

# **Report of the Fairness Advisor on the Selection of Preferred Proponent after the Request for Proposals for BC Cancer Agency's Centre for the North Project, a Project of BC Cancer Agency and Provincial Health Services Authority assisted by Partnerships BC.**

## **1. Introduction**

### *(a) Designated Fairness Advisor Team:*

The ADR Chambers Team of Fairness Advisors designated to serve on this project are

#### *The Hon. Roger Kerans, FCI Arb, C. Arb*

The Team Leader, Roger Kerans, who has been called the "Resolution Man", has lived in B.C. since 1996. Mr. Kerans is a leading expert on standards of review for fairness. He has conducted several fairness Advising tasks as well as hundreds of mediations or arbitrations since his retirement from the Bench. Mr. Kerans is the author of a book entitled Standards of Review, which deals with the review of decisions for fairness.

#### *The Hon. H. Benjamin Casson, Q.C.*

Ben Casson, who has lived in Sidney B.C. since 1990, is a leading expert on the conduct of efficient, even-handed and fair inquiries into even the most difficult areas in modern life, including organized crime, breach of public trust, improprieties by persons holding public office, and breach of fiduciary duties. For the past 41 years, Mr. Casson has been involved in the justice system as Crown Counsel (18 years), a legal manager (5 years), judge (23 years), arbitrator, consultant, and instructor in administrative law. He knows how to conduct inquiries efficiently and with due regard for the rights of the individual.

#### *Barry Vogel, Q.C.*

Barry Vogel of Victoria, B.C. is a leading expert on the principles and duties of fairness, care and protection of confidential information, avoidance and disclosure of conflict of interest, bias and undue influence, and has acted as arbitrator and mediator on many occasions where he was required to resolve this sort of issue. Mr. Vogel's experience as Practice Advisor for the Law Society of Alberta, in which he was a consultant to lawyers, gave him considerable exposure to and experience in professional and business ethics. Mr Vogel retired from the Team in the early stages of the RFP process because of ill health.

*(b) Designated Task of the Fairness Advisor:*

The RFP Vol. 2 (s.11.13) asserts that the Authority, being the BC Cancer Agency, has appointed us “to monitor the Competitive Selection Process”. We understand the commitment to Proponents was that we would monitor for fairness. We were engaged, on July 24, 2008, to “ensure” that “. . . all aspects of the . . . Project are carried out in a manner that is fair, and that is free of unauthorized disclosure of confidential information, of unfair advantage, and of actual or perceived conflicts of interest. ”

This is what we mean by fair: First, let us emphasize what is not the task of the fairness auditor. The task is not to establish the selection procedures, nor to make or suggest the selection, nor to offer legal opinions about the duties of anybody in the process. The task rather is to offer an assessment about the procedures established by the RFP and the carrying out of those procedures by BC Cancer Agency and Provincial Health Services Authority, assisted by Partnerships BC. And the subject of the judgment is whether the recommended-selection process by the Evaluation Committee has been carried out in a fair and reasonable manner. The review, then, is a review of procedure, as opposed to a review of substantial decisions. As such, there is guidance available in the law. Concepts such as “fairness in action, review for fairness”, the “principles of natural justice”, and judicial review standards, are a good guide for the kind of review that should satisfy reasonable people that the procedure selected is fair, and the carrying out of that procedure has been fair.

Our task was to assess whether the procedure, in its design and in its execution, was one that reasonable and well-informed people would consider to be fair. It is beyond our capacity and our task to investigate any possible criminal behaviour, or breaches of confidentiality or non-disclosed conflicts of interest that in any way might affect or appear to a reasonable person to affect any decisions.

*(c) Reports:*

This is the second Report of the Team. The first was rendered after the completion of the selection of qualified Proponents (the “RFQ” stage). This Report relates to the selection of the recommended Preferred Proponent by the Evaluation Committee established under the RFP. To assist it, several advisory committees were also established, and staff were involved. We refer to them collectively as the Project Management Team.

*(d) Consultations:*

Pursuant to our contract, our Team was available for consultations. These consultations often occurred, but we strove to limit our comment to warnings as to what we may say about a proposed course of action in a public Report, or to point out what a Proponent may argue. We confess there were a few occasions where we did not wait to be asked before we offered comment. In this way we sought to serve the interests of all Proponents, as well as BC Cancer Agency and Provincial Health Services Authority assisted by Partnerships BC., in a fair and reasonable process.

## 2. The Request for Proposals

Three of the original Proponents approved in the RFQ stage were sent the Request for Proposals for BC Cancer Agency Centre for the North Project (the “RFP”). The RFP spells out the specifications for the project, and also the selection procedure to be followed. BC Cancer Agency and Provincial Health Services Authority, assisted by Partnerships BC. made available to us for review all of the material pertinent to the process which included the RFP, the Amendments and other data on the data site, the Proposals, the Conflicts Investigations, the qualifications of the Evaluation Teams, the Evaluation Manual, evaluation criteria in the RFP, the reports of the Evaluation advisory committees, all correspondence with proponents, and a myriad of other documents pertaining to the process. In general, the procedure established was similar to many previous projects, which are generally considered to be fair, but we will make reference to and comment on some variations below.

The three Proponents all submitted Proposals in a timely fashion, as provided in Clause 7.

## 3. Scheduling

The RFP spelled out a schedule for the preparation and evaluation of the Proposals, and for consultations by Proponents with BC Cancer Agency and Provincial Health Services Authority, assisted by Partnerships BC. The Authorities gave full and careful consideration to all scheduling requests, and the balancing need not to unduly delay this project, and acted, in this regard, in a fair and reasonable manner.

## 4. Communications with Proponents after the RFP.

### a) *Data Room*

Inevitably, between publication of the RFP and the submitting of Proposals, there are many amendments to the RFP, and other notifications, that all Proponents must receive. Fairness requires that the Proponents be treated in a like manner. The Data Room was established for the disclosure of all information to be shared amongst all Proponents. Email or written notice was given of new additions, and the system worked fairly.

b) *Collaborative Confidential Meetings*

Further, in fairness, each Proponent must have a reasonable opportunity to be reassured that it understands the RFP and other material. Moreover, it is in the best interests of BC Cancer Agency and Provincial Health Services Authority, and Partnerships BC that they hear suggestions for improvement of the specifications from Proponents. On the other hand, Proponents are in a competitive position, and do not wish to share ideas with their competitors.

The RFP fairly acknowledges a need for private, less formal, communications between each Proponent and project management. It provided for discussions that were both “collaborative” and “confidential”. As a result, s.2 of the RFP provided that the Authority would make available to Proponents certain personnel, consultants and advisors to participate in Collaborative meetings. Here were three of these with each proponent, and some were very lengthy. We monitored all of these meetings, and satisfied ourselves that the BC Cancer Agency and Provincial Health Services Authority and Partnerships BC. did not offer to any Proponent any unfair advantage or disadvantage in the way of unique information, premature evaluation, or encouragement that a particular idea may win approval.

In order to balance the need not to offer special advantage against the need to have meaningful discussions, the RFP provided that no comment or commitment by a representative of BC Cancer Agency and Provincial Health Services Authority, or Partnerships BC. At a collaborative meeting would bind the two authorities unless confirmation in writing was sought and supplied. Whenever a request for information led BC Cancer Agency and Provincial Health Services Authority and Partnerships BC. to conclude that the RFP needed clarification, the answer came in the form of an addendum to the RFP so that all Proponents were informed.

We commend the BC Cancer Agency and Provincial Health Services Authority, assisted by Partnerships BC, for its sensitive and careful adherence to the rules. No advantage was offered. No negotiations occurred, by which we mean there was

never a time to our knowledge when a representative of the BC Cancer Agency or Provincial Health Services Authority, or Partnerships BC, offered to do anything in return for the Proponents doing something. Nor, so far as we could determine, was there ever an occasion when proprietary information was disclosed improperly.

This process, while necessary, can be cumbersome and frustrating for all. We commend the Proponents and the BC Cancer Agency and Provincial Health Services Authority, and Partnerships BC, for their patience and conscientious following of the rules. Only on remarkably few occasions was it necessary for a Fairness Advisor to intervene to warn a person not to stray from the rules. In the result, the process was fair to all Proponents, because they had every opportunity to ask questions and make points for consideration.

*c) Other Communications*

Clause 7.5 provides that all enquiries be by email to a designated contact person at Partnerships BC. This term was fair and reasonable for routine matters. We monitored these communications as best we could and are satisfied that there was substantial compliance with Clause 7.5, and that only routine notices and other administrative issues were the subject of these emails.

We assume that BC Cancer Agency and Provincial Health Services Authority would also consider it appropriate that they follow the rules set forth in Clause 8.7., but it was impossible for us to monitor them.

We are satisfied that these communications were conducted in a fair manner, and no advantage was sought or gained and all requests given reasonable consideration.

4. Evaluation

A member of our Team attended the opening sessions of the Evaluation Committee, and the initial decision-making meetings of the expert advisory committees, to explain the fairness rules and to ask the members to report to us any hint of collusion, fraud, or lobbying. None was received.

Under Clause 10, BC Cancer Agency and Provincial Health Services Authority, assisted by Partnerships BC, took on the task, with assistance of counsel, to evaluate possible conflicts of members of the Project management team and the Evaluation Committee and its professional advisors, and found no irreconcilable conflicts. We have no reason to doubt this conclusion.

e) An Evaluation Manual was prepared for the use of the evaluators. We reviewed the draft of this and found it fair and reasonable.

f) We monitored the final meetings of the expert advisory committees to be satisfied that any dissent was given a fair hearing. It was.

g) We monitored the entire Evaluation process by the Evaluation Committee. It carefully followed the evaluation criteria in the RFP and the Evaluation Manual. Its methodology was reasonable, cogent reasons were given for each decision, and there was no regard to irrelevant considerations. The process was entirely fair and reasonable.

Novel issues arose. First, deep in the evaluation process, it became apparent that not all proponents gave the same interpretation to a clause in the financial terms. The Evaluation Committee, while aware that there may be some ambiguity in the term, nevertheless relied upon the advice of the expert sub-committee to apply a consistent interpretation to all proposals, and it noted any differences in terms of cost. We consider this to be fair and reasonable in the light of the fact that the only alternative was to stop the process, amend the RFP, and invite new Proposals, which in our view would be unthinkable and unfair to the proponents. In the end, this issue was not significant in the final selection.

Second, we addressed the likelihood that the two Authorities would have ongoing studies not referenced in the RFP. We were of the view that this was not unusual in the modern world. We explained to the Evaluation Committee that they must have no regard to those factors, because, to be fair to the proponents, the RFP and supporting documents must be viewed as a snapshot and frozen in time. We are satisfied that the Committee understood and complied.

## 5. Conclusions

We are of the view that the Evaluation of the Proposals met the criteria of fairness, openness, transparency and integrity. We congratulate all members of the Evaluation Committee and the BC Cancer Agency and Provincial Health Services Authority, and Partnerships BC, for the high degree of professionalism displayed throughout

DATED this 1 day of October, 2009

ADR Chambers Inc.

Per: \_\_\_\_\_

The Hon. Roger P. Kerans