

# **Pre-Enquete Brief**

Submitted to Chief Judge Nancy K. Orr,  
Designated Judge for  
the Pre-Enquete Hearing held on  
Tuesday, August 28, 2018 at 9:00 AM

P.E.I. Provincial Court House  
3 Harbourside Access Road  
Charlottetown, P.E.I.

Submitted by...

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(Informant)

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## NOTES

**NOTE #1:** Tabbed documents are referenced throughout the brief using two sets of page numbers: the first page number is the consecutive page number for the brief (bp = brief page); the second number is the page number in the actual document, if there is one(dp = document page).

**NOTE #2:** A few documents referenced in this brief were large documents, so only the title page of the document and the relevant pages referenced are included.

**NOTE #3:** Unless otherwise stated, the phrase “e-gaming file” or the term “e-gaming” is meant to also include the associated government projects referred to as the *Loyalty Card Program* and the *Financial Transactions Platform initiative* in addition to the “e-gaming project” *per se*.

## PART I

### Introduction

#### (a) The conditions for “process” to be issued in this criminal proceeding

On June 20, 2018, I filed two sworn “*Informations*” in the P.E.I. Provincial Court alleging that the former Liberal Premier of Prince Edward Island, Robert Ghiz ....

*Did commit mischief in relation to data by wilfully without legal justification or excuse and without colour of right, destroying data to wit, emails, email attachments, and [the] email account of his Chief-of-Staff, Chris LeClair, contrary to s. 430(5)(a) of the Criminal Code of Canada; [Tab 1]*

And...

*Did commit mischief in relation to data by wilfully without legal justification or excuse and without colour of right, destroying data to wit, emails, email attachments, and [the] email account of Rory Beck, Clerk of Executive Council, contrary to s. 430(5)(a) of the Criminal Code of Canada. [Tab 2].*

As the Informant in this matter, I understand - as Chief Judge Nancy Orr stipulated in a memo issued to Provincial Court staff, Justices of the Peace and Provincial Court Judges on June 25, 2018 [\[Tab 3\]](#) - that “...the private informant must call sufficient evidence to establish a *prima facie* case for process to issue...,” and that the judge must consider the following and determine:

- a) whether a *prima facie* case has been made out on all of the elements of the offence or offences;
- b) that the matter is not frivolous or vexatious; and
- c) that the witnesses are competent (for example, not mentally disordered) and credible.

Whereas “reasonable grounds to believe” that an offence has been committed is a sufficient test to lay an “Information,” I realize that given the primacy of the legal principle that a person is “presumed innocent until proven guilty” in Canada, the evidence I provide today must meet a much higher standard for process to be issued: namely, that there is “a reasonable prospect of conviction”. And to meet that standard, the evidence must establish “proof beyond a reasonable doubt.” I would obviously not have laid these two charges if I was not convinced that the evidence does meet this standard and offers a “likely prospect of conviction.”

**(b) The “nature” of the evidence establishing a *prima facie* case**

In my estimation, the third condition noted above (i.e., “that the witnesses are competent - for example, not mentally disordered and credible”) is not relevant in this proceeding, given that the evidence I am presenting today does not depend on the testimony of witnesses. My evidence is almost entirely “circumstantial,” as was the case in the criminal prosecution of former Chief-of-Staff to former premier Dalton McGuinty, David Livingston, in a recent case in Ontario where he was found guilty of “attempting to commit mischief to data.” for destroying documents in the notorious “gas plant” scandal. As Judge Lipson clarified in his decision in that matter (R. v. Livingston, 2018 ONCJ 25)

*“[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 circumstantial 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.” [Tab 4; p.. 39]:*

There is a common misconception that “circumstantial” evidence is less reliable and much inferior to direct evidence (i.e., first-hand witness testimony); however, depending on the nature of the decisions, events, and circumstances of a given matter, in many cases the opposite is actually true.

The direct testimony of witnesses may differ or give rise to conflicting and even contradictory claims, making it impossible to know for certain which person's testimony is accurate and to be

believed. On the other hand, logical inferences drawn from accepted and indisputable facts can produce certain conclusions. Again, as judge Lipson explained in his in R. v. Livingston ruling :

*“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”* [Tab 4: p 38].

This case concerning the destruction of e-gaming records rests on proven facts from which inferences can logically be drawn. The circumstantial evidence – mostly, but not entirely, presented in documentary form – will be the primary means of proof for the claims alleged in my two “Informations”.

The witnesses I have asked to participate in this Pre-Enquete hearing do not have (as far as I know at present) direct knowledge of the most important details of the crimes I am alleging Robert Ghiz committed. They do, however, have expert and/or direct knowledge of one or more of the facts constituting the circumstantial evidence supporting the allegations that Robert Ghiz committed *mischief in relation to data contrary to s. 430(5)(a) of the Criminal Code of Canada*, and they will hopefully be able to provide some additional confirmation, clarification and understanding of those facts.

## PART II

### **Clarifying the “Terms” and “Processes” associated with the Management and Disposition of Government Records**

A great deal of confusion has existed concerning the policies and procedures associated with the management and disposition of P.E.I. government records. There has been a lack of clarity regarding the precise meaning of key terms used to describe the various options and associated processes pertaining to the retention and/or destruction of government records. There have also been false claims made by government officials regarding those terms, options and processes which have further confused the issue.

Key terms relating to the disposition and/or retention of electronic government records – including the disposition and/or retention of emails and email “attachments” - have a technically-precise meaning within the *Record Information Management (RIM)* (a) legislation, (b) Treasury Board directives, and (c) departmental policies providing, respectively, the (a) legal basis, (b) regulatory framework, and (c) administrative guidelines and procedures for record management within the PEI government.

To obtain a clear understanding of how decisions made by former premier Robert Ghiz to issue and/or authorize orders to *Information Technology Shared Services (ITSS)* to delete all of Chris LeClair's and Rory Beck's electronically-stored files, including their emails, email attachments, and network files – as well as Robert Ghiz's decision to authorize Chris LeClair's desktop computer be “wiped” clean, and all LeClair's and Beck's hard copy e-gaming documents be destroyed – were acts motivated by an intent to do mischief to data, it is first necessary to have an accurate understanding of all the relevant terms within the laws, policy directives and administrative procedures relating to the disposition of government records within the P.E.I. government.

Both the Auditor General and members of the *Standing Committee on Public Accounts* obtained and documented a precise understanding of these key terms and processes from various experts within government – especially from ITSS and the *Public Archives and Records Office (PARO)* in the course of their respective e-gaming investigations, and that expert clarification is provided in the following subsections of my brief.

**(a) “Disabling” an e-mail account:**

When an employee leaves government a supervisor of that employee will make a request to ITSS to have that employee's GroupWise email account “disabled”. Once disabled, the account's original owner/user will no longer be able to access the account via the internet from any location, and the account will no longer either receive or send email. As the Auditor General clarified at a Public Accounts meeting on January 18, 2017, “*Disabling means that the user account is retained. The user account is there, but the account cannot receive emails.*” [\[Tab 5; p. 66\]](#).

Although a disabled GroupWise email account cannot receive or send emails, the account nonetheless remains on the system, and the contents of the account remain fully intact and accessible until such time as ITSS receives an order [via a completed ITSS “*Employee Removal Form*” (which was, around 2012, renamed the “*LAN Access Removal Information Form*”)] from an authorized person with instructions to “delete” the account.

**(b) “Deletion” of an email account and electronic files on network drives:**

When an employee leaves government and has his or her email account “disabled,” the person having supervisory authority over that employee and email account requesting ITSS to disable that account is provided a form by ITSS titled “Employee Removal Request Form.” That form requests precise instructions regarding the disposition of both (1) the records in the former employee's network drives; and (2) the disposition of the records (emails and email attachments) in the former employee's GroupWise email account.

The authorized person completing the form must respond to a precise question regarding the disposition of the email account and contents with a “yes” or “no” answer: “Do you want the employee's GroupWise account deleted?” If “no” is selected, the email account, and all the documents in that account, are kept indefinitely in a fully intact, but “disabled” state. If the “no” option is chosen, the form requests additional information about who is to be given “proxy” access to the account.

Likewise, information is requested on the form regarding the disposition of electronic files contained on one or more network drives with another “yes” or “no” question: “Do you want the user's network files deleted?” If the “no” option is selected, the form requests additional information regarding where to move the files.

**(c) Emails in “deleted” accounts can still be recovered for one year**

When ITSS are instructed to “delete” email accounts, it is still possible to recover those emails for one year. This has to do with the manner in which “back ups” are routinely made by ITSS with a backup system that essentially has 365 “days” capacity. As Scott Cudmore, [Director, Enterprise Architecture, Information Technology Shared Services, Finance] explained to members of the *Public Accounts Committee* on February 1, 2018:

*“So what happens when we have 365 days of backup? We flip to the first card and we overwrite all of the emails on that card, so in that way we always maintain 365 days or one year of email backup that we can restore back to.”* [\[Tab 6; p. 100\]](#).

**(d) “Normal” procedure for handling the Network Drive files and email accounts**

With the clarification offered in the preceding subheadings (a, b, c,) it becomes clear that the only standardized elements with the policy and procedures regarding the management, retention and/or disposition of electronic accounts and files of employees who have left government are the following: (1) the email GroupWise account is “disabled”; and (2) an ITSS *Employee Removal Request Form* is completed giving instructions to ITSS regarding the disposition of the employee's electronic files which are present on both network drives and in the employee's GroupWise email

account; and (3) if the instruction provided regarding the GroupWise email account is to “delete” the files, those files can only be retrieved from back-up tapes for one year. If the instruction is to not delete them, they remain in the disabled account indefinitely and can be viewed and accessed by anyone given proxy access to the account.

**(e) Government's inaccurate narrative regarding “normal” procedure for handling the email accounts of former government employees**

The clarification provided in the preceding subsections of this section of my brief makes it clear that the P.E.I. government's official explanation regarding the missing e-gaming records from the email accounts of three senior bureaucrats heavily involved in e-gaming (Rory Beck; Melissa MacEachern and Chris LeClair) – individuals identified by the Auditor General - was both inaccurate and misleading.

It was repeatedly stated by government officials that the email accounts of those three individuals were disposed of following “normal” procedure, in the very same manner as with the GroupWise accounts of all former government employees....they were “disabled,” then after one year, automatically “overwritten” and deleted.

The most detailed and well-documented version of this narrative came from former Minister of Education Hon. Doug Currie during Question Period in the Legislative Assembly on December 1, 2016, just a few weeks after the Auditor General made her e-gaming report public on October 4, 2016. His explanation was in response to questions by opposition MLAs who were asking why those three email accounts – LeClair's, Beck's and MacEachern's [although it was not known who the three individuals owning the accounts were at that time, the Auditor General stating only that three “senior bureaucrats” had their email accounts deleted in her e-gaming report] - and the e-gaming records contained in those accounts – had been deleted. Minister Currie answered as follows:

*“When an employee leaves the public service there’s a formal questioning. The IT Shared Services disable the email account...Even though the accounts are disabled, following the requests the records are backed up and stored for an additional year. Following that time the records are overwritten. This is a **common practice** that allows for space in the server and means the government is no longer paying license fees for unused accounts. As I stated, **these actions follow a regular process** as employees leave the system. Since 2007, when government implemented a system to track these actions, there have been 2,481 accounts disabled.” (My emphasis) [Tab 7; p. 1969].*

His statement: *“Even though the accounts are disabled, following the requests the records are backed up and stored for an additional year;”* was clearly misleading. As noted previously, the electronic files in “disabled” email accounts remain fully intact indefinitely and are never overwritten automatically, but disappear only after someone orders them deleted and an ITSS technician manually deletes them.

Premier MacLauchlan initially, in a Guardian interview on October 5, 2016, the day after the AG made her e-gaming report public, suggested that the email accounts of the then unnamed senior bureaucrats involved with e-gaming had been deleted by those same three individuals – which was not the case – promising that changes would be made so this would not be possible in the future:

*“That will not happen again,” he said. “That will not be possible for a civil servant at any level who's departing to delete his or her email account” [Tab 8; p. 47].*

However, he later abandoned that explanation and adopted the same narrative presented to the Legislative Assembly by Minister Currie on December 1, 2016. In both his CBC Compass and Guardian 2016 year-end interviews recorded in late December, Premier MacLauchlan stated that the email accounts of those three senior bureaucrats involved in e-gaming were overwritten in accordance with “normal” government policy applying equally to all employees leaving government.

Former Minister Currie's account of what he described as “common practice” and actions that follow a “regular process as employees leave the system” strongly suggested that no one was responsible for the missing e-gaming records of the three senior bureaucrats involved in e-gaming – Beck, LeClair and MacEachern - and that they were simply overwritten in accordance with the normal policies and

procedures associated with the disposition of electronic government documents and email accounts. This was not true. That is not what happened.

Given this inaccurate explanation from then Minister of Education, Hon. Doug Currie - who was also the Minister responsible for the administration of the *Public Archives and Records Office (PARO)* - it is not surprising that the MLAs on the *Public Accounts Committee* were confused about the meaning of the terms “disabled” and “deleted” and the intended meaning of these terms within RIM policy governing the management of records, especially regarding the management of government records in the email accounts of employees who had left government. The following exchange between Hon. Jordan Brown and the Auditor General at a Public Accounts Meeting held on January 18, 2017 is indicative of this confusion:

**Mr. J. Brown:** *I'm happy to have – because this is – I can't for the life of me make these distinctions at this point in time anyway. The day after tomorrow, in my case, my account will be disabled and then it would be slated for deletion in a year? Is that right?*

**Jane MacAdam:** *It depends what management requested. Management could request that your account be deleted or they could request that your account be disabled. It depends what the request is to ITSS.*

**Mr. J. Brown:** *Back to the – ostensibly, too, there were three names that you had mentioned that you didn't have emails for. Do you know or can you tell us: Were the accounts disabled or were they deleted kind of the day after (Indistinct)*

**Jane MacAdam:** *The accounts – we say in the report the accounts were closed or deleted. So we use those terms interchangeably, closed and deleted. In this case, it's not a matter of them being disabled. They were deleted.*

**Mr. J. Brown:** *They weren't there for the year afterwards then? Jane MacAdam: They were deleted.*

**Mr. Myers:** *Thank you.*

**Jane MacAdam:** *They could be recovered. Mr. Myers: (Indistinct) for months.*

**Jane MacAdam:** *They could be recovered for up to a year. [\[Tab 5; p 66-67\]](#)*

The ability to recover documents from GroupWise email accounts for one year was not (as Scott Cudmore explained to members of the *Standing Committee on Public Accounts* on February 1, 2017) a part of the PEI government's "*Record Information Management*" policy. It was, rather, part of ITSS's "disaster data recovery" policy. As Cudmore explained:

*"It was designed exactly for that purpose, that we backup the data in case something happens to that data and we want to return it. So an accidental deletion, for example, we would have a year's backup in order to restore that information back."*

[\[Tab 6: p100\]](#).

Mr. Cudmore was here making the point that any records in email accounts legally required to be retained under provisions of the *Archives and Records Act* should have already been copied and kept secure before instructions were provided to ITSS to delete the files and accounts – backup recovery that was possible for one year following the deletion of accounts was only meant to restore records that had already been "retained" for Record Information Management purposes, but might have been accidentally deleted.

Mr. Cudmore also emphasized that ITSS would not have deleted the electronic government records in the GroupWise accounts and network drives of those three senior bureaucrats if the technician had realized that Mr. Ghiz had not first copied them for safe storage. As Scott Cudmore told members of the *Public Accounts Committee* on February 1, 2017:

*"...the assumption on the part of IT Shared Services at the time was that records had been retained according to records management policy"* [\[Tab 6: p 106\]](#).

There are two operating assumptions at play with this ITSS backup policy: (1) any records remaining in email accounts that were not "retainable" records would not need to be copied and secured elsewhere, and would never need to be replaced from a backup; and (2) any records that were "retainable" under the statutory requirements of the *Archives and Records Act* would have already been copied and kept secure elsewhere by the supervisor/manager who authorized the deletion of the employee's network drive files and email records and account.

Although the primary responsibility for ensuring government records that must, by law, be retained and not deleted resides with the employee's supervisor requesting ITSS services, on ITSS's *LAN Removal Form*, ITSS nonetheless included a clear reminder of this fundamental legal responsibility for the supervisor benefit to ensure emails are not destroyed without first being copied and kept safe:

*“Note: It is the responsibility of the Supervisor to Forward, Print, or Archive GroupWise email before an account is deleted”* [\[Tab 9; p. 149\]](#).

Chris LeClair's and Rory Beck's records were not destroyed in the “normal course of events,” as a result of regular policy and procedure; they were destroyed so they would no longer be accessible and available to the Provincial Archivist, the Auditor General, members of the legislative assembly and the *Standing Committee on Public Accounts*, the media, and members of the general public because they were ordered “deleted” by Robert Ghiz without first being copied and kept secure in accordance with the laws and policies of the provincial government.

**(f) The number of “disabled” accounts vs. the number of “deleted” accounts**

The number of GroupWise email accounts that were “disabled – i.e., email accounts with all emails and attachments still intact and retrievable – in the PEI government's GroupWise email system was, according to what former Doug Currie informed the House on December 1, 2016 (cited previously) from the time that both he and former premier Robert Ghiz were first elected as the government (May 28, 2007) to the day Minister Currie reported that number in the Legislative Assembly (December 1, 2016) was 2,481 email accounts. He noted at the time that it was 2007 that his newly-elected government first started “tracking” the disabling/deletion of accounts and I was able to confirm this fact with Tracy Wood, COO of ITSS in a telephone conversation on August 16, 2018.

If Minister Currie's claim was correct, that means that all of the 2,481 GroupWise email accounts he referenced remain on the system with their emails fully intact, and the only GroupWise accounts that were actually “deleted” during this period of time were the three senior bureaucrats involved in e-gaming. But was his statement accurate?

Although Currie said all email accounts were “disabled,” it's possible he actually meant “deleted” - since he then went on to describe what actually happens when email accounts are “deleted” not “disabled” - namely, that the emails in those accounts are automatically overwritten and lost after one year.

However, it's more likely that he was correct when he said “disabled” - and simply wrong in his description of what happens to disabled email accounts – given that Scott Cudmore (a senior person with ITSS who would know) informed members of the *Public Account Committee* on February 1, 2017 that: “*Currently, we have about 10,000 active users in our email system and we have about 4,000 disabled accounts*” [Tab 6; p. 99] and later, during the same meeting, reiterated that same claim, clarifying that the emails in those 4,000 disabled accounts were still intact and accessible: “*I'd mentioned there were 4,000 disabled accounts so that their emails are still available*” [Tab 6; p.103].

Given the fact that 4,000 disabled email accounts were remaining on the system with emails intact as of February 1, 2017, and according to former Minister Currie there were apparently 2,481 email accounts “disabled” from the time that Robert Ghiz was first elected Premier in May, 2007 to December 1, 2016 when former Minister Doug Currie provided that number to the Legislative Assembly, it seems obvious that the vast majority of the email accounts of former employees were not “deleted” but simply “disabled,” with proxy access being granted to other employees – presumably employees who assumed the positions which were being vacated. Such would especially be the case for employees who were senior-level bureaucrats working on multiple, important, and sensitive files with records still classified as “active,” - as were the three individuals who had their government records deleted, two of whom by Robert Ghiz - as Mr. Cudmore told members of the public account committee:

*“One of the reasons why a department would want to have that proxy access is in a transition of responsibilities, for example, where emails were used to conduct business. If somebody leaves, somebody else comes along and takes their place, replaces them, it's often necessary for that individual who's replacing the person to have that access to those emails. When an email account is disabled, it can always be re-enabled and restored. In other words, disabling the account does not remove any email.”* [Tab 6; p 98].

I have recently submitted an *Access to Information Request* for a copy of the *ITSS Employee Removal Form* for every PEI government employees who had their email accounts either “disabled” or “deleted” (the forms will disclose that information) from the day Robert Ghiz became premier of P.E.I. to December 31, 2011.

Given what former minister Doug Currie and Scott Cudmore have both stated regarding the number of email accounts that were “disabled,” but not deleted, I expect those forms over a consecutive period of 4 1/2 years will confirm that the “normal” process for nearly all employees leaving government is to simply “disable” the accounts with proxy access being granted to someone else giving that person access to the account and emails; presumably, the normal and typical person getting proxy access being the person replacing the employee in that government position.

Given the fact that Robert Ghiz ordered his former Deputy and Chief-of-Staff, Chris LeClair's network files and email account and files deleted just eight (8) days after Allan Campbell replaced him as Chief-of-Staff and Deputy Minister to the Premier – immediately following the provincial election in October, 2011 – there were undoubtedly multiple “active” files with many important emails - including e-gaming emails and attached documents - in Chris LeClair's account. However, because they were destroyed, it is impossible to know exactly what documents, or how many, were actually deleted.

What is known for certain however – according to the Auditor General - is that there were e-gaming records in Chris LeClair's email account that should have been retained, but were ordered deleted by Robert Ghiz on October 19, 2011:

*7.11 We noted instances where the e-mail accounts of senior government officials, who were key participants in the E-gaming initiative and/or the establishment of a financial services platform, were removed after leaving government. We requested information and were not provided with any e-mail or other records for these individuals. We concluded that government records existed at one time in these e-mail accounts because we received relevant government records from other public bodies and sources external to government that should have been retained in accordance with legislation and policy. [Tab 10; p.41-42. My emphasis].*

Elsewhere, the Auditor General pointed out that e-gaming business was also conducted using text messaging and PINS [peer-to-peer messaging using Blackberry devices with Personal Identification Numbers] – and that she specifically requested those government records as well – but was provided none:

*“We requested from government all relevant texts including instant messages and PINS. There were none provided by government even though we were advised, and have evidence that some government business relevant to these files was conducted through these forms of communication.” [Tab 10; p. 48].*

The P.E.I. government has a remarkably simple and straightforward policy governing the management of government records. That policy finds statutory authority and precise expression in the *Archives and Records Act*, and is expressed in plain-English language in various policy documents and instruments to ensure that all government employees are made aware of the legal and administrative requirements of the law regarding the P.E.I. government's *Record Information Management* policy: there are clear guidelines and various “reminders of duties and responsibilities” - including documents which must be “signed” confirming knowledge of government policy regarding record management as they relate to specific contexts and situations, and various “forms” which must be completed and signed to transfer and/or remove or destroy records. As well, PEI's *Public Archives and Records Office* (PARO) provides information, training and administrative support to various government personnel at the departmental level charged with specific record management responsibilities. Where the intention to comply with the policy objectives and legal requirements of PEI's record management system exists, it would not be difficult for any government employee, especially senior-level public servants to comply with RIM responsibilities and objectives (e.g. PARO & ITSS).

Before examining the legal and policy aspects of record management as they pertain to the particular “Informations” I have laid against Robert Ghiz, it is instructive to first situate those two events within the standard administrative “timeline” governing the classification of government records.

**(g) “Active” - “semi-active” - and “inactive” government records**

It is helpful to situate the deletion of Chris LeClair's and Rory Beck's government records within the timelines of both (1) the classification system of the PEI government's record management system and (2) the e-gaming project. Doing so helps to appreciate the serious nature of the orders and/or authorizations given by Ghiz to delete all of Chris LeClair's and Rory Beck's electronic e-gaming records.

The *Public Archives and Records Office* (PARO) has developed a manual to assist government departments and agencies to manage government records and complete the mandatory retention schedules as required by the *Archives and Records Act*:

*“The Classification Plan and Retention Schedule (CPRS) is a standard to fit record keeping requirements for both government departments and other public bodies such as agencies, board and commissions, which fall under the mandate of the Archives & Records Act.”*

[\[Tab 11; p. 207\]](#).

Within that standard, a key distinction has been made between “active;” “semi-active;” and “inactive” records, with all government records having a designated period of time associated with each “status,” which is contingent upon various factors, including the nature of the document.

**“Active” records** are to be retained in the “...*active office equipment and space of the user*” for a designated period of time, depending on the nature of the documents. In the case of “project files,” documents are to be classified as “active” “...*until the project is completed*” [\[Tab 11; p. 213\]](#).

**“Semi-Active” records** refer to records which are not required constantly for current use and which need not be maintained in the office space, storage areas or equipment of the user. These records still have value for the administrative and operational functions of the department or agency, but should be stored in inexpensive, off-site storage at the *Provincial Records Centre* until no longer needed.” [\[Tab 11\]](#). The retention periods range from 0 – 6 years, referring to the number of years the record will be housed at the Records Centre.

**“Inactive” records** are records that are ready for final disposition, and will either be destroyed or archived – as will be explained further in the following section of this brief, those decisions are made by – and only by - the *Provincial Archivist*.

As noted earlier, Chris LeClair was replaced by Allan Campbell on October 11, 2011. According to the Auditor General, the “e-gaming project” began in October, 2008 and formally ended on February 24, 2012 when government informed attendees at a meeting between government officials, Mi'kmaq Confederacy of PEI (MCPEI) and members of McInnis Cooper of it's decision to end the e-gaming project. [\[Tab 10; p.13\]](#).

This means that the e-gaming project was still active when Robert Ghiz instructed ITSS to delete LeClair's email account, along with all the government documents in the account, as well as all the electronic records in his network drives, despite those government records still being classified as “active” with an expectation they be kept in the “active office equipment” and physical office space of the Chief-of-Staff, regardless of who that person was.

The Auditor General outlines the key events and timeline with the e-gaming initiative in Figure 3.1, found on page 13 of her e-gaming report. [\[Tab 10; p. 13\]](#). As can be seen from that chart, the actual “e-gaming” project was “active” from October, 2008 to February 24, 2012 and Ghiz ordered the files deleted on October 19, 2011.

As well, those e-gaming documents should have been retained and moved to the Provincial Records Centre after February 24, 2012 and kept there for the maximum period of time stipulated in the policy governing “semi-active” records (6 yrs), as the Auditor General told members of the *Public Accounts Committee* on February 15, 2017:

*“We were advised for the Premier’s office that they use similar – a same schedule as – the Premier’s office’s use same schedule as for minister’s offices’ records, so ministerial office records. That’s a six year – six years is the retention period for semi-active records.”*

After that six year period ended [February 24, 2018] those e-gaming records would then achieve “inactive” status and would have been transferred to staff at the *Public Archives and Records Office* and disposed of – either by being permanently “deleted” or “archived” indefinitely, depending on the assessment criteria used by PARO to value records and justify their disposition recommendations made to the the Provincial Archivist, on the authority of the *Archives and Records Act*.

## PART III

### PEI Government Law and Policy Governing the Destruction of Government Records

The PEI government has a variety of policy documents and instruments to ensure that all government employees are fully aware of the legal requirement not to damage or destroy government records. These laws and core policy directives and provisions regarding the management of government records have been integrated into other policies and documents, including the PEI government's *Human Resources Policy* and *Information Security Policy*. In this way, government ensures that all employees receive basic information about the importance of *Record Information Management*, and are made aware of their respective roles, duties and responsibilities regarding the management of government records so the legal and administrative requirements for proper record management are both understood and realized.

In this section of my brief I will review the relevant provisions and aspects of these legal and policy documents to demonstrate that Robert Ghiz would have had prior knowledge that he was not authorized to order and/or authorize the destruction of government records; and, in fact, that he would have been aware that he had a designated legal duty as Premier and President of *Executive Council* to ensure that those records be protected and retained.

#### **(a) Record Information Management (RIM): Managing Electronic Mail**

In March, 2007, two months before Robert Ghiz was first elected premier of Prince Edward Island (May, 2007), the *Public Archives and Records Office* of PEI issued a policy document with detailed guidelines and instructions relevant to all PEI government departments and employees regarding the retention and disposition of electronic government records titled "*Record Information Management: Managing Electronic Mail*." [\[Tab 12\]](#).

This document spelled out procedures and protocols to be followed by all government bodies and employees regarding the classification, storage, transfer and disposition of electronic government records. It also identified who was to be designated with the authority, responsibilities and obligations to ensure that government records were properly managed within each government department.

The guidelines in the *RIM: Managing Electronic Emails* policy document relied on – and were explicitly tied to – Treasury Board’s *Recorded Information Management (RIM) Directives*: s. 5.01 – Introduction [Tab 13]; s. 5.02 – Policy Responsibilities [Tab 14]; and s. 5.03 – Core Program Elements [Tab 15]; all of which were themselves based on the statutory provisions of the *Archives and Records Act* [Tab 16].

The “RIM: Managing Electronic Emails” policy document outlined that there were only two “legal” ways in which government records can be destroyed:

*Section 6: “The Archives & Records Act stipulates that records of the provincial government cannot be destroyed or permanently removed from government custody without the development of records retention and disposition schedules or a one-time destruction order, approved in writing by the Public Records Committee.” (Tab 12).*

*“In requiring that records not be destroyed without proper authority, the legislation recognizes that those who work and make decisions in the public interest must be accountable for their actions and decisions. The saving of records is an essential component of accountability.” (Tab 12).*

Regarding the government records Robert Ghiz ordered to be destroyed, no “retention and disposition schedule” was prepared; nor was there a “one-time destruction order, approved in writing by the Public Records Committee.”

#### **(b) Treasury Board’s Recorded Information Management (RIM) Directives**

Treasury Board's policy and procedure on Recorded Information Management (RIM) policy were established by Executive Council on January 20, 1998 via D#1998-33 and were in effect at the time of the incidents related to the two “Informations” I have laid with the P.E.I. provincial court.

In Treasury Board Directive 5.01 [Introduction] we read under s.1(b) that one of the purposes of the PEI

government's recorded information management policy is to:

*(b) [to] ensure that required information is obtained, used and maintained effectively, and [to] ensure timely access to reliable information in active, semi-active and inactive records;*

[\[Tab 13; p. 1\]](#)

Timely access to reliable information in “active, semi-active and inactive records” can obviously not be ensured if government records are deleted and destroyed. Not surprisingly, the next two “purposes” specified in this Treasury Board Directive have to do with ensuring that the unauthorized destruction of government records not occur:

*(c) [to] ensure that records are properly protected, and are not destroyed or removed from the control of the Government of Prince Edward Island unless authorized under the Archives Act;*

*(d) [to] ensure that records with archival value are preserved.*

[\[Tab 13; p. 1\]](#).

In Treasury Board Directive 5.02 [Policy Responsibilities], under section 1 [General Principles], we read:

*Authority is delegated to the [Public Archives Record Office] PARO through the Public Records Committee, which is authorized to control the destruction and disposition of public records.*

[\[Tab 14; p. 1\]](#)

Under section 2 of 5.02, this particular Directive further clarifies that the Public Records Committee is responsible for the review of requests for (i) the review of requests for transfer, destruction and scheduling of recorded information; as well as (ii) the approval or disapproval of requests for transfer, destruction and scheduling of recorded information and stipulates that:

*“An order for the destruction, transfer or scheduling of any public record must be supported by the written recommendation of the Public Records Committee.”*

[\[Tab 14; p. 2\]](#)

Section 2(c)(i) of Directive 5.02 further clarifies that Departments – and both the Premier's office and Executive Council are defined as departments under the *Archives and Records Act* – must ensure that:

*“All public records shall be preserved by the department to which they belong until transferred to the PARO or destroyed in accordance with the Archives Act;”*

[\[Tab 14; p. 2\]](#)

In other words, P.E.I. government policy states unambiguously that no one at the departmental level - including Ministers, Deputy-Ministers and even the Premier - has the authority to destroy public records;

and, in fact, departmental staff have an explicit legal obligation to preserve all government records until such time as they are transferred to the only government division which has the legal authority to destroy public records: the *Public Archives and Records Office*.

In Treasury Board Directive 5.03 [Core Program Elements], departments of the Prince Edward Island Government are instructed to designate one staff person to be responsible for the department's *Recorded Information Management Program* and to serve as a primary contact with the PARO. The specific duties and responsibilities of the *Records Management Liaison Officer* are outlined in the Treasury Board Directive 5.02, under s.2 [Accountability, Responsibility, Authority]:

*(d) Records Management Liaison Officer is one of the officers designated by the department and is responsible for: (i) administration and control of departmental records; (ii) implementation, maintenance and monitoring of recorded information management systems and operations according to Government and departmental policy, standards and guidelines; and, (iii) consultation with PARO regarding records classification systems, off-site storage and retrieval, Records Retention and Disposition Schedules, recorded information management training and other recorded information management guidelines. [Tab 14; p. 3].*

Designates have been identified at two levels: (1) a Management Level designate, who has overall accountability for the department's records; and (2) an Activity Level designate who is responsible for the implementation, maintenance, and administration of the department's recorded information management program. As the Directive goes on to say:

*It is imperative that one person in each department assume responsibility for all recorded information management functions within the department, regardless of type of system (centralized or decentralized) which exists. This person should be designated as the departmental Records Management Liaison Officer (RMLO). [Tab 15; p. 2].*

Section 5(e) of Treasury Board Directive 5.03 stipulates that for departmental records to be “destroyed” according to proper procedure, they must be transferred to PARO accompanied by the proper form, and that form must be signed by the departmental RMLO:

*(e) Departments must complete a "Records Transfer Request" form (Attachment 5.03- III) available from the Public Archives and Records Office when arranging for the scheduled destruction of records directly from the office. This form must be signed by the departmental Records Management Liaison Officer. [Tab 15; p. 4].*

The Records Management Liaison Officer at the time of the incidents at issue in this hearing – 2011 & 2012 – was Rose Long, who is now retired.

I had designated Mrs. Long as a witness for today's hearing, however, she and her husband had previously booked a trip to Ireland and their departure date was yesterday. When Mrs. Long received notice from me concerning the date and time of today's hearing, she called me and we had a long conversation concerning her role – or I should say “lack of a role” - in the management of both Chris LeClair's and Rory Beck's records after they left government. I asked her if she could send me a note confirming what she told me over the phone and she happily agreed to do so. It's short, but of key significance for this hearing, so I'd like to read it in its entirety:

From: **Rose Long** <rmlong4@gmail.com>  
Date: Tue, Aug 14, 2018 at 9:46 AM  
Subject: Re: Letter  
To: Kevin Arsenault <kja321@gmail.com>

Dear Mr. Arsenault,

I appreciate our conversation earlier today and your understanding regarding my inability to attend the hearing as a witness. My husband and I will be in Ireland, and this trip was booked long before I received notice about the date for the hearing.

As I told you on the phone, although I was the Record Management Liaison Officer for Executive Council in 2011-12, and would routinely send documents to the Public Archives and Records Office for destruction or to be archived, I had absolutely no involvement with Rory Beck's files after his untimely passing.

You mentioned that the Auditor General had indicated that Karen Stanley had signed the ITSS Employee Removal form for Rory's email and network records. I have no knowledge of what happened to Rory's files, nor do I know who was responsible for destroying Rory's e-gaming records. No one ever provided me with any records belonging to Rory Beck to classify or transfer anywhere, including to the Public Archives and Records Office.

You also asked me if I had anything to do with Chris LeClair's records after he left government. I have no knowledge of what happened to Chris LeClair's files, nor do I know who was responsible for destroying Chris LeClair's e-gaming records. No one ever provided me with any records belonging to Chris LeClair to classify or transfer anywhere, including to the Public Archives and Records Office.

Sincerely,

Rose Long

### (c) Duties of Department “Heads” under the *Archives and Records Act*

Achieving the purposes and objectives of the PEI government's *Records Information Management (RIM)* policy ascribed to “Departments” contained in the Treasury Board Directives, which I have just discussed, is ultimately the responsibility of the “Head” of the department, as per the definition of “head” found in section 1(c) of the *Archives and Records Act*:

*(c) “head”, in relation to a public body, means (i) the member of the Executive Council who presides over, or is responsible for, the public body by order of the Lieutenant Governor in Council, where the public body is (A) a department, branch or office of the Government, or (B) a body referred to in subclause 1(1)(f)(iii) or (iv) that reports directly to that member of Executive Council respecting its day-to-day operations, [Tab 16; p. 5].*

The role of the head of the department is so central and important to the overall success of the government's Record Information Management policy and program that one key “purpose” stipulated in the Act under s. 3(c) [**Purposes of Act**] is:

*(e) to provide for the duties of the head of a public body with respect to the management and preservation of public records. 2001,c.28,s.3; 2017,c.60,s.3. [Tab 16; p. 7].*

Although the Treasury Board Directives on the P.E.I. Government's RIM policy explain that it is the RMLO who is the person who is designated to “assume responsibility for all recorded information management functions,” within each government department, the *Archives and Record Act* clarifies under s. 9. that it is actually the “head” of the department who ultimately must ensure that records are not destroyed, but rather, transferred to the PARO by the *Record Management Liaison Officer*:

***Public record of archival importance*** : *Notwithstanding any other Act, including the Freedom of Information and Protection of Privacy Act and the Health Information Act, where the Provincial Archivist is of the opinion that a public record in the custody or under the control of a public body is of archival importance, the head of the public body shall ensure that the record is transferred to the care and control of the Provincial Archivist in accordance with the applicable records retention and disposition schedule approved by the Committee. 2001,c.28,s.9; 2017,c.60,s.9. [Tab 16; p. 9. My emphasis].*

Robert Ghiz clearly failed in his duty to “ensure that the record is transferred to the care and control of the Provincial Archivist” when he took it upon himself – without the legal authority to do so – to order the destruction of Chris LeClair's and Rory Beck's government records, without either

notifying or including the one person within executive council with the authority to manage those records, Rose Long.

More precisely, under s. 17 (a) of the Act, the duties of the head of a public body are articulated in a list as follows:

*“The head of a public body shall: (a) ensure that the public records in the custody or under the control of the public body are (i) protected and maintained so that the records are accessible, legible, understandable, usable and transferable throughout the life cycle of the records, from creation to final disposition, (ii) maintained in formats, media and conditions that ensure the retention and preservation of the records, and (iii) retained and disposed of in accordance with the retention and disposition schedules approved by the Committee in respect of the public records;”* [\[Tab 16; p. 11\]](#).

The obligation for the head of the public body to protect and maintain records expressed “positively” in section 17 (e.g., an articulation of what must be done) is also expressed “negatively” in even stronger terms in s. 19.1 of the Act (e.g., in terms ensuring that records are not to be damaged or destroyed):

*“(1) No person shall, with the intent to deprive a public body, the Public Archives and Records Office or the Provincial Archivist of the custody, control or use of, or access to, a public record, (a) destroy or damage a public record; (b) erase or remove information from a public record or make a public record illegible; (c) remove or conceal a public record from the public body or the Provincial Archivist; or (d) direct, counsel or cause any person to do anything mentioned in clause (a), (b) or (c).”* [\[Tab 16; p. 12\]](#).

As already noted, the *Archives and Records Act* does not regard the improper or unauthorized destruction of government records to be a trivial matter, and therefore offers unambiguous clarity regarding the prohibition of unauthorized document destruction:

### **19.1 Prohibition**

*(1) No person shall, with the intent to deprive a public body, the Public Archives and Records Office or the Provincial Archivist of the custody, control or use of, or access to, a public record, (a) destroy or damage a public record; (b) erase or remove information from a public record or make a public record illegible; (c) remove or conceal a public record from the public body or the Provincial Archivist; or (d) direct, counsel or cause any person to do anything mentioned in clause (a), (b) or (c).* [\[Tab 16; p. 12\]](#).

And the punitive consequences for causing the unauthorized destruction of government records now stipulated in the Act are severe, as a result of an amendment made in early 2017, which actually came about as a result of the destruction of the records of the three senior bureaucrats:

***19.1 Offence and penalty***

*(3) A person who contravenes subsection (1) is guilty of an offence and liable on summary conviction to a fine of not more than \$10,000.*

***Discipline, termination***

*(4) In addition to and apart from the sanction provided for in subsection (3), an officer or employee of a public body who contravenes subsection (1) may be subject to disciplinary action, up to and including termination from employment. 2017,c.60,s.18*

What must be here noted is that no head of any government department – including former premier Robert Ghiz – has the authority or prerogative to destroy government records. Conversely, as head of Executive Council, Robert Ghiz had the express legal duty and responsibility to ensure that the RIM policy of the PEI government was being followed by staff within both his own office and Executive Council, given the fact that the premier is the designated “head” of both the Premier's office and Executive Council, as per the definition of “head” within the *Archives and Records Act*.

In addition to the statutory prohibition against destroying public records in the *PEI Archives and Records Act*, the *P.E.I. Freedom of Information and Protection of Privacy (FOIPP) Act* also prohibits the destruction of any government records subject to the *FOIPP Act* under s. 75(e) which reads:

***Offences (1) A person shall not wilfully:***

*(e) destroy any records subject to this Act, or direct another person to do so, with the intent to evade a request for access to the records; [Tab 17; p. 47-48].*

What must be noted here is that the offence of destroying records subject to the FOIPP Act not only covers incidents where an individual destroys records directly, but also incidents where an individual “directs another person to do so.”

Whereas Robert Ghiz directly ordered ITSS to destroy Chris LeClair's government records, with Rory Beck's government records, he authorized and/or directed a subordinate member of Executive Council, Karen Stanley to do as Supervisor and Head (President) of Executive Council.

#### **d) Composition and Duties of the “Public Records Committee”**

Treasury Board Directive 5.01 provides the composition of the Public Records Committee as follows:

*(h) “Public Records Committee” is a Committee consisting of the Provincial Archivist, the Clerk of Executive Council, and representatives from the Department of Community Services and Attorney General, the Department of the Provincial Treasury and the History Department of the University of Prince Edward Island. **This Committee must approve all Records Retention and Disposition Schedules for public records.** [Tab 13; p. 3. My Emphasis].*

In addition, the *Public Archives Act* invests the Public Records Committee with the following duties:

##### **14. Duties of Committee**

*(1) The Committee shall (a) review records retention and disposition schedules submitted to it by a public body; (b) review procedures for the retention, preservation, destruction or alienation of records identified in a records retention and disposition schedule; and (c) approve records retention and disposition schedules. [Tab 16: p. 10].*

The Premier is not a member of the *Public Records Committee*, so Robert Ghiz circumvented both the authority of the designated *Records Management Liaison Officer* for the Premier's Office and Executive Council when he ordered the deletion of the email accounts and e-gaming records of Chris LeClair [Note: the “Division” indicated on the ITSS *Employee Removal Form* for Chris LeClair completed by Robert Ghiz was “Executive Council” - (Tab 18)] and Rory Beck, but also the Public Records Committee, the only government body with the authority to “*approve all Records Retention and Disposition Schedules for public records,*” and make recommendations to the *Provincial Archivist* regarding what records should be archived or destroyed.

### **(e) The proper “chain of command” with the destruction of government records**

The “chain of command” with respect to the manner in which the legal requirements for government record management is protected within the PEI provincial government administrative procedures and process requires a four-step process:

- (1)** All employees are provided both guidelines and technical assistance to ensure that all records they receive and/or generate are retained for eventual disposition by the *Provincial Archivist*;
- (2)** The *Records Management Liaison Officer* in each government body or department liaises both with staff in that government body or department, and the *Public Archives and Records Office (PARO)*. Schedules must be completed for all records by the *Records Management Liaison Officer* – along with a transfer form which the RMLO signs – and forwarded to the PARO;
- (3)** Under the authority of the *Archives and Records Act*, the *Public Records Committee* reviews, approves all schedules received from the RMLOs within government bodies or departments and signs the *Records Retention and Disposition Schedule* as part of the consultative process. The Schedule only comes into effect when approved by the *Public Records Committee*, and finally;
- (4)** Under the authority of the *Archives Act*, the public records designated for retention or disposition are either “archived” or “destroyed” by the *Provincial Archivist*. Again, the *Archives and Records Act* makes it clear that it is the *Provincial Archivist* - and only the *Provincial Archivist* - who has the legal authority to destroy government records; or, for that matter, the power and duty to “decide” whether government records are to be archived or destroyed.

#### **6.2 Destruction of records**

*(2) Subject to the terms and conditions under which records have been acquired or obtained, the Provincial Archivist may destroy or dispose of any record in the Public Archives and Records Office, where the Provincial Archivist considers that it is no longer necessary to retain the record. 2001,c.28,s.6; 2017,c.60,s.5. [Tab 16; p. 8].*

The main reason for carefully laying out the legal and administrative framework in place within the PEI provincial government – which I have just done here – is to show how several options were readily available to Robert Ghiz to comply with the law.

*Treasury Board Directives and Legislation* make it clear that only the *Provincial Archivist* has the legal authority to dispose of government records. This is also spelled out clearly in the PEI government's “*Information Technology Security Handbook and Acceptable Use Policy for Computer Systems*”:

*“Information, including open or public information and assets, must be destroyed in the manner outlined in the Recorded Information Management Policy which can be located at the provincial government Intranet site at <http://iis.peigov/>. For information you should contact your department's Records Management Liaison Officer.”* [Tab 19].

#### **f) Authority for Altering Computer hardware**

In addition to the Records Information Management Policy primarily designed to ensure that retainable records are not destroyed but properly archived for posterity, the PEI government also has strict policies governing how information technology is managed to protect information. Information devices and systems are technically-complex and require expertise to manage properly.

Section 5 of the “Human Resource Policy and Procedures Manual” of the PEI government is titled “Information Technology Security Handbook and Acceptable Use Policy for Computer Systems.” [Tab 19]. Under the subsection titled “Computer Use and Access,” it states:

*Note to Managers/Supervisors \_\_\_\_\_ As a manager/supervisor, you must ensure that computer hardware alterations and configurations are handled by IT staff.*  
[Tab 19].

The blank line is for the Manager/Supervisor signature, to confirm for the record that supervisors have read and understand the policy.

“Wiping” a computer's hard drive of all information definitely qualifies as a “computer hardware alteration” and should only be undertaken by IT staff according to PEI government policy. Although “deleting” all records on a hard drive may seem like a simple and straightforward

procedure, special software is required to ensure that data is removed from electronic storage devices in such a way as to ensure it can not be recovered and/or subsequently retrieved for illicit purposes, or resulting in breaches of personal privacy or governmental confidentiality.

All government employees are required to give written confirmation that they have been provided information concerning the policy pertaining to the security requirements of computer use and data protection and sign the “Acceptable Use Policy” as indicated in sub-section 5.06 (3)(03) of the HR Manual titled “*IT Security and Electronic Devices*”:

*3.03 All employees, or external users, must also read and sign the Acceptable Use Policy at the time they receive access to these resources. This signed document is then given to the Human Resource Manager for their Department (or designate) and kept on file (Attachments 4.03 or 4.04). [Tab 20; p. 1].*

In the memo field at the bottom of the ITTS Employee Removal Form Robert Ghiz completed for Chris LeClair he indicated that Chris LeClair's desktop was already “wiped” thereby suggesting that IT Shared Services did not know it was wiped, and did not do the “wiping”. Not only was this contrary to the P.E.I. government's IT Security Policy regarding the acceptable means for disposing of information and/or information assets, it failed to follow the procedures outlined in the policy document “*Standard Procedures for the Disposal of Government Information on Electronic Media.*” [Tab 31]. Part of the procedure/process to be followed according to that document is that the owner or supervisor authorizing the “wiping” of the computer must sign a waiver/form (which must be witnessed) verifying that retainable records under the P.E.I. government's Record Management laws and policies have been properly copied and retained. That form is the last page of the “*Standard Procedures for the Disposal of Government Information on Electronic Media*” policy document [Tab 32] and was apparently not completed for Chris LeClair's computer, although that will only be confirmed when I receive a formal response to my FOIPP request for that document filed several weeks ago.

## Part IV

### A summary overview of pertinent and undisputed facts

It is my contention that the following facts pertaining to the two “Informations” laid against Robert Ghiz are proven and not in dispute:

#### 1. Chris LeClair

- (a) That at the time of the alleged offence (October 19, 2011) Chris LeClair had left his employ as Deputy Minister and Chief-of-Staff to then premier, Robert Ghiz;
- (b) That Robert Ghiz sent an email message to *Information Technology and Shared Services* (ITSS) at 9:05 am on October 19, 2011 requesting that Chris LeClair's email account be “cancelled”; [Original 'incident activity log' ([Tab 21](#)); a more legible transcript ([Tab 22](#))]
- (c) That Rachel MacAusland, an ITSS employee, called the premier's office at 10:34 am on October 19, 2018 to get a contact to forward a *Local Area Network (LAN) Removal Form* completed, and was told to send it to Virginia Flood. She then sent an email with an *Employee Removal Form* attached and placed the incident on hold [Original 'incident activity log' ([Tab 21](#)); for a more legible transcript ([Tab 23](#))].
- (d) That it explicitly states on the *Local Area Network (LAN) Removal Form* that ““It is the responsibility of the Supervisor to Forward, Print or Archive GroupWise email before an account is deleted” [[Tab 9](#)].
- (e) That Robert Ghiz received an email message from ITSS at 10:36 am on October 19, 2018 indicating that Chris LeClair's email account had been “disabled and hidden,” and that a copy of an *ITSS Employee Removal Request Form* was attached as a pdf file, requesting instructions regarding (1) the removal of LeClair's network login account; (2) the

disposition of the files in his network drives, and (3) the disposition of the emails in his GroupWise account [Original 'incident activity log' ([Tab 21](#)); for a more legible transcript of same ([Tab 24](#))];

- (f) That Robert Ghiz indicated on a signed ITSS *Employee Removal Request Form* dated October 19, 2011, that he wanted Chris LeClair's network files “deleted,” and that he was (by virtue of that decision) declining a service offered by ITSS to move the network files to a secure location [[Tab 18](#)];
- (g) That Robert Ghiz indicated on a signed ITSS *Employee Removal Request Form* dated October 19, 2011 that he wanted Chris LeClair's GroupWise email account “deleted,” and that he was (by virtue of that decision) declining a service offered by ITSS to grant proxy access to LeClair's GroupWise email account and emails to another person or persons [[Tab 18](#)];
- (h) That Robert Ghiz indicated on a signed ITSS *Employee Removal Request Form* dated October 19, 2011 in a “notes or comments” field that: “Chris LeClair's desktop computer already been wiped...all we want removed is his GroupWise account.” [[Tab 18](#)];
- (i) That PEI government “*Information Technology Security Handbook and Acceptable Use Policy*” stipulates that any “alterations” to computers must be undertaken by ITSS.
- (j) That Scott Cudmore told members of the *Public Accounts Committee* at a February 1, 2017 meeting - in response to a question from Hon. Jordan Brown regarding whether Chris LeClair's email account had been “deleted” or “disabled” - that it was his understanding that the request that came through to *IT Shared Services* was to “delete the account” adding that “...*the assumption on the part of IT Shared Services at the time was that account records had been retained according to records management policy.*” [[Tab 6; p 106](#)].

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- (k) That the PEI Auditor General, Jane MacAdam, obtained evidence and confirmed that government records existed at one time in Chris LeClair's email accounts that should have been retained in accordance with the law pertaining to the P.E.I. government's *Record Information Management* policy, because she received relevant government records from other public bodies and sources external to government proving the existence of retainable records in those email accounts.
- (l) That in order to comply with the obligation invested in the “heads” of departments stipulated as a legal “duty” under s.9 of the *Archives and Records Act*, Robert Ghiz was legally required to complete a *“Records Transfer Request”* form when arranging for the scheduled destruction of Chris LeClair's government records, and that to be in compliance with Treasury Board RIM Directive 5.03 the *“Records Transfer Request”* form *“.....must be signed by the departmental Records Management Liaison Officer,”* who was, at the time, Rose Long.
- (m) That the *Record Management Liaison Officer* responsible for managing and transferring Chris LeClair's records at the time, Rose Long, has declared that she has no knowledge of what happened to Chris LeClair's files, and no knowledge of who was responsible for destroying Chris LeClair's e-gaming records; and that no one ever provided her with any records belonging to Chris LeClair to classify or transfer anywhere, including to the *Public Archives and Records Office*, nor did she sign a *“Record Transfer Request”* form for Chris LeClair's records.

## 2. Rory Beck

- (a) That Rory Beck was the Clerk of *Executive Council* under former premier Robert Ghiz until Friday, April 13, 2012.
- (b) That the Auditor General confirmed on January 18, 2017 that Karen Stanley, a director at Executive Council, instructed ITSS – by completing and signing the ITSS *Employee Removal Form* dated September 24, 2012 – to delete Rory Beck's email account; and that the AG did not know whether Ms. Stanley was aware at the time that she completed that form whether Rory Beck's files had been copied and retained in accordance with legislation and policy. [\[Tab 5; p 72\]](#).
- (c) That the PEI Auditor General obtained evidence which confirmed that government records that should have been retained in accordance with legislation and policy existed at one time in Rory Beck's email account, because she received relevant government records from other public bodies and sources external to government proving that claim.
- (d) That in order to comply with the obligation invested in the “heads” of departments as a legal “duty” under s.9 of the *Archives and Records Act*, Robert Ghiz was legally required to complete a "Records Transfer Request" Form when arranging for the scheduled destruction of Rory Beck's records, and that to be in compliance with Treasury Board RIM Directive 5.03 the “*Request Transfer Request*” form “.....must be signed by the departmental Records Management Liaison Officer,” who was, at the time, Rose Long.
- (e) That the *Record Management Liaison Officer* responsible for managing and transferring Rory Beck's records has declared that she has no knowledge of what happened to Rory's files, and no knowledge of who was responsible for destroying Rory's e-gaming records; and that no one ever provided her with any records belonging to Rory Beck to classify or transfer anywhere, including to the Public Archives and Records Office, nor did she sign a “*Record Transfer Request*” form for Chris LeClair's records.

## PART V

### Inferences derived from the facts

If the facts presented in the previous section of this brief (Part IV) remain uncontested and are accepted as true, certain “inferences” can logically be drawn from those facts which together prove beyond a reasonable doubt that Robert Ghiz committed the crime of causing “mischief to data” when he ordered the destruction of retainable government records - something which he did not have the legal authority or right to do.

1. In instructing ITSS to “delete” all electronic files in Chris LeClair's network drives without first copying those files, Robert Ghiz's purpose was to ensure that no records remained on those network drives that were responsive to either a *Freedom of Access to Information and Protection of Privacy Act (FOIPP)* request or a future *Production Order* of a Standing Committee of the PEI Legislature (e.g., Public Accounts);
2. In instructing ITSS to “delete” all electronic files in Chris LeClair's email accounts, without first copying those files, Robert Ghiz's purpose was to ensure that no records remained on those network drives that were responsive to either a *Freedom of Access to Information and Protection of Privacy Act (FOIPP)* request or a future *Production Order* of a Standing Committee of the PEI Legislature (e.g., Public Accounts);
3. Although Karen Stanley, a director of Executive Council, completed the “*Employee Removal Form*” instructing ITSS to delete Rory Beck's GroupWise email account and the electronic files contained therein - without first ensuring that those files were copied – or confirming that those files had already been copied and retained in accordance with the Archives and Records Act - it is not reasonable to assume that she acted without first obtaining either a directive to undertake that action, or the authorization to undertake that

action, from her supervisor, the President of Executive Council and Premier at the time, Robert Ghiz.

4. It is not reasonable to believe that no hard copy records were produced and/or received and stored in the offices of the Chief-of-Staff (Chris LeClair) and the Clerk of Executive Council (Rory Beck) pertaining to the E-gaming project, the Loyalty Card project, and the Financial Transaction Platform initiative which, together, stretched over a time period of many years.
5. It is not reasonable to believe that someone would systematically destroy all hard copy e-gaming documents belonging to Chris LeClair and Rory Beck without first receiving a directive and/or authorization from the person designated as the “head” of both the Premier's office and Executive Council – Robert Ghiz – the only person with the legal duty and responsibility to ensure the protection of government records, and charged with the duty to ensure that all such records are transferred to the *Public Archives and Records Office* for disposition.
6. Given the fact that clear directives forbidding unauthorized government personnel from deleting government records were consistent and ubiquitous in government legislation, policy and operational manuals – including the *FOIPP Act*; the *Archives and Records Act*; Treasury Board Directives; the *Human Resource Policy and Procedures Manual*; the *Classification Plan and Retention Schedules for Administrative Records Manual*; and various other RIM policy documents including “*Managing Electronic Documents*,” it is not reasonable to believe that Robert Ghiz did not know he was acting with mischievous intent when he ordered the deletion of all the files on Chris LeClair's Network Drives and GroupWise email accounts without first copying those files. Given his many years in government as both Leader of the Opposition and Premier of PEI, Robert Ghiz would have known that his indiscriminate elimination of all of the government records of his

Chief-of-Staff was both forbidden and unlawful. Such would also be true for the deletion of Rory Beck's government documents.

7. If the inferred claims in the preceding (1- 6) are accepted to be reasonable conclusions that follow logically from the facts related to this matter, then the following claims must also be accepted as reasonable and true:
- (a) Robert Ghiz knew he was not authorized to destroy government records – especially government records with “active” and/or “semi-active” status.
  - (b) Robert Ghiz destroyed government records indiscriminately, employing a “scorched earth” strategy requiring multiple acts, each using separate and deliberate means: e.g., a form with specific instructions had to be completed for GroupWise email accounts for Chris LeClair; directives and authorization had to be provided to Karen Stanley to eliminate Rory Beck's electronic files; directives and/or personal actions had to be given or undertaken to shred – or otherwise dispose of – hard copy government records belonging to both Chris LeClair and Rory Beck; etc. The complexity involved with ensuring no e-gaming records remained – for both Chris LeClair and Rory Beck – of any type, in any format, on any device, or in any filing cabinet or other storage facility, demonstrates a conscious, deliberate effort involving careful and sustained strategic planning and clear intent to destroy all e-gaming records for the sole purpose that those records would not be seen or otherwise be available to other people who had a legal right to access those records as per provisions of the *Archives and Records Act* and *FOIPP Act*.
  - (c) Robert Ghiz knowingly broke the law by ordering the destruction of government records without the legal authorization to do so, and had an explicit legal duty to ensure those records were protected.

- (d) Robert Ghiz's long career as the Premier of PEI, and before that, the Leader of the Official Opposition, along with the many public statements he made over the years demonstrating both a sophisticated knowledge of, and stated commitment to, government accountability and open, honest and transparent governance clearly demonstrate a refined moral and legal awareness that the destruction of government records was not only contrary to several provincial statutory authorities and a consistent government policy widely entrenched throughout government in both policies, procedures, and programs, it (1) represented a deliberate interference with the proper functioning of parliamentary democracy by denying legislative committees access to information which they have a right to have, and (2) represented a betrayal of duty by depriving Islanders access to information which they are entitled to have through legislation. Denying Islanders access to information by destroying records subverts the fundamental principles of open governance, accountability and the values of honesty and trust, and seriously weakens our cherished democratic system of governance.

## Part VI

### Possible Motives for Destroying Government E-gaming Records

In light of a comprehensive overview of all the legislative, policy and administrative “checks and balances” that were in place at the time that Robert Ghiz ordered and/or authorized Chris LeClair's and Rory Beck's e-gaming records destroyed, it becomes clear that a significant degree of premeditated planning was required for Ghiz to effect the destruction of those government records, while at the same time circumventing the elaborate administrative and legal framework in place to prevent unauthorized destruction of government records.

I believe the undisputed “facts” listed in Section IV of this brief - based primarily on circumstantial, but incontrovertible, documentary evidence - establishes solid grounds to infer from those facts that Robert Ghiz's decisions and acts ordering and/or authorizing the destruction of government records were carried out with mischievous intent.

Assessing or drawing conclusions about a person's “intent” is a tricky business, given that it is usually not possible to prove intent in the same way that you can prove that a person is, for example “alive” - by drawing attention to facts that he or she is breathing, talking and walking around. To prove that there is mischievous intent to destroy data requires a discussion of a “motive” for doing so and a broad understanding of the context within which the destruction of documents occurred, along with an appreciation of the information on the documents destroyed.

If the incidents in question concerned the destruction of records that had no real importance – e.g., the records were a bunch of used colouring books – a person could, on the basis of what I have already provided in this brief, prove that laws were broken, policies were ignored, etc., but that no mischievous intent existed - to suggest that destroying a bunch of used colouring books of no value constituted a “crime” would be a ridiculous allegation.

There is, however, a substantial body of information and evidence demonstrating that it is entirely likely that Robert Ghiz did not want others to access and scrutinize government records pertaining to the failed e-gaming project and that he had motive to destroy the records of key senior-level people involved in the file to prevent such access from happening. Although it is obviously impossible to draw conclusions with certainty regarding what the motive (or motives) may have been, it is nonetheless important to review evidence that a number of inter-related, possible motives exist.

**(a) Chris LeClair's incidents of “Conflict of Interest” and “Insider Trading” with e-gaming**

In the PEI Auditor General's report into e-gaming she stated: “*We noted apparent conflict of interest with two senior executives involved with these files, a former Chief-of-Staff and a former Deputy Minister*” [Tab 10; p. 3]. The AG subsequently noted that it was Chris LeClair who had introduced *Capital Market Technologies* (CMT) and Simplex to the *E-gaming Working Group* (EWG) in May, 2011. [Tab 10; p. 13], which eventually lead to the signing of a *Memorandum of Understanding* (MOU) which, in turn, subsequently led to a \$50 million civil litigation by CMT against 16 defendants, including Chris LeClair and Robert Ghiz.

There are serious allegations of malfeasance involving both these individuals [LeClair and Ghiz] in this legal action, and although nothing has yet been proven in court, the fact that a large body of documentation relevant to this matter was destroyed by Robert Ghiz, a defendant in this action, is of considerable concern. Inferences are being drawn by the plaintiffs related to the “spoliation of records” by Ghiz, for both Chris LeClair's and Rory Beck's destroyed e-gaming records (see subsection “c” below).

In addition to the “inferences” drawn by the plaintiffs concerning possible motives for Ghiz destroying LeClair's and Beck's records, there are also a number of “facts' suggesting Chris LeClair not only engaged in various e-gaming activities that put him in a “conflict of interest” situation, but that he also, with his wife, engaged in “insider trading” as a result of an investment he and his wife made based on inside information LeClair had about an e-gaming related company. There were also other possible incidents of impropriety and possible conflicts of interest with Chris

LeClair; however, because LeClair's records were destroyed by Robert Ghiz, all we have at present are a lot of unanswered questions.

For example, the Auditor General disclosed that when Chris LeClair travelled to England for an e-gaming conference with the former Minister of Finance (Wes Sheridan), although she was able to report the travel costs for the Minister, she was unable to report the travel costs for Mr. LeClair because those records had been destroyed, despite a P.E.I. government policy requirement that those costs be both retained and disclosed to the public. [\[Tab 10; p..25\]](#). Did Mr. LeClair incur expenses on that trip that were unauthorized, inappropriate or excessive? Possibly, but because those records were destroyed it is impossible to know.

However, the AG did find evidence that LeClair clearly put himself in an “apparent” conflict of interest [it's baffling to me why the AG used the qualifier “apparent” in describing this incident, since the evidence demonstrates a *bona fide* case of “conflict of interest”]. The AG begins by clarifying what the PEI government *Conflict of Interest* policy entailed [there was no conflict of interest “legislation” at the time]:

*“Section 9 of the Conflict of Interest Policy in place at the time, which applied to Deputy Heads [Chris LeClair], outlines the concept of preferential treatment. Specifically, it states that 'employees must not accord preferential treatment in relation to any official matter to family members, friends, other persons or organizations in which the employee, family members or friends have a financial or other interest.' [\[Tab 10; p. 37\]](#).”*

Chris LeClair's wife was one of an unknown number of Islanders who bought shares in a company called Rev Tech, an e-gaming-related company. Although LeClair's wife's signature was on the document, LeClair later confirmed to the Globe and Mail that it was a joint endeavour. The AG noted that the company, Rev Tech, was a shell company that was traded on an 'over-the-counter' exchange and “would not be known by the average investor” [\[Tab 10; p. 37\]](#).

After a careful review of this matter of Chris LeClair and his wife purchasing Rev Tech shares, it's hard not to conclude that LeClair not only acted from a position of “conflict of interest,” but that he was also guilty of “insider trading”. Yet, this very serious matter has never been fully investigated by the Auditor General, nor has it led to any action being taken against Chris LeClair by the *P.E.I. Securities*

*Commission.* In reviewing this evidence in more detail, let's start with what the AG stated in section 6.14 of her e-gaming report:

*“In early 2011, a local business owner [Jenkins] introduced the former Chief of Staff [LeClair] to CMT’s Vice President of Business Development, and the CEO of Simplex. These companies were pursuing the development of a financial services platform in PEI and began working with the former Chief of Staff [LeClair] to market PEI to prospective companies.”* [Tab 10; p. 36].

It is clear from what the AG reported in s. 6.15 of her e-gaming report that, as Chief-of-Staff to Premier Ghiz, Chris LeClair had non-public and uncommon knowledge of these companies.

*“In May 2011, the former Chief of Staff and these individuals presented the opportunity of marrying the two projects (E-gaming and the financial services platform) to the E-gaming working group. Simplex, CMT’s Technology partner was then engaged by the local law firm to prepare a report on how the platform would work for E-gaming and the technical requirements it would need to operate.”* [Tab 10; p. 36].

It is also clear that - contrary to the Government public position in the Legislative Assembly and the media - it was LeClair who was the “lead” for recruiting e-gaming companies to PEI, and that the government was fully aware of these companies since at least early 2011:

*“6.17 “Some convertible debentures were being sold directly by the target company, Rev Tech. We were unable to substantiate Rev Tech’s investor list, but we did confirm that in the spring of 2011, the former Chief of Staff’s spouse purchased \$1,500 of convertible debentures in Rev Tech. Rev Tech was a shell company that was traded on the Over-the – Counter exchange and would not be known by the average investor.”* [Tab 10; p. 37].

LeClair later confirmed in an email to the *Globe and Mail* that he was aware of this investment and stated that “they” [both he and his wife] had made the investment together....

*“Because we heard it was a company that could be used for a variety of purposes, including financial services.”* [Tab 25].

The intent underlying LeClair and his wife's purchasing these shares was clearly to “profit from inside information,” which is the very definition of “insider trading” as spelled out in the *PEI Securities Act* [See s. 119 “Liabilities for Insider Trading,” and s.12. “Special relationship with reporting issuer.”]. Despite the revelation of this particular incident of “insider trading” by Chris LeClair - as mentioned earlier - no action has ever been taken against LeClair, nor has the *Superintendent of Securities* for P.E.I.,

the Auditor General, nor – to my knowledge – anyone else, ever requested that the shareholder list of Rev Tech be produced to determine who else may have invested money in this company, or to determine if there may have been other individuals who did so on the basis of inside information. Such an investigation should still be undertaken, especially given the fact that Robert Ghiz has destroyed Chris LeClair's government records which may have had additional information related to this matter.

LeClair's emails – and possibly other documents in his network drives and/or computer desktop – may have revealed other investors who also acted on inside information. They may have also have shed light on what other companies he and his family, or other close friends and colleagues, possibly also Robert Ghiz, were possibly involved in other “conflicts of interest” and/or incidents of “insider trading.”

*"A week after the premier's gala, Rev Tech's lawyer, Colin James, received a fax from the chief of staff's wife, Christine DaPrat. She wanted to make a \$1,500 investment in Rev Tech. This document, which was obtained by The Globe, was sent to Mr. LeClair and Ms. DaPrat for comment." [Tab 25].*

In an e-mail response to the Globe, Chris LeClair admitted that he and his wife made the investment in Rev Tech *"...because we heard it was a company that could be used for a variety of purposes, including financial services,"* adding that. *"...it was a small sum of money that we invested into a debenture, perhaps mistakenly on our part, without a lot of due diligence. ... However, in the event that any investment in any company ever posed a potential conflict of interest to me, we would have forfeited any potential benefit." [Tab 25].*

A “potential” conflict of interest? How does a person with insider information on a secret government project file involving a company not known to the public, who then uses that preferential knowledge to purchase shares in that obscure company, not recognize that a serious “conflict of interest” already exists? When asked by the Globe and Mail reporter if he had ever worked on a file before that intersected with his private life, LeClair said, *"There were no files that I can think of, but in a small place it is always a consideration."*

**(b) Destruction of E-gaming records to “cover-up” the cover-up**

When Robert Ghiz ordered the destruction of the government records of Chris LeClair and Rory Beck, there was only a handful of people who even knew about the e-gaming initiative. A well-orchestrated effort had been employed to keep the project secret, so it is reasonable to believe that when Ghiz made those decisions he rationalized what he did as simply being part of the existing strategy to keep the project “secretive”.

Despite a significant investment of time and effort in e-gaming by the former Minister of Finance – Wes Sheridan – who, according to the Auditor General, was the lead government person on the e-gaming file, attended 100 meetings and had over 140 contacts on the file. [\[Tab 10; p.. 16\]](#). Yet, Sheridan and Ghiz kept the entire e-gaming strategy a government secret, never once mentioning it in the Legislative Assembly, despite it being at the centre of the P.E.I. government's gaming strategy since October, 2008.

In fact, the former Minister of Finance repeatedly spoke about the PEI government's new “gaming strategy” introduced in the fall of 2008 – the very same time as e-gaming project began – without ever mentioning e-gaming.

*For the first time in history, in the fall of 2008, this administration brought forward a responsible gaming strategy for Prince Edward Island. Never before - 11 straight years of willy-nilly, doing whatever they wanted with regards to gaming on Prince Edward Island. In 2008 we brought forward a number of things that we were going to do for Islanders and gaming. [\[Tab 26; p.. 1296\]](#).*

And many deliberate well-calculated decisions were taken to ensure that all e-gaming activities were completely secretive – Wes Sheridan was the only person from government on the 5-member E-gaming Working Group – which began meeting regularly in February 2010.

Mr. Sheridan was also the Chair of the PEI Lotteries Commission at the time, and although he arranged to have some e-gaming monies flow through the Lotteries Commission, there was,

according to the Auditor General, no mention of e-gaming in the PEI Lotteries Commission minutes. [\[Tab 10; p. 14\]](#).

And the Ghiz government amended the Lotteries Act (effective May 10, 2010) to remove the Provincial Treasurer as the person responsible for payments and advances to the Lotteries Commission, replacing him with Mr. Sheridan – then Minister of Finance – who assumed the power and responsibility of making payments and advances to the Commission. [\[Tab 27\]](#).

And, as is noted in more detail later in this brief, the \$950,000 loan to the Mi'kmaq Confederacy of P.E.I. that was written-off as a complete loss had been reduced from \$1.2 million so as not to have to seek Cabinet approval to avoid generating a public document that would expose the e-gaming initiative to the media and general public, and further, had been secured only with a letter from Mr. Sheridan, which was in direct contravention of both Treasury Board policy and the *Financial Administration Act*.

At every possible turn, deliberate and premeditated decisions and actions were taken to keep the e-gaming file completely secretive – even from members of the official opposition, who have a legislative duty to hold the government to account in its dealings.

Given the secretive agenda that prevailed throughout the time period in question – leading up to the dates when both Chris LeClair's and Rory Beck's documents were ordered “destroyed” - it seems clear that the simple realization by Ghiz that a FOIPP request for “gaming” records (perhaps not even intentionally looking for “e-gaming” records) could potentially compromise the entire strategy to keep the e-gaming project a secret. Contemplating this possibility could possibly have led to a decision that the only protection against something like that happening would be to destroy those records.

It was becoming clear by October 19, 2011 that the e-gaming project was doomed to fail. Plan “A” to enlist support from other provinces was abandoned just weeks later, and a Plan “B” attempt to

have the Mi'kmaq Confederacy house the e-gaming project was abandoned shortly thereafter in February, 2012.

The fact that Chris LeClair allegedly attempted to undermine the same work he did on e-gaming while Chief-of-Staff immediately after leaving government (when, with no “cooling off” period whatsoever, he began working for McInnis Cooper as a consultant on the same file) may have contributed additional motive for eliminating his e-gaming records, as is conjectured by the Plaintiffs in the CMT civil litigation currently underway in the P.E.I. Supreme Court of P.E.I. as discussed in the following subsection.

**(c) Inferred motives for document destruction by Robert Ghiz in CMT litigation**

Capital Markets Technologies Inc. (CMT) is presently engaged in a civil litigation action seeking damages it alleges resulted from a breach of the terms of an MOU it had with the PEI government. The merits of CMT’s allegations have yet to be tested in court, although the judge recently ruled in favour of a Motion filed by CMT to add additional names to the case, largely based on revelations from the P.E.I. Auditor General’s report on e-gaming. There are now 16 named defendants in the action, including both Chris LeClair and Robert Ghiz.

The Plaintiff’s Responding Motion contains information based on documents submitted as evidence relating to the destruction of e-gaming records which is of interest and relevance to the two “Informations” I have laid against Robert Ghiz; in particular, how the allegations and inferences drawn by the Plaintiffs suggest a motive for the destruction or “spoliation” of e-gaming records.

If the allegations outlined in this motion are eventually proven in court, it will be easy to see how mischievous intent may have fuelled Ghiz’s decisions to order the destruction of e-gaming records.

I have taken a verbatim section of the Plaintiff's Responding Motion below ([Tab 28: s. 85-89](#)).

### **85. DESTRUCTION OF EVIDENCE**

**86.** *Spoliation or destruction of evidence is an act of commission conducted for a purpose. The rebuttable presumption of fact is that destroyed evidence would not assist the spoliator and therefore the evidence was destroyed.*

**87.** *In this case the onus of reversing the presumption is on Ghiz and Stewart. All that the plaintiffs can do at this time, since the evidence has been destroyed, is attempt to make logical and reasonable inferences.*

### **88. October 19, 2011 Ghiz Spoliation of LeClair Emails**

***Inference:*** *Ghiz ordered destruction of the LeClair's emails to hide from public view the fact that LeClair after his forced resignation set out to destroy the Financial Services Platform and promote an alternative business service platform designed to enrich Ghiz, Sheridan and LeClair personally.*

***Inference:*** *Ghiz and LeClair never stopped their activities to destroy the Financial Services Platform and promote an alternative business service platform through the service of LeClair as an outside consultant employed by Policy Intel with favoured PEI Government contracts.*

***Inference:*** *LeClair became that principal contact with Newcourt/Newco and Laslop, the proposed replacement for the Simplex Financial Services Platform, and attempted to hide from public view the names of Newcourt/Newco and Laslop by misusing of section 15.(1) of the Freedom of Information and Protection of Privacy Act.*

***Inference:*** *Ghiz and LeClair, knew or should have known from the very beginning, that Sheridan was prepared to issue false statements and Sheridan in order to "win" would attempt to destroy other persons reputations with a series of false statements.*

**89. September 04, 2012 Ghiz Spoliation of Beck Emails**

***Inference:*** Ghiz ordered destruction of the Beck's emails to hide from public view the fact that Beck was involved in the E-gaming initiative (Sheridan initiative) from the very beginning as Clerk of the Executive Council and Secretary to the Cabinet.

***Inference:*** Ghiz ordered destruction of the Beck's emails to hide from public view the fact that Beck favoured the Financial Services Platform and that Beck was involved in the Loyalty Card Program (MacEachern initiative) from the very beginning as Clerk of the Executive Council and Secretary to the Cabinet.

***Inference:*** Ghiz ordered destruction of the Beck's emails to hide from public view the direct involvement of Sheridan, Roach and Paynter in the breach of the MOU when these individuals dealt directly with Newcourt/Newco and Laslop.

## Part VII

### Concluding Comments and Observations

In the previous sections of this brief, I have noted that according to the Auditor General who formally requested the production of e-gaming records from the provincial government [and again, to avoid any confusion the phrase “e-gaming records” throughout this brief was meant to include records pertaining to the *Loyalty Card Program* and the *Financial Transactions Platform* project] and discovered that no e-gaming records of any type were produced for three key individuals: Chris LeClair; Rory Beck; and Melissa MacEachern:

*“We concluded that government records existed at one time in these e-mail accounts because we received relevant government records from other public bodies and sources external to government that should have been retained in accordance with legislation and policy.”* [Tab 10; p. 42].

The Auditor General several times elaborated on the broad, “scorched earth” nature of the destruction of the e-gaming records belonging to these three individuals at Public Accounts:

**Public Accounts Committee Chair:** *Right. I guess I just fail to understand why someone is not being taken to task because all correspondence from these individuals was essentially expunged, it disappeared, whether it was deleted as an email or it was taken out to a shredding machine, that none of these records were available to be given to the Auditor General who is directed by the Premier of Prince Edward Island to do a thorough audit of this file.*

**Jane MacAdam:** *Yeah, it was concerning for sure, and that’s why it’s in the report. We did not get any records for these individuals from the relevant public body. Like I said before, we got the other end of some emails that were given to us from other sources, from other public bodies or sources outside government. [Public Accounts, Feb. 15, 2017, p. 137].*

This strongly suggests that there are also grounds to lay a charge of “Mischief to Data” against Neil Stewart, Deputy Minister of *Innovation and Advanced Learning* at the time (now Deputy Minister of Finance) who, as the Auditor General told members of the *Public Accounts Committee*, is the

person who ordered the destruction of Melissa MacEachern's e-gaming records – or at least the electronic e-gaming records in her GroupWise email account and network drives.

I have also provided information in this brief concerning the destruction of government records on Chris LeClair's desktop computer as Robert Ghiz noted on the ITSS *Employee Removal Form* he completed and sent to ITSS with instructions to have LeClair's Network Files, emails and email account deleted. I have asked the COO of ITSS (Ms. Tracy Wood) if she could provide me with information regarding whether the form to be completed by the person authorizing the wiping of a computer hard drive was completed for Chris LeClair's computer, and if so, by whom; however, she declined to provide that information and suggested I file a FOIPP request for those records, which I have done. Unfortunately, I have not yet received the records from that request.

I have also submitted several other targeted FOIPP requests to ITSS, to the Premier's office, and to Executive Council for additional documentation regarding the missing records of Rory Beck and Chris LeClair, which I have also not yet received.

As well, on August 14, 2018, I filed a formal request with the Commissioner to Access to Information, Karen Rose, asking that she conduct her own investigation into the matter of record destruction by Robert Ghiz [\[Tab 29\]](#).

As previously mentioned, given the fact that Robert Ghiz informed ITSS that Chris LeClair's computer had been “wiped”; and given the fact that the PEI *Information Security Policy* stipulates that alterations to computer hard drives are to be undertaken by IT staff only; and given the fact that no e-gaming records were copied and kept from Chris LeClair's computer – the only logical inference - other than Chris LeClair kept no files whatsoever on his desktop computer – is that government records on his desktop computer were destroyed without legal authorization, constituting another incident of someone causing “mischief to data,” as well as a separate criminal charge of “unauthorized use of a computer,” contrary to s. 342.1 of the Criminal Code of Canada.

I have no direct or circumstantial evidence currently as to who wiped Chris LeClair's computer – or whether Rory Beck's computer was also wiped without records first being copied and retained. The FOIPP requests which I've submitted may provide additional information which could potentially lead to more criminal charges. In a telephone conversation with Tracy Wood, COO for ITSS, and John Brennan [I.T. Infrastructure Operations Manager] (they were on a speaker phone) - it was confirmed by them that all activity on all computers in the possession of the provincial government is logged with ITSS, so it should be possible to discover who altered and/or destroyed records on both Chris LeClair's and Rory Beck's Desktop computers by accessing those records in a FOIPP request.

Similarly, although the Auditor General reported that she received no e-gaming records of any type for Chris LeClair, Rory Beck and Melissa MacEachern – including no hard copy records - she did not report anything about the destruction of hard copy records; or, for that matter, make the claim that anyone destroyed hard copy e-gaming records. The following exchange at the January 18, 2017 Public Accounts Committee confirms this statement [\[Tab 5; p. 71\]](#):

**Mr. Myers:** *But in the case where Rory Beck died, who went in his office and shredded his documents?*

**Jane MacAdam:** *I don't know that there were records destroyed connected with – I don't have evidence that there were hard copy documents destroyed for Rory Beck.*

It is not reasonable to believe that there were no hard copy e-gaming records with Beck, LeClair and MacEachern given the fact that they were key players in a major file that stretched over many years; however, no one has yet disclosed how it came to be that no hard copy e-gaming records exist for these three individuals. Since we know that any hard copy e-gaming records that may have existed with Rory Beck and Chris LeClair were destroyed - but should have been retained – discovering who destroyed these records would likely lead to additional criminal charges being laid against the individual or individuals responsible.

Finally, although much of what I have included in this brief regarding the PEI *Record Information Management (RIM)* laws, policies and procedures is equally relevant to both “Informations” I have

laid with the provincial court, there are a few significant differences which may result in different determinations in this hearing to which I would like to draw your attention.

**(a) Information re: destruction of Chris LeClair's documents**

I believe the facts presented in this pre-enquete brief prove the allegation that Robert Ghiz committed “mischief” to data when he ordered the destruction of all Chris LeClair's e-gaming records, both those in his GroupWise email account, and those in his network drives on the Local Area Network (LAN).

It is also probable that Robert Ghiz ordered the destruction of Chris LeClair's hard-copy e-gaming records, given the Auditor General's claim that she received no e-gaming records of any kind, in any format, including hard copy records; however, given that I have no direct or circumstantial evidence directly tying Robert Ghiz to the destruction of hard copy e-gaming records, I am not alleging that he destroyed these records in the “Information” laid related to Chris LeClair's government records, but only that he failed in his legal duty as “head” of his department to ensure their protection.

I have included a discussion of the destruction of hard copy e-gaming documents in my presentation this morning to highlight the fact that there was clearly a “scorched earth” strategy employed to destroy Chris LeClair's e-gaming documents.

It is also clear that Robert Ghiz was at least “aware” that Chris LeClair's desktop computer was “wiped”; and as I have previously explained, there is an established procedure in place at ITSS requiring the person authorizing the wiping of computer hard drives to first sign a declaration that all records legally required to be retained were copied. Questions surrounding this incident remain unanswered; but despite not being able to answer these key question, the wiping of Chris LeClair's computer remains a serious matter.

Logically, there are legal problems regardless of what happened: (1) if someone signed the declaration affirming that records that were legally required to be retained were copied before the desktop computer was wiped, those copied records must have subsequently been destroyed, since the Auditor General was told there were no records from Chris LeClair; (2) if someone signed the declaration affirming that records legally required to be retained were copied but did not, in fact, copy the records, the signed and witnessed declaration was fraudulent; (3) if the declaration was not signed and witnessed [something presumably required before an ITSS technician would “wipe” a computer] and the computer was wiped nonetheless, then government's own policy was breached either by an ITSS technician, or, if the computer was wiped by a non-ITSS staff person, some other individual not authorized to wipe computers as per government policy. Again, given that Robert Ghiz informed ITSS staff that the desktop was wiped, Robert Ghiz obviously has additional information regarding this important event.

To sum up: for the purposes of this Pre-Enquete, and the particular charge I have laid in the “Information” involving the destruction of Chris LeClair's e-gaming documents by Robert Ghiz, I am only formally alleging that Robert Ghiz *committed mischief in relation to data by wilfully without legal justification or excuse and without colour of right, destroying data to wit, **emails, email attachments, and [the] email account** of his Chief-of-Staff, Chris LeClair, contrary to s. 430(5)(a) of the Criminal Code of Canada.*

**(b) Information re: destruction of Rory Beck's documents**

The significant difference between the two “Informations” I have laid against Robert Ghiz is that in Chris LeClair's case, Mr. Ghiz completed the form instructing ITSS to delete all the electronic records in both his network drives and GroupWise email account.

With Rory Beck, initially a “proxy” was established (Karen Stanley) and it was only some months after his death that an ITSS form instructing ITSS to delete all the electronic records in both the network drives and GroupWise email account was completed. The person who signed that form was Karen Stanley; however, as I have argued, it is not reasonable to assume that she would have

made the decision to destroy all Rory Beck's electronic files without first receiving a directive and/or authorization from her superior, Robert Ghiz, the “head” and president of Executive Council at the time.

If Karen Stanley acted on her own and did not either act in response to a directive from Robert Ghiz or seek authorization from Robert Ghiz to complete the form instructing ITSS to destroy Rory Beck's electronic files without first copying them to ensure their retention in compliance with government law and policy, then Karen Stanley committed the crime of causing “mischief to data”. Given that either Robert Ghiz or Karen Stanley committed this crime, I believe it is likely that of the two possibilities the most likely to be the case is that Robert Ghiz authorized Ms. Stanley to instruct ITSS to destroy Rory Beck's electronic government records and process should therefore also be issued for this Information. If it is later determined that Robert Ghiz did not authorize the destruction of Rory Beck's government records, this particular charge can be withdrawn at that time.

### **(c) Final Thoughts**

This brief has provided a considerable amount of information concerning the laws, policies and procedures pertaining to the management of records within the PEI government. I felt this was necessary, given the widely disseminated misinformation by government regarding these same matters, both within the legislative assembly as recorded in Hansard and through the media. It is both curious and perplexing that despite a dedicated interest in discovering who destroyed the e-gaming records of the three individuals identified by the Auditor General – when it was first reported to the *Public Accounts Committee* by the AG on January 18, 2017 neither the Guardian, Journal-Pioneer nor CBC reported that information. And the Guardian declined to print a Guest Opinion (two separate versions at two separate times actually), although the Eastern Graphic did print that article [\[Tab 30\]](#).

As explained in previous sections of this brief, there was not only a false narrative presented by government which attempted to dismiss concerns about the deletion of government e-gaming

records with erroneous claims that those records had been “automatically” disposed of in accordance with normal procedures which applied equally to all employees leaving government; there was also a deliberate effort to suggest that the basis for many of the concerns raised by the Auditor General resulted from inadequate policy and procedures, which government has since committed itself to correcting. This too was – as this brief hopefully shows – misleading: the RIM laws, policies and procedures in place at the time of the incidents at issue in this matter were comprehensive, effective, clear and unambiguous.

The respective duties, obligations and authorizations regarding the management of government records, including clarification regarding who had the responsibility and/or authority to take particular actions related to record management, including the destruction of government records, were clearly articulated in numerous ways, and left no confusion, or possibility that orders to indiscriminately destroy all the government records of senior government personnel - in all formats, on all devices, and in all storage locations, could happen accidentally.

The recent precedent established in Ontario with the conviction of former Chief-of-Staff to former premier Dalton McGuinty – i.e., David Livingston - for “attempting to create mischief to data” is instructive for these “Informations.” The sentencing decision by Judge Lipson [\[Tab 31\]](#) has been included as a tabbed document with this brief. There are, however, several notable differences which I believe make the actions of Robert Ghiz to order the destruction of government records a much more serious matter:

(1) As Chief-of-Staff, the court did not find that David Livingston held a “public office” or a “position of public trust”. His position was not under the control of Cabinet, nor was there any legislation creating the position of “chief-of-staff”. Nor was he ever required to take an “oath of office.”

As Premier of P.E.I., Robert Ghiz clearly held “public office” and a “position of public trust” - indeed, the most senior and important position in government. As well, Robert Ghiz swore an oath

to uphold the law on October 10, 2011, a little more than a week later, he signed the order to destroy Chris LeClair's documents which were required by law to be retained.

(2) In the Livingston case in Ontario, the judge referred to the indiscriminate destruction of government records as a “scorched earth” approach. [Decision, para. 176, p. 61]. However, there was no evidence that the destruction of government records extended beyond the wiping of computer hard drives.

It would be more appropriate to refer to the destruction of government records by Robert Ghiz as a “scorched universe” approach given the fact that the evidence clearly demonstrates (especially with Chris LeClair) that he employed a strategy to destroy all e-gaming records with the indiscriminate destruction of records existing in all formats – both electronic and hard copy – in all locations and in all devices, e.g., network drives, desktop computer, GroupWise email account, blackberry device, etc.,

(3) In the Livingston case, the file was properly managed within government with no evidence of other significant improprieties, conflicts of interest, breaches of government policy, non-compliance with provincial laws, etc. The crime was an attempt to destroy a record of the decisions and actions of government on the gas plant file that Livingston didn't want anyone else to see.

In PEI, according to the Auditor General, there were “*numerous examples of non-compliance with legislation, policy and controls...[which] demonstrated a lack of regard for transparency and accountability.*” [Tab 10; p. 1]. Laws were broken on numerous occasions, including the *Financial Administration Act*. Deliberate efforts were made to avoid the creation of public documents, including reducing the amount of a grant application by 1/4 million dollars to bring it below the \$1 million loan approval ceiling of the Island Investment Development Inc.'s (IID) Board of Directors to avoid the need to obtain Cabinet approval (which would have made information about the grant and the secretive e-gaming initiative public) despite the fact that the scope of the work in the application remained the same [Tab 10; p. 20]; and there were many other incidents, including a number of apparent “conflicts of interest”.

In fact, the Auditor General was refused access to countless e-gaming project files and documents because those project files had not even been kept within government, but rather at McInnis Cooper's law firm; and McInnis Cooper lawyers claimed they were protected by solicitor/client privilege although, - as the Auditor General affirmed - the records requested were project management files which were not protected by solicitor/client privilege [Tab 10; p. 15]. Section 3.18 of the AG's report is especially instructive regarding the dedicated and long-standing effort to keep the e-gaming initiative a secret and “outside the regular control framework of government.” [Tab 10; p. 15]:

**3.18** Because of the nature of this arrangement and the funding of the initiative through MCPEI, this significant government project operated outside the regular control framework of government. Government did not have an agreement outlining its access to project information. We could not examine important documentation, including project management information, and information on contracts with external third parties on this initiative. For example, we noted from invoices submitted on claims for the loan that some due diligence was carried out by the local law firm on CMT and Simplex, but we could not determine the extent or the results obtained. We could not confirm with the local law firm whether minutes of the working group were prepared and if so, we could not examine those minutes. All of these factors limited the audit trail for our assignment and resulted in a lack of transparency on this file.

These efforts to deny access to information and prevent transparency on the e-gaming file demonstrate that the decisions Robert Ghiz made to completely erase e-gaming records belonging to two senior government staff heavily involved in the e-gaming file – Chris LeClair and Rory Beck – were completely consistent with the objective demonstrated throughout the active period of the e-gaming, loyalty card and financial transaction platform projects to keep these matters secretive and to deny future access to these matters by parliamentary committees, opposition MLAs, the media, or members of the general public.

In his sentencing of David Livingston, Judge Lipson made the following statement:

*(7) The wiping of the hard drives was not only unauthorized, but undertaken with the intent to destroy retainable records the defendant believed to exist on the hard drives. His purpose was to prevent lawful access to such records in order to thwart the fundamental objectives of both access to information legislation and the legislative committee process. [Tab 31; p. 2].*

The evidence in support of the two “Informations” laid against former Premier Robert Ghiz demonstrates beyond a reasonable doubt that Mr. Ghiz's deletion of government records was also (a) unauthorized; (b) undertaken with the intent to destroy retainable records KNOWN to exist; and - given the complex planning and premeditated nature of the manifold record deletion – far more comprehensive than that of Mr. Livingston, extending to every possible document format, system, and storage device. In light of this evidence, no other logical inference can reasonably be drawn than Robert Ghiz's purpose in ordering and/or authorizing the destruction of Chris LeClair's and Rory Beck's government records was, like Livingston intended “...to prevent lawful access to such records in order to thwart the fundamental objectives of both access to information legislation and the legislative committee process.” Given such evidence, it is my contention that process should be issued in this matter.