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Councillor Adam Vaughan
City of Toronto
100 Queen Street West
Toronto, Ontario M5H 2N2

November 29, 2012

Dear Councillor Vaughan:

Re: Toronto Port Authority and the Billy Bishop Toronto City Airport

I take this opportunity to address your most recent statements on *The John Oakley Show*, and to clarify yet again your ongoing misrepresentations regarding various issues involving the Toronto Port Authority ("TPA") and the Billy Bishop Toronto City Airport ("BBTCA"). This letter is in keeping with previous correspondence along similar lines regarding your many other misunderstandings and misrepresentations (June 27, 2008, August 28, 2009, October 20, 2010, December 1, 2010, September 13, 2011, March 23, 2012, March 27, 2012 and November 13, 2012), all of which are available, for transparency purposes, in the Executive Correspondence section at www.torontoport.com.

In your effort to explain away your unsupported statements from the November 9, 2012 airing of *The John Oakley Show*, you appear to have generated new "facts" for use on the November 16, 2012 program. As John Oakley said himself, you have the right to your own opinion, but not your own facts. The contrasts are stark:

- You claimed the airport was dropped (in 1939) into what was historically a residential community. You are wrong: it was a mixed-use industrial community, as the enclosed pictures demonstrate.
- You claimed that you didn't say that the BBTCA pedestrian tunnel was "*a bunch of money to help one particular airline, not the airline industry. It's a bunch of money to move a few very privileged people, not taxpayers.*" According to The Toronto Star's Rob Ferguson, you did.
- You claimed that the TPA wanted to build a sidewalk "through" Little Norway Park. According to the written Court Decision of Madam Justice D.A. Wilson dated December 23, 2008, a copy of which is attached, you didn't tell the truth when you spoke on this issue on AM640.
- You claimed that the new traffic restriction signs at Bathurst and Queen's Quay don't contribute to traffic congestion. According to the Toronto Police Service representative involved in the traffic management meetings, they specifically do,

and not just at the Queens Quay intersection, but all the way through Bathurst and Lakeshore Boulevard to the north. You knew this to be their position prior to your appearance on the Nov. 16, 2012 *John Oakley Show*.

- You claimed that the TPA and I are “economically evicting” the Ornge Medevac service and forcing them to move to the Hamilton International Airport by increasing Ornge’s landing fees. Ornge advised the TPA of its intention to leave the BBTCA in an e-mail to dated May 18, 2010, well prior to September 2010, which was the date when the TPA Board began to consider raising landing fees for non-commercial fixed and rotary wing aircraft.

The factual record gives the lie to your claims, once again. That you chose to explain away your earlier falsehoods with new, and even more fictional, explanations is astounding. Our mutual stakeholders deserve better.

To make matters worse, you told the BQNA Neighbourhood Association Town Hall meeting on November 19, 2012 that the TPA has launched a “media campaign to discredit [your] complaints against the TPA using double talk to skirt the truth”.¹ This is the height of irony: my Nov. 13, 2012 letter was written after you first took to the AM640 airwaves, using specious facts and clear falsehoods to revitalize your longstanding campaign against the airport. Not once have you demonstrated where we’ve “skirted the truth”; all you’ve done is get more inventive with your fictional representation of the facts associated with BBTCA-related issues. I invite you to take a moment and document in writing where we’ve “skirted the truth” on these issues; a flippant comment isn’t sufficient.

To help address the misrepresentations and falsehoods from the Nov. 16, 2012 Oakley show, at least those of a material nature, I’ve included your statements in bold italics below, along with the relevant context:

“ADAM VAUGHAN: And I told you, I think an industrial use in that part of the waterfront is detrimental to the quality of life for the people that live there, period.

PETER KORMOS (Former NDP MPP): But most of those people moved into condos that were built longer after the...

VAUGHAN: No.

KORMOS: ... airport existed.

VAUGHAN: No, the residential community, predates the residential community predates the airport.

KORMOS: Well, along the Lakeshore, for Pete’s sake.

¹ <http://www.digitaljournal.com/article/337328>

VAUGHAN: Not just along Lakeshore but the residential community predates the airport. You can look it up. It's in the history books."

As you are well aware, the Billy Bishop Toronto City Airport opened in 1939. None of the condos and townhouses that are along the Waterfront, and specifically the Bathurst & Queen's Quay neighbourhood, pre-date the airport. I assume you meant to say that the BBTCA neighbourhood was home to some sort of a residential community during the first part of the last century.

As you suggested, we have looked "in the history books", and searched the archives. Please find enclosed photographs of the area from 1912, 1918, 1922, 1928, 1930, the late 1930s, and even one from 1949. You will see that the neighbourhood in question is dominated by marine terminals, warehouses, factories (with their omnipresent smoke stacks) and even a slaughterhouse. In 1936, for example, the Central Heating Plant (on the harbour at the foot of York Street) produced up to 150,000 kilograms of steam every hour for Union Station.

Even as late as 1949, the site of the current Harbourfront School (south east corner of Bathurst Street and Queen's Quay West) was being used by Firestone (the structure in the photo was originally built in 1927 as a factory for a British pickle and jam manufacturer, named Crosse and Blackwell), and just across the street to the north was Goodyear (on a site that was originally the Rogers-Majestic radio factory in 1929). The baseball stadium to the west was built circa 1922 (on the site of what is Little Norway Park today). Beyond that was that Tip Top Tailor clothing and textile factory.

The area to the north of the BBTCA was not a "residential community" prior to the airport's creation in 1939; it was primarily a mixed-use industrial and commercial district in the decades leading up to, and following, the establishment of the airport. But, don't take my word for it: as they say, the enclosed photos of industrial use speaks a thousand [truthful] words. I'd be happy to review whatever "history books" you're referring to, but I think there's little doubt about this unless you were thinking of the City of York in the 1700s.

“DOUG FORD (City councillor): Okay, well, this is a statement that... This is quoted Adam Vaughan. It's a bunch of money to help particular, one particular airline, not the airline industry. It's a bunch of money to move very few privileged people, and not taxpayers.

VAUGHAN: (Inaudible) inarticulate all my life.”

From the tape of the November 16, 2012 AM640 show, it appears that you contested the excerpt the Councillor Ford read from my November 13, 2012 letter: “I’ve never been so inarticulate in all my life”. Are you are now denying the quote that was attributed to you by *The Toronto Star* and published on August 24, 2009?:

"It's a bunch of money to help one particular airline, not the airline industry. It's a bunch of money to move a few very privileged people, not taxpayers," Vaughan said.²

If the above quote isn’t what you said to Star journalist Rob Ferguson, nor how you actually feel, did you ask *The Toronto Star* to print a retraction or clarification? None appears on the Star’s website, where the original article remains for your review. Despite having brought this quote to your attention a couple of years ago, this is the first time you’ve actually denied having made the remark in the first place.

I have taken the liberty of copying Mr. Ferguson on this letter so that he is aware of your claim of a “misquote”, in the event his editors would like to consider publishing a clarification.

“FORD: Adam wouldn’t even let him fix the sidewalk.

VAUGHAN: It may even cost (inaudible...).

FORD: Every which way he can be an obstructionist, he is down there.

VAUGHAN: No, because the sidewalk they wanted to drive was through a city park.

FORD: Come on!

VAUGHAN: And not to connect the neighbourhood to a school.

FORD: Adam. Adam, it’s a tri-party agreement. They have the right to (inaudible) the sidewalk.

VAUGHAN: A tri-party agreement, and they don’t have the right to fix the sidewalk without consultation with the city and they don’t have the right to take sidewalks away from schools...

² <http://www.thestar.com/news/ontario/article/685923--politicians-square-off-on-tunnel-plan>

JOHN OAKLEY: All right, back in with Peter Kormos, Doug Ford and Councillor Adam Vaughan. And we were talking, Adam, about the accusations that you're obstructionist when it comes to the Toronto Island Airport. I'm just going to read you one of the things sent along in the sheaf of notes from the Toronto Port Authority where they took down the transcripts from last week's show and wanted to I guess contest what your position was. And certainly, it's beyond my purview to know all of the details as to what had taken place, but they cite as the obstructionist theme various meetings and they say that obstructionist theme also arose in the December 2008 written decision of Superior Court of Ontario Judge D.A. Wilson regarding your refusal to grant to Toronto Port Authority a simple sidewalk...

VAUGHAN: A very strange characterization of that. What we tried to do...

OAKLEY: All right, let me finish. Hold on. The learned judge referred to the city's reliance on, quote: "The affidavit of a member of city council, Adam Vaughan." And then she continued, quote: "It is important to note that Mr. Vaughan, while clearly familiar with this area, is not an expert in the area of vehicular traffic, pedestrian safety or roadway safety. The views and opinions expressed in his affidavit are of little assistance."

"In a ruling, the judge determined that the refusal of the city to approve the Toronto Port Authority work application leads me to conclude that the city was acting to achieve a collateral purpose. The collateral purpose, as you continue to demonstrate", says the TPA letter, "four years later is to use any means in your grasp to undermine the efficient operation of the airport." He's citing a Superior Court judge.

VAUGHAN: And then he interprets it in a very strange way. This is what was at the heart of that issue. We wanted to build a sidewalk on lower Bathurst Street. The airport didn't want the sidewalk there.

OAKLEY: The airport didn't.

VAUGHAN: No, the airport didn't want. They wanted the sidewalk in the park. And we said sorry, sidewalks go next to roads. They don't go to the park and create a wider road, allowing you to use the parking lot and turn it into effectively a six-lane road. That's an inappropriate place for a sidewalk. We went to court, saying the sidewalk should go where we said it should go, where in fact the lease said it should go on the BQ1 lands. They disagreed. They said that would interfere with their approach to the airport, that it would choke the airport. The irony is that the result of this court case, instead of a sidewalk, what we get is a grass meridian in exactly the same spot the sidewalk would be.

FORD: You know something...

OAKLEY: That's the court...

FORD: I know, but that's Adam story.

VAUGHAN: It's not my story. Look at the entire court transcript."

It appears that you have forgotten what the TPA's work permit application was all about, which wound up before Madam Justice D.A. Wilson due to your obstruction of the initial positive recommendations of City Staff. It was not, as you baldly claimed on *The John Oakley Show* on Nov. 16, 2012, about the TPA's desire to build "a sidewalk in the park" or "the sidewalk they wanted to drive was through a city park" as per above.

According to the written decision of Madam Justice Wilson, a copy of which I have attached, the TPA sought a work permit in the Finger Lot "which consisted of the removal of 5 curbstones to permit access. It is conceded by the City that the work contemplated is minor."³ I am quoting from the Court Record; I am not "interpreting" the Judge's decision "in a strange way", as you suggested to Councillor Doug Ford in the transcript above.

The TPA engaged Dillon Consulting, an independent engineering firm; Dillon prepared a report that "recommended certain work be undertaken on the Finger Lot to improve access to the airport and to maximize safety concerns."⁴ At no time did the TPA try to "take sidewalks away from schools" as you claim above.

The TPA's Dillon Report also "recommended a sidewalk be constructed on the west side of the Finger Lot, alongside Little Norway Park."⁵ According to Madam Justice Wilson's written decision, the TPA's proposed sidewalk was "alongside" the park.

In your AM640 interview above, you also claim that "we [you and former Mayor David Miller] wanted to build a sidewalk on lower Bathurst Street. The airport didn't want the sidewalk there." According to Madam Justice Wilson's written decision, the TPA, itself, proposed a sidewalk "alongside" the park at Lower Bathurst for "safety" reasons. It was to be alongside, not through, the park as you wrongly advised AM640 listeners.

The written Court Decision attached is clear on both of those points. Yet you denied the content of the Judge's written decision on AM640.

Of equal relevance given your recent shenanigans (erecting no-turn restriction signs at Bathurst/Queen's Quay), you passed a motion on June 26, 2007 "designating Eireann Quay...as a fire route with no stopping at any time. The Bill...prevented taxis and other vehicles from queuing for access to the airport."⁶ Your 2007-vintage By-Law tactic was designed to prevent taxis from waiting for BBTCA passengers on the Lower Bathurst

³ Paragraph 11, page 3, Decision of Madam Justice D.A. Wilson, December 23, 2008

⁴ Paragraph 11, page 3, Decision of Madam Justice D.A. Wilson, December 23, 2008

⁵ Paragraph 13, page 4, Decision of Madam Justice D.A. Wilson, December 23, 2008

⁶ Paragraph 13, page 4, Decision of Madam Justice D.A. Wilson, December 23, 2008

Street Finger Lot, on the assumption that an absence of taxis would eventually deter passengers from using the airport.

According to Madam Justice Wilson, “the enactment of the [City] By-Laws which had the effect of preventing the use of the Finger Lot as contemplated by the [TPA’s] application constitute a breach of the provisions of the Tripartite Agreement not to interfere with the ‘safe use and operation of the Island Airport’.”⁷ She struck your By-Law down in the same Court Decision.

Your 2012 move to erect a series of traffic-choking turn prohibition signs at the corner of Bathurst and Queens Quay is in keeping with your earlier 2007-vintage “no stopping fire route” By-Law, which was struck down by Madam Justice Wilson for being a transparent attempt to interfere with the safe use and operation of the airport.⁸ The Judge specifically said your 2007 no-stopping By-Law was implemented “to achieve a collateral purpose”;⁹ i.e., to undermine the operation of the airport. This was the Judge’s specific finding, and not my “interpretation”, as you claimed to Councillor Ford on the November 16th *Oakley Show*.

This is why the “obstructionist” label seems so fitting. You were struck down by a Judge in 2007 for specifically trying to choke access to the airport in 2007, and you’re back at it again in 2012.

“FORD: He goes to local community council and folks, I’ve got to tell you, local community council, the downtown folks, they’re all lefties. They’re all part of this gang there. And he uses all the tools at local community council to...”

VAUGHAN: To protect my ward.

FORD: No, no, to be an obstructionist.

VAUGHAN: To protect my ward.

FORD: And that’s what it’s all about. He puts in... he erects a series of traffic signs that constantly cause traffic congestion.

VAUGHAN: They don’t. They don’t do that.

FORD: You know, Adam, that’s a great asset. Let’s just cut to the chase here. It’s a great asset to the city.

VAUGHAN: It manages the intersection in a way...

⁷ Paragraph 45, page 11, Decision of Madam Justice D.A. Wilson, December 23, 2008

⁸ Paragraph 59, page 14, Decision of Madam Justice D.A. Wilson, December 23, 2008

⁹ Paragraph 56, page 14, Decision of Madam Justice D.A. Wilson, December 23, 2008

FORD: ... to Porter Airlines.

VAUGHAN: ... that is fair to the children and the taxis and the passengers.”

In the interaction above, you state that the new series of no-turn traffic signs “don’t” cause traffic congestion.

According to the Toronto Police Service (“TPS”), they do. This was made clear by the TPS representative at the November 8, 2012 meeting regarding traffic movements around the BBTCA, attended by City staff, the TTC, and TPA. As per my letter of November 13, 2012:

These restriction signs have dramatically increased traffic congestion, while at the same time not producing any enhanced pedestrian safety. This was confirmed last week by a representative of the Toronto Police Service at the multi-stakeholder meeting (which included City of Toronto delegates) on the issue.

If the turning restrictions were truly about managing safety for the school children and youth who use the community centre, and not choking access to the airport, you wouldn’t have made it a 24-hour/day ban. There aren’t any 8 year-old schoolchildren using that intersection at 10 p.m., for example.

“OAKLEY: Adam, what you’re saying is each party has a right to their own opinion. The adage is you don’t have a right to your own facts and they contest as well, I’ve said.....(speakers overlap)...

VAUGHAN: But neither do they (inaudible).

OAKLEY: (Inaudible).

VAUGHAN: That’s exactly what they wonder about, as per your letter of September 13th, as per my letter, I guess Mr. McQueen says September 13th, 2011, the copy of which is attached. Toronto Port Authority has not evicted ORNGE. And last week you said they had evicted ORNGE. But he says ORNGE is moving to Hamilton.

OAKLEY: That’s right.

VAUGHAN: They’re moving to Hamilton because the rent that was being charged them to do touchdown landings and maintenance of their aircraft and fixed-wing is, and helicopter is too expensive. They are being economically evicted. Mark McQueen may not want to take responsibility for that, but when you talk to the folks at ORNGE, that’s why they’re moving to Hamilton.

FORD: (Inaudible).

VAUGHAN: *The trouble is, the trouble is that... is that the move to Hamilton was interrupted by all the scandal up at Queen's Park, a separate issue. But that's what stopped it.*

FORD: *So now ORNGE have all of a sudden become prudent fiscal managers, after they've blown, after they've blown millions and millions of dollars?*

VAUGHAN: *I'm not going to weigh into it.*

FORD: *(Inaudible...) on ORNGE right now?*

VAUGHAN: *And I hope they find out what happened there, but the issue at the heart of this is that the only way they could improve... increase the number of flights was to alter their sound contour. That required getting rid of the helicopters and fixed craft that come in from ORNGE. They have been moved to Hamilton through higher fees being charged, and that's given the airport the ability to expand. We told them that that's the way we're trying to do it. We told them that and they said they...*

VAUGHAN: *For people like Porter with the move ORNGE out, they're moving ORNGE out so they can increase the (inaudible)[commercial airline slots].*

KORMOS: *ORNGE didn't do it of their own volition. They were, you say, economically...*

VAUGHAN: *The fees went up to a point where it was economically more feasible to do go Hamilton than Toronto. That's the economic eviction. They needed to get them out so they could get more commercial flights in. That's the goal of the Mark McQueen and the Port Authority. That's fine, they're welcome to that goal. But I don't... I don't have to recount my statements that they were evicted. They were evicted by having a huge hike in their lease."*

For the life of me I do not understand why you continue to ignore the most basic, irrefutable facts surrounding Ornge's announced move from the Billy Bishop Toronto City Airport. Despite what you say above, I didn't advise in my letter of November 13, 2012, that Ornge's move to Hamilton was still underway. I clearly stated that we understood the proposed move to now be on hold:

As per my letter of September 13, 2011, a copy of which is attached, the TPA has not evicted Ornge. But you already know this. For publicly-stated operational reasons, Ornge had concluded that it should base itself in Hamilton. We understand those plans are now on hold, perhaps permanently, in part due to resistance to any move by Ornge's own pilots and staff.

The bigger point relates to your false claim that the TPA is evicting (economically or otherwise) Ornge to accommodate the recently increased commercial flights at the

BBTCA. The 2010 commercial slot award process, which added 90 slots (including Air Canada's 30), was undertaken with the full expectation that Ornge was staying at the BBTCA; that commercial slot award did not, and does not, require Ornge's move to Hamilton to "make room" for the additional commercial landings. You claim otherwise above, yet both constituents continue to use the airport to this day – clearly, Ornge's departure from the BBTCA wasn't required to make room under the "Noise Exposure Forecast NEF Contour" for Air Canada to begin service following the 2010 commercial slot allocation process.

The City of Toronto's own independent "peer review" of the Jacobs Consulting study¹⁰, the report that served as the foundation of the additional commercial slot award, confirmed that both Ornge and the additional 90 commercial slots could be accommodated at the BBTCA, as you well know.

In terms of the Ornge move to Hamilton, the facts are simple. We were advised in writing on May 18, 2010 that it was Ornge's desire to move the operation to another location. In June 2010, Ornge began to make plans to move from the BBTCA to Hamilton International Airport.¹¹ On October 19, 2010, further public mention was made of the proposed departure from the BBTCA¹²:

The move to Hamilton was prompted by several factors, including a desire for more space - Hamilton's airport has longer runways that can accommodate airplane ambulances - to weather conditions, said Ornge chief operating officer Tom Lepine.

"Toronto island is often foggy, we don't have that problem as often in Hamilton," he said.

In December 2010, Ornge leased a 31,000-square foot hangar at the Hamilton International Airport.¹³

According to Ornge's own public statements, the move from the BBTCA to Hamilton related to their desire for "longer runways", more reliable "weather conditions" and "more space". They made no mention of cost savings as being a factor in their considerations.

On September 22, 2010, the TPA Board of Directors considered a motion that would increase the landing fees for each of the following categories: private general aviation / recreational aircraft and helicopters (including sightseeing, traffic and medevac). This was done to coincide with the new commercial slot award process. Landing fees for commercial aviation, such as the SkyRegional and Porter Q400s are set under a separate "deficiency agreement" as per the Commercial Carrier Operating Agreement. The

¹⁰ <http://www.torontoport.com/TorontoPortAuthority/media/TPASiteAssets/news/Toronto-Port-Authority-Slot-Bulletin--2009-Dec-24.pdf>

¹¹ <http://www.oshawaexpress.ca/viewposting.php?view=3201>

¹² <http://www.theglobeandmail.com/news/toronto/air-ambulance-base-to-move-to-hamilton/article4190577/>

¹³ <http://www.thestar.com/news/canada/article/1114889--ornge-wasted-600-000-on-empty-hangar>

landing fees as they relate to Ornge rotary wing aircraft were increased from \$39.98 to \$53.48 and fixed wing aircraft from \$29.40 to \$38.20 on January 1, 2011; this was the first rate increase at the BBTCA since May 2003. The new BBTCA landing fees are very competitive with those charged at other area airports, such as Pearson Airport or Hamilton International Airport, for example.

According to the April 1, 2012 tariff schedule¹⁴ at Hamilton, the landing fee for an Ornge Agusta Westland AW139 would range between \$42.04 and \$73.47 depending on its empty versus gross weight status at the time of landing; the relevant new BBTCA landing fee is below the midpoint of the range of fees charged by Hamilton for the same helicopter. The published minimum landing fee charged by Hamilton for a fixed wing aircraft in the range of 2,001 kg-3,750 kg (such as the Ornge PC-12) is \$39.00; this fee is higher than the new landing fee charged by the BBTCA.

Even though Ornge advised the TPA of their move four months before our Board amended the BBTCA's landing fee schedule, it is clear that the new BBTCA rates are not higher than those assessed in Hamilton for the same aircraft. We are not "economically evicting" Ornge. And the rate increases took place well after Ornge advised us of their plans to move sites.

You have to stop making this stuff up.

"KORMOS: But please, it's one thing to argue interest and do it in a civil way. To call Vaughan an obstructionist because he's arguing the interests as he sees them I think is a (inaudible) attack and that (inaudible) attack not there, I don't think... I don't think Vaughan has ever personally criticized or labelled any of the Port Authority people, maybe in private.

OAKLEY: We've got our two competing points of view.

KORMOS: Yes, exactly."

I regret that Mr. Kormos sees the volume of correspondence over the past four years as uncivil. Had Mr. Kormos been given the opportunity to review the dozens of pages covering your misrepresentations of these key issues and facts, perhaps the added context would have addressed his concerns. Our concern is not about your advocating on behalf of any particular position; it's about your pattern of ignoring the truth and facts of the situation as you go about this so-called advocacy.

On the point of public attacks, we've made none. But I'm sure you remember the September 2008 TPA annual general meeting held at the Royal York Hotel. At a public event with >80 members of the public in attendance, in full view of the local and national media, you accused TPA Chief Financial Officer Alan Paul of:

¹⁴ <http://www.flyhi.ca/business-and-cargo/rates-and-charges/>

*Either “perjuring himself under oath” at the Dispute Advisory Panel hearing relating to the TPA’s Pilts calculations, or “falsifying” the financial records of the TPA.*¹⁵

We do not refer to you as obstructionist to cause hurt feelings; we merely conclude this on the basis of your actions over the past few years. As Madam Justice Wilson said herself: you are “acting to achieve a collateral purpose”¹⁶ when, in the name of pedestrian safety and traffic concerns, you throw up roadblocks in an effort to undermine the airport’s basic operation.

Thank you for the opportunity to address your misrepresentations, yet again. It is becoming tedious, however. If you would like any further detail, our team remains ready, as always, to assist. I am anxious to receive a written record from you of where we’ve “skirted the truth”¹⁷ on any of these issues.

Respectfully,



Mark McQueen
Chairman

cc: His Worship Mayor Rob Ford, City of Toronto

Councillor Doug Ford, City of Toronto

John Oakley, AM640

Robert Ferguson, The Toronto Star

Appendix: AM640 Interview Transcript

Attachment (Decision of Madam Justice D.A. Wilson, December 23, 2008)

Attachment (neighbourhood photos from 1912)

¹⁵ Minutes of the TPA Annual General Meeting, September 11, 2008

¹⁶ Paragraph 56, page 14, Decision of Madam Justice D.A. Wilson, December 23, 2008.

¹⁷ Adam Vaughan, *The John Oakley Show*, AM640, November 16, 2012

**TRANSCRIPT OF AM640 INTERVIEW
PREPARED BY CISON CANADA INC. / Cision RADIO/TV – OTTAWA**

**THE JOHN OAKLEY SHOW (5) (CFMJ-AM), Toronto, 16 Nov 2012, Time:
09:38am, Length: 00:17:57**

PANEL WITH ADAM VAUGHAN, PETER KORMOS AND DOUG FORD

JOHN OAKLEY (CFMJ-AM): Insofar as condemnation, Adam, I've got to ask you. I mean, when we talked last week, you know, you said a lot of things about Toronto Port Authority as well as the Island Airport and suggesting, you know, we've got to do more feasibility studies because the tunnelling machines were delivered, they were having a big 10 o'clock press conference celebrating the fact that...

ADAM VAUGHAN (City councillor): The question I was asked by you, by other panellists, was why do I stand up so strongly for the neighbourhood that I represent? And I explained that the airport is having an impact on the residential community that I represent.

They have a right to expect their city councillor to solve problems like the congestion, like the bad habits that the taxis are bringing to the intersection where kids have to cross to go to a school; all these sorts of things.

JOHN OAKLEY: All right, I don't believe that...

ADAM VAUGHAN: And when asked about the tunnel...

JOHN OAKLEY: Whoa, whoa, whoa!

ADAM VAUGHAN: When asked about the tunnel, when asked about the tunnel...

JOHN OAKLEY: Whoa, I don't think the question was why are you standing up for the community? I phrased it...

ADAM VAUGHAN: The phase that started...

JOHN OAKLEY: I know, but it was maybe with parsing terms here, but why are you against the airport as vehemently as you are and the Airport Authority?

ADAM VAUGHAN: And I told you, I think an industrial use in that part of the waterfront is detrimental to the quality of life for the people that live there, period.

PETER KORMOS (Former NDP MPP): But most of those people moved into condos that were built longer after the...

ADAM VAUGHAN: No.

PETER KORMOS: ... airport existed.

ADAM VAUGHAN: No, the residential community, predates the residential community predates the airport.

PETER KORMOS: Well, along the Lakeshore, for Pete's sake.

ADAM VAUGHAN: Not just along Lakeshore but the residential community predates the airport. You can look it up. It's in the history books.

JOHN OAKLEY: But to the point that's being cited here, and Doug, I'll get you in a second because the Airport Authority, they've gone after... through the program. I guess they solicited a tape and chapter and verse and put it down in print here and CCed copies and you guys have received yours.

It seems like they're contesting some of your points that you've raised like you're doing a traffic study right now.

ADAM VAUGHAN: Yeah.

JOHN OAKLEY: You say we've done traffic counts. We're remodelling the intersections. Bathurst and Lakeshore is a very problematic intersection.

ADAM VAUGHAN: Yeah.

JOHN OAKLEY: Especially with the fleet turns. We need to make sure that people move in and out of that community safely and efficiently. And the trouble is that every time we've tried to take steps to do this, someone in the Port Authority, usually the CEO or the Board, has tried to...

ADAM VAUGHAN: Legal action.

JOHN OAKLEY: You say has tried to sue us.

ADAM VAUGHAN: Right.

JOHN OAKLEY: And they say in response, the TPA has never sued you or the City of Toronto.

ADAM VAUGHAN: That's not true.

JOHN OAKLEY: Or even threatened to.

ADAM VAUGHAN: That's just not true.

DOUG FORD (City councillor): Okay, well, this is a statement that... This is quoted Adam Vaughan. It's a bunch of money to help particular, one particular airline, not the airline industry. It's a bunch of money to move very few privileged people, and not taxpayers.

ADAM VAUGHAN: (Inaudible) inarticulate all my life.

DOUG FORD: So, you know, there are two million people that are going through that airport, the people of his ward support the airport.

ADAM VAUGHAN: Some did.

DOUG FORD: And you have a reputation of being an obstructionist.

ADAM VAUGHAN: No, what I have is a reputation for standing up for my ward and for the residents that live in it.

DOUG FORD: Actually, no.

ADAM VAUGHAN: If you ask people who go to the airport whether or not the intersection that children cross there to go to school should be a safe one for kids to cross, they will not disagree with the position I've taken.

DOUG FORD: Adam is one who put up all the no-left, no-right signs. He's just being an obstructionist down there and it says right here from Mark McQueen, I take this opportunity to address your recent statements on The John Oakley Show.

...(speakers overlap)...

ADAM VAUGHAN: We stopped that intersection...

DOUG FORD: And to clarify yet again your ongoing misrepresentations regarding various issues involving the Toronto Port Authority.

ADAM VAUGHAN: When I say the tunnel line can cost \$40 million, it's going to cost 80, he says no, that's not true. It does cost 80. I was right.

DOUG FORD: Adam wouldn't even let him fix the sidewalk.

ADAM VAUGHAN: It may even cost (inaudible...).

DOUG FORD: Every which way he can be an obstructionist, he is down there.

ADAM VAUGHAN: No, because the sidewalk they wanted to drive was through a city

park.
DOUG FORD: Come on!
ADAM VAUGHAN: And not to connect the neighbourhood to a school.
DOUG FORD: Adam. Adam, it's a tri-party agreement. They have the right to
(inaudible) the sidewalk.
ADAM VAUGHAN: A tri-party agreement, and they don't have the right to fix the
sidewalk without consultation with the city and they don't have the right to take
sidewalks away from schools...
JOHN OAKLEY: Go ahead.
...(speakers overlap)...
ADAM VAUGHAN: (inaudible...) to schools and make the crossing of that intersection
dangerous for children. They don't have that right.
PETER KORMOS: Tunnelling is such a difficult and rife with all sorts of risks in terms
of extra costs that I think it's impossible to put a value on it.
JOHN OAKLEY: Um-hmm.
PETER KORMOS: That's number one. Number two.
ADAM VAUGHAN: Really?
PETER KORMOS: Yeah!
ADAM VAUGHAN: Really!
PETER KORMOS: Geez! You knew that.
ADAM VAUGHAN: Well, and what we said was the way they had it configured wasn't
going to meet the efficiencies they were trying to get.
PETER KORMOS: But the other thing is...
ADAM VAUGHAN: The only way to achieve what they were trying to do was to build a
bigger tunnel. They said no. It turned out I was right. They had to rescope the project.
PETER KORMOS: The other thing is get those kids a school crossing guard.
ADAM VAUGHAN: We have.
PETER KORMOS: Well, they say... But even, even in this note here...
ADAM VAUGHAN: We have, but the trouble is that the school crossing guard is quite
often charged at by taxi drivers. And so what we've said is first of all, it's four corners.
We need two crossing guards.
PETER KORMOS: Good!
ADAM VAUGHAN: And what we've asked for instead is actually paid duty officers
down there because the taxis and some of the folks coming out of the airport are more
concerned about getting to their plane than the safety of the kids crossing the street.
DOUG FORD: This is not working hand in hand with the Port Authority.
ADAM VAUGHAN: We are!
DOUG FORD: It's an obstruction ...(speakers overlap)...
ADAM VAUGHAN: (inaudible).
DOUG FORD: Come on! I've got letters, I've got 15 pages from Mark McQueen, the
CEO.
ADAM VAUGHAN: He's the CEO of the board. Talk to the general manager of the
Airport.
DOUG FORD: Of being obstructionist.
ADAM VAUGHAN: I had a meeting last night with the Port Authority.
DOUG FORD: Adam, it's not just the Port Authority.

ADAM VAUGHAN: (Inaudible) down the waterfront BIA.

DOUG FORD: You've got a reputation down at city council, you've got a reputation at the city to be an obstructionist, and you are.

ADAM VAUGHAN: I have to...

...(speakers overlap)...

ADAM VAUGHAN: The obstructionism is in the eyes of Mark McQueen, that's fine.

DOUG FORD: I cite the Superior Court.

ADAM VAUGHAN: (Inaudible) the children and the families in that neighbourhood and I will do that.

...(speakers overlap)...

ADAM VAUGHAN: (Inaudible) cooperate when the safety and the quality of life for the residents.

DOUG FORD: Come on, you rake him through the coals.

ADAM VAUGHAN: I do not cooperate when the health and safety and the quality of life.

DOUG FORD: Your residents support...

ADAM VAUGHAN: They do not support dangerous driving.

DOUG FORD: (Inaudible). You're right.

ADAM VAUGHAN: They do not support mindless congestion and they do not support giving all of the carriage of this issue to a federal agency as opposed to a local city hall.

PETER KORMOS: Adam, Adam, you're right, I defend you. All the issues you raise are valid, but it's a matter of making sure that that airport works because I think it's an ideal...

ADAM VAUGHAN: And that's why we're sitting down.

PETER KORMOS: ... passing (inaudible) downtown.

...(speakers overlap)...

ADAM VAUGHAN: Talk to the general manager of the airport, talk to Ken Lundy, and you ask him whether or not the meetings we're having right now on easing traffic congestion down there aren't the most productive and smart talk we've had (inaudible) year for the longest time.

PETER KORMOS: And insofar as cabby goes, cabbies go...

ADAM VAUGHAN: They're part of the conversation.

PETER KORMOS: Stop ticketing them when they're parked across from a hotel at a venue, no-cab zone and start ticketing them for going through red lights.

DOUG FORD: What he's doing is erecting a series of traffic choking prohibition signs.

ADAM VAUGHAN: No.

DOUG FORD: You are, at the corner of Bathurst and Queen (inaudible).

ADAM VAUGHAN: We're rendering that intersection safe to cross.

DOUG FORD: Absolutely, you're an obstructionist.

JOHN OAKLEY: And by the way, on the point of the cost overruns from 40 million to 80 million, they point out, Toronto Port Authority, that \$51.5 million to revitalize Nathan Phillips Square and even that's now going beyond the budget, well beyond it.

They are building a bigger tunnel than has originally been planned...

ADAM VAUGHAN: Right.

JOHN OAKLEY: ... because there's just more traffic.

ADAM VAUGHAN: No, because the way in which they configured it created choke

points that they couldn't move people through. And when we pointed out this is a really bizarre project and quite clearly it was not going to come out at \$40 million, and there was no way to build it the way they originally proposed, it was going to cost more, they said we're telling feds, I'll stand by the statements and I was right because it did change the direction of the tunnel, they did change the scope of the tunnel.

JOHN OAKLEY: All right, we'll come back.

ADAM VAUGHAN: It does cost twice as much as it used to.

JOHN OAKLEY: All right, so you're saying you're not obstructionist, that's their claim. Doug, you wanted to add more credence to the Toronto Port Authority.

DOUG FORD: Well, it was just...

JOHN OAKLEY: Hang on to that thought. Just a second. Let me get out to the roads now, updating AM 640 chopper traffic, Darryl Fraser.

(traffic break)

JOHN OAKLEY: All right, back in with Peter Kormos, Doug Ford and Councillor Adam Vaughan. And we were talking, Adam, about the accusations that you're obstructionist when it comes to the Toronto Island Airport.

I'm just going to read you one of the things sent along in the sheaf of notes from the Toronto Port Authority where they took down the transcripts from last week's show and wanted to I guess contest what your position was. And certainly, it's beyond my purview to know all of the details as to what had taken place, but they cite as the obstructionist theme various meetings and they say that obstructionist theme also arose in the December 2008 written decision of Superior Court of Ontario Judge D.A. Wilson regarding your refusal to grant to Toronto Port Authority a simple sidewalk...

ADAM VAUGHAN: A very strange characterization of that. What we tried to do...

JOHN OAKLEY: All right, let me finish. Hold on. The learned judge referred to the city's reliance on, quote: "The affidavit of a member of city council, Adam Vaughan." And then she continued, quote: "It is important to note that Mr. Vaughan, while clearly familiar with this area, is not an expert in the area of vehicular traffic, pedestrian safety or roadway safety. The views and opinions expressed in his affidavit are of little assistance." End quote.

"In a ruling, the judge determined that the refusal of the city to approve the Toronto Port Authority work application leads me to conclude that the city was acting to achieve a collateral purpose. The collateral purpose, as you continue to demonstrate", says the TPA letter, "four years later is to use any means in your grasp to undermine the efficient operation of the airport."

He's citing a Superior Court judge.

ADAM VAUGHAN: And then he interprets it in a very strange way. This is what was at the heart of that issue. We wanted to build a sidewalk on lower Bathurst Street. The airport didn't want the sidewalk there.

JOHN OAKLEY: The airport didn't.

ADAM VAUGHAN: No, the airport didn't want. They wanted the sidewalk in the park. And we said sorry, sidewalks go next to roads. They don't go to the park and create a wider road, allowing you to use the parking lot and turn it into effectively a six-lane road. That's an inappropriate place for a sidewalk. We went to court, saying the sidewalk should go where we said it should go, where in fact the lease said it should go on the BQ1 lands.

They disagreed. They said that would interfere with their approach to the airport, that it would choke the airport. The irony is that the result of this court case, instead of a sidewalk, what we get is a grass meridian in exactly the same spot the sidewalk would be.

DOUG FORD: You know something...

JOHN OAKLEY: That's the court...

DOUG FORD: I know, but that's Adam story.

ADAM VAUGHAN: It's not my story. Look at the entire court transcript.

DOUG FORD: He goes to local community council and folks, I've got to tell you, local community council, the downtown folks, they're all lefties. They're all part of this gang there. And he uses all the tools at local community council to...

ADAM VAUGHAN: To protect my ward.

DOUG FORD: No, no, to be an obstructionist.

ADAM VAUGHAN: To protect my ward.

DOUG FORD: And that's what it's all about. He puts in... he erects a series of traffic signs that constantly cause traffic congestion.

ADAM VAUGHAN: They don't. They don't do that.

DOUG FORD: You know, Adam, that's a great asset. Let's just cut to the chase here. It's a great asset to the city.

ADAM VAUGHAN: It manages the intersection in a way...

DOUG FORD: ... to Porter Airlines.

ADAM VAUGHAN: ... that is fair to the children and the taxis and the passengers.

DOUG FORD: Let me tell you something. We need more people like Bob Deluce, Mark McQueen, down at the Port Authority, Bob Deluce, CEO of Porter Airlines, one of the greatest companies in this country. He put everything he had on the line and he's a success now.

ADAM VAUGHAN: But...

DOUG FORD: And he's giving back to the city. I've never seen a guy that gives back to the city more than Bob Deluce does.

ADAM VAUGHAN: Except your brother(?).

PETER KORMOS: How appropriate is it for the Port Authority to publicly attack Adam Vaughan?

DOUG FORD: Well, he publicly attacks the Port Authority.

...(speakers overlap)...

ADAM VAUGHAN: They have the right to stand up for the interests of the Port Authority and I have a responsibility to stand up for the interests of the community I represent. Finding that balance is not always easy. There are contentious issues. But when push comes to shove, if you ask me who my interests are, which interests I place above the Port Authority, it's the right of school children in that neighbourhood to cross that street to go to the school and community centre and the day care.

DOUG FORD: All right, so you're talking about...

ADAM VAUGHAN: And if the Port Authority has a problem with that, they're free to criticize me. But that's ... that's the heart of this issue.

JOHN OAKLEY: Adam, what you're saying is each party has a right to their own opinion. The adage is you don't have a right to your own facts and they contest as well, I've said....

...(speakers overlap)...

ADAM VAUGHAN: But neither do they (inaudible).

JOHN OAKLEY: (Inaudible).

ADAM VAUGHAN: That's exactly what they wonder about, as per your letter of September 13th, as per my letter, I guess Mr. McQueen says September 13th, 2011, the copy of which is attached. Toronto Port Authority has not evicted ORNGE. And last week you said they had evicted ORNGE. But he says ORNGE is moving to Hamilton.

JOHN OAKLEY: That's right.

ADAM VAUGHAN: They're moving to Hamilton because the rent that was being charged them to do touchdown landings and maintenance of their aircraft and fixed-wing is, and helicopter is too expensive. They are being economically evicted.

Mark McQueen may not want to take responsibility for that, but when you talk to the folks at ORNGE, that's why they're moving to Hamilton.

DOUG FORD: (Inaudible).

ADAM VAUGHAN: The trouble is, the trouble is that... is that the move to Hamilton was interrupted by all the scandal up at Queen's Park, a separate issue. But that's what stopped it.

DOUG FORD: So now ORNGE have all of a sudden become prudent fiscal managers, after they've blown, after they've blown millions and millions of dollars?

ADAM VAUGHAN: I'm not going to weigh into it.

DOUG FORD: (Inaudible...) on ORNGE right now?

ADAM VAUGHAN: And I hope they find out what happened there, but the issue at the heart of this is that the only way they could improve... increase the number of flights was to alter their sound contour. That required getting rid of the helicopters and fixed craft that come in from ORNGE. They have been moved to Hamilton through higher fees being charged, and that's given the airport the ability to expand.

We told them that that's the way we're trying to do it. We told them that and they said they...

DOUG FORD: Who's complaining about the noise, Adam?

ADAM VAUGHAN: They say they would...

DOUG FORD: The guys who are getting a free rent on the island?

ADAM VAUGHAN: That's a tri-partite agreement (inaudible...).

DOUG FORD: Guys who are paying a dollar a year?

ADAM VAUGHAN: No, (inaudible) a year.

...(speakers overlap)...

ADAM VAUGHAN: And the only way to increase the number of flights...

PETER KORMOS: Somebody should be monitoring the sound in here.

ADAM VAUGHAN: For people like Porter with the move ORNGE out, they're moving ORNGE out so they can increase the (inaudible).

PETER KORMOS: ORNGE didn't do it of their own volition. They were, you say, economically...

ADAM VAUGHAN: The fees went up to a point where it was economically more feasible to do go Hamilton than Toronto. That's the economic eviction. They needed to get them out so they could get more commercial flights in. That's the goal of the Mark McQueen and the Port Authority. That's fine, they're welcome to that goal. But I don't...

I don't have to recount my statements that they were evicted. They were evicted by having a huge hike in their lease.

PETER KORMOS: But please, it's one thing to argue interest and do it in a civil way. To call Vaughan an obstructionist because he's arguing the interests as he sees them I think is a (inaudible) attack and that (inaudible) attack not there, I don't think... I don't think Vaughan has ever personally criticized or labelled any of the Port Authority people, maybe in private.

JOHN OAKLEY: We've got our two competing points of view.

PETER KORMOS: Yes, exactly.

JOHN OAKLEY: As Adam pointed out himself, he's got his stake in the matter and take on the matter, and so do they.

ADAM VAUGHAN: I have (inaudible) relations with Jeff Wilson. We're working together to solve problems down there. (Inaudible...).

DOUG FORD: Adam Vaughan has the reputation of misrepresenting the facts and ...

ADAM VAUGHAN: Oh, come on!

DOUG FORD: ... obstructionist, not just here but down at city hall as well.

ADAM VAUGHAN: From a Ford?

DOUG FORD: Absolutely.

ADAM VAUGHAN: From a Ford (inaudible) right now because of his accurate representation of the facts?

DOUG FORD: I know, but that's the court to decide, isn't it?

ADAM VAUGHAN: (Inaudible) politics in Toronto (inaudible).

JOHN OAKLEY: All right, guys. We'll have to leave it on that note. As always, a real delight to have had a romp at the last order of business on a Friday.

Doug Ford, Adam, Vaughan, Peter Kormos, we'll reconvene.

ADAM VAUGHAN: It's therapy.

JOHN OAKLEY: Yes, we'll have to say so long and thank you, all.



SUPERIOR COURT OF JUSTICE

*130 Queen Street West
Toronto, ON M5H 2N5*

Telephone: (416) 327-5093 Fax: (416) 327-6209

FAX COVER SHEET

Date: December 23, 2008

TO:

FAX NO.:

Pat Flaherty & Charles Finlay

(416) 865-7380

Charles Campbell & Chris Henderson

(416) 598-3484

Timothy Hill

(416) 863-1515

FROM: Daisy Ng, filling in for the Secretary to Madam Justice D.A. Wilson

TOTAL PAGES (INCLUDING COVER PAGE): 17

MESSAGE:

RE: Toronto Port Authority v. City of Toronto and
Porter Airlines Inc. v. City of Toronto

Enclosed please find a copy of reason for judgment released today regarding the above matter.

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COURT FILE NOs: 07-CV-335301PD3 &
07-CV-335305PD3
DATE: 20081223

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

TORONTO PORT AUTHORITY

Applicant

- and -

CITY OF TORONTO

Respondent

- AND BETWEEN -

PORTER AIRLINES INC.

Applicant

- and -

CITY OF TORONTO

Respondent

) *Pat Flaherty & Charles Finlay,*
) for the Applicant

) *Charles Campbell & Chris Henderson,*
) for the Respondent

) *Timothy Hill, for the Applicant*

) *Charles Campbell & Chris Henderson,*
) for the Respondent

) **HEARD: September 15, 16 and 17, 2008**

D.A. WILSON, J.

[1] Applications are brought by the Toronto Port Authority ("TPA") and Porter Airlines Inc. ("Porter") for identical relief: a declaration that the City of Toronto (the "City") is in breach of the 1983 Tripartite Agreement and of its obligations under a lease agreement with respect to a certain area known as the Finger Lot. Further, a mandatory order is sought directing the city to approve the TPA's application for work to be done on the Finger Lot as well as a declaration that the City acted in bad faith in enacting By-Law 487-2007 item 5.45 ("the By-Law").

[2] In support of the TPA's application, the following affidavits were filed: affidavit of Lisa Raitt, the CEO of the TPA, sworn June 25, 2007; the supplementary affidavit of Ms. Raitt sworn April 10, 2008; the affidavit of Alvaro Almuina sworn April 11, 2008. Mr. Almuina is an engineer with a specialty in traffic and transportation matters. Porter filed the affidavit of Robert DeLuce sworn June 25, 2007. Mr. DeLuce is the President and CEO of Porter.

[3] The Respondent City opposes the applications and filed the following documents: the affidavit of Adam Vaughan sworn September 13, 2007. Mr. Vaughan is a City Councillor who represents the ward where the Finger Lot is located; the affidavit of David Hill sworn September 7, 2007. Mr. Hill is the principal of a school located near the Finger Lot; the affidavit of Andrew

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Kostuik sworn September 12, 2007. Mr. Kostuik is the Division Commander for Toronto Fire Services; and the affidavit of Dennis Bryant sworn April 28, 2008. Mr. Bryant lives in an apartment which overlooks the Finger Lot. Also filed were transcripts of the cross-examinations of Lisa Raitt, Robert Delucc, and Alvaro Almuina.

[4] Following the argument on the applications, on the consent of counsel, a motion was brought by the City to strike portions of the affidavit of Lisa Raitt sworn April 10, 2008 and parts of the affidavit of Mr. Almuina sworn April 11, 2008. In support of this motion, the following documents were filed: the affidavit of Diana Dimmer, the Director of Litigation in Legal Services for the City; the affidavit of Jerry Verhousek, who was the Access and Privacy Officer for the City; and the supplementary affidavit of Diana Dimmer sworn August 1, 2008. In response, the TPA filed the affidavit of Frank Cesario sworn July 17, 2008. Mr. Cesario was a solicitor with the law firm representing the TPA.

[5] Although the factum of the City submits that Porter had no standing in the application this issue was not argued before me.

BACKGROUND

[6] Certain facts are not in dispute. The TPA owns and operates the Toronto City Centre Airport ("Airport"), which has been operating out of the Island site since 1939. In October 2006, the applicant Porter commenced operating a commercial airline from the airport.

[7] The Federal Government, the City and the TPA are parties to an agreement referred to as the "Tripartite Agreement" which was signed and subsequently amended in 1983. Section 50 of that agreement contains a negative covenant as follows:

The parties hereto shall not do or permit to be done in, on, or over lands or waters adjacent to or in the vicinity of the Island Airport over which any party hereto exercises jurisdiction, anything which would interfere with the safe use and operation of the Island Airport. [emphasis added]

[8] The TPA leases a piece of land from the City known as the Finger Lot. It is located on the west side of Bathurst Street south of Queens Quay. The lease was entered into in August 1987. Prior to that time, the TPA was entitled to use areas of land around Bathurst Street and the Finger Lot for parking and access to the Airport. The City wished to create a park and the TPA agreed to give up its rights to some of the lands it was using at the time in order to facilitate the creation of Little Norway Park, which is located on the west side of Bathurst Street and the Finger Lot. As part of this negotiation, the City agreed to lease the Finger Lot to the TPA, to be used for parking and access to the Airport.

[9] Certain parts of the lease are relevant to the applications before me. Paragraph A6 states that the lessee covenants with the lessor:

That the lessee will not: (a) carry out any work; (b) erect any permanent or temporary building or structure or any other encumbrance, on or over the

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said demised premises without the prior approval of the Commissioner of Public Works of the Lessor, such approval not to be unreasonably withheld.

Paragraph A7 covenants:

That the Lessee will maintain the development of the said demised premises substantially in accordance with Plan BQ1 as revised July 9, 1986...

Paragraph A8 requires:

The Lessee to maintain and drain the "parking lot on the said demised premises..."

Paragraph A9 covenants that the Lessee:

will maintain to the satisfaction of the Commissioner of Public Works of the Lessor the bumper railings along the new west limit of Bathurst Street to prevent vehicles from overhanging the portion of the street to remain open....

[10] Plan BQ1 that is referred to in the lease shows the Finger Lot with a number of parking spaces running at right angles to Bathurst Street and an entrance at its southern boundary for access. A series of concrete curbs run along the east side of the Finger Lot preventing access from Bathurst Street to the Finger Lot. The lower part of Bathurst was renamed Eireann Quay at some point in time.

[11] In the early part of 2006, the TPA submitted an application to the City which proposed, among other things, a new ferry terminal and a reconfiguration of the Finger Lot to permit taxis to queue and park. The part of the work application that is at issue in these proceedings is the work that was requested be performed in the Finger Lot area, which consisted of the removal of 5 curbstones to permit access. It is conceded by the City that the work contemplated is minor. In support of the application from the TPA the Dillon Report was obtained. This study included an environmental assessment and detailed traffic assessment prepared by traffic consultants and engineers. While the report dealt with a number of issues, it recommended certain work be undertaken on the Finger Lot to improve access to the airport and to maximize safety concerns. In particular, the report recommended that access be provided at the north end of the Finger Lot and that three lanes in the Lot would be used for vehicles, buses and taxis to queue to provide access to the airport and they would exit at the south end of the lot. In addition, a sidewalk to the west of the Finger Lot was suggested for the safety of pedestrians in the area. At the time of the preparation of the Dillon Report, taxis and other vehicles were queuing and parking on the west side of Eireann Quay, immediately adjacent to the Finger Lot.

[12] It is acknowledged that there were extensive communications between the City and the TPA concerning the Dillon Report and the input from the City culminated in the final plan that was submitted by the TPA. Filed as evidence on the applications were copies of numerous letters from the City to the TPA making suggestions for amendments to the proposed plans, and requesting further information and documentation. It was not disputed by counsel for the City on

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these applications that certain employees of the City approved of the changes to the Finger Lot suggested in the Dillon report, specifically: John Mcndc, Manager of Traffic Planning; Toronto Fire Services; the Waterfront Secretariat; and Toronto Emergency Medical Services. It was emphasized, however, that these employees did not and could not convey to the TPA the support of the plan by the City. It was not disputed that the work application that was submitted was never approved by the City nor was it rejected; rather, there was no response.

[13] During a Council meeting held February 13, 2007, a report was requested on the cost of constructing a sidewalk between the east side of the Finger Lot and the east side of Eireann Quay. The Dillon Report had recommended that a sidewalk be constructed on the west side of the Finger Lot, alongside Little Norway Park. At a meeting held May 1, 2007, the Council enacted By-Law No. 487-2007 ("the By-Law") which designated Eireann Quay, formerly Bathurst Street, adjacent to the BQ1 lands as a fire route with no stopping at any time. The Bill was passed at the Council meeting of June 26, 2007 and it prevented taxis and other vehicles from queuing for access to the airport.

[14] The within applications were launched June 25, 2007.

POSITIONS OF THE PARTIES

Toronto Port Authority

[15] Pursuant to the terms of the lease, the City may not unreasonably withhold its approval of the work that the TPA has requested be done on the Finger Lot. The work application that was submitted was supported by expert opinion in the area of traffic and planning and safety concerns. In fact, it was supported by the City's own traffic expert, who agreed that the use of the Finger Lot for access to the Airport through queuing and parking of taxis, buses and other vehicles. To withhold approval of the work order constitutes a breach of the lease and of the Tripartite Agreement as well as a failure to act in good faith. The TPA submitted that there is no basis for the argument that the proposed amendments do not fall within the terms of the lease which permits the lands to be used for parking and access to the airport.

Porter Airlines

[16] Given the location of the airport on the island, access to taxis by passengers is essential to the operations of Porter. Taxis have always queued and parked on the west side of Eireann Quay, formerly known as Bathurst Street. Porter agrees with the position of TPA that using the Finger Lot for the queuing and parking of taxis would be a preferable solution and in the best interests of all parties. However, the City "stonewalled" the approval of the TPA's work application concerning the Finger Lot and never responded in any fashion to it. Instead, it enacted a "No Stopping" By-Law on June 26, 2007 which prohibits taxi queuing/parking on Eireann Quay which could only be designed to adversely affect the operation of the Airport and consequently, Porter. The actions of the City constitute bad faith, without the fairness, openness and impartiality which are requirements of a municipal government. It is clear that the intention of the City in enacting the By-Law in the face of the application that had been submitted many months prior by the TPA was to interfere with the operations of the TPA, Porter and the Airport.

City of Toronto

[17] The City denies there was any bad faith in the manner in which the work application submitted by TPA was dealt with. Under the terms of the lease, the Finger Lot was intended to be used as a parking lot and what the TPA seeks to do is to effectively change the use of the leased land to an airport taxi queuing area, which is not a permitted use. The lease regarding the Finger Lot is a contract and it is clear on its face that the land was intended to be used as an enclosed parking lot. If the proposed work changes the use of the land as determined by the lease, the landlord's refusal to convey his or her approval cannot be said to be unreasonable. It is not the court's function to determine whether the landlord's position is correct; rather it is to determine whether the position is "reasonable".

[18] Contrary to what is asserted by the applicants, the By-Law that was enacted was to address issues in the area and was effected in good faith. Further, it is incorrect to state that the City ignored the work application of the TPA. Throughout 2006, there was on-going communication between the City and the TPA concerning the contents of the Dillon Report. While it is true that some employees of the City recommended accepting the TPA proposal regarding the changes to the Finger Lot to permit taxi queuing, this was not unanimous, nor was it indicative of the position of the City on the issue.

[19] The withholding of the City's consent to the work application was never unreasonable. The City must consider a variety of interests when deciding on a particular application. In this case, there is a school nearby and a community centre and there are pedestrian safety issues to be concerned with. Further, there is a park adjacent to the Finger Lot and the queuing of taxis in the Finger Lot could have a negative impact on the park.

[20] With respect to the argument that the actions of the city constitute bad faith, deference must be given to municipalities in the exercise of their statutory powers. The law is clear that By-Laws passed in good faith are not open to review, even if they are unreasonable.

[21] With respect to the allegations of bad faith, there is no evidence to support this. Councillor Vaughan filed an Affidavit which sets out his concerns about the change of use of the Finger Lot and justification for the motions he put forward at the Council meetings. The "No Stopping" By-Law was necessary for safety concerns and the sidewalk By-Law would place the sidewalk in a more desirable location.

MOTION TO STRIKE PORTIONS OF EVIDENCE

[22] I will deal at the outset with the motion to strike parts of the evidence which was brought by the City pursuant to Rule 25.11(a) of the Rules. At issue are documents obtained by the TPA pursuant to an access to information request, principally a report dated July 9, 2007 from the City Solicitor to City Counsel in which instructions were sought regarding the within applications. This report, marked confidential, is attached as exhibit H to the affidavit of Lisa Raitt sworn April 10, 2008. Counsel for the City asks that it be struck on the basis of solicitor/client privilege.

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[23] In addition, the City sought to strike portions of the affidavit of Lisa Raitt sworn April 10, 2008 and the affidavit of Alvaro Almuina sworn April 11, 2008 which referred to the interim agreement entered into between counsel after the initiation of the applications, and dealt with usage of the Finger Lot on an interim basis, until the hearing of the applications. Objection was taken to references to how the Finger Lot was used after the commencement of the applications, as these discussions and documentation flowing from them were protected by "settlement privilege". In support of the city's motion to strike the affidavit of Diana Dimmer sworn June 25, 2008 was filed. Ms. Dimmer is the Director of Litigation in the Legal Services Division of the city.

[24] The TPA objects to the motion to strike and filed the affidavit of Frank Cesario sworn July 17, 2008. Mr. Cesario acted on behalf of the TPA in 2007, along with Mr. Flaherty. Essentially, the TPA argues that the City waived privilege in the solicitor's report and that the notion of "settlement privilege" simply does not exist.

[25] The report dated July 9, 2007 was prepared by Anna Kinastowski, a solicitor with the City, and was given to City Council with recommendations concerning the court applications that had been launched. The solicitor recommended to Council that the work order of the TPA to remove the parking curbs in the Finger Lot be approved and as well, the document contains other information such as the solicitor's opinion on other issues between the parties.

[26] The background to the production of the solicitor's report is relevant. By way of a Freedom of Information request, counsel for the TPA received a bundle of documents from the City's Access and Privacy Officer. According to the affidavit of Mr. Cesario, the documents were picked up from the City and when he commenced reviewing them on September 26, 2007, he saw the report and wondered if it was privileged, so he stopped reading it. He called Ms. Dimmer on the same day and advised her that in the bundle of documents received pursuant to the access to information request, perhaps there were documents that should not have been included. Ms. Dimmer advised that she would attend at the office of counsel for the TPA and examine the documents. Because of work commitments, Ms. Dimmer was unable to attend herself and she sent an articling student, Rani Khan.

[27] The report in question was at the top of the documents and was numbered pages 1 through 11. Ms. Khan spent more than 2 hours reviewing the documents and removed approximately 27 documents on the basis of privilege and then left the office. Mr. Cesario commenced reviewing the remaining documents sometime after October 5, 2007 according to his affidavit. He noticed that the solicitor's report was still at the top of the bundle. Mr. Flaherty sent a letter to Ms. Dimmer on October 9, 2007 in which he asked for her confirmation that the documents which had been reviewed by Ms. Khan were properly produced. Ms. Dimmer did not apparently respond to this letter and her affidavit makes no reference to it.

[28] The affidavits for use on the applications were prepared and the report was included as an exhibit in the affidavits of both Lisa Raitt and Alvaro Almuina which were served on counsel for the City sometime in April of 2008. Following service of the application materials, Mr. Campbell sent a letter April 24, 2008 objecting to the inclusion of the report in the application record.

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[29] In argument, Mr. Campbell stated that the report was produced through inadvertence and is clearly privileged so ought not to be considered by the Court. He denied there was ever a waiver of privilege, noting that silence cannot be implied as a waiver of privilege. In response, Mr. Finlay argued that carelessness can amount to a waiver of privilege, according to the case law, and in the case before me, the City had several opportunities to correct their error and failed to do so.

[30] In *Chan v. Dynasty Executive Suites Ltd.*, [2006] O.J. No 2877, Mr. Justice Belobaba considered the issue of waiver of privilege in a case involving privileged documents being listed in Schedule A of an affidavit of documents instead of Schedule B. He referred to the well-known text *The Law of Evidence in Canada* (Sopinka, Lederman and Bryant) which sets out the 3 factors a court must consider when determining whether or not privilege has been waived through inadvertent disclosure: whether the mistake was inadvertent; whether an immediate attempt was made to retrieve the documents; and whether it would be unfair to the receiving party to preserve the privilege in the particular fact situation. In doing so, Justice Belobaba considered whether the error approached the level of carelessness that was greater than inadvertence, which is what I must do in the case before me.

[31] Clearly there was mistake made by the access and privacy officer in producing the report. The City had an opportunity to remedy this when Mr. Cesario called Ms. Dimmer to alert her to the fact that a privileged document had potentially been produced through error. Although no affidavit evidence was filed by Ms. Khan, it appears that the privileged report was sitting on the top of the pile of documents when she attended to review them. She failed to identify it as a privileged document and although she left with more than 25 documents she viewed as privileged, the disputed report was left behind. Again, counsel contacted Ms. Dimmer by letter to inquire if the balance of the documents were properly produced. There was no response to this letter for more than 6 months and this failure is not addressed in the affidavit of Diana Dimmer.

[32] In the present case, I find on the evidence that with the phone call from counsel for the TPA September 26, Ms. Dimmer ought to have been alerted to the fact that potentially, a privileged document had been produced to the TPA inadvertently. When the articling student returned with more than 25 documents which were retrieved from the documents sent to counsel for the TPA, this should have given even greater cause for concern to Ms. Dimmer. When counsel sent his letter October 9, in light of the circumstances, it would have been reasonable for counsel to contact Mr. Flaherty to ensure that all of the documents that were in his possession at that time were properly produced. To do so would have satisfied the second factor in the test as set out in *Chan v Dynasty, supra*, to immediately attempt to retrieve the document. Counsel for the City did not do this, however, and in fact did not even respond to the correspondence or follow up in any way to satisfy herself on this point. I find on the facts that the actions of the City were careless, perhaps reckless. The disclosure of the report certainly, in my view, goes beyond mere inadvertence.

[33] I turn, then, to the consideration of whether it would be unfair to the TPA to preserve privilege in these circumstances and I have concluded that it would. The report that is at the centre of this motion is an analysis of in-house counsel at the City which contains a recommendation to the City Council on how to proceed with the applications that are before me.

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It includes the solicitor's opinion on the merits of the TPA's application, and the downside of opposing it, including the risk of a finding of bad faith. It is not disputed that the purpose of the document was to advise counsel and would, in the usual course, be deemed privileged. Given that solicitor/client privilege is one of the fundamental underpinnings of our justice system, the waiver of documents normally subject to this privilege must only be done in the clearest of cases, in my opinion. The contents of the solicitor's report is additional support for the position of the TPA in this application but given the other evidence marshaled by the applicant, I do not find that it would be unfair to the TPA to preserve the privilege that attaches to the solicitor's report. At the same time, I find that the prejudice that would occasion to the City by waiver of the privilege would be significant. Therefore, Exhibit H of the affidavit of Lisa Raitt sworn April 10, 2008 and Exhibit G of the affidavit of Alvaro Almuina sworn April 11, 2008 along with any references to these exhibits in the aforementioned affidavits shall be struck.

[34] I turn now to the issue of whether Exhibits B and F of the Raitt affidavit of April 10, 2008 and Exhibit I of the affidavit of Alvaro Almuina sworn April 11, 2008 and references to these documents throughout the affidavits ought to be struck on the basis that they disclose materials protected by settlement privilege. Essentially, what is objected to is Exhibit B and F of the Raitt affidavit which make reference to the interim arrangement between counsel for the use of the Finger Lot in the period of time until the court applications were dealt with. Ms. Dimmer in her letter of June 29, 2007 to Mr. Flaherty confirming the interim arrangement noted:

This arrangement is without prejudice to all of the parties [sic] rights and it is agreed that this agreement cannot be relied upon by any party in support of or in response to the court application or a motion for interim relief, if necessary.

Mr. Campbell argues that because the arrangement was done on a without prejudice basis, it is improper for Ms. Raitt and Mr. Almuina to refer to it in their respective affidavits. Counsel for the TPA acknowledges that the interim arrangement was without prejudice, but that meant that neither party could make reference to it during the hearing of the application. However, the facts of what has transpired since the institution of the application are not subject to any privilege and certainly can be referred to.

[35] I am unaware of what constitutes "settlement privilege" as referred to by counsel for the TPA. Certainly, without prejudice communications between counsel for the purpose of resolution of issues in a legal proceeding cannot be referred to before the court. Clearly, it was the intention of counsel for all parties that the interim arrangement was entered into on a "without prejudice" basis in order to address how the Finger Lot was to be used pending the outcome of these applications. In my view, this means that the arrangement could not be referred to by counsel during argument as somehow adding support to the position taken by a particular party. It does not, however, preclude reference in the evidence to the Finger Lot in the period of time after June 29, 2007 when the interim arrangement was entered into. In the text, *The Law of Evidence in Canada* by Sopinka, Lederman and Bryant (which was referred to by counsel during argument) it is noted at section 14.203 that:

...courts have protected from disclosure communications, whether written or oral, made with a view to reconciliation or settlement. In the absence of such

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protection, few parties would initiate settlement negotiations for fear that any concession they would be prepared to offer could be used to their detriment if no settlement agreement was forthcoming...

In my view, that is precisely the situation in the present case. If the City thought that by agreeing to allow the use of the Finger Lot in accordance with the plan the TPA sought approval of would be used against them at the hearing of the applications, the City would not have agreed to permit the use on an interim basis. It did so in the interests of attempting to resolve matters between the parties and to allow the argument to be put forth that because the interim agreement has worked for a year without any apparent safety issue or traffic problem would be manifestly unfair.

[36] Mr. Almuina in paragraphs 54, 55, 56, 57 and 58 of his affidavit that are objected to by the City does not refer to the interim agreement; rather he makes reference to his observations of the flow of traffic and pedestrian safety on the Finger Lot in 2008 and consequently, they are proper. However, in paragraph 67, he makes specific reference to the "interim solution" and states that there have been "no major issues have been observed or reported by the City to the TPA during this time, confirming the design agreed to between the City and TPA works effectively and safely." In my opinion, this paragraph offends the "without prejudice" nature of the interim arrangement because Mr. Almuina is seeking to make reference to the agreement to support his opinion that the planned use of the area which the TPA sought approval of from the City is the best use of the space. He is not simply setting out facts that he observed in the time period after the interim agreement was in place. In essence, he is saying "the proof is in the pudding." Consequently, paragraph 67 shall be struck.

[37] Similarly, paragraph 5 of the Raitt affidavit shall be struck as she refers to the interim arrangement with the City to bolster her statement that the Finger Lot has been operating functionally and safely as a taxi queuing/parking area since September 24, 2007. For the same reasons, paragraphs 20, 21, the last sentence of paragraph 38 the last sentence of paragraph 42 shall all be struck. The other portions of the affidavit of Raitt objected to, in my view, do not offend the "without prejudice" nature of the interim arrangement - the last sentence of paragraph 10, paragraphs 11, 18, 19, Exhibits B and F - they are factual or simply make reference to the interim agreement so they shall remain.

ANALYSIS

[38] It is not the function of the Court on these applications to decide between the competing interests of various groups, all which use the neighbourhood. Rather, the questions that must be answered are as follows:

- 1) Does the refusal of the City to approve the work application submitted by the TPA and/or the enactment of the By-Law breach the Tripartite Agreement which requires the City not to interfere with the safe use and operation of the Airport?
- 2) Does the refusal of the City to approve the work application submitted by the TPA constitute a breach of the Lease Agreement to not unreasonably withhold its consent to the changes?

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- 3) Would the changes sought by the TPA to the Finger Lot effectively change the use of the lands from a parking area as stipulated in the Lease?
- 4) Do the actions of the City constitute bad faith and should the By-Law be quashed for illegality?

[39] The airport has been in operation for almost 70 years. Since October of 2006 when Porter began operating out of this airport, there are more flights going into and out of the airport. Given its unique location, the access to and from the airport is an on-going concern for the parties involved in these applications as well as for residents who live in the area. The affidavit of Robert Deluce sworn June 25, 2007 indicates that access to and availability of sufficient taxi cabs to transport customers to and from the airport is critical to Porter's operations, particularly given the location of the airport. Taxis must be able to queue for passengers or the situation would be chaotic.

[40] In reviewing the evidence filed by all of the parties on these applications, I find the affidavit of Alvaro Almuina ("Almuina"), without Exhibit G or paragraph 67 which I struck, of particular assistance. Almuina is a professional engineer with a particular expertise in traffic planning and roadway safety. He is a partner with Dillon Consulting Limited, which had conducted a number of studies concerning this particular area: in 2002 it prepared 2 reports dealing with traffic related issues; and in 2005 it prepared an environmental report. His curriculum vitae which was attached to his affidavit demonstrates that he has been retained by cities, towns, clubs, hospitals as well as other private organizations to advise on land use planning, roadway safety, parking and traffic engineering. While he has done work for the TPA, he has also been retained by the City.

[41] In the present case, Almuina was retained by the TPA in 2005 to conduct an environmental assessment for a large project that was contemplated to provide better access to the airport. While he was working on this project, Almuina worked closely with staff from the City on transportation issues. He dealt with the concerns of the city as part of his work for the project. In Mr. Almuina's opinion, the use of the Finger Lot for taxi queuing/parking for access to the airport does not negatively impact the neighbourhood. Further, the final design plan (exhibit E to his affidavit) constitutes the best alternative for the use of Bathurst Street south of Queens Quay including access to the airport. Mr. Almuina deposes that in his professional opinion, the use of the Finger Lot as a taxi queuing/parking area for access to the airport does not pose safety concerns for pedestrians or vehicular traffic. His views were supported by certain of the staff from the City who are identified in paragraph 52 of his affidavit.

[42] It is clear that the City had input into the TPA's proposed design for the use of the Finger Lot and by the early part of 2007, the City staff who had been involved approved the design in principle. However, the application from the TPA was not dealt with; there was no response whatsoever. Instead, City Council enacted a By-Law (487-2007) on May 1, 2007, without notice to the TPA. This By-Law prevented vehicles from stopping on the west side of Eireann Quay and prevented taxis from queuing/parking on Eireann Quay to pick up/drop off passengers from the airport. On June 26, 2007 Council enacted a further By-Law (756-2007), again without notice to the TPA, which contained a directive to build a sidewalk between the Finger Lot and

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the traffic lane on Eireann Quay. There is considerable evidence before me, including the opinion of Mr. Almuina, that construction of a sidewalk as contemplated by By-Law 756-2007 would be unsafe and illogical.

QUESTIONS

1) By refusing to approve the TPA's application to perform certain work, was the City in breach of its negative covenant pursuant to the Tripartite Agreement not to interfere with the safe use and operation of the Airport?

[43] Counsel for the City took the position that the Tripartite Agreement did not apply to the Finger Lot. In my view, this argument is untenable and I reject it. The parties to the agreement - the Federal Government, The City of Toronto and the TPA - agreed that they would not do anything "in, on, or over lands or waters adjacent to or in the vicinity of the Island Airport ... which would interfere with the safe use and operation of the Island Airport..." The Finger Lot clearly falls squarely within the lands as described.

[44] The evidence establishes that the TPA sought expert input as well as suggestions from City staff prior to submitting their proposed plan for the Finger Lot. The expert opinion from Dillon Consulting was that there would not be any safety concerns for pedestrians or vehicles as a result of the changes sought. It was the conclusion of the experts that the Finger Lot was the best location for queuing/parking for taxis and other vehicles accessing the airport for passengers and that the proposed use would also control the taxis. These opinions were supported by members of the City staff, some of whom had input into the proposal put forth by the TPA. Instead of considering the work application, the City enacted 2 By-Laws to prevent any vehicles from stopping on Eireann Quay and to construct a sidewalk in a location which was not considered safe by the experts. These By-Laws clearly had the effect of interfering with the safe use and operation of the airport, contrary to the provisions of the Tripartite Agreement. Given the unique location of this airport, it is clear that access to taxicabs is absolutely essential to people using the airport and its smooth operation. The effect of the By-Law is to prevent taxis from queuing and, therefore, being available to airport travellers. It is difficult to conceive of how the consequences of the By-Law could be viewed as anything other than an interference with the operation of the airport. Given the failure of the City to deal with the work application submitted in March 2006 and the decision to instead enact By-Laws without notice which were contrary to the expert opinions on safety issues, the inescapable conclusion that the Court must draw is that the By-Laws were enacted to interfere with the operations of the TPA and their plans for the Finger Lot.

[45] Pursuant to the terms of the Tripartite Agreement, the parties agreed not to do anything which would interfere with the safe use and operation of the Island Airport. In my view, the enactment of the By-Laws which had the effect of preventing the use of the Finger Lot as contemplated by the application constitute a breach of the provisions of the Tripartite Agreement not to interfere with the "safe use and operation of the Island Airport".

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2) By refusing to approve the TPA's application to perform certain work, was the City in breach of its obligations under the Lease Agreement for the Finger Lot to not unreasonably withhold its consent to the TPA performing work on the Finger Lot, in this case, to move 5 parking curbs to allow access to the Finger Lot?

[46] Justice Cullity in *1455202 Ontario Inc. v. Welbow Holdings Ltd.* noted:

in determining the reasonableness of a refusal to consent, it is the information available to—and the reasons given by—the Landlord at the time of the refusal—and not any additional or different facts or reasons provided subsequently to the court—that is material.

[47] In the case before me, the City failed to give any reasons at the time for its refusal to approve the work application. Indeed, no reasoning at all was provided until these applications were launched. On the basis of the reasoning in *Welbow*, *supra*, this would make the refusal to consent unreasonable.

[48] However, I will proceed to determine whether the failure to provide consent was unreasonable on the fact before me. Madam Justice Mesbur considered the issue of what constitutes a reasonable withholding of consent by a landlord in *Zellers Inc. v. Brad-Jay Investments Ltd.*, [2002] 117 ACWS (3d) 814 (Ontario Superior Court). She noted that the discretion of the landlord

... must be exercised in good faith, and not for any collateral or ulterior purpose. There is both a subjective and objective component to the landlord's decision ... The court must consider the landlord's "subjective" reasons, that is, the landlord's true motives or reasons for withholding its consent. If the landlord made its decision for a collateral purpose, unrelated or extraneous to the lease, the refusal will be found to be unreasonable.

[49] When considering the actions of the City on an objective basis (that is, would a reasonable landlord have refused to provide consent), I note that members of the City staff who reviewed the proposed use of the Finger Lot agreed with the suggested use of space. The expert opinions are in agreement with the proposed changes. There is no satisfactory evidence before me to support the contention that there is any safety issue concerning the taxi queuing/parking in the Finger Lot. The alleged safety concerns set out in the affidavit of Mr. Vaughan cannot form the basis upon which a reasonable landlord would refuse to consent to the work application. There is no persuasive evidence offered by the City to support the contention that the failure to approve the application was based on safety concerns.

[50] The City relies on the Affidavit of a member of City Council, Adam Vaughan, who deposes that "in his view" the work application submitted by the TPA would constitute a change of use of the Finger Lot from parking to taxi queuing and through traffic and he is concerned that it would not be in the interests of the local residents. Counsel for the City argued that the fact that the applicants did not cross-examine Mr. Vaughan on his affidavit meant that the contents of his affidavit must be accepted by the court. This is an incorrect statement of the law. The fact that there was no cross-examination of a deponent can be explained on the basis that the contents of

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the affidavit did not require it and such a decision is a judgment call on the part of counsel. The proper weight to be given to an affidavit is always in the discretion of the Court and depends on a variety of factors.

[51] While he concedes that reports prepared by City Staff supported the changes suggested by the TPA, in paragraph 33 of his affidavit Mr. Vaughan baldly states, "My opinion was that TPA's proposal was not satisfactory and would make the problems on the street worse." (emphasis mine). It is important to note that Mr. Vaughan, while clearly familiar with the area, is not an expert in the area of vehicular traffic, pedestrian safety or roadway safety. While he deposes in his affidavit that he met with various groups and individuals in an effort to "find solutions for this intersection", there is an absence of reference to any experts who support his view of the use of the Finger Lot. While I have no doubt that Mr. Vaughan has the best interests of his constituents in mind, the views and opinions expressed in his affidavit are of little assistance to the court on the issues raised in these applications.

[52] The evidence is compelling that the planned use for the Finger Lot was arrived at with much consideration. The experts in the area of traffic and pedestrian safety concluded the best use of the Finger Lot was for queuing and parking, given the proximity of the airport. The City's staff was asked for input into the study and their comments were taken into consideration. Consequently, the City staff members, including those with some expertise in the area, supported the plans in principle. Further, the City's Emergency Services and Fire Services supported the plan. There is nothing in the evidence filed by the respondent to suggest that there was any basis for the failure to approve the TPA application or indeed, to even respond to it. Presented with this evidence, in my view, under the circumstances, on an objective basis, any reasonable landlord would have provided consent to the work contemplated.

[53] I turn to the consideration of whether the landlord's withholding of consent was subjectively unreasonable. The law is clear that if a landlord makes a decision for a collateral purpose, its refusal to consent will be found to be unreasonable: *Welch Foods v. Cadbury Beverages Canada Inc.*, [1999] O.J. No 544 (Ont. Sup. Ct.). The onus is on the tenant to show that the withholding of consent is unreasonable. It is not my function to determine whether the consent ought to have been granted after the application was submitted. Rather, the Court must decide whether the City acted reasonably in withholding consent.

[54] On the basis of the evidence filed on these applications, I am not satisfied that safety concerns played any role in the failure to approve the application of the TPA. The expert opinions from Mr. Almuina, the Emergency Services Departments and the Traffic and Planning Departments of the City all concur that the plan is the best use of the space and is the safest. The safety issue was addressed by traffic studies that were done in 2006 as set out in the Almuina affidavit and the conclusion was that the proposal of the TPA for taxi queuing and parking in the Finger Lot would not have any adverse effects on safety.

[55] These opinions were not addressed through other expert opinions secured by the City; rather, the City appears to rely on the views of Councillor Vaughan which are not supported by expert opinion. The affidavits filed by David Hill and Dennis Bryant make reference to vague safety concerns which are not supported by any expert opinion or study. The affidavit of the

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employee of Toronto Fire Services, Andrew Kostiuk contains his personal opinion. Given that the TPA secured the endorsement of the Chief of Toronto Fire Services to the proposal, I attach very little weight to the Kostiuk affidavit.

[56] The refusal of the City to approve the work application seen in conjunction with its enactment of the By-Law to prevent cars from stopping on the west side of Eireann Quay and the further direction that a sidewalk be built in a location that was not supported by the studies that had been done lead me to conclude that the City was acting to achieve a collateral purpose and therefore, on a subjective basis, its refusal to consent was unreasonable.

3) Does the work application submitted by the TPA constitute a change of use of the Finger Lot, contrary to the terms of the lease?

[57] The terms of the Lease permits the TPA to use the Finger Lot for parking and access to the airport. To suggest as the respondent does, that the work application would alter the fundamental use of the land as contemplated by the lease is simply not supported on the facts. The work proposed is to remove 5 curb stones to open up an entrance to the Finger Lot and to change the parking spaces from perpendicular to Eireann Quay as opposed to parallel.

[58] It was suggested by counsel for the City that the proposal of the TPA would substantially alter the use of the Finger Lot as set out in the lease but this argument is without merit, in my opinion. The evidence indicates that upon entering into the aforesaid lease, the TPA gave up rights to certain areas in the vicinity of the Finger Lot and "gave" them to the City to facilitate the creation of a park in the area. In return, the TPA secured the lease of the Finger Lot that was to be used for parking and access to the airport. The work application submitted by the TPA which involved the removal of 5 curb stones would not change the intended use of the lands, which according to the lease, were for parking, access and egress purposes. Even the evidence from the City Manager confirmed that the plans of the TPA were not in breach of the provisions of the lease - see letter from Shirley Hoy, exhibit LL to affidavit of Lisa Raitt sworn 10 April, 2008. I have no difficulty finding that the work application filed by the TPA is consistent with the terms of the lease and conforms with the intended use of the lands as set out in the lease: to permit vehicles to park; and to permit access to the airport. This does not, in my opinion, change the use of lands as set out in the lease.

CONCLUSION

[59] For the reasons set out above, I find that the refusal of the City to approve the work application submitted by the TPA and its enactment of By-Law 487-2007, item 5.45, constitutes a breach of the negative covenant set out in the Tripartite Agreement not to interfere with the safe use and operation of the Toronto City Centre Airport and a breach of its obligation to the TPA pursuant to the Lease Agreement for the Finger Lot to not unreasonably withhold its consent to the work requested on the Finger Lot and a declaration shall issue to this effect.

[60] The City is directed to forthwith approve the TPA's application to perform certain work on the Finger Lot, in particular the removal of five curb stones on the Finger Lot.

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[61] Given my order, it does not appear necessary for me to determine whether the By-Law ought to be quashed for illegality or whether the actions of the Council constituted bad faith. If counsel require that I deal with this issue, they can advise me in writing, following which I will deliver written reasons on this point.

[62] If the parties cannot agree on the issue of costs, I will receive brief written submissions within one week of the release of my reasons, such submissions being no more than 5 pages in length with supporting documentation, following which I will fix the costs.

Released: December 23, 2008


Wilson, D.A., J.

**COURT FILE NOs.: 07-CV-335301PD3 &
07-CV-335305PD3
DATE: 20081223**

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

TORONTO PORT

Applicant

- and -

CITY OF TORONTO

Respondent

- AND BETWEEN -

PORTER AIRLINES INC.

Applicant

- and -

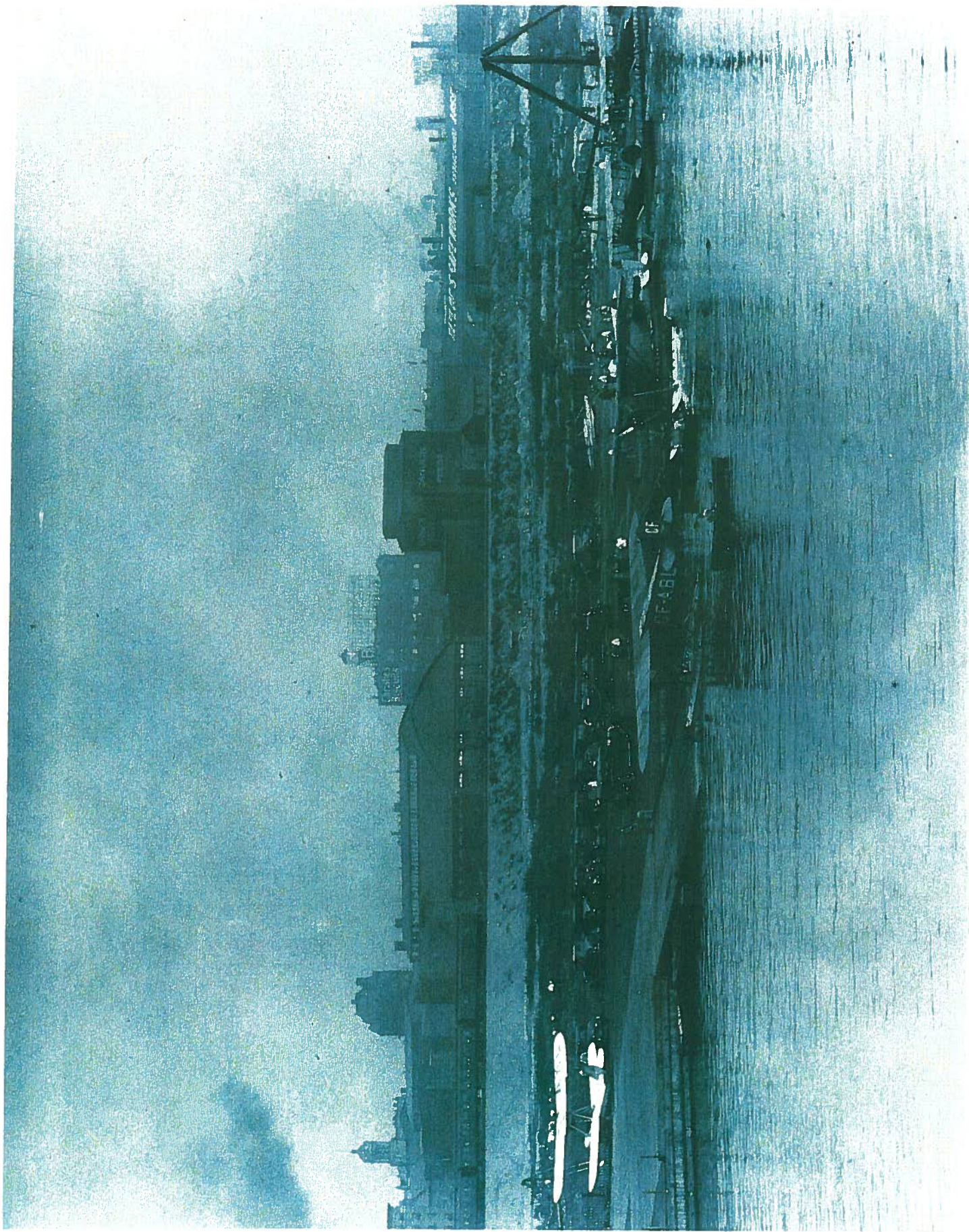
CITY OF TORONTO

Respondent

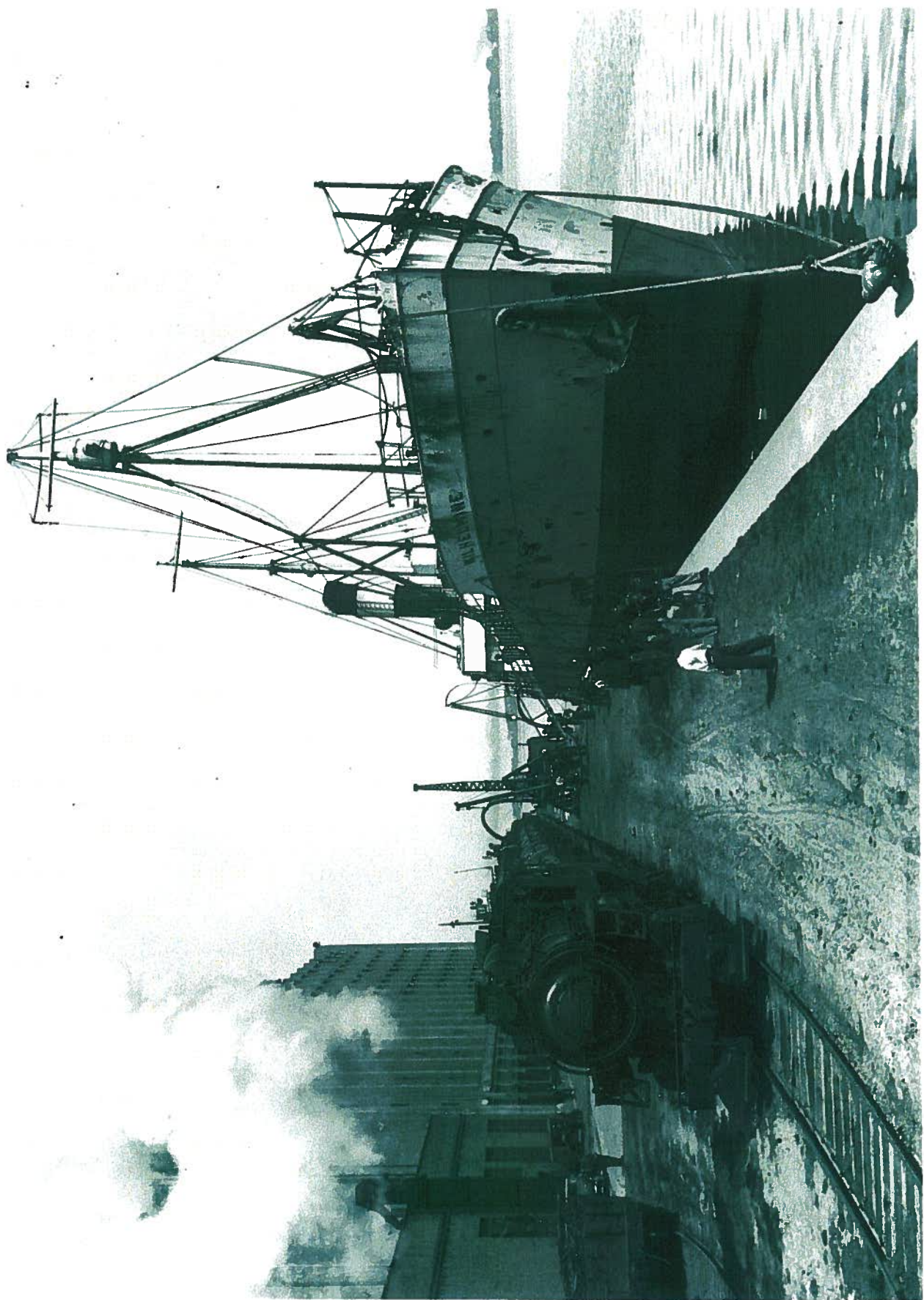
REASONS FOR JUDGMENT

WILSON D.A., J.

Released: December 23, 2008

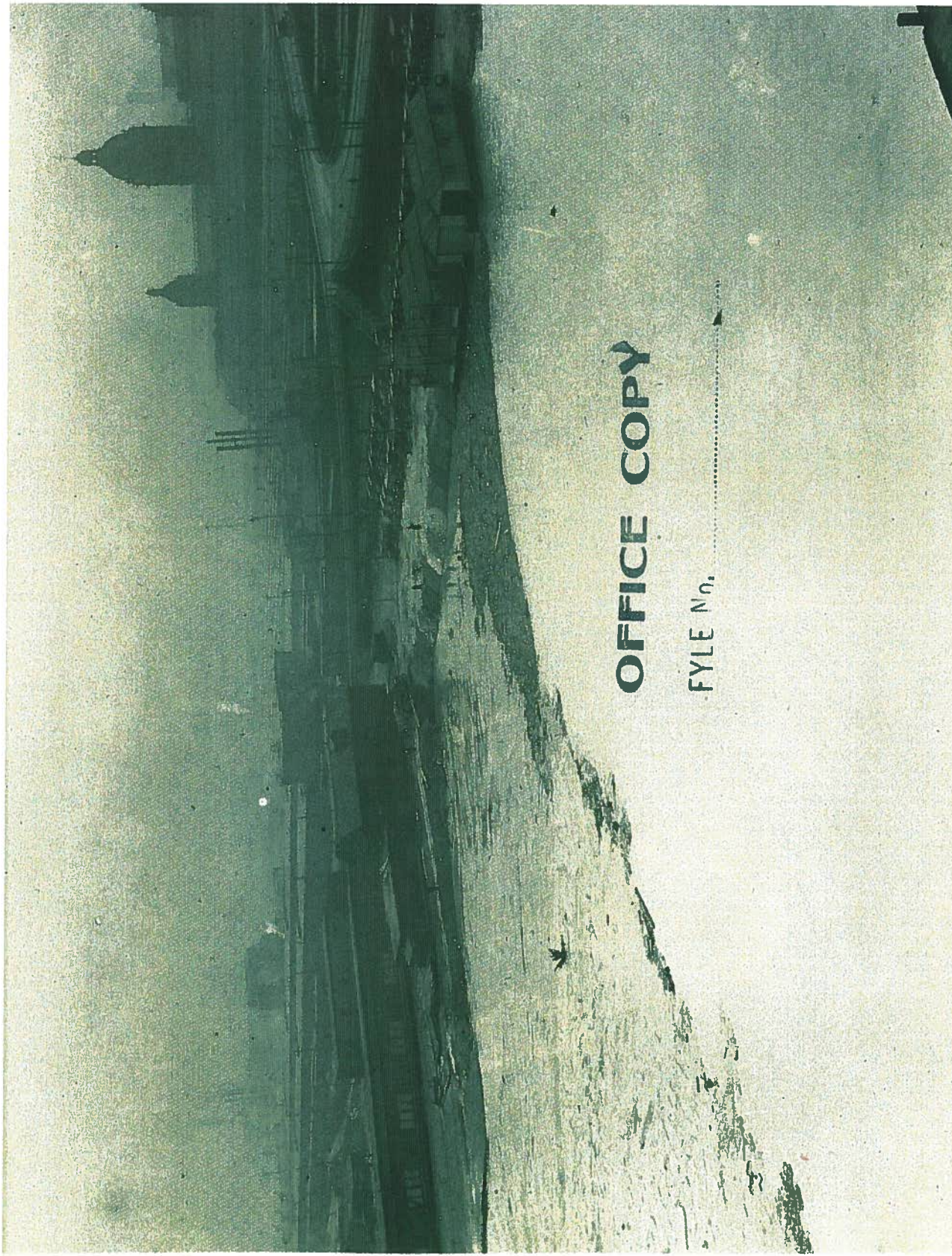






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