

**Toronto  
Port  
Authority**



**Administration  
Portuaire  
de Toronto**

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June 17th, 2009

Councillor  
City of Toronto  
100 Queen Street West  
Toronto ON M5H 2N2

Dear Councillor:

**Re: Toronto Port Authority (“TPA”) and the City of Toronto (the “City”)**

I write to you today regarding the overall relationship between the Toronto Port Authority and the City of Toronto. As an important service provider to the businesses and residents of our community, we are keen to work cooperatively to improve and enhance those services as part of a thriving waterfront and city centre. Notwithstanding this objective, the TPA’s relationship with the City has been strained for many years. In our view, this serves neither the City nor its residents well. I am sure that you will agree that it is time that we collectively move beyond past disputes and do everything we can to put the well-being of our stakeholders first.

The goal of this letter is two-fold. First, the City continues to owe the TPA substantial sums under previously-executed agreements, and despite our best attempts to find a resolution to the matter, we have been unable to do so. Second, it appears that the TPA is overdue in addressing some misperceptions regarding our relationship with the City.

In the case of the outstanding sums and despite our best efforts, the TPA was left with no alternative but to serve the City of Toronto with a Claim for unpaid amounts the City owes the TPA, pursuant to a 2003 Settlement Agreement between the two parties and the Toronto Economic Development Corporation (“TEDCO”).

The TPA wrote to Mayor David Miller on December 24, 2008 to advise that we were nearing the end of the period that the TPA could wait for a voluntary settlement of the outstanding bill. The first phase of this Claim was originally commenced in Ontario Superior Court on December 23, 2008 and the Mayor’s office was notified at the time the Claim was issued.

As you may know, the 2003 Settlement Agreement was entered into to resolve substantial outstanding litigation between the TPA, the City and others with respect to land ownership and related compensation. As has been reported publicly, the Settlement Agreement represented a very substantial compromise of the TPA’s claim associated with the City’s de facto expropriation of 600 acres of TPA land worth in excess of \$1 billion. I am advised that the TPA made that compromise at that time not because it lacked confidence in its claim, but because it considered it in the public interest to establish a basis for an effective working relationship with the City.

In resolution of these issues, the City undertook to make a number of annual and semi-annual operating and capital payments (the "Settlement Payments") to the TPA. Payments were made as agreed from 2003 to 2005. Since January 1, 2006, however, none of these payments required by the City have been made. As such, to the end of 2008, \$10,000,000 in principal and \$746,314 in interest remains unpaid.

Although the TPA Board has authorized the payment of approximately \$5.5 million for payments in lieu of taxes ("PILTs"), these funds have been set-off against the debt the City has refused to pay. Interest has been calculated on the difference between payments required by the City and the PILTs amounts recognized. In 2009, a further \$850,000 in capital payments, plus interest of \$111,071 is outstanding under the Settlement Agreement.

At the time the Settlement Agreement was made, there were outstanding disputes between the TPA and the City with respect to the amounts to be paid by the TPA as PILTs and by the City in respect of Harbour User Fees ("HUFs"), owed to the TPA. The Settlement Agreement contemplated those disputes and provided for their resolution in a manner which did not impede the required Settlement Payments from the City to the TPA. Specifically, it required the City to pay the TPA the Settlement Payments noted above, notwithstanding the specifically contemplated disputes. Although the City is aware of this, payment has still been withheld and it remains unclear why payment has not been made.

With respect to HUFs, the Settlement Agreement required the City to pay all HUFs not in dispute. Notwithstanding that requirement, to date the City has paid nothing at all on account of the \$3,317,474 of HUFs which have been assessed against it since 2000. Further, although the *Canada Marine Act* provides a specific mechanism for the resolution of disputes with respect to the level of fees charged, the City has not engaged that mechanism. In other words, the City has taken no steps to dispute the amount of HUFs it has declined to pay. In the circumstances, the outstanding and unpaid HUFs are owing to the TPA both by virtue of the provisions of the Settlement Agreement and the *Canada Marine Act*. Also outstanding is interest, pursuant to TPA invoices in the amount of \$2,738,078 on that amount.

With respect to PILTs, the *Payments in Lieu of Taxes Act* (the "*PILTs Act*") does not require the TPA to remit any amount of PILTs to the City. The Settlement Agreement provided that the TPA was to remit to the City the PILTs amount that it agreed was owed. We have previously provided the City with particulars of those amounts, and following the execution of the Settlement Agreement certain of those amounts were paid as promised. With the City's refusal to make payments, it no longer made sense for the TPA to continue, given the one-sided nature of the situation. As a result of the City's refusal to honour the substantial monetary obligations noted above, to the end of 2008 the TPA has deducted the \$4,425,347 it otherwise would have paid to the City, from the City's \$16,514,444 indebtedness to TPA.

While the TPA has agreed to remit PILTs to the City, the City challenged the amount owing, seeking advice from the federal Dispute Advisory Panel responsible for this issue. The Panel recommended that the appropriate amount of PILTs to be paid for the period ending December 31, 2008 is \$5,062,943, not the \$35,273,533 sought by the City. Having considered that advice, the TPA has concluded that for the period from 1999 to 2008, inclusive, it is prepared to pay to the City a further \$1,136,260 for a total of \$5,487,858 (\$5,561,607 less \$73,749 paid). The TPA Board of Directors has approved management's recommendation in this regard. This amount has been deducted from the City's outstanding payment obligations described above. The net result is that the City's outstanding obligation to the TPA is \$12,275,079 to May 31, 2009.

Through multiple channels of communication, the City has previously indicated, most recently in correspondence of August 28, 2008 from Aditya Rupsingh, the City's Acting Director of Accounting Services to Alan J. Paul, then Vice-President & CFO for the TPA, that upon a release of the Dispute Advisory Panel's recommendation, City staff would report back to City Council to obtain further direction regarding this matter. Importantly, the City advised that its holdback payments had been "set aside" as per the City's correspondence. In light of the Dispute Advisory Panel's recommendation, the TPA expected the City to pay outstanding amounts owed to the TPA. We instead received Notice of the City's application for a judicial review of the Dispute Advisory Panel (which was later amended to include a judicial review of the decision made by TPA's Board of Directors to pay \$5,561,607).

Despite serving the City today with the Claim, it is the desire of the Toronto Port Authority to meet and we have communicated this to the City. We are ready and willing to work with the City on our many files of mutual interest. We would be pleased to meet with you at a time of your convenience to discuss the details of this situation.

Our goal is not to generate more business for the lawyers or to have a litigious relationship with the City, but the timelines imposed under the rules governing court proceedings have tied our hands. It is only through the will of City Council that this situation can be remedied in the near term.

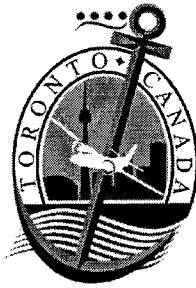
Respectfully,

TORONTO PORT AUTHORITY



Mark McQueen  
Chair

Encl.



## **FACT SHEET**

- In 2003, the Toronto Port Authority (“TPA”) and the City of Toronto (“City”) entered into an agreement that settled the TPA’s suit against the City for wrongful transfer of more than \$1 billion of TPA lands. The TPA settled the case for much less than it expected to recover in the litigation. It did so because it considered it was of paramount importance to establish an effective and appropriate working relationship with the City, and because the Settlement Agreement required the City to repay sufficient resources to the TPA to enable the TPA to discharge its statutory mandate.
- Over the last few years the relationship between the TPA and the City has not reflected the optimism that existed when the Settlement Agreement was signed. Outstanding Capital and Operating Payments and Harbour User Fees owed by the City to the TPA total in the millions of dollars. The TPA has attempted to work with the City to resolve these outstanding issues and remains hopeful that a long-term solution can be reached. This will benefit the City and the TPA, but more importantly the residents of the City of Toronto.
- Among the significant obligations contained in the 2003 Settlement Agreement were the following:
  - a Tripartite Amending Agreement between the TPA, Minister of Transport and City of Toronto for the operation of the Toronto City Centre Airport (“TCCA”), in which the three parties agreed to the construction of a fixed link bridge and related infrastructure and addressed the obligations for funding the TCCA operations;
  - a Ground Lease to enable the TPA to lease to port tenants approximately thirty-five (35) acres of land at the east end of the Ship Channel, for a period of up to forty (40) years;
  - the City’s undertaking to make payments in four (4) installments of \$1 million on account of the outstanding Operating and Capital Payments it owed for the years 1995 to 2002 and a payment of \$1.45 million on account of outstanding capital payments in 2001 and 2002.
  - the City’s further undertaking to make semi-annual Capital Payments of \$1.5 million for six (6) years for the period January 1, 2003 to December 31, 2008 and semi-annual Capital

Payments of \$0.850 million for four (4) years for the period January 1, 2009 to December 31, 2012;

- the City of Toronto's and TEDCO's joint and several obligation to pay Operating Payments of \$3 million every year for ten (10) years commencing January 1, 2003, less any rental revenue received from the leased lands under the Ground Lease;
  - an obligation to pay interest at two (2) percentage points in excess of the prime rate on any outstanding payments under the Settlement Agreement;
  - agreements on the means for resolving then outstanding disputes between the TPA and the City concerning payments in lieu of taxes ("PILTs") to be paid by the TPA and Harbour User Fees ("HUFs") to be paid by the City.
- Pursuant to the *Canada Marine Act*, the TPA has assessed HUFs against the City since 2000. (Please see attached Backgrounder on HUFs). The City had neither paid the HUFs, nor has it taken its complaints with respect to the amount of the HUFs to the agency charged under the *Canada Marine Act* with resolving such issues. The Settlement Agreement provided that the City and the TPA would use their best efforts to resolve the amounts in dispute, and that in the meantime the City would pay the amount of HUFs which it did not dispute.
  - Similarly, the Settlement Agreement provided that the TPA would pay the amount of PILTs which it did not dispute, that the parties would use their best efforts to resolve the disputed amounts, and that in default of an agreement the parties would resort to the available statutory mechanisms for reviewing the issue with a PILTs Dispute Advisory Panel. (Please see attached Backgrounder on PILTs).
  - Notwithstanding the obligations in the Settlement Agreement, in December 2003, led by the new Mayor, City Council resolved that it did not support the construction of a fixed link bridge to the Toronto City Centre Airport and that it would ask the Federal Government and the TPA to amend the Tripartite Agreement to remove the provision for a fixed link bridge to the Airport.
  - The City of Toronto made the semi-annual Capital Payments for the period January 1, 2003 to December 31, 2005. Notwithstanding the obligation in the Settlement Agreement, the City has made none of the required Capital Payments since then. Nor did the City pay the Operating and Capital Payment of \$1 million due in July 2006.
  - In 2005, the TPA remitted a PILT payment of \$73,749, but thereafter, in light of the significant outstanding amounts owed by the City under the Settlement Agreement, ceased making PILTs payments to the City. Since then, the amount of PILTs payments which would have been paid to the City have been used to reduce the amount of the City's outstanding obligations under the Settlement Agreement.

- In December 2005, City Council resolved to withhold the amount claimed by the City as PILTs, to apply to the Federal Dispute Advisory Panel for resolution of the matter, and to hold the balance of all the disputed funds in a reserve account until the Panel ruled on the matter. The Settlement Agreement does not permit the City to withhold Capital Payments or Operating and Capital Payments as a set-off against PILTs.
- In April 2006, the City applied to the PILTs Dispute Advisory Panel for a hearing in order to have the Panel provide advice to the TPA on the values of four (4) test properties, including the TCCA, for purposes of calculating PILTs.
- In February 2008, a hearing was held before the PILTs Dispute Advisory Panel on four (4) test properties, including the Toronto City Centre Airport.
- In August 2008, in response to further communications by the TPA requesting payment, the City advised the TPA in writing that it was withholding “\$10 million” of funds it contractually owed to the TPA and that the funds “[have been] set aside pending resolution of the dispute”. The City letter continued: “As you know, the City is waiting for the decision from the Federal PILTs Dispute Advisory Panel regarding the PILTs issues on the TPA’s major properties.”
- As of December 2008, the City owed the TPA \$10 million towards outstanding Capital Payments and Operating and Capital Payments, \$746,314 for interest on outstanding Capital Payments and Operating and Capital Payments net of PILTs amounts, \$3,276,398 for outstanding HUFs and \$2,491,732 for interest on outstanding HUFs.
- Given the seriousness of the outstanding obligations and the inability to get the City to engage with respect to them, the TPA filed a Notice of Action against the City of Toronto in the Ontario Superior Court of Justice on December 23, 2008, for the outstanding Capital and Operating Payments and Harbour User Fees, interest and costs. The TPA advised City representatives of its action in advance of the notice filing. The Statement of Claim was subsequently filed on January 20, 2009. City representatives were advised that the TPA hoped to be able to resolve the outstanding matters before the deadline for service of the action.
- In January 2009, the Dispute Advisory Panel released its report on the four (4) test properties in dispute between the TPA and the City of Toronto.
- In February 2009, the TPA, in accordance with the recommendations made by the Dispute Advisory Panel, determined that the appropriate amount of PILTs payable for the four (4) properties for the years 1998 to 2008, inclusive, was \$5,062,943. Taking into account other

properties subject to PILTs, the total PILT amount determined to be appropriate by the TPA was \$5,561,607 for the years 1998-2008, inclusive.

- The City was informed of this decision and was given the underlying information and calculations on which the decision was based.
- Although the City had said it would address these issues when the Dispute Advisory Panel rendered its advice, it has instead pursued further litigation. In February 2009, the City issued a Notice of Application for Judicial Review of the Panel's recommendations by the Federal Court. The Application was later amended to include a Judicial Review of the decision made by TPA's Board of Directors on PILTs. This will result in further expenditure of legal fees for both the City and TPA, as well as staff resources.
- Another matter that used up scarce human resources and required the expenditure of legal fees was the enactment of a By-Law by the City making it unlawful for taxis or any other vehicle to stop in the "Finger Lot" that runs down the west side of Bathurst Street below Queen's Quay. The lot was being used by TPA as a queuing/parking area. The City also refused to approve an application by the TPA to perform certain works on the Finger Lot to enhance public safety. This matter was ultimately resolved in TPA's favour in Court. Since then the parties have reached a settlement, whereby the City dropped its Appeal of the Court's decision. (Please see attached Backgrounder on Bathurst Street Finger Lot).
- In the meantime, the City's outstanding defaults in paying Capital Payments, Operating and Capital Payments and HUFs continue to escalate.
- As of May 31, 2009, the City owed the TPA \$10.850 million towards outstanding Capital Payments and Operating and Capital Payments, \$857,385 for interest on outstanding Capital Payments and Operating and Capital Payments net of PILTs amounts, \$3,317,474 for outstanding HUFs and \$2,738,078 for interest on outstanding HUFs, totaling to \$12,275,079, net of the PILTS amount of \$5,487,858 (\$5,561,607 minus \$73,749 paid by TPA).
- The claim by the TPA regarding the Settlement Agreement must be served upon the City before June 22, 2009. However, the TPA is willing to meet with City officials to review all of the issues and pursue a constructive dialogue in an effort to settle all matters between the two parties.

## **Harbour User Fees (“HUFs”) (Background)**

In 2000, the Toronto Port Authority (“TPA”) set Harbour User Fees (“HUFs”) for Commercial Users of the Port in accordance with the Canada Marine Act. Harbour User Fees are fees to recover some of the costs of harbor maintenance services. These services include maintenance of navigation aids such as buoys, signage, lights and beacons; harbour cleaning, (which is the removal of floating wood and debris, oil slicks and obstructions in the water); harbour management, including the Harbour Master; and dredging.

The TPA charges HUFs to the City of Toronto for use of the Inner Harbour by City ferries. In setting the fees to be paid by the City, TPA took into account the City’s public service objective. The City is charged \$10 per crossing, regardless of the number of passengers.

In March 2003, the Canadian Passenger Vessel Association brought a complaint to the Canadian Transportation Agency (“CTA”) regarding the fees. The complaint alleged that by charging the City lower fees than those charged to Association members the TPA was discriminating against them. In July 2003, the CTA ruled that the TPA’s fee structure was not unjustly discriminatory to the tour and charter vessels. In the ruling the CTA noted that the City ferry service was a transportation necessity and the lower fee structure charged to the City was commercially acceptable.

As part of the legal settlement reached in May 2003 the City of Toronto agreed to pay HUFs relating to the City’s operation of the ferries. The City covenanted to pay such HUFs to the TPA as and when due, provided, however, that the City could postpone remittance of any amount of HUFs in dispute. The total amount of HUFs charged to the City since 2000 is \$3,317,474, plus interest of \$2,738,078. Notwithstanding the commitment in the Settlement Agreement, none of these amounts have been paid.



## **Payments-in-Lieu of Taxes (“PILTs”) (Backgrounder)**

Payments in lieu of taxes or PILTs are payments which may be paid by federal agencies to the municipality in which they operate, pursuant to the federal PILTs Act. The decision as to the calculation of the value upon which a PILTs payment is based and the quantum of the PILTs payment are discretionary decisions of federal bodies governed by the PILTs Act.

As part of the Settlement Agreement reached in 2003, the Toronto Port Authority (“TPA”) agreed to make certain payments in lieu of taxes in respect of lands the Port Authority owns and operates, and the Port Authority and the City of Toronto agreed to use their best efforts to resolve the issues related to the magnitude of PILTs to be paid expeditiously, in accordance with the provisions contained in the PILTs Act. It was further agreed that should there be a dispute on the amount of PILTs to be paid, then until such time as the exact amount had been determined, the Port Authority would postpone remittance of the disputed amount.

As per the Act, the City made application for PILTs to the Port Authority and the Port Authority provided the City with its calculation for the amount of PILTs payable (value x tax rate). The City's updated request for 1999 to 2008 is \$39,587,760.

Since 2003, the Port Authority has retained Public Works Canada to review the applications and assist the Port Authority in determining amounts that the Port Authority may agree to pay. The Port Authority took the advice of Public Works Canada and then made a calculation on the amount of PILTs to pay. The amount of PILTs calculated to be appropriate by the Toronto Port Authority is similar in scale to other Canadian Port Authorities. In June 2005, the Port Authority calculated an appropriate PILTs payment for fiscal years 1999 to 2004 to be \$1,892,555. It remitted a payment to the City in the amount of \$73,749, and has deducted the balance of the PILTs payments it would otherwise make from the outstanding Capital and Operating payments owed by the City to the TPA.

The City applied to the PILTs Dispute Advisory (“Panel”) on April 13, 2006. The City and the Port Authority appeared before the Panel from February 25 to 28, 2008. The Panel heard evidence on valuation methods for four (4) test properties owned and occupied by the Port Authority (including Toronto City Centre Airport) that form the basis to calculate a PILTs payment. The Panel consisted of three people appointed by the federal government (Public Works). The Panel also asked for written submissions to be provided by both sides. The written submissions were compiled and sent to the Panel in April 2008. On January 5, 2009, the Dispute Advisory Panel sent their recommendations to Toronto Port Authority for the four (4) subject properties. The Report is only advice to the Port Authority; it is not binding and does not create a debt payable by the Port Authority. The amount of PILTs the City requested

on the four subject properties was \$35,273,533. The TPA's amount was \$3,656,721 and the amount of PILTs based on the Panel's advice was \$5,062,943.

The TPA Board reviewed the Panel's advice and made a decision to accept management's recommendation on an amount of PILTs that is fair and equitable. The TPA revised the total PILTs accrual to an amount of \$5,561,607 for the period 1999-2008, inclusive. The accrued liability as at December 31, 2008 was \$5,487,858 (\$5,561,607 less \$73,749 paid in 2005).

On February 4, 2009 the City filed an Application in Federal Court for a Judicial Review of the Panel's recommendations to the TPA Board and on May 8, 2009, amended the Application for a Judicial Review of the decision of the TPA Board, with respect to the amount of PILTs to pay. The TPA will vigorously defend its position on PILTs.

## **Bathurst Street - Airport "Finger Lot" (Background)**

In 1983, the federal government, the City of Toronto ("City") and the Toronto Port Authority ("TPA") entered into a Tripartite Agreement, which governs matters related to the operations and access to the Toronto City Centre Airport ("TCCA"). The Tripartite Agreement was amended in 2003 to allow a bridge to the TCCA, which was subsequently prohibited by federal regulation. Section 50 of the Tripartite Agreement provides that no party shall do, or permit to be done, in, on or over the TCCA, or in, on or over lands or waters adjacent to or in the vicinity of the TCCA (over which any party has jurisdiction) anything that would interfere with the safe use and operation of TCCA.

As part of the access to the TCCA, the TPA leases a "finger lot" from the City, which runs down the west side of Eireann Quay (formerly Bathurst Street), below Queens Quay. As part of the improved access to the TCCA that was the subject of an environmental assessment, the TPA asked the City to approve minor changes (acknowledged as such by the City) to the finger lot for access to the TCCA (including queuing for taxis and vehicles accessing the TCCA). This was considered as part of the environmental assessment which recommended the work and confirmed there would not be significant adverse effects resulting from this. The requested use of the finger lot to access the TCCA was supported by traffic, planning and safety experts, including the City's own traffic expert.

The City submitted that the finger lot was to be used only as a parking lot and that the TPA's request would change the permitted use. The matter went to the Ontario Superior Court and the Court agreed with the TPA's position.

The Ontario Superior Court made several findings, including:

- The Tripartite Agreement applies to the finger lot
- The TPA's use of, and requested work related to the finger lot are consistent with the Lease Agreement and conform with the intended use of the lands set out in the Lease (to permit vehicles to park and to permit access to TCCA)
- The City interfered with the safe use and operation of the TCCA in breach of the Tripartite Agreement by:
  - enacting a by-law to prevent vehicles from stopping on Eireann Quay east of the finger lot, and
  - refusing to approve the TPA's requested work related to the finger lot

Although the City filed an Appeal of the Court's decision, the City and TPA resolved the matter on the basis that the City drop the Appeal, the City pay legal costs and the City and TPA agree to certain work on the finger lot and Eireann Quay.