition as a government transition, as if there was a change in political parties.

**[123]** That the Cabinet Office did not trust Mr. Livingston or his staff to retain records is reflected in another decision by Mr. Bromm and Ms. Jackson not to disclose this change of policy to Mr. Livingston, nor any of his staff. Mr. Bromm testified that this was because he and Ms. Jackson "did not want to be put in a position not to do it."

**[124]** Not knowing about this secret change decided upon by Mr. Bromm and Ms. Jackson, Mr. Livingston would have reasonably assumed, based on the earlier information he had received from Mr. Nicholl, that e-mail accounts of departing staff would continue to be decommissioned in the normal course and unavailable for further searches.

**[125]** On this assumption, all that would be required to eliminate any remaining retainable records, or any trace of them, was to have the hard drives wiped for e-mails in PST files, along with saved e-mails and attachments, and any other business records that OPO staffers had saved to their computers.

**[126]** The wiping of the hard drives would have the effect of ensuring that e-mails and attachments deleted from the server upon closing of the accounts would also be removed from the hard drives.

### *(vi) It is a reasonable inference that the defendants believed that there were retainable records on the hard drives*

**[127]** There is no admissible forensic evidence of what, if any, data Mr. Faist wiped from the OPO computers. However, I find on the evidence that at the time Mr. Faist was hired, the defendants believed that retainable records would still be remaining on the hard drives of computers of departing OPO staff, as well as their own.

**[128]** It is uncontested that e-mails primarily resided on, and were backed up to, e-mail servers and not hard drives. However, e-mails could potentially be found on the hard drive as well. Mr. Gitt was a technical team leader in the IT unit responsible for POCO. I accept his straightforward testimony that some user-created files were saved on the "C" drive and that e-mail attachments could be inadvertently be saved on the hard drives.

**[129]** Personal Storage Tables, or "PST" folders containing e-mails, were also sometimes saved on the "C" drive. There is evidence that the defendants had PST files in their data found in their Ontario Government e-mail accounts[67]. Another form of e-mail archive file , called an "OST" file, was automatically created by the Microsoft Outlook software on POCO computers. The OST file was designed to be a local copy of a user's e-mail account, in order to reduce the need for data to be transmitted over the network. The OST file resided on the hard drive, but if it was deleted, or if a new computer was used to access the same e-mail account, the server copy of the e-mails would not be affected and the system would automatically create a new OST file and start duplicating the account again. As well OPO political staff used a computer program, called Citrix, to

[67] Exhibit 2, Admission re: Continuity of Electronic Evidence p.4

connect to Liberal Caucus or Liberal Party computer networks. This program was capable of saving documents to local hard drives.

**[130]** It is true, as the defence points out, that there were numerous existing Ontario government policies advising employees against keeping retainable business records on their hard drives. But that fact does not mean that those policies were always followed, or more importantly, that Mr. Livingston *believed* they were strictly followed. Indeed, instructions given to POCO staff for FOI searches explicitly directed them to include the C: drives in their searches.

**[131]** I agree with the Crown that Mr. Livingston and Ms. Miller were sophisticated individuals with extensive experience in government and the private sector. As well, they required at least a basic knowledge of how Windows-based computer systems worked in order to do their jobs. Mr. Livingston showed a marked interest in how his staff could permanently delete e-mails and, more troubling, how e-mail accounts of departing staff could be permanently deleted.

**[132]** Mr. Wallace and his senior advisors in the Cabinet Office believed there were retainable records on OPO computers. They clearly communicated that belief to Mr. Livingston just a few days before Mr. Faist conducted the wiping of the hard drives in the OPO.

**[133]** After granting administrative rights to Mr. Livingston, Mr. Wallace, who did not feel "remotely comfortable" in doing so, instructed his counsel, Mr. Bromm, to create a "background memo" for the defendant that would clearly set out the defendant's obliga-

tions and those of others in the OPO with respect to records management. This memorandum was prepared by Mr. Bromm with revisions by Don Fawcett. Mr. Nicholl conveyed this advice to Mr. Livingston in both a telephone call and an e-mail in the afternoon of January 31, 2013. In the e-mail, Mr. Nicholl told Mr. Livingston:

> "I just wanted to follow up on our discussion regarding the steps that can be taken to properly deactivate and erase current e-mail accounts of departing Premier's Office staff *as well as any records maintained on their computer hard drives*. This would include…*Deletion of all records currently maintained in computer hard drive files; Wiping/cleaning of the hard drive in a manner that prevents any recreation of records…*I understand that at the present time there is an FOI matter related to your office that is currently under appeal. As a result, my recommendation would be to preserve the e-mail accounts and records of any individuals involved in that matter until the appeal process is complete. This will avoid any allegation that your office improperly deleted records knowing that a matter was under appeal...Similar steps should be taken for any outstanding FOI requests for documents in the Premier's Office. Your office can work with Jamie Forrest, the Cabinet Office FOI coordinator, to identify the appropriate individuals... *[T]here is an outstanding Order of the Legislative Assembly with respect to the production of records related to the closure of the Oakville and Mississauga power plants. In light of the risk that this matter could be raised in the House in a new Session, steps should be taken to search for and preserve any records related to these matters, and to document those steps in writing, to again avoid any allegation that records were improperly deleted."* (emphasis added)

**[134]** This e-mail was a clear message to Mr. Livingston and, through him, others in the OPO to search for and preserve retainable records on their computers. It also repeated earlier advice that Mr. Wallace had given Mr. Livingston the previous August. However, no search was done by the defendants after January 31. Nor was any effort made to preserve potential records. Ignoring the good advice provided by the Cabinet Office, Mr. Livingston took exactly the opposite route.

**[135]** On February 5, the defendants, through Mr. Faist, attempted to execute their plan to indiscriminately wipe *any and all* data that could be located on selected OPO

computers. Doing this, in defiance of the advice contained in the January 31 e-mail, is compelling circumstantial evidence that the defendants believed there were retainable records on those computers, and that their intent was to eliminate those records. Certainly the defendants were well aware that further Standing Committee proceedings on the gas plants were foreseeable. Both of them knew they had been selected to be on "Ontario PCs list of witnesses for the gas plant investigation"[68] being conducted by the Standing Committee prior to the resignation of Premier McGuinty and the prorogation of the Legislature.

**[136]** During cross examination, counsel for Ms. Miller suggested to Mr. Wallace that he intended the January 31 e-mail on record retention to be some kind of bureaucratic ploy to cover his "backside". In resisting this suggestion, the Secretary stated, "All I am trying to do though this process is to make sure that Mr. Livingston, and through him, any others, are aware of their obligations."

**[137]** I accept Mr. Wallace's evidence that this indeed was his purpose. I have no doubt that had Mr. Wallace suspected that the defendant was seriously considering using a non-OPS consultant to wipe the hard drives in the Office of the Premier, the January 31 e-mail would have certainly included a strong admonition against using any person other than OPS IT to remove data, as well as referring Mr. Livingston to the required government procurement policy he needed to follow.

[68] Exhibit 22,Tab 69

### *(vii) It is not a reasonable inference that the defendants' sole intent was to wipe "personal information" and Liberal Party documents from the OPO hard drives*

**[138]** It is simply implausible that the defendants, through the Liberal Party Caucus, would choose to pay $11,000 to someone to erase "personal" data, such as resumes, family photos or banking information or trivial, non-business records that did not need to be retained, rather than relying on POCO IT to wipe OPO hard drives at no cost. It does make sense, however, that the defendants would resort to paying an outsider to erase data of retainable records of sensitive internal communications dealing with the most controversial and problematic issue that plagued the Premier and his minority government in its final months. By retaining Mr. Faist, the defendants were able to control the process and bypass any policies or instructions POCO may have been required to follow with respect to the destruction of hard drives and the files on them. From his earlier discussions with Mr. Wallace, Mr. Livingston knew that the Cabinet Office would never authorize POCO IT to erase data from OPO computers, unless it was satisfied that the OPO had fulfilled its record keeping obligations under the *Premier's Office Record Retention Schedule.* Mr. Wallace had made that perfectly clear to Mr. Livingston, as had the e-mail of January 31 from Mr. Nicholl.

**[139]** While there is evidence that some OPO staff had experienced occasional and understandable frustration with POCO IT services, I do not accept that there was a widespread belief in the Premier's Office that POCO IT was incompetent. I do not accept that the defendants honestly believed that POCO IT utterly lacked the ability to perform the

task of collecting and wiping or destroying their hard drives. I listened carefully to the evidence of Mr. Stenson and Mr. Gitt from POCO IT whose obvious experience and expertise were never challenged by the defence in cross-examination. Nor was Mr. Nicholl, the person in charge of the Ontario Government IT, ever challenged on the overall competence of POCO IT, a unit set up to provide a higher standard of service than found in any other government ministry.

**[140]** It is of significance that many of the people selected by the defendants to have their hard drives wiped were named in the e-mails requesting FOI searches. While there is not a perfect correlation between the list of individuals who received the FOI records search e-mails and the list of individuals whose hard drives were targeted by the defendants, the list of selected individuals included Mr. Livingston's Deputy Chiefs of Staff who were frequent participants in e-mail exchanges arising out of the gas plant controversy. These employees selected by the defendants were not the only ones departing. The point is that those individuals were among the OPO staff who were front and centre in managing the gas plant controversy, as is evident in the e-mail trail that forms part of Exhibits 22 and 33. I conclude that the defendants were most concerned about, and, as a result selected, the computers of senior OPO staff, whom they considered strong candidates for searches for future FOI requests and Standing Committee Production Orders.

**[141]** There are several pieces of circumstantial evidence relating to the wiping of the hard drives that are inconsistent with Mr. Livingston's stated plan to wipe only "personal" data from the hard drives:

- There is an absence of evidence that any OPO staff member ever made a specific request of the defendants to ensure that personal data was cleaned from his or her computer hard drive.

- There is evidence that the defendants never informed OPO employees of the plan to wipe their personal data from the hard drives or asked their permission to do so:

    - On January 24, 2013, Ms. Wai, Mr. Livingston's Executive Assistant, e-mails Ms. Miller asking, "Can you enlighten me as to what the project is about?"[69]

    - On February 4, 2013 Wendy McCann, Executive Director, Communications e-mails Ms. Miller, copying Mr. Livingston: "Is Pete or someone else wiping our computer hard drives?" Ms. Miller replies: "Not all comms staff however. Just you, Neala and Leon."[70]

    - Ms. Gair testified that she was "not exactly clear what [Mr. Faist] was doing but [she] figured it was something to do with the job". All she knew was that he was there to clean the hard drives and she was there to assist him. It is clear that she did not ask to have her personal information deleted from her hard drive nor did she provide any informed consent to have that done.

[69] Exhibit 22, Tab 107
[70] Exhibit 22, Tab 124

- Ms. McKenzie testified that someone told her that "they needed to do some work on her computer" and she "was asked not to touch her computer for 40 minutes". She did not recall what work was being done on her computer, nor did she give provide any informed consent to wipe personal data from her hard drive.

- Mr. Faist said most of the users were not present when he wiped the computers.

- Mr. Faist used a software that indiscriminately deleted all files in the user profiles on each hard drive.

- Mr. Faist testified that the $40 software he brought was chosen to perform the task he was contracted to do, and was consistent with the expectations of those who had asked him to do the task.

- The wiping process was the same whether the user was there or not.

- Mr. Faist never tried to determine or ask the user what kind of documents were being stored on the hard drives he wiped.

- Mr. Faist never consulted POCO IT when he encountered difficulties wiping the hard drives, or at any time.

- No one gave Mr. Faist direction about taking precautions with regard to any records stored on the hard drives.

- Neither Mr. Faist nor Ms. Gair, who assisted him, had any instructions to preserve records or any user profiles.

**[142]** It is evident that for the employees who happened to be present when Mr. Faist was working on their computers, it was rather a case of passive acquiescence on their part, than of providing permission for him to erase personal information from their hard drives.

**[143]** It was submitted that the defendants had wanted to delete not only personal information, but also any "Citrix" Liberal Party documents saved to the hard drives of OPO staff. I do not accept this submission. Mr. Livingston did not refer to the removal of Citrix documents, either in seeking administrative rights from Mr. Wallace or in any of his discussions with Mr. Nicholl. Mr. Gene did not mention Citrix to Peter Faist when they discussed arrangements for the wiping of the hard drives.

**[144]** The only reference to Citrix in the evidence is in an e-mail sent on February 8 by an OPO employee, who asked Ms. Gair, "I can't use Citrix anymore?" Ms. Gair, who was helping Mr. Faist with the wiping, wrote, "Don't know anything about Citrix."[71] In my view, the evidence as a whole excludes the possibility that the defendants had ever considered or had any interest in deleting Citrix documents that had possibly been saved to the hard drives.

**[145]** Counsel for the defendants submitted that there was no attempt to conceal the activities of Mr. Faist while he was at Queen's Park, and that this fact is inconsistent with

[71] Exhibit 38, Tab23

any criminal intent on their part. They highlight the fact that during "Pete's Project", Mr. Faist signed into the Legislative Assembly building on multiple occasions and did his work wiping the hard drives openly and during business hours with many people around, including readily identifiable plain clothes OPP officers who were members of the Premier's security detail.

**[146]** I do not draw the inference advocated by the defence. The fact is that Mr. Livingston and Ms. Miller instructed their assistants, Ms. Wai and Ms. Gair, to assist and accompany Mr. Faist in accessing the building, as well as the selected computers. There is no evidence to suggest that anyone outside the OPO was made aware of Mr. Faist's presence in the building or his reason for being there. It is also evident that most of the staff in the OPO did not understand what Mr. Faist was doing there either. Regardless, a lack of concealment does not diminish the dishonest character of the acts.[72]

### *(viii) Mr. Livingston deceived Mr. Wallace into granting him administrative rights to access OPO computers*

**[147]** On January 24, 2013, Mr. Faist attempted to install WhiteCanyon "WipeDrive SystemSaver" software on Ms. Miller's computer. The program did not work because Ms. Miller lacked the local administrative rights that would permit the application of the software. As a result of this unsuccessful attempt, as well as the e-mail exchanges that followed, both defendants knew their normal user privileges did not allow them to wipe the drives and that they would require elevated authorization to do so.[73]

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[72] *R. v. Parent* at para 59
[73] Exhibit 22, Tabs 110-114

**[148]** Granting a non-OPS IT user administrative rights over multiple computers was highly exceptional and required authorization. Through OPS IT, the Government of Ontario establishes restrictions on what users, including POCO staff, can do with Government of Ontario-owned computers. Non-OPS IT users have access only to documents in their own user profile. Even users with administrative rights generally have those rights limited to their own computer. These restrictions extend to what users can do to access, manipulate and delete data. The work-related data on these computers is the property of the Government of Ontario.

**[149]** Mr. Stenson testified that in his 27 years in the Ontario Public Service, he had never provided this kind of administrative access to someone who was not in IT. Mr. Stenson and Mr. Gitt both testified that this was an "unusual request".

**[150]** Mr. Wallace gave evidence that, in the circumstances of the transition from Premier McGuinty to Premier Wynne, he reserved to himself the authority to make the decision to grant administrative rights. No one else had the authority to grant those rights.

**[151]** Peter Wallace never authorized Mr. Livingston to delete files from the hard drives in the OPO in the way that was done in this case. Mr. Wallace did not, and could not, authorize the indiscriminate wiping of hard drives in a manner that could foreseeably result in the deletion of retainable records. I accept his evidence that had Mr. Livingston told him any material aspects of his plan to wipe the hard drives, he would not have given his permission. To do so would have been contrary to both precedent and policy.[74]

[74] Exhibit 20, Tab 1, OPS IT Policy on Passwords; Exhibit 3,Tab 1, Management Board Procurement Directive; Exhibit 3,Tab 2 Contractor Screening Operating Policy

**[152]** I wish to be clear that Mr. Livingston's omission to inform Mr. Wallace that the wiping would be indiscriminate is as, if not more, serious and troubling than his failure to mention the involvement of Peter Faist. It was not only personal data, but any data consisting of retainable records that would also be destroyed through this process. Mr. Livingston knew from his earlier discussions with Mr. Wallace that permission would not have been granted if there was any possibility of such records being eliminated in the wiping. He could not have honestly believed that he had the Secretary's authorization to do what he did.

**[153]** Neither defendant had colour of right over work-related data on OPO computers. They knew that the data intended to be wiped from other OPO employees' computers was not their own. It is significant with respect to the issue of criminal intent that the defendants were prepared to wipe the hard drives without anyone's permission, except their own. The failed initial attempt by Mr. Faist to wipe the hard drive of Ms. Miller's computer forced Mr. Livingston to request permission. I accept the testimony of Mr. Faist that had the installation been successful on his partner's computer, he would have proceeded to wipe all of the selected computers.

**[154]** Mr. Livingston told Mr. Wallace that he was seeking permission to remove personal data from his own computer, as well as those of others in the OPO. He did not inform Mr. Wallace of Mr. Faist's unsuccessful attempt just hours earlier to install the WipeDrive software. Nor did the defendant tell him that the administrative access would be used, not by his assistant, Wendy Wai, to whom access was granted, but by a non-

OPS, non-security-cleared individual contracted through the Liberal Caucus Service Bureau, not the OPS.

**[155]** Mr. Wallace was unequivocal that he would not have granted the access had he known that it would be used by a non-OPS employee who was not properly contracted nor security-cleared. To do that would be contrary to his "decision rule" that he used during transition to determine whether access should be permitted. His rule was that the granting of access must not create any new precedent.

**[156]** I found Mr. Wallace to be an entirely credible witness. He conducted himself throughout these events with the utmost integrity and care one would expect of and hope for from the province's most senior public servant. I accept his evidence that he would not have acceded to Mr. Livingston's request for administrative access had the defendant disclosed the crucial facts about his plan and its purpose.

**[157]** In his testimony, Mr. Wallace made it abundantly clear that he deeply regrets the decision to permit Mr. Livingston access to the OPO computers. He relied, of course, on the representations made by the defendant. However, Mr. Wallace also requested other senior public servants to find out if other OPO employees had the same kind of administrative rights requested by Mr. Livingston. The Secretary was informed that seven other employees in the OPO had those rights. Regrettably, that information was both incomplete and inaccurate.

**[158]** Mr. Wallace was never informed that the reason the other employees had administrative rights was for the limited purpose of accessing an administrative tracking pro-

gram, called "OpenText", used to organize the Premier's correspondence. As well, Mr. Wallace's advisors never told him that those administrative rights did not permit any of the seven users access to multiple computers in the OPO.

**[159]** The law is clear that, in the right circumstances, a deliberate and material omission can constitute "other fraudulent means" for the purpose of committing fraud, contrary to s. 380 of the *Criminal Code*. The non-disclosure must be of an important fact. The defendant must know that the fact omitted would be important to the person he is dealing with. As well, the omission must render the course of dealing one that reasonable people would stigmatize as dishonest. In *R. v. Theroulx*[75], the Supreme Court of Canada took care to distinguish dishonesty from mere "carelessness", "improvidence", or even "sharp practice".

**[160]** I find that, in order to obtain administrative rights from Mr. Wallace, the defendant deliberately omitted to provide material facts he knew would be important to Mr. Wallace in rendering his decision to grant access. Mr. Livingston knew that had he told the Secretary the truth about why he wanted access and how that access was going to be used, permission would never have been granted. The dishonest means used by the defendant to gain Mr. Wallace's permission constitute further evidence from which to reasonably infer that Mr. Livingston's intent was to eliminate retainable records.

### *(ix) Mr. Livingston's passing comment to Steen Hume about possibly using Mr. Faist to wipe the hard drives does not provide a "colour of right" defence*

[75] [1993] 2 SCR 5 at p 26

**[161]** As noted earlier, Steen Hume was Mr. Wallace's Executive Assistant. The Secretary testified that prior to the January 30 Cabinet Office meeting that dealt with Mr. Livingston's request for administrative rights, Mr. Hume informed him that the defendant had "made a passing comment" that "there might be a potential to bring in someone from the outside" to wipe the hard drives and that it "might be the life partner of Ms. Miller".

**[162]** In testimony, Mr. Wallace was emphatic that, "he placed no weight on this whatsoever" and that, "in direct conversation with me he had not mentioned it." He explained to the court that the Ontario Public Service provided "wraparound IT service" to the OPO, and that "the notion of an outsider performing this kind of task was "simply not something that penetrated my consciousness".

**[163]** The defence submits that Mr. Hume's hearsay statement is admissible not for the truth of its contents, but for the fact that it was made. It is contended that Mr. Livingston must have known that Mr. Hume would pass along this information to Mr. Wallace, which, in fact, he did. Counsel submit that Livingston was, therefore, open with the Cabinet Office about the role of Mr. Faist. They suggest that since Mr. Wallace did not raise any objection or concern about this, it follows that the defendant would justifiably feel that he had the "green light" to use Ms. Miller's partner.

**[164]** There is no dispute that Mr. Hume reported Mr. Livingston's comment to Mr. Wallace. It is, in my view, a correct statement of law that the defendant's comment is admissible for the limited purpose of finding as a fact that it had been made. The issue is what weight, if any, to attach to Mr. Livingston's reported comment.

**[165]** There is no evidence of the circumstances under which Mr. Hume received this information. There is no evidence Mr. Livingston spoke directly to Mr. Hume, or whether Mr. Hume overheard the comment not intended for his ears. Also, there is no evidence that the defendant was even aware that Mr. Hume had heard the "passing comment" that he passed on to Wallace. In effect, there is an absence of evidence capable of supporting the inference that Mr. Livingston provided this information to Mr. Hume with the expectation that it would be passed on to be considered as part of the request for the granting of administrative rights.

**[166]** Mr. Wallace's reaction to the defendant's indirect comment clearly suggests that this information was not provided to Mr. Hume on a straightforward and serious basis. The mere fact that Mr. Hume may have heard a passing remark from Mr. Livingston as to his intention, and passed it on to Mr. Wallace sometime before the Secretary made his decision, is not, in my view, cogent evidence permitting the inference that it provided the defendant with the sincere belief that he had been given permission to proceed with the wiping of the hard drives.

**[167]** It must be noted that using Mr. Faist was a core element of the defendants' project to wipe the hard drives. In his direct conversations with the Secretary, not once did Mr. Livingston mention his intent to use an outside IT consultant, although he had abundant opportunity to do so. In this regard, it is significant, that according to Mr. Wallace, he and the defendant set weekly meetings and would work together nearly every day.

**[168]** In my view, floating the possibility of retaining Ms. Miller's life partner in a "passing comment" to Mr. Hume does not, in any meaningful or realistic sense, amount

to informing Mr. Wallace about using Mr. Faist's services. While there is no evidence that Mr. Livingston knew of the January 30 meeting and the steps taken by the Cabinet Office before his request was granted, it would have been clear to him that Mr. Wallace's informed approval was required.

**[169]** Moreover, Mr. Livingston's failure to tell the Secretary directly about his intended use of Mr. Faist and the scope of his assignment, were material omissions that, on all of the evidence, permits a strong inference that they were deliberate. I am of the view that Mr. Livingston's 'passing comment' does not support an inference that the defendant subjectively believed he had a colour of right to use an "outsider" by reason of Mr. Wallace's failure to object, nor am I left in reasonable doubt by that evidence.

**[170]** The defence also submits that the court should draw an adverse inference against the Crown for not calling Mr. Hume as a witness. Counsel say that, having elicited evidence of the 'passing comment' in Mr. Hume's absence, the Crown cannot now establish that the defendant concealed Mr. Faist's role from the civil service. I don't agree. What Mr. Hume might have said about the circumstances of his hearing the comment is purely speculative. Nor should an adverse inference be drawn. The Crown's obligation is to call enough witnesses to adequately prove the essential elements of the offence.[76] As well, there is no suggestion that the Crown operated here on the basis of an oblique motive.

[76] R. v. Jolivet, [2000] 1 S.C.R. 751 at paras 22-30; R. v. E.S., [2000] O.J. No. 405 at paras. 28-37 (C.A.)

## *PART VI: CONCLUSIONS*

## *CONCLUSIONS: COUNTS AGAINST MR. LIVINGSTON*

**[171]** In order to convict, I must be satisfied beyond a reasonable doubt that the only reasonable inference that can be drawn from the circumstantial evidence is that Mr. Livingston is guilty. I must be satisfied beyond a reasonable doubt that he had the required intent to destroy data without colour of right. I have borne in mind that there is no obligation on Mr. Livingston to point to evidence that support inferences that are inconsistent with guilt. A gap in the evidence can result in reasonable inferences other than guilt.

**[172]** There is ample direct evidence that Mr. Livingston directed the wiping of some twenty hard drives belonging to Ontario computers in the Office of the Premier. The live issue in this case is whether the Crown has proven that Mr. Livingston had the requisite criminal intent.

**[173]** On the count of *Attempt Commit Mischief to Data*, the Crown must prove beyond a reasonable doubt that Mr. Livingston believed that there was retainable data on the hard drives and that he intended to delete them. The Crown must also prove beyond a reasonable doubt that he believed he did not have the authority to act as he did. The Crown must also prove beyond a reasonable doubt that Mr. Livingston acted without legal justification or excuse or colour of right. With respect to the count of *Unauthorized Use of a Computer*, the Crown must, in addition, prove that the defendant acted fraudulently. “Fraudulently” connotes an independent requirement of dishonesty.

**[174]** The Crown has presented a compelling circumstantial case against Mr. Livingston. The totality of evidence proves beyond a reasonable doubt that he was neither justified nor authorized nor had colour of right to arrange for the wiping of the hard drives of employees of the Office of the Premier, including his own. He was clearly aware of his obligation to retain records with respect to the gas plant issues.

**[175]** Nevertheless, Mr. Livingston resorted to extreme and unauthorized measures to permanently delete records he and Ms. Miller believed existed on computers in the Office of the Premier. First, he dishonestly obtained administrative rights from the Secretary. Then, using Mr. Faist, a non-OPS consultant, he attempted to destroy data on the hard drives of colleagues who could have saved copies of e-mails or attachments on their computers at a time when FOI requests in relation to gas plant documents were still outstanding and when a Standing Committee Production Order was foreseeable in a new session of the Legislature.

**[176]** Mr. Faist's wiping of the OPO computers was not the careful and selective deletion of personal information that the Cabinet Office permitted. Mr. Livingston's plan to eliminate sensitive and confidential work-related data, in my view, amounted to a "scorched earth" strategy, where information that could be potentially useful to adversaries, both within and outside of the Liberal Party, would be destroyed.

**[177]** The defendant claims that he simply wanted to delete personal information and Liberal Party documents from the hard drives. While this is a possible inference arising from the evidence, it is not, in my view, a reasonable one. An inference of guilt drawn

from the circumstantial evidence in this case is the only reasonable inference that such evidence permits.

**[178]** I am satisfied beyond a reasonable doubt that Mr. Livingston deceived the Secretary of Cabinet, Peter Wallace, into granting him administrative rights to computers in the Office of the Premier and that he deliberately misled Mr. Wallace as to his true purpose for this request. Moreover, he deliberately omitted to tell Mr. Wallace that the Liberal Party Caucus was paying an outside consultant to indiscriminately wipe data from the hard drives of the computers in the Office of the Premier. Mr. Livingston knew that Mr. Wallace would have never given his permission had he been told the truth about his plan.

**[179]** I find Mr. Livingston guilty on both counts.

## CONCLUSIONS: COUNTS AGAINST MS. MILLER

**[180]** There is evidence upon which the court could draw a reasonable inference that Ms. Miller was a party to the offences committed by Mr. Livingston. In her role as Deputy Chief of Staff, Communications, she worked closely with Mr. Livingston. The e-mail trail seen in Exhibit 22 shows Ms. Miller's deep involvement in decision-making regarding the government's communications strategies to address various aspects of the gas plant controversy. She was party to highly sensitive and confidential e-mails concerning the gas plant issues.

**[181]** Like Mr. Livingston, Ms. Miller had reason to prevent potentially sensitive, confidential and, at times, embarrassing communications being made public as a result of an

FOI request or a Production Order, or during her testimony as a likely witness at a future Standing Committee hearing investigating the gas plant issues. Ms. Miller was the person who enlisted Mr. Faist to wipe the hard drives. She assisted Mr. Livingston in selecting the names of OPO staff whose computers were to be wiped. She provided a list of those names to Ms. Gair in order to assist Mr. Faist. She also provided her own work computer as the first for Mr. Faist to wipe.

**[182]** On the other hand, Ms. Miller was not present at the August meetings between Mr. Livingston and Mr. Wallace. There is no evidence that she received the e-mails or memos from the Cabinet Office about the obligation to retain records. She was not present at the meeting in August between Mr. Livingston and Mr. Nicholl where he described the government protocols for decommissioning the e-mail accounts of departing staffers. Most significantly, there is no evidence that Ms. Miller was involved in any conversation with Mr. Wallace, or anyone else in the Cabinet Office to request administrative access or explain the reason for the request. There is also no evidence that Ms. Miller schemed with Mr. Livingston on what to say or omit from his request of Mr. Wallace for administrative rights. Because of her close working relationship with the defendant, it is very possible that at some point she learned about the means used by Mr. Livingston to obtain permission from the Secretary of Cabinet. However, to conclude beyond a reasonable doubt that she did know is not possible and would amount to speculation.

**[183]** On January 31, 2013, upon learning that the Cabinet Office had approved the granting administrative rights, Mr. Livingston e-mailed Ms. Miller, “We have broken through. CO has facilitated and I will be talking to David Nicholl this afternoon about

how to get codes and move forward".[77] On the totality of the evidence I cannot exclude a reasonable inference that Ms. Miller believed on good authority that she had colour of right to access computers in the Office of the Premier. In the end, I am left in reasonable doubt as to her guilt on the remaining counts in the information.

## PART VII: VERDICTS

**[184]** I find Mr. Livingston guilty of Attempt to Commit Mischief to Data and Unauthorized Use of a Computer. I find Ms. Miller not guilty. The charges against Ms. Miller are dismissed.

**Released: January 19, 2018** **Justice Timothy R. Lipson**

[77] Exhibit 22, Tab 114