GOWLINGS

REVIEW OF TORONTO PORT AUTHORITY REPORT

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TORONTO PORT AUTHORITY REVIEW

OVERVIEW

- In the years that followed its establishment in 1911, the Toronto Harbour Commissioners (THC) played a determinant role in reclaiming from Lake Ontario hundreds of acres of priceless land on the Toronto Waterfront. This was done without political direction from federal, provincial or municipal authorities.

- Beginning in the early 1930s, the THC also played a key role in the setting up and development of the Toronto Island Airport, which in the 1960s had become one of Canada's busiest airports.

- In the late 1970s and early 1980s, with the advent of Short Take-Off and Landing (STOL) aircraft, municipal authorities worked with the federal authorities to establish a framework for the management and operations of the Toronto Airport. These efforts led to the signing of the 1983 Agreement between the City of Toronto, Transport Canada and the THC, an Agreement that sought to define the conditions under which the Island Airport would operate to ensure it would not dominate Waterfront activities to the detriment of other stakeholders. The Tripartite Agreement is still in place and will terminate only in 2033.

- In the late 1980s, the City of Toronto who, like the THC, also owned considerable lands on the Waterfront, became concerned with the land development activities of the THC. The City, after the Crombie Royal Commission Report recommended the THC divest itself of certain lands, decided to use power it thought it had over the THC through its appointment power of three out of five THC Commissioners, to effectively start implementing unilaterally the policy direction and recommendations of the Commission.

- Up until that time, THC activities were largely funded by the rental revenues it was collecting from the leasing of its large pieces of lands on the Waterfront, about $6-million annually.

- The City, by a first Lease Purchase Agreement in 1991, was able to effectively transfer from the THC to the City and one of its subsidiaries, the Toronto Economic Development Operation (TEDCO), through the control it exercised on the majority of THC Board members, large land holdings of the THC (more than 300 acres). The 1991 Lease Purchase Agreement provided for an annual payment of about $1.5-million, a substantial decrease in the annual amount the THC was collecting through the rental of the very same land transferred to the City.

- In 1994, the City entered into a second Lease Purchase Agreement transferring another 300 acres of THC land to the City and TEDCO. An amended Subsidy Agreement increased the amount to be paid to the THC to $2.8-million, which was much less than the $6-million collected on the rentals of the land the THC originally owned. Moreover, soon after having entered the Agreement, the City, however, defaulted on its 1994 undertaking, creating further financial difficulties for the THC.

- These transfers were made over the objections of THC management and the non-City appointed directors, who consistently maintained that these transfers were not in the best interests of the THC.

- In mid-1990s, the federal government entered into a program to modernize Canadian harbours and ports, which lead eventually to proposals for a new *Canada Marine Act* (*CMA).* The legislative proposals were debated in Parliament over a couple of years before and after the 1997 federal elections. Initially, it was not contemplated that the Toronto Harbour would be covered by the proposed legislation. At the insistence of a few Toronto MPs, however, the federal government eventually agreed, in the face of an all-party agreement, to include Toronto to the list of ports to be covered by the legislation. The *CMA* was adopted and it continues to apply to this day to the Toronto Harbour.

- Parliament itself made a determination that the Port of Toronto met the criteria set out in the legislation for the purpose and was a port of national importance, and that as such it should come under the *CMA.*

- The *CMA* adopted by Parliament in 1998 was meant to ensure that Canadian ports of national importance would be competitive, efficient, commercially oriented and be maintained on a financial self-sufficient basis. The legislation contains many measures, in contrast with the legislation of 1911 governing the THC, to ensure the transparency and accountability of Port Authorities.

- After many unsuccessful attempts by the THC, the TPA and Transport Canada to persuade the City of Toronto to remedy the untenable situation created by the land transfer of the early and mid-1990s, the TPA launched court proceedings in 2001 against the City to obtain satisfaction of its grievances.

- Back in 1995 and 1998, the City had approved an amendment of the 1983 Tripartite Agreement to allow for the construction of a fixed link between the Island Airport and the City mainland. Improved access via a fixed link had been considered by many studies as a prerequisite to the airport becoming financially self-sufficient.

- While the proceedings initiated by the TPA relating to the land transfers were following their course in Court, the City, at the request of the TPA, was debating again the question of a fixed link. Eventually in 2003, the City approved a settlement of the proceedings launched by the TPA, and after having formally approved in 2002, an amendment to the 1983 Tripartite Agreement to permit the construction if a fixed link. This amendment also obtained the approval of the federal government.

- The City having endorsed the construction of a fixed link, the TPA in early 2003 took formally various steps toward the construction of the fixed link: environment assessment procedures and processes, requests for proposals from construction companies, etc.

- 2003 was a municipal election year in Ontario. One of the candidates, Mr. David Miller, who was running to become mayor, promised, as one part of his campaign platform, to stop the construction of the bridge if he was elected. After his election as mayor on November 10, 2003, Mr. Miller quickly called a meeting of City Council on December 2, at which the Council purported to withdraw its support of the fixed link.

- Many questions have been raised in the media, at City Hall, amongst Toronto Waterfront and Island residents and others regarding the eventual decision of the federal government to adopt a regulation under the CMA to prohibit the construction of a fixed link to the Island Airport and the payment of damages to the TPA and third parties for claims resulting from the cancellation of the bridge. Questions have also been raised regarding, the commercial arrangements entered into by the TPA and RegCo for the creation of a new airline to operate at the Island Airport.

- The questions raised, and which are reviewed in this report, concerned primarily the actions and decisions of the TPA regarding the construction of the bridge, the purchase of a new ferry and these commercial arrangements. As my Report shows, it is my view, considering all the facts that have been brought to my attention that the TPA has in all respects complied with due diligence requirements and the generally respected principles of good governance.

- My review has also demonstrated the very challenging conditions under which the TPA was managing its harbour and, particularly, its airport responsibilities. Since its creation, the TPA has met with organized opposition from a number of groups and individuals who pursue the objective of either closing the Island airport or transferring the responsibility for it to the City who, under the current administration would most likely want to close it. A consequence of this opposition has been a deterioration of the TPA relations with most if not all community groups, and the City, certainly since the November 2003 elections.

- In concluding my Report, I make recommendations designed to strengthen the transparency of the TPA administration and facilitate relations with stakeholders and interested groups and individuals.

- The various matters set out briefly in this Overview are discussed in the Report in more details and at greater length. This overview is meant only to provide in summary form the key events relevant to my review. These events are fully elaborated upon in the Report.

- Attached to my Report is a partial list of persons and groups I interviewed or met with during the course of the review and/or who made submissions to or corresponded with me. (Attachment 1).

INTRODUCTION

This report concerns the review I have conducted of the transactions and decisions of the Toronto Port Authority (TPA) regarding the construction of a fixed link to the Toronto City Centre Airport (TCCA or Island Airport), the purchase of a new ferry and the construction of new passenger terminals, in accordance with the attached Terms of reference (Attachment 2).

The TCCA has a long and distinguished history that goes back to the early days of aviation in Canada. It is managed and operated by the TPA, which is also responsible for the Toronto Harbour which itself predates the Island Airport.

For the purpose of my review, I felt it was imperative to familiarize myself with the history of both the Harbour and the Island Airport. I quickly realized, as I begun my review, that many of the controversies that in the past and still today affect the Harbour and Island Airport can be traced back tens of years ago.

PART I of the Report reviews the key developments that form the history of the Toronto Harbour and the Island Airport since 1911 up to now. It focuses on elements that are relevant to my mandate and attempts to avoid unnecessary details.

The Report begins with the establishment of the Toronto Harbour Commission (THC) in 1911, its role in the development of the Toronto Waterfront and the establishment of the Island Airport in the 1930s. It briefly discusses the 1983 Tripartite Agreement between the federal government, the City of Toronto and the THC that allowed for the operation of the Island Airport in a manner that would respect the interests of all stakeholders in the use and enjoyment of the Toronto Waterfront.

Next, the report of the Royal Commission on the future of the Toronto Waterfront in mid-1980s is briefly reviewed as well as the course adopted by the City of Toronto, the THC and the federal government in response to the Commission's recommendations.

In the mid-1990s, the federal government adopted a new National Marine Policy, which eventually, in 1998, led to the adoption of the *Canada Marine Act* (CMA). Although the initial legislative proposal did not include the Port of Toronto, following insistence on the part of Toronto MPs, the CMA was amended prior to being enacted into law to include the Port of Toronto. PART I does review the salient points of the parliamentary debates at the time.

The TPA was established in June 1999 and, in 2001, the Toronto Port Authority launched court proceedings against the City of Toronto, to recuperate lands that had been, according to the TPA and its legal advisors, improperly and invalidly transferred in 1991 and 1994 by the THC to the City of Toronto. These

proceedings were settled in 2003 by the federal government, the City and the TPA. As part of the settlement, the parties agreed to amend the 1983 Tripartite Agreement to allow for the construction of a fixed link between the Island Airport and the mainland of Toronto and ensure the ongoing financial viability of the Island Airport. After the City had endorsed in November 2002 the construction of a fixed link, the TPA took steps towards its construction.

Next, the new Mayor of the City of Toronto, David Miller, after his election in November 2003, quickly called a meeting of City Council in early December which purported to withdraw its support to the amendment to the Tripartite Agreement allowing for the construction of a fixed link to the Island Airport.

Ultimately, bowing to pressure from the City, the federal government prepared a regulation pursuant to the *Canada Marine Act*, which was published in the *Canada Gazette* on June 21, 2004, and which prohibited the construction of the fixed link.

PART I of the report reviews in some details the events that occurred between the election of the Mayor and the cancellation of the construction of the bridge, up to the 2005 Settlement Agreement.

This historical background does shed, in my view, important light on the underlying causes of the controversies, as well as provide, in context, information that is essential to a better understanding of the matters under review. It does, as well, address some of the specific questions raised by my Terms of reference such as the question relating to the inclusion of Toronto as a Canadian Port Authority under the CMA, the events and circumstances that led to the amendments of the Tripartite Agreement in 2003, the events and circumstances respecting the TPA's decision to construct a fixed link from mainland Toronto to the Island Airport and the reasonableness of the settlement in the amount of $35-million that was concluded in June 2005.

PART II deals in more details with a number of questions raised in PART I, but not discussed at any length, that specifically come within my Terms of reference. It does, for example, review the TPA construction contract with Aecon for the construction of the bridge, a number of issues regarding the environmental assessments carried out by the TPA in relation to the construction of the bridge and the purchase of a new ferry, it reviews the allegations of municipal political involvement on the part of TPA's personnel as well as the TPA CEO's response to the comments of the Prime Minister Designate made after the election of Mayor Miller.

PART III reviews the question of the noise generated by the use of the Island Airport, issues regarding the payment in lieu of taxes to the City of Toronto by the TPA (PILTS) as well as questions regarding the TPA Board of Directors, all of which come within my Terms of reference, although not specifically referred to.

PART IV discusses the question whether the Port of Toronto is a Port of national importance, the question of the compatibility of the activities carried out by the Island Airport with the Toronto Waterfront, as well as TPA accountability and community relations.

PART V concludes with general observations and recommendations that the review suggests to me.

Many issues and concerns raised with me during the course of the review either fell outside my Terms of Reference or were so peripheral to my mandate that I did not consider nor address them.

I should also add that the main focus of my review was the TPA, but I have not hesitated to briefly address matters that did not fall immediately under the responsibility of the TPA where I thought my review might help to shed light on complex and little known matters of government administration and responsibility that related to the TPA.

Finally, I should note that Mr. Jeffrey Smith, C.A., a partner at BDO Dunwoody LLP, had been commissioned by Transport Canada in support of my mandate. Volume I of Mr. Smith's Report, which discloses no confidential information, (attachment 3) forms an integral part of my Report. Mr. Smith has been most helpful to me during the course of my review and I have benefited from his advice provided both in his Report and in many discussions. I agree with the findings and conclusions contained in his Report.

PART I

THE EARLY DAYS

- **The establishment of the Toronto Harbour Commission in 1911**

Although the Port of Toronto had existed since the mid-1850s, it was not until 1911, with the adoption of the *Toronto Harbour Commissioners Act* (the "*THC Act*") by the Parliament of Canada, that the port management and administration were formally organized. The call to form a new harbour agency was partially in response to concerns of various groups that no single body was accountable for operating and managing Toronto's port and developing Toronto's waterfront. A number of institutions, like the City Council and a body, called the Harbour Trust, had divided control over the Port and the waterfront. An entirely new body – a Harbour Commission – seemed to offer the greatest potential for developing Toronto's waterfront and Port, while providing local control and accountability.

The general intention was that with the formation of the Toronto Harbour Commission (THC) in 1911, the City, the federal government and the Toronto Board of Trade, representing the business community, would be the key players in the operations and management of the Port and the development of the Toronto's waterfront.

The THC was created not only to improve the facilities and the operation of the Port of Toronto but also to plan, develop and manage the City's Waterfront in the public interest.

- **THC Responsibility and Corporate Structure**

The Toronto Harbour Commission was set up as a corporation, consisting of five commissioners, three of whom to be appointed by the Council of the City of Toronto, one by the federal government and another one also to be appointed by the federal government, upon the recommendation of the Board of Trade of the City of Toronto. Each commissioner was to be appointed for a term of three years subject to removal, and was to remain in office until a successor was appointed.

Under the *THC Act*, the Commissioners were charged with developing, maintaining and managing the harbour and all property under their jurisdiction. They were also granted the power to adopt by-laws to control the use and development of the waterfront. The federal legislation granted the THC broad powers for the development and the management of the lands situated within the Harbour limits, which comprised dock property and water lots owned by the City of Toronto as well as property owned by the THC.

The THC was not an agent of the Crown. The THC was intended to have an arm's length relation with the Crown. The 1911 legislation provided the THC with a broad measure of autonomy and independence. The Commissioners were to act, not on behalf of the government which appointed them but in accordance with their oath of office which provided that each Commissioner: *"…will truly and impartially, to the best of his skill and understanding execute the powers vested in him as a member of the corporation".* (s. 10).

The Act also provided that the books and documents of the THC be open for inspection by the City Auditor and that the THC's proceedings be reported annually to the City Council. The transparency and accountability requirements of the *THC Act* were indeed minimal.

- **Development of the Waterfront**

Early after the adoption of the 1911 legislation, the THC moved to produce a waterfront plan to develop the port in three sections comprising a mix of industrial, commercial and recreational areas.

In the western section, the development included the construction of breakwaters for beaches, the Sunnyside amusement park and dock walls.

The eastern waterfront comprised mixed industry and recreation. New industrial sites were erected including manufactures bordered by parks and lagoons.

The THC waterfront development plan provided for the dredging of the shallow harbour to a depth of 27-ft. and the use of the dredged materials to fill water laths, with the possibility of reclaiming many hundreds of acres of land. In 1914, the City and the THC agreed that lands covered by water along the waterfront were to be reclaimed, with the THC carrying out the work and the City paying for the costs. Upon completion of the reclamation work, the City would be entitled to the use of the lands in return for the payment of an annual sum of $1. Over the years, the THC created hundreds of acres of urban waterfront land and miles of beaches.

- **The arrival of airplanes**

It is in 1909 that the first amphibious aircraft landed in the Toronto Harbour. In the late 1920s, air transportation and the prospects of a trans-Canada air route began to attract the attention of governments and the use of the waterfront for commercial aviation began to be seriously considered. In 1928, the Toronto City Council asked the THC to report on the feasibility of developing the Toronto Island's Western Sandbar as a seaplane, flying boat and an amphibious airplane base.

In 1937, the Toronto City Council assigned to the THC, the responsibility for the development and operation of two airports, one to be situated on the island site on lands owned partly by THC and partly by the City. The other was to be situated in Malton (renamed Lester B. Pearson International in the early 1980's). The THC had the responsibility for the development and operation of the two airports, for and at the expense of the City.

The Island Airport situated on lands owned by the THC and partly by the City was completed and became operational in 1939 with two paved runways, a terminal building and a seaplane base. In the same year, Parliament amended the 1911 legislation to grant the power to the THC to construct and operate the Toronto Island Airport and the other one at Malton. The federal government agreed to lease the Malton land from the City for one dollar a year and took over all operational deficits. Under the agreement, the City retained control of the Island Airport, with the THC taking over its operation on its behalf.

In 1957, the City transferred the ownership of Malton Airport to the Federal Government, which assumed the responsibility for the Malton Airport in exchange for providing improvements to the Island Airport, including a new 4000-foot runway, the installation of navigation and landing systems as well as lights for night flying. A ferry was put into service.

In 1962, the City leased all lands located at the Island Airport to the THC for 21 years. In 1962, the Toronto Harbour Commissioners also assumed financial responsibility for the Island Airport's operation from the City of Toronto and from that point on the Commissioners became responsible for the Island Airport as principals rather than as agents for the City of Toronto. When the 1962 lease expired in 1983, the Tripartite Agreement negotiated between the City, the federal government and the THC came into effect.

In those years, the Island Airport's revenues did not cover its costs of the Airport and the Airport ferry; and in 1974 the federal government agreed to grant a subsidy to the Toronto Harbour Commissioners, subject to intergovernmental agreement on the future of the facility. The province agreed to cover the operating losses of the Airport ferry.

The discussions that followed between the federal government, the province, Metro Toronto and the City government, failed to determine a common vision between the parties. The federal, provincial and Metro governments were favoring the general aviation/STOL option, while the City was favoring the general aviation option only.

The future of the Airport remained an issue until 1981, when a proposal by the Mayor was accepted by Toronto's City Council. The proposal called for an agreement between the federal government and the THC to develop the Airport

for general aviation and limited commercial STOL services, provided that the City's waterfront objectives could be protected.

In 1981, a Memorandum of Understanding (MOU) was signed by the THC, the City of Toronto and Transport Canada, detailing the conditions under which a limited STOL passenger service could be established at the Island Airport.

In 1982, the Canadian Transport Commission (CTC) issued a license to City Center Airways to operate a commercial STOL service between Toronto Island, Ottawa and Montreal, using deHavilland Dash 7 aircraft.

COMMENT

It is widely recognized that the THC, following its establishment in 1911, played a determinant role in building hundreds of acres of land on the Toronto Waterfront. This was realized without political direction from federal, provincial or municipal authorities. It was achieved under a corporate structure that provided for a very minimal level of transparency as well as responsibility and accountability. As the years went by, this lack of transparency, responsibility and accountability became a matter of controversy and a subject of reform proposals.

For instance, the amazing results obtained by the THC in the creation of hundreds of acres of priceless new lands from Lake Ontario water lots, north of Front street, boarding the original lake edge, constituted an accomplishment that carried new governmental controversies and challenges. The hundreds of acres of new lands sold under the responsibility and authority of the THC, created tension, disputes and conflicts with the City of Toronto, which had governmental responsibility for the City planning and development of the Toronto Waterfront.

We shall see later how the 1988 federal Royal Commission (Crombie Commission) addressed the problem created by these developments and the recommendations it made to facilitate orderly development and planning of the Toronto Waterfront, addressed to all three orders of government.

THE 1983 TRIPARTITE AGREEMENT

On June 30,1983, the THC (now the Toronto Port Authority), the City of Toronto and Transport Canada negotiated a fifty-year Tripartite Agreement superceding the 1981 MOU and providing for the continued use of the Island Airport for general aviation and limited Short Take-Off and Landing (STOL) service. The agreement was, in large part, constituted of land lease agreements, approximately 162 acres of land and 168 acres of water being owned by the THC, 48 acres of land and 10 acres of water, held by the City and 5 acres held by the federal government.

The agreement which remains in effect today and is legally binding on the City of Toronto, the federal government and the TPA, contains a number of restrictive provisions such as, restrictions on the type of aircraft that could use the airport, a prohibition of additional runways or extension of runways, a prohibition of jet powered aircraft except for medical evacuation flights (MEDEVAC) and restrictions on noise levels. The original 1983 Agreement also contained a prohibition for the construction of a fixed link, bridge or tunnel to the Island, which was removed by the amendments to the Tripartite Agreement agreed to by the three parties in 2003.

The Tripartite Agreement does not directly set a maximum number of flights or passengers at the Island Airport; it does, however, establish noise exposure parameters which are not to be exceeded (NEF 25), thus effectively providing restrictions on the number of flights.

The agreement, as amended in July 1985, to specifically permit operation of the deHavilland Dash 8, defines the responsibilities of each of the parties for the continuing operation of the TCCA. The federal government agreed to seek funding from Parliament to offset any deficit that may be incurred by the THC under conditions specified in a separate Funding Agreement. The Minister could limit the funding, which was to be based on the expenses set out in a forecast annual budget prepared by the THC. The Tripartite Agreement also provided that the Minister would seek appropriate funding for capital improvements which, in his opinion, were required for the continued use of the airport.

At the time, the province of Ontario was operating a program for the funding of ferry services from the mainland to the Island Airport and other island destinations.

COMMENT

The federal government, the City of Toronto and the THC, by this agreement, have defined the conditions under which the Toronto Island Airport could operate in the public interest.

By their Agreement, the three parties determined the framework to govern the airport operations and to ensure that the airport would not come to dominate the harbour activities and the Waterfront. The Agreement was indeed designed to foster an equilibrium between the interests of various stakeholders in the activities and development of the Waterfront and the Airport.

The Agreement is a contract that legally binds its parties, the federal government, the TPA and the City. It cannot be modified or altered unilaterally by any of the three parties. Changes to the Agreement require the consent of the three parties, thus providing the City with some leverage in the determination of the conditions under which the airport would operate, a matter of exclusive federal jurisdiction. Both the 1983 Tripartite Agreement and the 2003 Amending Agreement testify, as we shall see later in this Report, to the influence of the City in the framing of the conditions binding the TPA in the management and operation of the Airport.

THE ROYAL COMMISSION ON THE FUTURE OF THE TORONTO WATERFRONT (CROMBIE COMMISSION)

- **Its mandate and its recommendations**

By the mid-1980's, the THC owned hundred acres of valuable land in the Toronto Harbour. The land was worth many hundreds of million dollars. Despite its valuable assets, the THC was experiencing cash flow difficulties. It decided to sell some of its valuable land to improve its cash position. In 1986 and 1987, it sold approximately 23.5 acres at a price of about $43-million

The City strongly opposed certain of these sales and shortly thereafter the City replaced the three City representatives with three elected City councilors. These appointments were contrary to the recommendations of a 1927 Royal Commission that recommended that future appointments to the THC exclude elected officials.

From 1987 on, the City continued to control the THC through its three City-appointed commissioners. Beginning in the early 1990's, the THC, led by the three City-appointed commissioners, and over the objections of the other two members, approved the transfer of much of the land holdings of the THC to the City.

In June 1988, the federal government appointed the Honourable David Crombie as a one-person Royal Commission to study the Toronto Waterfront.

The Commission was mandated *"to make recommendations regarding the future of the Toronto Waterfront …in order to ensure that, in the public interest, federal lands and jurisdiction serve to enhance the physical, environmental, legislative and administrative context governing the use, enjoyment and development of the*

Toronto Waterfront and related lands". In particular, it was requested to examine the role and mandate of the Toronto Harbour Commissioners, the future of the Toronto Island Airport and other topics related to the federal responsibilities and federal lands as well as the possible use of federal lands to support projects such as the Olympic games.

In the summer of 1989, the Crombie Commission recommended, among other things, in its Interim Report, that the THC's mandate should be separated from the planning or development of lands that do not serve the Port function on the waterfront and that its jurisdiction should be limited to these operations and should not include the planning and development of lands that do not serve that function. The Commission recommended that land not likely to be needed in the future should be transferred to TEDCO.

In September 1990, in a second Interim Report, the "Watershed", the Commission recommended, among other things, that the THC's lands not required for the port operations be transferred to the City and provincial waterfront development agencies. The Commission estimated that about 100 acres of land would be necessary for the port operations.

Regarding the Island Airport, the Crombie Commission in its Interim Report, concluded that the airport should continue in its existing role as an airport serving general aviation and limited commercial air passenger traffic and that its operations should continue to be governed by the Tripartite Agreement. Noting that from time to time adjustments may be required, the Interim Report stated that *"Experience has shown that the Agreement is sufficiently firm to give the City and others concerned the assurances they need that uncontrolled growth at the Airport… will not be permitted"*. (Crombie, p. 41). The Royal Commission rejected the view that the airport be closed as well as the idea of a major expansion of the airport through the introduction of commercial jets and the construction of a fixed vehicular link. (Crombie, pp. 41-42).

The Interim Report also discussed at some lengths the question of management and accountability commenting on the many divergent views expressed by the witnesses that appeared before the Commission, one important question being whether the THC should continue to act as manager and operator of the airport. Noting that the question would necessitate negotiations between Transport Canada, the province and/or Metro, the Commission offered criteria that might be considered:

- the need for public accountability in managing and operating the Airport;

- the need for efficiency and effectiveness in the regional airport system;

- the need to protect local interests; and

- the need to balance Toronto Island Airport-related activity with other waterfront uses.

Crombie emphasized that, irrespective of the options retained, certain management improvements were required including a more open and formal approach to airport planning with better links to the City's land-use planning, a restructured financial and accounting base, improved relations with Airport users and improved noise monitoring and stricter enforcement of hours of operations, improved public information and consultation, etc. (Crombie, pp. 44-45).

THE RESPONSE TO THE CROMBIE COMMISSION REPORT

- **The City of Toronto Response**

Immediately following on the Interim Report "Watershed" of the Crombie Commission, in September 1990, City Council adopted in November 1990 a resolution that called for the transfer of large pieces of the THC's lands to the City, and requiring THC representatives immediately take necessary actions to implement the Crombie Commission's recommendations.

In August 1991, by a vote of 3 to 2, the three City-appointed commissioners voted in favour of a resolution to sell more than 300 acres of the Portlands to the City. The two federally-appointed commissioners objected on the ground that the sale was not in the best interest of the corporation and that the majority was breaching the fiduciary duties it owed the THC. The City-appointed representatives, over the objections of the remaining Commissioners, passed a resolution requiring the THC to consolidate its operations on 100 acres of land and that the THC should make a proposal to convey land to the City and TEDCO. The three City-appointed representatives defeated a motion to seek court direction on whether they were operating under a conflict of interest and whether the vote was valid.

On November 1, 1991, again over the objections of the remaining Commissioners, the three City-appointed representatives accepted the terms of a letter of intent dealing with the transfer of the lands to TEDCO. The three City-appointed Commissioners defeated motions to consult the federal Minister with respect to their actions, seeking legal advice on whether the agreement was an illegal delegation of statutory authority and/or deprived the THC of the resources to discharge its statutory mandate and to retain outside counsel to advise and assist with respect to the Commissioner's liability as directors.

On November 30, 1991, the THC represented by one of the City-appointed Commissioner and the General Manager agreed with the City to transfer 300 acres of its lands to TEDCO (Phase I). The transfer to TEDCO, by way of a

Purchase and Sale Agreement signed on January 22,1992, was for $10.00 and an annual subsidy in an amount to be agreed to by the parties, or failing agreement, by a mutually agreed upon third-party consultant, and failing agreement between the parties, by arbitration.

In its report of December 14, 1992, the level of this subsidy was fixed by BoozAllen, a consulting firm agreed upon by TEDCO and the THC, at $6.5-million a year, for 5 years for a total payment of $25.6-milllion. Both the City and TEDCO objected to this amount. However, this amount was unanimously confirmed in a subsequent arbitration agreed to by the parties that was released in April 1993. The City and TEDCO refused to pay. The THC Board, for its part, refused to reduce the payment from $6-million to $1.5-million. In June 1993, the Councillors who had been appointed by the City were dismissed and replaced by municipal civil servants. The Board subsequently transferred the land in return for an annual payment of $1.5-million in lieu of the rents the THC had been collecting on these lands.

The three commissioners who were dismissed by the City challenged their dismissal in court. The court decided that the commissioners held their position *"at pleasure"* and could be dismissed at any time without cause. In rending its decision, the court stated that the commissioners were not agents of the City and *"must act in the best interest of the THC regardless of who appointed them"* and that *"when acting as a commissioner, the employee must act in the best interest of the Commission and not be a mere spokesperson or agent of the City"*.

- **The Federal Government Response**

In January 1991, the Toronto Harbour Commissioners reported to the Minister of Transport and the mayor of the City of Toronto, following the Crombie report, that the THC estimated its land requirement for port operations at 560 acres, plus the Toronto Island Airport, excluding any additional lands the THC required to produce revenue to ensure its financial viability.

In February 1991, the Minister of Transport directed his department to work in consultation with representatives of the Crombie Commission and the THC to conduct a review to determine the amount of land required to sustain the THC as a viable economic unit and urged the Harbour Commissioners not to implement the Crombie recommendations in an *ad hoc* manner.

Later, on November 1, 1991, the Director General Canadian Coast Guard Harbours and Ports of Transport Canada wrote the THC urging it that no federal land be transferred or disposed of and that the Port must have adequate lands to serve its present users and attract future business.

On December 2, 1991, the then Minister of Transport, the Hon. Jean Corbeil, advised Mr. Crombie, the Toronto Mayor and the THC that the federal government accepted in principle the recommendation that the THC release significant amount of its lands, and that the port operations needed more than 100 acres, most likely not more than 200 acres.

In order to ensure the implementation of the recommendation of the Commission, the Transport Minister asked Mr. Crombie to produce a Memorandum of Understanding (MOU) with representatives of the City, the THC and Transport Canada, to define the amount of land to be transferred as well as the handling of any federal land or jurisdictional questions and the future viability of the Port of Toronto including any financial support which may be required.

Mr. Crombie was faced with immediate difficulties when the THC strenuously disagreed with the studies carried out by his consultant on the current and future financial position of the THC. The THC decided to retain its own consultants. Mr. Crombie's consultant and the THC's consultants held different views and came to different conclusions on the financial condition of the THC. In reaction to the THC's actions, which were qualified as unacceptable, City Council determined in June 1993 to remove the City-appointed members of the THC Board and replace them with three City-staff.

In April 1993, Mr. Crombie suggested to the Minister of Transport that another Memorandum of Understanding (MOU) be developed to address the future of the Toronto Port. The Minister replied, on June 5, that he strongly supported the development of a MOU regarding the changes to be made in the administration and operation of the Port. He wrote to the Toronto Mayor and the THC to encourage them to participate in the work to be undertaken by Mr. Crombie.

Aside from this correspondence, it does not appear that anything further occurred in furtherance of these attempts to develop MOUs.

In December 1993, the Province of Ontario announced that it would be removing the provincial subsidy for the operation of the Island Airport ferry. (a $500,000 reduction effective January 1994 and approximately $1,000,000 reduction effective January 1995). At about the same time, the Government of Canada announced a National Airports Policy that would eliminate the funding of airport deficits by the year 2000 starting in 1995. The combined negative impact of these two measures for the THC created a major financing problem for the THC.

In March 1994, the Toronto City Council endorsed a new plan under which the majority of the balance of THC lands (Phase 2 lands covering about another 300 acres) was to be transferred by way of an amendment to the Purchase and Sale Agreement of 1991, either to TEDCO or to the City. As a result, THC was left with approximately 100 acres to operate its port business.

To give effect to the Council's resolution, on July 18, 1994, the THC entered into a new Agreement of Purchase and Sale with TEDCO and a subsidy agreement with the City. In consideration of the transfer of this additional land, the THC received an additional subsidy of $1.25-million.

The Subsidy Agreement (II) entered into between the City and the THC on October 31, 1994, included a plan for the restructuring of the THC. The Agreement provided that the THC would have to submit to the City for approval its annual capital and operating budgets, a recurring three-year strategic business plan, a property management and property disposition plans. The THC agreed also to submit City Council for approval any financial obligation of the THC, including the establishment of any borrowing or credit facilities that would increase future subsidy request to the City.

The subsidy was linked to the rent obtained from the lands, and not to tax revenues. The total amount of annual rent was set at about $2.8-million. The City decided at the same time that it would not subsidize any of the operational deficits or capital requirements of the TCCA. This $2.8-million was to funded by TEDCO ($2.4-million) and the City ($0.4-million).

The subsidy agreement also provided that, up until the year 2000, capital expenditures would be funded from the THC reserves but that, thereafter, additional capital expenditures could be funded by the City, if required.

On August 3, 1995, the THC Chairman, Martin Silva, wrote the Mayor of Toronto putting forward a proposal to amend the Tripartite Agreement to make the airport attractive to scheduled air carriers and to increase the market base for the airport business. This could be done by an amendment that would allow for the replacement of the ferry service by a lift bridge and allowing Stage 3 aircraft at the Island Airport, including jets.

The THC was already operating the Island Airport under a subsidy agreement with the City and the Chairman urged the City to seriously consider an amendment to its subsidy agreement with the THC to provide the necessary operating and capital funds to carry on the airport business.

The Chairman expressed the view that the City might very well decide that it may not want the airport on the Island, in which case, the THC would be prepared to advise Transport Canada that it is no longer in a position to operate the airport and to request the federal government to relieve it of the burden at its earliest opportunity.

The Economic Development Committee of the City Council endorsed a change to the Tripartite Agreement to permit Stage 3 aircraft and the construction of a bridge or terminal at the airport. The matter came before the full City Council on August 14 and the proposed amendment was defeated as well as a proposal to

close the airport. The THC decided, on August 17, 1995, to serve formal Notice to the Minister of Transport under s. 45 of the Tripartite Agreement that they no longer wanted to be financially responsible for the operations of the Island Airport.

Following discussions with the province of Ontario, the Municipality of Metropolitan Toronto, the City of Toronto, the Greater Toronto Airports Authority and the business community, it became apparent that there was considerable support for the continuation of the airport, except for several councilors and a number of resident groups who wanted to see the airport closed.

The THC had indicated that they would withdraw their section 45 Notice if two amendments were made to the Tripartite Agreement to allow Stage 3 Turboprops aircraft to access the airport and to allow the construction of a fixed link. The City agreed to these amendments, subject to an environmental assessment, at its Council meeting of October 16 and 17, 1995. Transport Canada having indicated its concurrence with the proposed changes, the THC, on October 28, 1996, decided to withdraw its section 45 Notice that had been extended several times with the agreement of all three parties. The federal government and the City of Toronto agreed to the withdrawal of the Notice.

In 1996, the THC made public a five-year business plan with a view to building inter-modal revenues in the port and growing airport revenues, which would require an amendment to the Tripartite Agreement to allow for the construction of a fixed link and the opening of the airport to a broader range of aircraft.

After intensive review and debates in the Council Standing Committee on Urban Environment and Development, which had considered all facets of the matter, City Council approved at its meeting of December 16 and 17, 1998, a plan to amend the Tripartite Agreement to allow for the construction of a fixed link subject to the condition that an environment assessment be completed.

TOWARDS A NATIONAL MARINE POLICY

Back in December 1994, the House of Commons Standing Committee on Transportation undertook a study of Canada's Marine Transportation Sector. The objective was to assist the government in the development of policies for an efficient marine transportation system. The Committee traveled across the country and held meetings with stakeholders, port authorities, the provinces and municipalities, and heard over 100 witnesses.

At that time, there were about 500 public ports in Transport Canada and 2,200 ports in Fisheries and Oceans. There was no national legislation in place providing a framework for the management of these ports, although there existed separate statutes for Harbour Commissioners in a number of Canadian harbours, such as Toronto.

The Committee presented its report, *A National Marine Strategy*, to the House of Commons in May 1995.

Transport Canada also held its own consultation with shippers, carriers, other levels of government, associations and others in the industry. Later, in December 1995, the then Minister of Transport, the Honourable Doug Young, announced the Government's new National Marine Policy to reform the governance of ports, harbours and the St. Lawrence Seaway.

In addition to fostering the modernization of the marine transportation system, the new policy was proposing to divest the federal government of port operations and make them financially self-sufficient wherever possible.

Under the Port Divestiture Program, which was part of the National Marine Policy, regional/local ports, owned by Transport Canada, were to be first offered to other federal departments and then to the provinces and territories. If a province was not interested in acquiring the facilities, Transport Canada then would seek expression of interests from local stakeholders, including industries and municipalities.

As an aside, my view is that this Divestiture Program would apply to the TPA in the event the federal government sought to disband the TPA and there is no certainty the City would be the eventual operator.

Under the National Marine Policy, the vast majority of ports in Canada are clarified as regional/local. Canada Port Authorities covered by the *Canada Marine Act* and Remote Ports (isolated communities) do no come under the Port Divestiture Program.

- **Bill C-44 – in the House of Commons**

In January 1996, a new Minister of Transport, the Honourable David Anderson, was appointed and on June 10, 1996, he introduced Bill C-44, the *Canada Marine Act,* to the House of Commons. As it turned out, Bill C-44 was the initial version of the *Canada Marine Act* adopted by Parliament in 1998.

The proposed legislation was designed to make the system of Canadian Ports competitive, efficient and commercially oriented. It provided for the establishment of port authorities and the divesting of certain harbours and ports as well as the commercialization of the St. Lawrence Seaway and ferry services. It was indeed a major piece of legislative proposals.

Immediately after its first reading on June 10, 1996 and prior to second reading, Bill C-44 was referred to the House of Commons Standing Committee on

Transportation. The intention was to provide committee members of all political parties with the opportunity to consult all interested stakeholders.

In the fall of 1996, meetings were held across the country to hear the representations of interested parties. The City of Toronto delegation attended a meeting held in Hamilton as observers but did not participate. This was so, I was told, because the City had received assurances from the Minister of Transport that the proposed legislation would not cover the Toronto Harbour and that separate discussions, from the *Canada Marine Act,* would be held to determine the future of the Toronto Harbour.

Bill C-44 was meant to apply automatically on adoption to every port authority set out in a Schedule of the Act. Initially, the Schedule included only eight ports and did not include the Toronto Harbour.

The Bill effectively provided that port authorities set out in the Schedule of the *Act* would be automatically continued. The Minister was required by the Act to issue to them letters patent setting out the information required by the legislation.

However, there were provisions in the Bill empowering the Minister to issue letters patent of continuance to a port authority not listed originally in the Schedule, if the Minister was satisfied that four criteria were met:

1. The port is, and is likely to remain, financially self-sufficient;
2. the port is of strategic significance to Canada's trade;
3. the port is linked to major rail lines or a major highway infrastructure; and
4. the port has diversified traffic.

Strictly speaking, these criteria did not apply to the port authorities listed on the Schedule to the Bill and approved by Parliament. Parliament itself was approving the initial Schedule; Parliament did not leave this responsibility to the Minister. It would be obvious, however, that Parliament, in deciding which ports should be originally listed in the Schedule, would take account of those criteria.

In July 1996, Transport Canada had commissioned Nesbitt Burns to assess the financial self-sufficiency of a number of port authorities that had expressed or might have an interest in obtaining status under the new legislation.

On October 29, 1996, representatives of Nesbitt Burns gave evidence before the Transportation Committee and expressed the view that, in the case of the Toronto Port, the current operations of the Port did not generate cash flow sufficient to cover expected maintenance capital spending. Also, they felt that, as a significant portion of the port's revenue came from a subsidy from the City of Toronto (which they appear to have mistakenly identified as being a payment which had no enforceability at law), the current situation of the Port could not

support commercial lending and as a result, they identified Toronto as not self-sufficient.

After a clause-by-clause review of Bill C-44, on November 6, 1996, the Standing Committee approved a large number of amendments to Bill C-44 but brought no change to the list of eight Port Authorities that originally appeared on the Schedule.

On April 14, 1997, the report of the Standing Committee on Transportation was called for consideration before second reading of the Bill in the House of Commons. The report of the Committee was eventually adopted and the Bill passed on second reading by the House of Commons. During debate of the Bill, the House adopted a number of amendments, including the addition of 8 Port Authorities to the list of 8 that originally appeared on the initial Schedule. The 8 new Port Authorities to be covered by the Schedule, included the Toronto Port Authority, brought to 16 the number of Port Authorities on the Schedule.

During the course of the debates, Mr. Dennis Mills, M.P. for Broadview-Greenwood, on April 14, 1997, on an amendment adding Toronto as a Port Authority to the Schedule, spoke these words:

> *"The work that was done to make that happen is unimaginable. It has been a long arduous task, but today in the Nation's boardroom we celebrate the fact that we finally have an all-party agreement to proceed with this designation".*

The amendments adding Toronto to the list of Port Authorities covered by the Bill were unanimously approved. (Hansard, April 14, 1997, p. 9689, 9697-9698).

- **Bill C-44 – in the Senate**

After its adoption by the House of Commons (on third reading, on April 17th,) Bill C-44 was sent to the Senate where it was referred to the Senate Standing Committee on Transport. The Senate Committee held a number of meetings during which both opponents and supporters of the inclusion of the Toronto Port on the Schedule attached to the Bill appeared before the Committee.

Particularly of note, two Councillors of the City of Toronto, Mr. Martin Silva who was also a City-appointed member of the THC, and Mr. Dan Leckie as well as Mr. Jack Layton, the Regional Councillor for the Municipality of Toronto, appeared before the Committee on April 23rd. Mr. Layton was also the Chair of the City Planning and Transportation Committee at the Metropolitan Council. They were appearing in their private capacity, not as a representative of the City Council or the Metro Council, because neither Council had met to discuss the matter. They testified that their view was that the Port of Toronto should not be covered by the proposed legislation. They were concerned that the creation of a

new entity that depended on the federal government would cause problems for the development of the waterfront and that it would be difficult for the City, if not impossible, to harmonize its development plans and activities with the new port authority. They were particularly concerned that the City would lose its dominant position on the Board of the new entity.

Mr. Charles Parmelee, Chairman of the THC and Mr. Howard Joy, a City Councillor and Vice-chairman of the THC, also appeared before the Committee taking a completely opposite position and arguing that the Toronto Port should not be deleted from the Schedule and that the inclusion of the Toronto Port was a necessary step in the evolution of this important institution. The Chair of the Senate Committee read a letter from City Councillors, (a vice-chair of the THC, a former chair and a former Commissioner), expressing their support for the proposed legislation and arguing that the proposal should not be held up because of a power struggle and squabbling amongst local politicians in the City of Toronto.

On the same day, April 23rd, the Standing Committee adopted Bill C-44 without amendment and reported it to the Senate.

On April 27, 1997, Parliament was dissolved, a general election was called and Bill C-44 died on the Order Paper. No additional changes were made to the legislation prior to Parliament being prorogued.

- **Bill C-9 – in the House of Commons**

After the general election, Bill C-44 was re-introduced in the House of Commons on October 10, 1997 as Bill C-9 by a new Minister of Transport, the Honourable David Collenette, with a Schedule that continued to include the Port of Toronto.

After first reading, Bill C-9 that mirrored Bill C-44, was again sent to the Standing Committee on Transport.

At the meeting of the Committee on October 21, 1997, the MP for Etobicoke North, Mr. Roy Cullen, asked the minister, David Collenette, how he saw the Toronto Port, to be designated under the new legislation as a Canadian Port Authority, would develop in the future and what sort of process the minister saw evolving to address the different stakeholder interests in coming up with some kind of harmonized and optimal plan for the future. In his response, the Minister noted that *"while there had been some degree of controversy about the designation of Toronto as a Canadian Port Authority, this certainly was not from the members of Parliament from the Toronto area, who insisted on this being included in the last Bill".* The Minister also noted that *"the provincial government and most municipal leaders, business leaders and others in the Toronto area, supported this designation. The Minister expressed his belief that the harbour could attract new business and grow from just being where it was and that a port*

authority representing users, more reflective of a commercial approach, taking the matter out of the hands of local politicians and indeed even, I suppose, other politicians would be a better way to develop the port".

At the October 28 meeting, questions were raised as to the reason why the Port of Hamilton was not included in the Schedule. Some members felt that all Harbour Commissioners Authorities should be treated the same way and one member proposed that all Harbour Commissioners Authorities should be covered by the *Canada Marine Act* only on application by the Harbour Commissioners Authority of a specific harbour and not automatically by the legislation.

The matter was further discussed at the Standing Committee meeting of November 4th. A proposal was made that would have ensured that all Harbour Board Commissions would be treated the same way as the government had proposed for the Hamilton Harbour. At the Committee's meeting of November 18th, when the Bill was called for clause-by-clause consideration, the amendment to the Bill that would have given effect to this proposal was defeated. At the same meeting, amendments, however, were approved by the Committee to add the Hamilton Port Authority to the Schedule. These amendments were approved unanimously by the Committee and without any reference in the relevant debates to the Port of Toronto being listed in the Schedule.

- **Bill C-9 – in the Senate**

After its adoption by the House of Commons, Bill C-9 was sent to Senate where it was referred to the Senate Standing Committee on Transport. The Committee held many meetings and had many hours of debates on potential amendments. The principal issue under discussion was whether, given the devolution policy of the government and the requirement that the new port authorities be financially self-sufficient, many of the new authorities and smaller ports not covered by the legislation could be successful. Many amendments were adopted but none of the proposed or adopted amendments concerned the inclusion or deletion of the Port of Toronto from the Schedule.

On that same day (November 18, 1997), the Committee unanimously agreed to adopt amendments to the Bill and the Schedule bringing the number of port authorities covered by the legislation to eighteen, the addition being the North Fraser Port Authority.

The report of the Committee was sent to the Senate on November 20, 1997, where it was read a third time and adopted on December 9th. On the same day, it received a first reading in the Senate and placed on the Orders of the day for second reading on December 11th.

The Bill was briefly debated on February 10, 1998 and again on March 24th and March 26th, when the proposed legislation was read for a second time. However,

before reading the Bill a third time, the Senate referred the Bill back to the Standing Senate Committee on Transport.

The Committee heard witnesses at its meetings of April 27th, including Mr. Pereenboom, Chairman of the THC, Mr. Gary Reid, the THC general manager, and Mr. Tom Jakobec, a Toronto City Councillor and a former City Budget Chair.

The TPA Chairman testified at length on what he considered to be the accomplishments of the THC after its establishment in 1911, literally creating hundreds of acres of urban waterfront land. But, he also accused the Toronto City Council of having abused its powers to deprive the THC, in the 1990's, of hundreds of acres of land, dispossessing the THC of much needed revenues.

The TPA Chairman also testified that in 1996, the THC had recommended a comprehensive proposal for waterfront reforms. Meetings were held with the Mayor who agreed to return certain lands needed for the port operations. According to the witness, the Mayor had also agreed to seek amendments to the *THC Act* to reduce the number of City representatives on the THC Board. He reported that later, he together with the Minister, met with the Mayor who agreed to bring the proposal forward, but this was never done.

The Committee meeting spent considerable time comparing the Port of Toronto with Hamilton, the future of the Toronto Harbour, its finances, etc.

On April 30, 1998, the Senior Planner of the City of Toronto appeared before the Committee on behalf of the City of Toronto. The witness informed the Committee that the former City of Toronto had adopted a motion opposing Bill C-9 at its meeting of early February 1998. Briefly said, the witness reported that the City was opposed to the Bill because the Port of Toronto did not qualify under the criteria proposed by the Act. It objected to the diminishing role of the City under the proposed legislation, because of the difficulties in the planning of land development that will follow the adoption of the Bill, etc. It protested the exclusion of elected Members of Council from serving on the Board.

The witness testified that the City was objecting to the legislation because the reduced power of the City on the new authority, the powers the federal minister would have regarding the appointment of Board members, the powers of the Governor-in-council to make regulations for the corporate management and control of the port authority, the federal Finance minister's power to control the new port authority's power to borrow money, etc.

The witness agreed with the Committee chairman that the Toronto Star of April 25th reported that the new Mayor of Toronto was urging the City to drop its opposition to Bill C-9 and the inclusion of Toronto in the Bill. The witness indicated that a motion from the Mayor recommending cooperation with the minister on the issue had not yet been before Council or voted upon.

The Committee also heard officials from the City of Hamilton, Windsor and Oshawa.

On May 14, 1998, the Bill was called for third reading. The Senate received a further report from the Standing Senate Committee on Transport, which saw a need to include comments and recommendations for the government and the minister in its report on Bill C-9.

The Committee Report comments and recommendations dealt primarily with concerns that had been expressed by some people about the impact of divestiture of some of the ports on their communities and offering little hope for attracting investment they needed. The Committee recommended that the minister be willing to recognize on a case-by-case basis that some local and regional ports received special consideration from the department before a decision to divest is made. Another concern was the additional financial burden resulting from becoming a Canadian Port Authority under Bill C-9, such as having to pay grants in lieu of taxes, not being able to obtain government subsidies, etc.

A letter from the minister of Transport was tabled before the Senate where he stated he was prepared on a case-by-case basis to recognize that certain local/regional ports may well be essential to the economy or future development of their region and that, in such circumstances, such ports would not be divested until he, the minister, had satisfied himself that their facilities had been brought to appropriate operating standards. He added that, if the $125-million Port Divestiture Fund was not sufficient to facilitate the transfer of such ports, he would seek necessary additional funding.

The debate on third reading of Bill C-9 continued on May 26, 1998, during the course of which a member of the Opposition sought and obtained permission to file a minority report. The debate continued on May 27th, when the Senate debated and defeated a motion that would have delayed third reading to November 25, 1998*, "in order to give Ports in Canada the opportunity to put their cases regarding the disastrous effects of this Bill before the Government"*.

Nothing was said during the debate on third reading or in the minority report prepared by the Official Opposition about the fact that the Toronto Port Authority was on the Schedule to be automatically covered by the Act on its adoption.

The Bill as a whole was effectively adopted by the Senate on third reading and passed, on division, on May 28th. The Bill received Royal Assent on June 11, 1998, and came into force on January 1, 1999.

The question of financial self-sufficiency reviewed again by Transport Canada

Prior to the coming in force of the Bill, Nesbitt Burns, on December 18, 1998, provided Transport Canada with an update of its 1996 Study of the 18 Port Authorities that appeared on the Schedule attached to Bill C-9. Their mandate was to particularly addressed the question whether the criteria of financial self-sufficiency was met by the ports on the Schedule to the *Canada Marine Act*.

For the purpose of preparing its report, Nesbitt Burns held consultations with the management of each Port Authority to determine whether each Port Authority was financially self-sufficient, what was the Port's debt capacity, what was the type of financing the Port could access and what would be the Port's estimated cost of debt. Nesbitt Burns' conclusion was that 17 of the Ports listed on the Schedule, including the Toronto Port, were financially self-sufficient. In the case of Oshawa, Nesbitt Burns was awaiting additional information before coming to a conclusion.

Nesbitt Burns' opinion regarding Toronto Port was based partly on the fact that the TCCA was receiving an annual rental recovery payment from the City of Toronto (which in 1997 amounted to $2.8 million), the THC had a large cash reserve ($12 million) as well as $8 million in mortgage receivable. The THC could also, if need be, reduce its expenses to eliminate any negative cashflow.

The Nesbitt Burns' opinion was not needed by the Minister to decide whether or not the Port authorities should be listed on the Schedule. That decision had already been made by Parliament. In any event, the opinion confirmed that the financial self-sufficiency criterion was met. I was informed that the opinion was also required by Treasury Board and the Department of Finance for the exercise of their continuing responsibility under the *Canada Marine Act* and the letters Patent to be issued to each Port Authority regarding particularly their borrowing authority.

<u>COMMENT</u>

It appears from the above review that the government initially intended Bill C-44 to cover only a list of eight port authorities, but not Toronto. A few Members of Parliament from the Greater Toronto area were of the view that Toronto should be covered and persuaded other MPs in the Toronto area and elsewhere, of various political affiliations, that the Bill should be amended accordingly. Eventually, an all-party agreement was reached and amendments were proposed to the legislation, with support of the government, providing that Toronto should be covered by the Act. Eventually, eight additional port authorities, including the Port of Toronto were added to the list of ports to be covered by the Act.

The above review of the debates, both in the House and the Senate and parliamentary committees, suggests that Parliament understood the circumstances, activities and importance of the Port of Toronto and its potential for the future. Parliamentarians were aware that some, primarily City Councillors, were opposed to the inclusion of the Port of Toronto.

It is understandable that some constituents and stakeholders, who may have received government or ministerial indication, or even assurances, that Toronto would not be included in the CMA, might have been disappointed by its inclusion. In the end, however, the inclusion was the result of open debate in Parliament, after witnesses supporting or opposing the inclusion were heard in Committees. It can hardly be argued, as some have suggested, that the decision was not made with a clear understanding of the issues and circumstances involved.

My Terms of reference require me to consider whether the continued inclusion of Toronto as a Port Authority under the Canada Marine Act is justified in the context of the Port's business and traffic levels and whether its inclusion differ markedly from the treatment of other Port Authorities. This question is examined later in this Report under "DOES THE TORONTO HARBOUR QUALIFY AS A NATIONAL PORT"?

THE *CANADA MARINE ACT*

Parliament adopted the Act in 1998. It came into force on January 1, 1999. One of its main purposes, as I have already mentioned, was to make the system of Canadian ports more competitive, efficient and commercially oriented. It was meant to foster the management of the Canadian marine infrastructure and services in a commercial manner that encourages and takes into account the input of users and the community in which the port or harbour is located.

Port authorities are not-for-profit corporations that meet four criteria:

1. are financially self-sufficient;
2. have diversified traffic;
3. are of strategic significance to Canada's trade; and
4. are linked to a major railway line or highway.

The *Canada Marine Act* provides for the composition of the Board of Directors of Port Authorities in a manner designed to make them more independent from undue political influence whether federal, provincial or municipal. Indeed the *Act* prohibits the appointment as director of anyone who holds office in and/or is employed by the government of the City where the Port Authority is located, the government of a province or of Canada. For example, the legislation would make it impossible for the City of Toronto to appoint City Councillors or City personnel as directors of the TPA Board, which was permitted under the *Toronto Harbour Commissioners Act*.

A port authority has the power under the *CMA* to operate other businesses (such as an airport) and if it does, it is required to do so at its own expense, subject to its letters patent, any other Act, and to any agreement with the Government of Canada that provides otherwise, which would include, for example, the 1983 Tripartite Agreement.

Under the TPA letters patent, the Board of Directors is made up of seven members, one appointed by the Government of Canada, one by the City, one by the Province of Ontario and four, by the federal government, in consultation with the classes of users mentioned in the letters patent.

The Act requires Port Authorities' directors to act honestly and in good faith with a view to the best interests of the Port Authority and to exercise the care, diligence and skills that reasonably prudent person would exercise in comparable circumstances.

Port Authorities are agents of Her Majesty in right of Canada only for certain purposes. Agent status allows ports to pay grants in lieu of taxes on all of their holdings. Previously the THC had been exempted from the payment of such taxes.

Port authorities, however, are not able to borrow money as agents. They have to convince commercial lenders of the merits of their proposed investments; the Crown does not back up port loans.

Port authorities are Crown agents only for the purposes of engaging in the port activities relating to shipping, navigation, transportation of passengers and goods, the handling of goods and storage of goods to the extent that those activities are specified in the letters patent. In all other circumstances, including the operation of an airport, a Port Authority is not an agent of Her Majesty.

The Act provides that no payment to a port authority may be made under an appropriation by Parliament to enable a port authority to discharge an obligation or liability. This prohibition does not apply in case of emergencies or an Act of general application providing for grants. The prohibition does not apply either in the case of the funding of the Crown's obligations under an agreement in existence, such as the 1983 Tripartite Agreement, when s. 25 came into effect on January 1, 1999.

Likewise, no guarantee may be given under the authority of Parliament by/or on behalf of Her Majesty for the discharge of an obligation or liability of a port authority. These provisions make it clear that port authorities are obliged to operate on a commercial basis.

A Port Authority obviously is not and does not operate as a department of the federal government. It is a separate and independent agency with considerable

autonomy. It is governed by the *Canada Marine Act,* its Letters Patent and the regulations that may be made by the Governor in Council pursuant to s. 62. It is directed by a Board. The Board and management of a Port Authority exercise their responsibilities in the management and operations of the corporation, independently of the Minister and departmental staff. Indeed, in regard to the management and operations of the corporation, the Minister and departmental staff possess no authority to direct the Board or management of a Port Authority.

The *Financial Administration Act* (FAA) does not apply to Port Authorities. The FAA provisions granting the government the power, under certain conditions, to give instructions to certain Crown corporations and agencies do not apply to Port Authorities.

The *Canada Marine Act* and the *Letters patent* (LP) issued by the government contain additional important features to ensure transparency, accountability and responsibility of Port Authorities. These include:

- a Code of Conduct for Directors and officers (art. 5 of L.P);
- strict eligibility rules to ensure Director's independence (ss. 14-16 of *CMA*);
- rules providing for the preparation of financial reporting (ss. 37-40 of *CMA);*
- an annual meeting open to the public (s. 35 of *CMA*);
- the application of the federal access to information legislation to Port Authorities;
- the application of the privacy legislation and the legislation regarding the protection of personal information;
- the preparation of annual five-year business plans (s. 39 of *CMA);*
- special examination of a Port Authority at the request of the Minister every 5 years (ss. 41-42 of *CMA);*
- the preparation of a land-use plan (s. 48 of *CMA).*

THE TORONTO PORT AUTHORITIES' LETTERS PATENT

The TPA's Letters Patent (LP), issued under the *CMA*, on June 5, 1999, automatically continued the THC as a port authority under the name of the Toronto Port Authority under the *CMA.*

The Letters patent describe the navigable waters and property managed by the TPA. The LP contain provisions regarding the qualifications of TPA's Directors, their numbers, the *quorum* for Directors' meetings, their appointments and their terms. The LP also contain a Code of Conduct and provisions for the Gross Revenue Charge to be paid by the TPA to the Minister annually. The LP set out the extent to which the port authority and a wholly owned subsidiary of the authority could undertake port activities under section 28(2) of the *CMA.*

The LP contain a long list of specific activities that the TPA is empowered to undertake, but the list also establishes the conditions and limitations under which these activities may be undertaken. For example, there is no provision for the creation of an industrial park by the TPA. There are no provisions authorizing entertainment activities. There is a provision relating to restaurants, retail operations and tourist-related services when these services are necessary to support port operations, which normally would be located in a passenger terminal facility and be related to the transportation of passengers.

The LP overall contain a number of checks and balances to allow the TPA greater commercial and operational flexibility while ensuring that the activities undertaken by the TPA are appropriate. The LP process does allow for adjustments as may be required from time to time through supplementary letters patent.

THE TPA's INITIAL DECISIONS

Not long after being confirmed as a Port Authority under the *CMA*, the TPA commissioned the Mariport Group Ltd., a firm providing advisory services for ports and the shipping industry – to prepare a Report entitled – *"Evaluating the Port of Toronto: Markets and Impacts on the GTA".*

The Mariport Report of December 1999 noted the considerable areas of uncertainty faced by the TPA at that time, concerning its relations with the City, the property demands associated with the City of Toronto's Olympic bid and the competition of TPA's mandated interests with those of TEDCO in particular. The Report provided the TPA with an analysis of the existing activities of the Port, possible future business lines and their impact. It also provided information to the new authority on the history of the Port, new business opportunities and the impact of the Port on the Greater Toronto Area (GTA). Overall, the Report provided the TPA with an important planning tool as it was assuming the responsibility for the management of the Port.

In 2001, the TPA commissioned another report entitled *"Toronto City Centre Airport General Aviation and Airport Feasibility Study – Small footprint – Big Impact"*. The report was prepared by Sypher:Muller International Inc. and outlined various options for the Toronto City Centre Airport (TCCA).

The objectives of the study were to provide the TPA with a factual background for decision-making, a realistic assessment of the options available to increase the use of the airport and assistance in developing a long-term business plan for the airport.

On January 14, 2002, in transmitting a copy of the report to the Mayor of Toronto and the Minister of Transport, the Chairman of the TPA expressed the hope that the report would promote and inform public discussions on the future of the

TCCA and that both the City and the Government of Canada would be reviewing the report. The TPA expressed its willingness to participate in any discussions initiated by either levels of government with respect to the future operations of the airport. At about the same time, the Report was released to the public.

On January 22, the Globe & Mail reported that then Transportation Minister, Mr. Collenette, had said that the best plan for the Toronto Island Airport would be to close it down and turn the site into a park. The Minister was reported as favoring expansion of the Pearson International Airport and a proposed high-speed link from Union Station, thus, in the view of some, undermining the argument for an expansion for the Island Airport. The Minister also said that the City, the federal government and the TPA should debate the options and that he was open to reasonable arguments.

The very same day, David Miller, then a Toronto City Councillor, wrote the Minister congratulating him on his announcement about the closure of the Toronto Island Airport. The very next day, in a press release, the Chairman of the TPA indicated that the Sypher:Muller Feasibility Study had been sent to the City and the federal government. In his view, the Report clearly stated that the *status quo* was not an option. Either the airport should be closed or important improvements should be made so that it could become viable. The Chair called for a balanced discussion among all stakeholders.

On April 10, the TPA Chairman informed the Minister of Transport that the Board had developed a position with respect to the Toronto City Centre Airport, in anticipation of the discussion that would take place before the Planning and Transportation and Economic Development Committee of the City of Toronto in early May, and subsequently before the City Council.

The TPA did not want to be seen as setting public transportation policy or sending a message that may be or may be seen to be contradictory to the Minister's views. For that reason, the TPA was seeking the Minister's comments on a statement of vision and principles that would guide TPA's representations to the City.

The proposed statement of vision provided that *"a viable City Centre Airport is an important asset for the City of Toronto and provides a significant opportunity for Toronto to distinguish itself as a world class city".*

The broad principles proposed by the TPA to guide the fulfillment of this vision included:

"1. Future operation of the Airport will be planned to ensure compatibility with the objectives of waterfront revitalization;

2. *The operations of the Airport must be consistent with other uses and enjoyment of the harbour and harbour and port and will be undertaken in consultation with interested stakeholders;*

3. *The City of Toronto, the Province of Ontario and the Federal Government will need to be publicly committed to the ongoing operations of the Airport;*

4. *The TPA has a fiduciary obligation to operate the Airport as a viable business; and*

5. *Development efforts will focus on the increased usage of turboprop aircraft as the most feasible option to achieve viability."*

In his response to the TPA Chairman's letter, the Minister indicated that, after having reviewed the proposed policy statement with regard to the many perspectives covered by the statement, Transport Canada was comfortable with the principles proposed.

The Minister was particularly pleased to note the emphasis on ensuring compatibility with the waterfront revitalization and the other uses of the harbour and port and the recognition of the need for consultation with a broad range of stakeholders, including the City of Toronto. Insofar as the federal government was concerned, he said: *"let me assure you of my own commitment to the continuation of this airport".*

Finally, the Minister indicated that he considered it important that the TPA develop and share with the department a business plan that encompasses the broad principles and addresses a number of specific issues such as infrastructure issues, including fixed link, a financial plan, compatibility with the Tripartite Agreement, etc.

The Minister also noted that the land ownership dispute had clouded the airport issue, making it difficult to move forward as expeditiously as desired, and that since the City of Toronto was an equal partner under the Tripartite Agreement, effective communication, consultation and coordination with the City was essential.

At about the same time, Minister Collenette wrote Councillor David Miller to thank him for his letter of January 23, 2002. The Minister said that he was writing to clarify that the TCCA had been a vital part of the aviation system in South central Ontario for many years and that he believed that there must be a public debate about the future of the TCCA. Referring to the Sypher:Muller report and the ongoing re-development of the Toronto waterfront, the major expansion of the Lester B. Pearson International Airport then underway and the development of a rail link between Pearson Airport and Union Station, the Minister's view was the time for this debate was now. Referring to the 1983 Tripartite Agreement

between Transport Canada, the City of Toronto and the Toronto Port Authority governing the airport operational matters, the Minister stated that he fully expected Toronto City Council to be a key part of the discussion of the TCCA's future given its interest in the future of the airport.

Early in 2002, the TPA received an unsolicited proposal from Regional Airlines Holdings Inc. (RegCo) to rejuvenate the Island Airport. RegCo's proposal called for the private sector to invest hundreds of millions dollars in upgrades to the Island Airport in return for the operation of an Island-based airline servicing up to 17 Canadian and U.S. destinations within 500 miles of Toronto, with 15 Q400 (DHC 8-400) Bombardier turboprop aircrafts to be built at Downsview.

The City of Toronto Staff prepared a comprehensive report dated September 26 for the consideration of a joint meeting of the Economic Development and Parks Committee and to the Planning and Transportation Committee, scheduled for October 24, 2002, en route to a Council meeting planned for November.

The Staff Report contained a detailed analysis of the financial, legal, community, health, environmental and economic impacts of various scenarios for the Toronto Island Airport.

On October 4, 2002, the TPA announced a four-point plan for the future of the Toronto City Centre Airport. The plan included a comprehensive business plan, an agreement with a second regional carrier, RegCo, and a design concept for a bridge to the mainland and the construction of a new passenger terminal.

The plan was for RegCo to begin operation within 12 months with service to Ottawa, Chicago and New York, the airline expanding to serve cities in the US and Canada within 90 minutes flight time or 500 nautical miles of Toronto.

Under the plan, RegCo would not use jets and would not require any change to the existing runways. RegCo intended to order 15 latest generation, quiet, fuel efficient, Q400 turboprops manufactured by Bombardier at their Downsview Plant. The plane order would be placed upon the tendering of the bridge from the mainland to the Island. It was indicated that the TPA expected to proceed with the construction of a fixed link to the TCCA once all the conditions attached to the City Council's approval of the bridge in 1998 had been met. It was noted that City Council had approved a bridge in 1998 subject to the finalization of the bridge design and a business plan that would show the bridge would not cost taxpayers' additional dollars, as well as an environmental assessment. The environmental assessment had been completed in 1999 and a bridge design concept and business plan had been updated.

On October 8, the Waterfront Reference Group (a Committee of City Council) held a meeting in the City Council Chambers with, according to media reports, about 600 people in attendance, including 9 Councillors, City-staff,

representatives of the TPA, Toronto Island residents, environmentalists, members of the Canadian Auto Workers (CAW), many individual airport supporters and opponents, along with representatives of RegCo, Air Canada and the GTAA (Greater Toronto Airport Authority, which operates Toronto's Pearson International Airport).

The September 26 City-staff report presented to the meeting suggested that there were only two options: do nothing, which would lead to the airport closing or expand the non-jet service, including building a new terminal and a bridge link to the waterfront. The City-staff urged Councillors to take "a balanced approach" and consider the City's waterfront residential and cultural needs as well as its employment and economic future. In a report dated October 22, 2002, the City's Chief Administrative Officer expressed the view that the proposed amendments to the 1983 Tripartite Agreement were considered to constitute a strong mechanism permitting a strong and effective balance between the various uses envisioned for a revitalized waterfront.

The recommendation of the 9 Councillors on the Waterfront Reference Group, on what the City should do with the airport, were sent to a joint meeting of the Planning and Transportation, and the Economic Development and Park Committees on October 24. The Committees held joint public meetings on October 24-25, and made a recommendation to full City Council that supported the expansion of the TCCA with certain conditions, one of those conditions being the resolution of the lawsuit between the City and the TPA.

The Toronto City Council held a regular meeting on November 26, 27 and 28, 2002, and a Special Meeting on November 28 and 29, and adopted the recommendations of the committees, including the proposed amendments to the 1983 Tripartite Agreement, with additional conditions to be imposed on the TPA. The approval of Council was conditional on the settlement of the legal dispute between the City, TEDCO and the TPA, as discussed in the next section.

THE TORONTO PORT AUTHORITY'S COURT PROCEEDINGS AGAINST THE CITY OF TORONTO

In 2001, the TPA had launched Court proceedings against the City. As mentioned previously, many questions had been raised over the years about the legality and appropriateness of the transfer, by the THC to the City, of large pieces of land in 1991 and 1994, depriving the THC of the revenues it required to carry out its activities and remain financially viable. In the course of these two transfers, approximately 600 of the 700 acres owned by the THC were transferred to the City of Toronto and TEDCO.

In 2001, after much discussion and debate and many attempts at resolving the issue amicably, the TPA launched court proceedings against the City of Toronto, one of its subsidiaries, TEDCO, the former mayor of the City of Toronto, and a

number of Toronto Harbour Commissioners who had been appointed by the City of Toronto and had approved the transfers of land to the City.

TPA's Caim was based on the actions of the City and the City-appointed Commissioners during years where the City, under the *Toronto Commissioners Act* 1911, appointed three of the five directors of the THC. The Statement of claim contained allegations that the impugned actions in transferring the land had been taken contrary to the interests of the THC and against the advice of and notwithstanding opposition from the officers of the THC and the non-City appointees on the THC's Board of Directors.

More specifically, it was alleged in the Statement of claim that on two occasions, in 1991 and 1994, large pieces of THC lands totaling more than 600 acres, had been transferred to the City of Toronto or TEDCO, lands having an estimated value, at the time, of more than $1-billion.

The Statement of claim further alleged that everyone but the City of Toronto, and ultimately its appointees on the THC Board, appear to have concurred in the necessity of a proper analysis of the amount of land and resources required to ensure the TPA viability, before any land transfer. It was further alleged that it was clearly contrary to the best interests of the THC to deprive it of the land and resources necessary to ensure its financial viability. The City-appointed Commissioners had entered into a one-sided agreement to transfer land to the City and TEDCO without analysis of the actual land requirements of the THC and without identifying its requirements for revenue earned on land transferred.

It was further alleged by the TPA that the City had refused to pay harbour fees imposed pursuant to the *Canada Marine Act* in an amount in excess of $1-million and that there was no basis for such refusal. In addition, the City had refused to comply with its Subsidy Agreement, having refused to properly consider any increase in the basic subsidy amount of $2.7-million. The City had also under-funded the 2000 capital budget by more than $800,000, and refused to pay any amount on account of the $5.9-million of capital expenditures for 2001 and 2002.

The main argument for the TPA's claim was that the Toronto City-appointed Commissioners acted on the instruction of City Council in the interest of the City and not in the best interests of the THC and that this constituted a breach of their fiduciary duties to the THC. It relied on a 1993 decision of Mr. Justice Steele of the Superior Court of Ontario to the effect that the THC Commissioners have a duty to act in the best interests of the THC regardless of who appointed them, even if that interest is contrary to the wishes of those who appointed them; principle that would apply whether the City appointees were members of the City Council, members of the City Staff or outsiders.

While the court case was proceeding, the TPA and the City of Toronto retained the Hon. George Adams, an experienced former Ontario Superior Court Justice

to act as mediator. I was told that little progress had been made at the first two mediation sessions and that a third session had been agreed to be held in early December 2002.

Examinations for Discovery in the litigation were set to commence in the week of December 2002 and continue to the week of April 21, 2003. It was expected that undertakings, motions and pre-trial activities would extend for months after the discovery. The trial had tentatively been set to commence in early 2004.

I was informed by TPA's counsel that when it became clear that further delays and the production of discovery would not be countenanced by the court, the City, on the eve of the commencement of the examinations for discovery, signaled a serious willingness to enter into settlement negotiations. No doubt the discussions taking place in City Council in November 2002 also had an impact on the City's willingness to enter into serious negotiations.

THE 2003 SETTLEMENT AGREEMENT

The negotiations that followed were prolonged, intensive and complex. They involved significant input and contribution from the TPA, its Board, Transport Canada as well as Toronto City Staff, Toronto City Council committees and the City Council itself.

The TPA had received advice from its outside independent legal counsel that it had a strong case against the City and that its claim was not frivolous. In the view of the TPA, the 2003 Settlement Agreement represented a very substantial compromise of its significant and legitimate legal claims.

The TPA was prepared to make the compromise on the basis of a number of important considerations, all of which according to information I received were repeatedly made clear to City representatives:

1. It was in the public interest to find a resolution that would allow the TPA and the City to restore a productive and effective working relationship. A TPA victory in litigation might have restored its misappropriated resources but would have likely significantly scarred the relationship between the TPA and the City.

2. The City and TEDCO wished to undertake substantial waterfront revitalization in the Portlands, which is the land located at the eastern end of the Port of Toronto. By giving up its claim to the return of those lands, the TPA was assisting in the shared objective of waterfront revitalization in a manner that, because of the other terms of the settlement, would leave it with lands and resources sufficient to continue to discharge its own important mandate.

3. By agreeing to amend the Tripartite Agreement to facilitate the building of a fixed-link to the Toronto City Centre Airport and the operation of a new airline at the airport, all three parties were in a position to achieve a long planned and very well studied enterprise, which would allow the TPA to revitalize the operations of the TCCA to a level contemplated by the original Tripartite Agreement, and environmental benefits, which had been identified over a number of years as being associated with the construction of a fixed-link.

4. Because of the revenues that would result from the operation of the TCCA under the 2003 Settlement Agreement, the TPA would be financially self-sufficient without requiring the return of or compensation for all of the lands that had been allegedly misappropriated by the City. This, in turn, meant that the City would not have to permanently subsidize the TPA for these transfers of land, as had been contemplated by the 1991 and 1994 agreements.

In the view of the TPA, the 2003 Settlement would ensure that the TPA had a basis upon which to achieve and retain long term financial self-sufficiency, but without forcing the City to be responsible for the enormous financial liabilities potentially associated with the alleged wrongful acts of its agents in the previous decade. Rather, the agreement contemplated specific capital and operating payments for a defined period of time, following which the City's financial liability to the TPA would cease. According to the TPA, these payments were set at the minimum level consistent with self-sufficiency and well below the level of revenue previously earned by the TPA from the misappropriated lands.

It is worth to set out briefly the benefits that each party obtained under the agreement:

- **Benefits for the City**

The City retained ownership of more than 600 acres of land in dispute, which would allow it to proceed with waterfront revitalization.

At the same time, the City obtained a reduction in the level of compensation to be provided by the City to the TPA as a result of the taking of the lands:

- outstanding and unpaid subsidy amounts for operating and capital payments for the years 1995 to 2002 were reduced to $5,457,000 ($4-million of which was allowed to be paid in staged installments of $1-million annually from July 15, 2003 to July 15, 2006);

- the period over which the future compensation was to be paid was limited to 10 years;

- amendments to the 1983 Tripartite Agreement that were agreed to:

    * to enable the construction of a fixed link which the City had previously approved in 1992, 1995 and 1998.

    * to remove any obligation on the City to provide funds for operating or for capital expenditures or for deficits associated directly or indirectly with the TCCA, its terminal, the fixed link or associated works; and

- amendments to the Tripartite Agreement also imposed new conditions required by the City in connection with the operation of the TCCA including:

    * limitations on hours of operation of the TCCA;
    * a prohibition on the operation of casinos;
    * the implementation of certain city-transit and other strategies;
    * a commitment on the TPA to work with a community advisory committee;
    * a commitment by the TPA *"to administer, control, maintain, manage and operate the TCCA in an efficient and business like manner so as to ensure a most effective operation thereof that is consistent with good management and leading the overall object of cost recovery".*

The City also obtained a concession that the planes to be purchased for operation at the Island Airport would be built in Toronto, as long as the prices were competitive. The City was also getting a release from a legal liability with a potential exposure in excess of many million dollars, with very substantial expenditures associated with defending TPA's claim.

- **Benefits for the federal Government**

The federal Government obtained a release from the third party claim initiated by the City of Toronto following the launching of the TPA court action. The federal government also obtained amendments to the 1983 Tripartite Agreement which removed any federal obligation to provide funds for operating expenses or capital expenditures or deficits associated directly or indirectly with the TCCA, the terminal, the fixed link or associated works. The parties agreed that the TPA shall continue to operate the TCCA on its own behalf and not on behalf of the Minister.

- **Benefits for the TPA**

The TPA obtained the City's acknowledgment and agreement that Toronto should have an active port function managed by the TPA under its legislated mandate. The TPA also obtained the payment of a significant portion of past outstanding amounts under the subsidy agreements, as described above. The TPA also obtained a contractual commitment from the City and TEDCO to make the annual payments over 10 years as described above.

The TPA also obtained an acknowledgment, consistent with the legislation governing payments in lieu of taxes (*PILTs Act*), that any disputes with respect to the amount of PILTs to be paid by the TPA to the City would be resolved pursuant to the *PILTs Act*. See further discussion of the PILTS issue later on in this Report.

The TPA also obtained a provision whereby the City agreed to pay the amount of Harbour User Fees that the City agreed was owing, and to work to a resolution of any amounts in dispute with the TPA.

Finally, the amendments to the Tripartite Agreement authorized the construction of a fixed link and a terminal at the TCCA, subject to conditions imposed by the City and the federal government.

COMMENT

Some have argued that the TPA's claim was frivolous and without any basis. This, for sure, will never be known for certain for the simple reason that the City decided, instead of letting the proceedings follow their course in Court, to negotiate a settlement that eventually was brought before, discussed and approved by City Council.

THE ELECTION OF DAVID MILLER AS MAYOR OF THE CITY OF TORONTO

At the November 10, 2003 municipal election, Mr. David Miller was elected Mayor of the City of Toronto. As one of his platform planks, Mr. Miller had campaigned against the construction of a bridge between the Mainland and the Island. According to press reports, Mr. Miller had contended the bridge was only the first step in an expansion of the facility that would harm the redevelopment of the waterfront.

During a press conference that kicked off the Liberal Leadership Convention on November 12, 2003, Mr. Paul Martin, then Prime Minister in-waiting, pointed out that *"We've got a new Mayor. We've got a new Council, which is a mixture of the old and certainly the new, and very clearly we will take our cue from municipal government".* [emphasis added]

Mayor Miller had made his opposition to the bridge a significant part of his campaign platform and giving the matter his top priority, he called a meeting of the Toronto City newly elected Council for early December 2003, two days after officially becoming Mayor.

The statement of the Prime Minister-in-waiting came as a shock to the TPA, and on November 27, 2003, the Globe & Mail reported that the TPA's Chief Executive Officer (CEO), Lisa Raitt criticized the comments of Mr. Paul Martin in saying that he would defer to Toronto City's Council on the future of the Island Airport bridge. The CEO argued that the Prime Minister-*designate "did not know the facts, He did not know the file. He has not been briefed."* The next day, the Toronto Globe & Mail reported that the incoming Prime Minister wanted the Toronto Port Authority to adopt a *"conciliatory posture"* when it comes to setting the future of the proposed bridge to the Island Airport. A spokesman for Mr. Martin was reported as having said *"it's probably best to adopt a more conciliatory posture at this point and work with people to see what the community will choose and decide".* According to the spokesman, Mr. Martin was *"fully equated with the facts and was watching closely".* I discuss these comments and the Board's reaction to them further in the section: *Response to the Comments of the Incoming Prime Minister.*

At its meeting of December 3, 2003, the newly elected Toronto City Council adopted several motions stating that the Council did not support the construction of a bridge to the Toronto Island Airport and that the federal government was requested to respond as soon as possible but not later than three months. The Council also requested the federal government and the Toronto Port Authority amend the Tripartite Agreement so as to remove the provisions for a fixed link to the Toronto City Centre Airport. The Council further requested the Chief Administrative Officer to report to Council on a request that the federal government indemnify the City of Toronto against any legal costs or liabilities pursued by third party that may arise from the amending of the Tripartite Agreement.

At the same meeting, Council rejected Motions calling for the referring of the matter of the fixed link to a special meeting of Council to be held, as soon as possible, sitting as Committee of the Whole, to hear deputations and give further consideration to the matter.

In brief, the Council, while withdrawing its support to the construction of the bridge, was effectively asking that discussions be held to amend the Tripartite Agreement to remove the provisions for a fixed link and requesting the federal government indemnify the City against any resulting legal costs or liabilities. It seems clear that City Council did not expect that the bridge would be cancelled without discussions with federal authorities of the conditions under which that could be done. Most importantly, the Council appears to have acknowledged

that the cancellation could result in some liability, and signaled a reluctance on the part of the City to incur any part of this liability.

The next day, on December 4, 2003, the Minister of Transport, Mr. David Collenette, speaking to the media, responded that *…"There has been some extensive debate on this particular issue, and it is now clear that the City does not feel it is in the best interest of the citizens of Toronto that a fixed link be built to the City Centre Airport… The City has now indicated that it wishes that the three signatories come back to amend the Tripartite Agreement as it affects the fixed link. On behalf of the Government of Canada, I am here to tell you that we are prepared to respect that request. It's now up to the Port Authority to reflect upon the decision".* In the course of his press conference, the Minister said that he had talked to the Port Authority Chair urging him to carefully consider the positions of the other two partners in the airport's operation. The Chair was reported as having given the Minister his assurance that the Port would reflect upon these developments. The Minister, however, also made it clear to the media that he had no power to influence the TPA Board, noting that the Authority was an arm's length body and that he did not have the statutory authority under the *Canada Marine Act* to direct the Port Authority.

In brief, the Minister was saying that the federal government was prepared to respect the City Council's wishes in regard to the bridge and that the TPA would be a key participant in the discussions with the City. As the TPA was an autonomous entity, the Minister expressed his hope that it would enter into discussions with the City to determine how the wishes of the City Council regarding the cancellation of the bridge could be accommodated.

Indeed, in the days before and after the City Council's meeting of December 3, 2003, the TPA Board independently held numerous meetings to consider and discuss its options with the assistance of independent external legal advice. The Board was particularly anxious to live up to the obligations imposed on directors and officers of a port authority by section 22 of the CMA, and indirectly alluded to by the Minister in his December 4th statement to the media that the TPA was operating at arm's length from the government.

On December 5, 2003, the TPA decided to pause active construction work on the bridge and chose to attempt to settle the matter. This pause continued until July 1, 2004.

As time went by, the positions and intentions of the federal authorities and the TPA as well as the City became more and more clear as we shall see now.

At a meeting held with Mayor Miller on December 18, 2003, and in a letter of the same day and another one dated December 23, 2003, the Chair of the TPA, described three matters that needed to be agreed to in principle before

discussions could begin with the City regarding the Council's request of December 3rd. The three matters were:

1. the costs incurred by the TPA regarding the construction of the bridge;
2. the third party claims that would result from the cancellation of the bridge; and
3. the future viability of the Island Airport.

With respect to the construction of the bridge, the Chair indicated that the TPA would attempt to arrange with the construction company an extension of the two-week work suspension that had been agreed with the Mayor, from December 8th through the following week.

The Chair felt that it was premature to make available to the City the information it requested regarding invoices of costs and documentation concerning the Aecon contract until an Agreement in Principle had been reached that would permit the discussions between the City and the TPA to proceed.

Mayor Miller responded to the Chairman's letter on December 24th, commenting on the three points raised by the Port Authority to be included in an Agreement in Principle as follows:

- regarding the Aecon contract, the Mayor indicated that the City would be cooperative in assisting the Port Authority to take appropriate steps to settle the contractor's claim;

- regarding the past expenditures of the Port Authority and the future viability of the Port, the Mayor expressed the view that they should be discussed separately. The Mayor felt that the TPA's past expenditures issue should be resolved quickly and suggested that the TPA staff provide detailed cost information to City staff;

- with respect to the future viability of the Port Authority, the Mayor suggested the discussions be entirely separate and be conducted in good faith and that one of the options that the City would like to consider was the City taking over the assets and liabilities of the Port if the Port Authority believed that it could not currently meet its mandate; and

- finally, the Mayor expressed the hope that his letter would be sufficient to produce a prompt resolution of the matter and would serve as a basis on which to instruct Aecon to cease further work.

In his response of December 29, 2003, the TPA Chairman expressed his disappointment that the Mayor's letter of December 24 did not touch on the possibility of lawsuits by other parties and that the City would not propose to indemnify the TPA for these. The Chairman drew the Mayor's attention to the

TPA's obligation to perform its function and to preserve and enhance its assets, in a reasonable and business-like manner. The Chairman said that the TPA proceeded with the construction of the bridge on the basis of an Agreement with the City and the federal government and that the City, with its request to remove the bridge from the Tripartite Agreement, seemed to want to have the TPA (and third parties) to suffer virtually all of the consequences and risks that such an action would provoke.

The TPA Chairman indicated that the TPA would insist upon an Agreement in Principle from the City that addressed all of the three key issues before the TPA could consider the City's request. Again, the three issues concerned the viability of the TPA and the Island Airport, the costs incurred to date relating to the bridge, and the indemnification for all costs and liabilities arising from the decision being taken by the City.

It quickly became clear that the City would not agree to discuss the potential liabilities that would result from the cancellation of the bridge.

On February 11, 2004, Mayor Miller reiterated to the TPA Chairman that the City was prepared to discuss in good faith the Port Authorities' duly foregone costs, as opposed to costs deliberately incurred in a rush to pre-empt the municipal election results and at a time when the Port Authority did not have all necessary approvals.

The Mayor pointed out that the Port Authorities' position that it wanted an "Agreement in Principle" in advance of providing the City with all necessary information was, in his view, unreasonable and simply unacceptable. The Mayor asked that the information requested be provided promptly so that the matter could be resolved.

In her letter of February 25, 2004 to the City, the CEO of the TPA proposed to give access to detailed information relating to the matters under discussion, to City Council, under certain conditions designed to protect the confidentiality of certain information, it being understood that the confidential information could be used only for the purpose of facilitating discussions between the City and the TPA with respect to the City's request to amend the Agreement.

The City was also asked by the CEO to acknowledge and agree that the confidential information would be provided in order to discuss how to address the costs that had been expended by the TPA with respect to the bridge, the costs arising from third parties who may suffer damages or commence proceedings against the TPA, and the viability of the TPA and the Island Airport.

Eventually, at the request of the City of Toronto, in early April 2004, a meeting with the TPA had been arranged to take place in late April. A few days before the meeting, the Chair of the TPA wrote Mayor Miller to remind him that the TPA

had provided him and other representatives of the City with the TPA's position, several times, both in person and by letter throughout December, January and February, and that any discussion about the bridge would have to include a commitment by the City to address the costs incurred by the TPA; potential liability with respect to action by third parties and the viability of the Island Airport.

The Chairman also indicated that the proposed meeting was particularly important given that the TPA's contract with Aecon required them to commence construction in the water after June 30, 2004, i.e. after certain construction restrictions contained in permits issued under the *Fisheries Act* expired (which prohibited any construction activities in the period March 31 to June 30, 2004.) The Chairman indicated that the TPA's Board was not prepared to instruct Aecon not to commence construction. The Chairman also proposed a timeline for discussions between the TPA and the City to ensure that any proposals by the City could be considered by the TPA's Board well in advance of July 1, 2004. The Chairman reminded the Mayor that the TPA had obligations it was required to meet. With full approval of the City and the federal government, the TPA had entered into a commercial and reasonable agreement with Aecon to build a bridge. The City was not prepared to address the consequences of the change it was seeking and, in particular, the consequences of its request to change the Tripartite amending Agreement to cancel the construction of the bridge.

The Chair also informed the Mayor that the TPA would be proceeding in a commercial and reasonable manner with RegCo to ensure the start-up of a commercial carrier coincident with completion of the bridge and that the TPA intended to finalize the matter at its June 1st, Board Meeting so that the bridge construction could commence on July 1, 2004.

The Chairman's letter prompted Mayor Miller to write the Prime Minister on April 26, 2004, complaining that federal government officials and the Toronto Port Authority were not honoring Prime Minister's pledge to stop the Island Airport's bridge as evidenced by the TPA Chair's letter of April 22, describing it as a threat to the people of Toronto and qualifying the behavior of the Toronto Port Authority, as a public agency, as unacceptable.

In his response to Mayor Miller's letter of April 26, to the Prime Minister, the Minister of Transport, Tony Valeri, reminded Mayor Miller that in responding to the Toronto City Council's resolution of December 3, 2003, the Prime Minister had indicated that, subject to the restrictions that might be placed upon the federal government, he would take his cue from the new City administration and he would have to examine what authority the federal government had over the Toronto Port Authority. He also reminded Mayor Miller that the TPA had a high degree of autonomy, that it was not an agent of the Crown and that in its management and operations of the Island Airport, the Port Authority was required to enter into all contracts regarding the airport in its own name and not as an

agent of the Crown and thus, the Government of Canada could not direct the decision of the TPA on this issue.

The Minister of Transport pointed out that the Government of Canada continued to support discussions between the City and the TPA in exploring alternatives to building a bridge. Canada remained firmly committed to respect local interests and was prepared to cooperate and participate in any agreement that the City and the TPA reached, provided they do not result in any financial liabilities to the Crown.

On May 21, 2004, the Honourable Joe Volpe, the federal Minister responsible for the Greater Toronto area, wrote Mayor Miller, in an attempt to resolve the outstanding issues concerning the building of a bridge. The Minister reminded Mayor Miller that he had asked him in late December 2003, if he would be amenable to deferring the closing of the 2003 Settlement Agreement (including the amendment of the Tripartite Agreement) scheduled for December 31, 2003, until outstanding issues between City Council and the Toronto Port Authority could be addressed. Mayor Miller had declined to do so.

The Minister also reminded Mayor Miller that the issues attending the City Council's resolution reversing Council's previous decision to support a bridge and to enter into a Tripartite Agreement permitting the construction of a bridge remained legally unresolved. The Minister noted particularly that the Council had not acknowledged that the party that changes its mind with respect to a contract normally bears the burden of that decision. Instead, noted the Minister, Council's resolution called for the federal government to absorb costs and liabilities incurred by the City if the City were to break the contract. Council also dismissed the claims that third parties might have as a result of the cancellation of the bridge.

The Minister expressed the view that problems relating to the costs and liabilities associated with the City Council's decision could only be resolved if all parties accepted to enter into discussions and/or negotiations on how to effect such solutions.

The Minister expressed his regret that Mayor Miller had declined the appointment of a facilitator to help the City and the TPA to reach a solution. He reiterated that the best way to move forward on the issue was through the appointment of a facilitator who could address the issues reasonably.

The Minister finally indicated that to ensure the bridge would not be built, the federal government was prepared to execute an amending agreement, one made necessary because the City Council had changed its mind. However, the federal government would not do so if the agreement would cause any other party, and in particular, the federal government, to incur any cost liabilities that would flow as a result of the execution of such an amending agreement.

THE NEGOTIATION OF A SETTLEMENT

It became clear in late Spring 2004 that it would not be possible for the TPA to have meaningful discussions with the City to determine the conditions under which the request of City Council that the construction of the bridge be terminated could be satisfied.

Transport Canada had for some time been considering, with the assistance of Justice Canada, the various options that were available, given the refusal of the City to participate and work towards a final settlement of the matter. One of the options was to agree with the City to amend the Tripartite Agreement and restore the provision prohibiting the construction of a fixed link. Another option was the enactment of regulations under *Canada Marine Act* that would prohibit the TPA from building the bridge.

On June 1, 2004, the Prime Minister indicated to the Mayor of Toronto that if the Mayor drafted and signed an Agreement to further amend the Tripartite Agreement in order to reinstate the prohibition against the construction of a fixed link, the Minister of Transport would stand ready to sign the Agreement in order to prevent the construction of a fixed link. The Mayor of Toronto prepared and signed such an Agreement and tendered it by his letter of June 3, 2004 to the Prime Minister for signature. Further assessment by the federal authorities, however, demonstrated that re-amending the Tripartite Agreement for this purpose would cause substantial legal risk for the federal authorities and that, in any event, such further amendment could not be effective unless and until it had been signed by the TPA, which was considered to be highly unlikely.

In mid-June, the federal government took the decision to pursue the public policy objective of stopping the construction of the fixed link by using a regulatory instrument as opposed to a contractual instrument and it authorized pre-publication of the proposed regulation in the *Canada Gazette*. At the same time, the federal government provided a mandate to the Minister of Transport to enter into discussions with the TPA and the City in order to explore and address the impacts that the proposed regulation would have on the TPA and the affected parties. This strategy was aiming at minimizing the financial exposure of the federal government. The viability of the TPA was also to be taken into account. The mandate provided to Transport Canada officials did not contemplate, however, the dissolution of the TPA under s. 55 of the *Canada Marine Act.*

The *Regulatory Impact Analysis Statement* (RIAS) published in Part I of the *Canada Gazette*, on June 21, 2004, referred to the commitment of the government of Canada to respect the wishes of the Toronto City Council as expressed by the motion adopted at Council's meeting of December 3, 2003, to reverse its support for the fixed link.

The 30-day pre-publishing period in Part I of the *Canada Gazette* was required to allow for the input of users and the local community regarding the regulatory proposal to provide that the TPA shall not use or authorize another person to use the port to build a bridge or other similar fixed link between the City of Toronto Mainland and the Toronto Island.

The Notice highlighted that the enactment of the proposed regulations might result in potential costs to the TPA, the City of Toronto, affected third parties and the Government of Canada. The Notice went on to signal that the total costs would *"be determined through deliberations undertaken with principal and third parties over the course of the 30-day consultation period".* It was also anticipated that the consultation process would address potential alternatives to the fixed link, including the requirement for appropriate access for emergency vehicles to the Island.

In July 2004, the City, Transport Canada and the TPA had a series of meetings to discuss the impacts the proposed regulations would have on the TPA and the affected third parties. Other parties, i.e., Aecon, Stolport and RegCo, were invited to make separate presentations to Transport Canada, the TPA and the City, so that their claims could be understood. All these discussions, as is the custom in such matters, were without prejudice and confidential and it was understood that all parties were initially attending without firm instructions to settle. Specific mandates would have to be sought. Although City staff initially participated in the discussions, it quickly became evident that the City was not prepared to share the costs of a settlement nor was it prepared to support alternatives to the fixed link. City officials indicated that they could not get instructions from the Mayor to contribute to the settlement and were not able to obtain any instructions to discuss any of the steps that later became part of the deal to mitigate the losses of the TPA and RegCo. The City officials indicated that they had no instructions to discuss the viability of the TCCA, but that they were prepared to discuss the closing of the Island Airport. Transport Canada representatives responded that they were not instructed to negotiate the closing of the Airport. Afterwards, the City ceased to participate any further in the negotiations. This left the TPA and Transport Canada to attempt to resolve, without the participation of the City, the liabilities associated with the City's withdrawal of its support for the construction of the bridge.

In September, Transport Canada agreed to continue to meet with the TPA to try and come to a settlement of the various claims that would arise from the proposed regulation and the cancellation of the bridge. From my discussions with the players involved, it was clear that each party to these discussions had clear objectives:

- The objective of Transport Canada was to settle the TPA potential claims and avoid leaving unsettled any direct or indirect claim that might exist

against the federal government as a result of the cancellation of the bridge.

- TPA's objectives throughout the negotiations were to resolve all claims or potential claims against the TPA, keeping in mind the potential for mitigating its damages by ensuring, if possible, the future viability of the Airport.

The TPA then conducted direct discussions with the affected third parties: Aecon, Stolport and RegCo. The TPA quickly made good progress towards achieving a settlement of the claims of Aecon and Stolport. The discussions with RegCo proved much more difficult and the TPA indicated to Transport Canada that a settlement of the claims of Stolport and Aecon would appear to be feasible, but that the discussions with RegCo were proving much more difficult. The TPA suggested that they proceed to settle with Aecon and Stolport, leaving RegCo for the moment.

Transport Canada, however, insisted that all potential claims by each of Aecon, Stolport and RegCo against the City and/or against the federal government or the TPA be settled and that releases be obtained from all potential claimants as part of a global settlement. Transport Canada was concerned, on the basis of advice from Justice Canada who was assisted by external independent lawyers, that a settlement that included only Stolport and Aecon – but not RegCo – would leave open the possibility that RegCo might have a recourse for damages either directly or indirectly against the TPA and/or the federal government. RegCo had already commenced an action in which it was suing the City in damages in excess of $550-million dollars and, even assuming that separate proceedings against the federal government were not commenced, it was probable that the City would seek indemnity from the federal government.

Transport Canada thus insisted that a settlement of Aecon's and Stolport's claims in and of themselves would not be sufficient and would not be satisfactory; a settlement of, and a release for, all potential claims should be sought.

Eventually, the TPA and RegCo agreed to have further negotiations. The result of all of these negotiations, as will be explored later, was that RegCo would attempt to mitigate its claim for damages it might have against the TPA, as a result of the cancellation of the bridge, while the TPA itself would attempt to mitigate its own damages in regard to claims it might have against Transport Canada and the City. It was during this last round of negotiations, where RegCo and the TPA agreed to consider the specific business arrangements that might permit each to mitigate its damages, which made a deal possible.

Before formally concluding the Settlement Agreement, Transport Canada had considered the advice of PriceWaterhouseCoopers Corporate Finance Inc.

(PWC) and their confirmation that the amounts of damages contemplated were reasonable.

The Settlement Agreement required lengthy and intense negotiations between, on the one hand, the TPA and each of Aecon, Stolport and RegCo separately, and the TPA and Transport Canada, on the other hand. Under the Settlement Agreement, Transport Canada, the TPA and the City obtained the release of all potential claims that Aecon, Stolport and RegCo might have had against each and every one of them caused by the cancellation of the bridge.

The Settlement included the payment of a total sum of $35-million to the TPA by Transport Canada, for the TPA's sunk costs, legal costs and other professional fees and losses of net revenues, and a reasonable amount to cover the claims of Aecon, Stolport and RegCo.

Transport Canada was concerned about their ability to make these payments and the provisions of s. 25 of the *Canada Marine Act*. After receiving legal advice, Transport Canada concluded that the section did not preclude the payment of damages by the federal government to the TPA of any amount that the federal government is legally bound to pay in order to discharge a lawful obligation towards the TPA.

Under the terms of the Settlement, it was incumbent upon the TPA after having received $35-million from Transport Canada in settlement of its claim against Transport Canada, to pay out the claims of Aecon, Stolport and Porter.

In addition, the TPA and RegCo entered into a commercial arrangement that help mitigate their respective claims.

Each and every one of the Settlement Agreements was confidential, as is usual in matters of this nature. Although I have reviewed the agreements in detail and have a complete understanding of their terms, for the purpose of this Report and in accordance with my terms of reference, I have not made reference to the specifics of this confidential information.

TPA's officers, with the assistance of independent legal advice, conducted the negotiations under the continuous direction of the TPA's Board which, since December 2003, had also retained the services of an independent lawyer to assist the Board to ensure compliance with due diligence and its fiduciary duties. Transport Canada's senior officials conducted the negotiations on behalf of the federal government with the assistance of Justice Canada working with external independent lawyers. I was informed that throughout the negotiations, Transport Canada's representatives acted under the supervision and guidance of the Minister of Transport who was acting in consultation and with the advice of his Cabinet colleagues.

The Governor General in Council, on April 21, 2005, authorized the Minister of Transport, on behalf of the Government of Canada, to enter into the settlement that had been negotiated with the TPA. (P.C. 2005-668).

- **Overall Settlement**

For the reasons set out below, my view is that the global $35 million settlement figure is reasonable and that the process in reaching each element of this settlement generally followed the principles of good governance.

In making this determination, I have been provided significant assistance by Jeffrey Smith, a partner at BDO Dunwoody LLP, the firm that Transport Canada retained to assist my review. In addition to discussing all of these matters with me on a number of occasions, Mr. Smith provided me with a report, the Executive Summary of which is found in Attachment 3.

Prior to the commencement of negotiations, Transport Canada, with advice from Justice Canada and its financial consultant, considered the range of exposure of the potential liability of the federal government and sought a mandate to enter into negotiations within the range of the anticipated exposure. In this context, a detailed legal opinion was produced which explored a number of avenues by which the federal government could be liable either directly or indirectly for the liability which flowed from the Regulation which had been introduced. In addition, PWC was retained to provide, as discussed above, its opinion on the likely range of the potential exposure to damages.

At the end of the day, the agreement which was reached between the TPA and the third parties: Aecon, Stolport and RegCo and which was funded by the federal government was well within this overall monetary range that had been given serious thought.

Aecon Settlement

As explored elsewhere herein, Aecon had entered into a conditional contract with the TPA on August 18, 2003 following a RFP process that commenced in March 2003. The underlying conditions took longer to complete than anticipated and two extensions were granted, with the conditions ultimately being satisfied and the instructions for work being given on October 31, 2003.

In the period between August 18, 2003 and October 31, 2003, Aecon engaged in certain preliminary work with the specific approval of the TPA which primarily consisted of detailed design and drafting work and included some prefabrication of metal construction parts. Following October 31, 2003, Aecon took steps to order further metal for work upon the project and set up a project site at the foot of the Bathurst Bridge. In doing this, Aecon incurred costs.

The settlement provided for the repayment of some of Aecon's costs which had been undertaken, along with provisions that Aecon was given ownership of the metals which had been ordered and fabricated, allowing for a mitigation of the costs and the ultimate liability of the TPA. These costs were analyzed by the TPA's Chief of Works & Engineering who determined that the settlement amount was the "*bare minimum*" of costs that Aecon had incurred.

This settlement was the product of negotiation between counsel for the TPA and counsel for Aecon. Members of the TPA Board were intimately involved in these discussions, and the amounts were seen to be reasonable.

Before approving this settlement, the federal government considered the advice provided by PWC, who reviewed the proposed settlement and met with Aecon to review the basis for the amounts claimed, and the basis upon which the settlement was reached. It was the opinion of PWC that the Aecon settlement was reasonable.

In his October 2006 Report to me, Mr. Jeffrey Smith reviewed the elements that composed the settlement with Aecon, noting that there appeared to be no provision for interest despite the fact that Aecon had incurred and carried these costs for 8 months, and concluded that the Aecon's portion of the settlement was "reasonable" in the circumstances.

I am in agreement that this settlement was reasonable and believe that all parties involved undertook appropriate due diligence in arranging and considering this settlement.

Stolport Settlement

As part of the design of the proposed fixed link, an existing building – Hangar #2, owned by Stolport would have to be demolished. In 1999, the TPA obtained amendments to Stolport's lease and Stolport's agreement to demolish this building as well as the abandon of its leasehold interest over certain lands required for the construction of the bridge. In exchange for this, the TPA agreed that Stolport would be the exclusive operator of the parking facilities on the island and that revenue from parking would be shared between Stolport and the TPA.

Stolport took the necessary steps to commence the demolition of Hangar #2, such that by the time that the regulation halting the construction of the bridge was published in the *Canada Gazette*, the hangar was no longer suitable for use as a hangar.

As a result of the decision to abandon the fixed link, the hangar likely did not need to be destroyed and the parking potential on the island was, effectively, nil. Stolport was most likely in a position to advance a significant contractual claim for breach of contract and lost revenues.

This settlement was the product of negotiation between counsel for the TPA and counsel for Stolport. Members of the TPA Board were intimately involved in these discussions, and the amounts were seen to be reasonable.

The agreement provided that Stolport would be compensated for the costs involved in constructing a hangar to replace the one destroyed at the request of the TPA. In addition, the concerns respecting lost parking revenues were mitigated through a new agreement which would provide that Stolport continue to operate the parking facilities that would support the new ferry on a revenue sharing basis. In addition, there were other representations and warranties obtained by the TPA as to future business operations. In assessing the sunk costs, the TPA considered primarily the replacement costs of the hangar, successfully insisting that management and related costs not be included in this calculation.

Before approving this settlement, the federal government considered the advice of PWC, who reviewed the proposed settlement and met with Stolport to review the basis of the amounts claimed and the basis for the settlement. It was the opinion of PWC that the Stolport settlement was reasonable.

In his October 2006 Report to me, Mr. Jeffrey Smith reviewed the elements that composed the settlement with Stolport, including the business arrangements which were included with the monetary terms, noting that the final monetary settlement was well below the initial claim for sunk costs, and determined that the Stolport's component of the settlement was "reasonable" in the circumstances.

I am in agreement that this settlement was reasonable and believe that all parties involved undertook appropriate due diligence in arranging and considering this settlement.

RegCo Settlement

The settlement with RegCo required significant negotiations between the TPA and RegCo and, in the end, required a great deal of compromise on the part of all parties not only to settle the outstanding dispute but also to craft an arrangement which would permit RegCo to operate out of the Island Airport in the substantially different circumstances.

RegCo had expended significant sums of money in pursuing an airline which would be based at the Island Airport and which would operate to various points in Canada and the United States. One of the prerequisites of their business plan was the construction of a fixed link to the mainland. With the federal regulation, the fixed link was gone and, along with it, the dreams of Robert Deluce and his backers to establish Porter Airlines (although I understand that the name of the airline was not developed until somewhat later.) In this scenario, the damages that might be awarded by the Court could have been significant. Indeed, in a

Statement of claim initiated against the City of Toronto, RegCo claimed over $550-million in damages. I am advised that this figure was arrived at in consultation with legal counsel and an expert in the valuation of damages in cases such as these.

The settlement with RegCo incorporated two elements. The first was the payment of a sum of money, which was substantially lower than that claimed by RegCo against the City. The second was a commercial arrangement between the TPA and RegCo that would permit RegCo to operate an airline based at the TCCA under similar conditions to those tentatively set out in a MOU between the TPA and RegCo on July 30, 2003. Certain amendments to the 2003 MOU were negotiated and agreed to, which reflected the new reality that a fixed link was not going to be constructed. In addition to mitigating the losses that RegCo might have against the TPA, the federal government and possibly the City, the TPA could, at the same time, mitigate the claim it had against Transport Canada through a commercial agreement with Porter that would ensure its financial stability and minimize its claim for lost revenue.

In speaking with the parties involved in this settlement, it is clear that this was the most difficult of the three arrangements to complete; and is certainly the most complex portion of the settlement. The arrangement with RegCo was finalized well after the other components had been agreed to and, as a result, some of the due diligence, which was possible with the components of the settlement regarding Aecon and Stolport was not completed with the same rigor.

RegCo's initial position was that any settlement would have to encompass compensation for the sunk costs that were expended in pursuit of an operation with a fixed link. In addition, RegCo obtained estimates of the profit differential between its original business plan and the somewhat smaller operation that would result from the cancellation of the fixed link, and took the position that all of these foregone profits should also form part of the settlement. Although this initial settlement figure was substantially less than that advanced in the claim that had been issued against the City of Toronto, it was substantially larger than the totality of the settlement that was eventually reached with all parties.

In mid November 2004, the TPA's view was that it appeared that a settlement would likely be achievable with Aecon, Stolport and RegCo as they had reached agreement in principle on the amounts claimed, although in the case of RegCo there were still on-going discussions between RegCo and the federal government about the possibility of financing for aircraft purchases and a number of other issues remained to be determined.

The RegCo portion of this figure was substantially smaller than that advanced by RegCo at the outset of the settlement discussions. In its submissions to Transport Canada, the TPA set out that the RegCo settlement figure comprised compensation for those sunk costs which were related to that portion of the

RegCo plan in relation to the fixed link – and not all of its costs incurred to date. As well, although there was some provision for loss of future profits, the TPA had obtained a commitment that RegCo would invest a parallel amount into its TCCA operations in a manner that had not been initially contemplated.

The TPA proceeded to take steps to advance these November 2004 preliminary settlement figures to Transport Canada, and was required to justify these numbers in some detail. In turn, as mentioned elsewhere, Transport Canada retained PWC to provide its views on the reasonableness of the settlement. Although cabinet approval was still required in order to achieve settlement, Transport Canada officials advised the TPA in the new year that they were comfortable with the settlement figures and the background provided, and that they would recommend settlement within the range suggested by the TPA in this process.

As a result, the TPA sought to put the balance of the settlement in place, almost all of which involved RegCo. Although the discussions on aircraft financing were not technically part of the settlement discussions, they were crucial for RegCo in its decision whether to pursue settlement and an ongoing business operation. Ultimately, in March 2005, RegCo was informed by federal officials that aircraft financing was not possible. As the value of the financing being sought by RegCo was substantial, the news that aircraft financing would not be available came as a disappointing shock to RegCo as it would affect the very core of its business plans. In its original business plan, RegCo had received commitments of financing from Bombardier, financing which was simply no longer available at the time the fixed link was cancelled.

RegCo was faced with the two options: to come back to the settlement table and attempt to obtain further concessions or to abandon its settlement hopes and seek full compensation in a lawsuit. In the end, RegCo determined that it would proceed with what would become the Porter operation, and returned to the settlement discussions with a goal of obtaining significantly more money and concessions than had been discussed in November 2004.

Ultimately, the final monetary settlement with RegCo was identical to that advanced in November 2004, as the TPA held firm to the numbers initially advanced – in part based on an understanding that Transport Canada was not likely to recommend the approval of any additional funds. However, the final RegCo settlement did contain certain key non-monetary concessions.

Some of these concessions were favorable to the TPA. As part of the settlement, RegCo was required to make significant investments in the TCCA infrastructure, which the TPA viewed as an important element to concretely tie the new Porter operation to the TCCA, a goal of the TPA in these discussions – to obtain a based carrier.

In return, the settlement agreement set out that the TPA would improve the access to the Island Airport through the purchase of a new ferry and the construction of new passenger terminal facilities.

However, the TPA was also forced to give a quite significant concession in its settlement with RegCo. In the Tripartite Agreement, the TPA is required to take all reasonable steps to ensure that any contracts entered into in respect of the TCCA contain clauses that permit the closure of the airport and ensure that no liability flows from such a decision. The agreement with RegCo entered into as a result of the settlement contains no such clause. This was one of the concessions that was included following the decision by the federal government not to advance aircraft purchase financing.

In speaking with RegCo's principal, Mr. Robert Deluce, he has explained to me how it would have been impossible for his company to obtain financing or to encourage further investment in a situation where the bridge had been cancelled and there was an ongoing push by some, including Mayor Miller, to close the TCCA or, at the very least, prohibit operations of the sort planned by RegCo. This became critical following the decision by the federal government to refuse RegCo's request to assist in the financing of the aircrafts. This was, in his company's view and, more significantly, in the views of his investors and financiers, a deal breaker.

This matter concerned officials at Transport Canada, who sought specific assurances from the TPA that it had attempted to obtain such a clause in its agreements with RegCo and that the TPA was unable to do so. In the end, Transport Canada determined that this was a reasonable concession and that the TPA had made all possible attempts to obtain such a clause in the circumstances, and that TPA's conclusion that this was not possible was correct.

I agree with the conclusions reached by the TPA and by Transport Canada and I believe that there was no practical way for the TPA to reach an agreement with RegCo without some security of tenure for Porter's operation at the TCCA.

Before approving this settlement, the federal government also considered advice received from PWC who reviewed the proposed settlement and considered the settlement in the context of the potential claims that might be advanced if mitigation had not been possible. As with the other components of the settlement, it was the opinion of PWC that the RegCo settlement was reasonable.

As with the other settlements, PWC conducted an analysis of each component of the claim. However, unlike the situation found in the other aspects of the settlement, PWC and, therefore, Transport Canada, relied upon the efforts of the TPA to verify the component of the claim that dealt with the costs thrown away. PWC's review of the lost profits component was cursory but sufficiently detailed

as to permit the reader to understand the basis for their conclusion that the settlement was reasonable.

When the individual designated by the TPA to review the documentation, a Chartered Accountant with expertise in auditing financial information, compiled by RegCo to support RegCo's claim to costs "thrown away" reviewed the documents, he concluded that the documentation supported a claim well in excess of the figure attributed to this portion of the settlement in the settlement documentation.

In his October 2006 Report to me, Mr. Jeffrey Smith reviewed the elements that composed the settlement with RegCo, including the history of the negotiations, and determined that the settlement with RegCo was "reasonable" in the circumstances. In coming to this conclusion, Mr. Smith met directly and separately with officials from Transport Canada, the TPA, RegCo and their legal advisors, considered the basis of the claims advanced by RegCo and had the benefit of the views from all sides of the table.

Based on my own review of the claims, and the work of BDO Dunwoody on my behalf, I have come to the view that the settlement with RegCo is a reasonable one and believe that all the parties involved undertook appropriate due diligence in arranging and considering the settlement. Indeed, I believe that the creative mitigation scheme that resulted from the negotiations with RegCo, meant that both the TPA and RegCo were able to create the circumstances under which RegCo's new airline would be able to commence operations on a more limited basis with a new ferry and the TPA would have a basis to work towards its goal of financial sustainability. This significantly reduced the damages that were suffered by each party, and thereby greatly reducing and limiting the liability of the federal government and the City of Toronto in this matter.

I am supported in this conclusion in referencing the work that was done by PWC in advance of the settlement with RegCo to analyze the potential exposure of the federal government as a whole, and the fact that the total settlement was within this initial range.

TPA Settlement

Finally, the settlement included funds that were to be directed to the TPA itself to compensate for the losses incurred by the TPA.

As stated above, the mitigation which was possible with RegCo also permitted the TPA to ensure the viability of the Island airport and to mitigate its own losses, although it is clear that one effect of the cancellation of the fixed link was to limit the number of flights and passengers to a level beyond that required by the NEF-25 limits in the Tripartite Agreement. As such, it is clear that the TPA suffered damages as a result of the federal regulation.

If mitigation had not been possible, it is not clear that the TCCA would have been viable going forward, and the losses of the TPA would have been significant.

Before approving this settlement, the federal government considered the advice of PWC, who reviewed the proposed settlement documentation and met with the TPA to review the basis of the amounts claimed and the basis for the settlement. It was the opinion of PWC that the TPA portion of the settlement was reasonable.

In his October 2006 Report to me, Mr. Jeffrey Smith reviewed the elements that composed the settlement with the TPA, including a detailed review of the claim for sunk costs, and determined that the settlement with the TPA was "reasonable" in the circumstances.

It is my view that the TPA portion of the settlement is entirely reasonable and that the efforts of the TPA to mitigate its losses through the agreements with Stolport and RegCo significantly reduced the exposure of all three Tripartite Agreement parties (the TPA, the federal government and the city) to the losses that were suffered by the settlement parties. I also believe that all parties involved undertook appropriate due diligence in arranging and considering this settlement.

- **The Commercial Carrier Operating Agreement (CCOA)**

Questions have been raised with me by a number of correspondents and stakeholders about the legality of the CCOA entered into between the TPA and RegCo in 2005, and challenging the authority of the TPA to enter into such an agreement.

Before addressing directly the questions that have been raised, it is important to review briefly the events that lead to the conclusion of the CCOA with RegCo.

Firstly, it is worthwhile to recall that, while Air Canada through various subsidiaries has had a presence at Island Airport since the early '90s, it has never achieved a passenger flow that was sufficient to sustain the costs of the operations of the Island Airport. Air Canada has consistently decreased destinations, frequency and passenger levels. The TPA has unsuccessfully made numerous requests of Air Canada to spend more marketing money, to increase advertising, to add routes, to invest in infrastructure and to generally increase its use of the airport.

Secondly, the Feasibility Study that the TPA commissioned from Sypher:Muller was released to the TPA in early 2002. As indicated earlier in this report, the purpose of the Study was to provide the TPA with a factual background for decision-making, realistic assessment of options available to the TPA to increase usage of the Island Airport and to assist the TPA in developing a longer term business plan for the airport.

After a careful study of the Sypher:Muller report, the TPA Board chose to adopt, in February 2002, the enhanced turboprop option put forth in the Sypher:Muller report. In coming to its decision, the Board also considered whether it should continue to operate the Island Airport or discussed with Greater Toronto Airport Authority (GTAA) a possible relationship for the management of the airport. Negotiations were commenced with the GTAA.

Also, in February 2002, Robert Deluce (owner of RegCo) announced plans for a new airline, a bridge and a new terminal. This announcement was made without any prior discussion with the TPA. As the negotiations with GTAA were stalling and getting nowhere, the Board decided to have discussions with Mr. Deluce and to negotiate a Memorandum of Understanding (MOU) for a based carrier at the Island Airport.

Having decided to operate the Island Airport, the TPA chose to pursue the construction of a fixed link that had already been endorsed by the City of Toronto in 1995 and 1998. In May 2002, the TPA wrote the City of Toronto requesting instructions on what was needed for final approval to amend the Tripartite Agreement to allow for a bridge to be built. The City indicated it would review the matter of final approval in the fall of 2002.

After having signed a MOU for a based carrier at the Island Airport in September 2002, the TPA, in October 2002, released its business plan for the Island Airport. As mentioned earlier, in November 2002, after considerable debates and on the basis of substantial City-staff studies and reports, the Council endorsed an amendment to the Tripartite Agreement to allow for the construction of the bridge. An important condition adopted by the City Council was that the TPA 2001 Court claim would be settled. In the meantime, the discussions initiated by Mr. Deluce with Transport Canada to ensure that its proposal for an airline based at the Island Airport was in accordance with the Government National Airport Policy, were continuing.

In May 2003, the TPA and TEDCO voted to accept the Minutes of Settlement of the proceedings initiated by the TPA against the City and TEDCO in August 2001. On May 24, 2003, the Policy and Finance Committee of the City of Toronto, after considering City staff reports on the implication of the Settlement, approved the Minutes of Settlement. On June 24, 2003, City Council approved the proposed settlement of the TPA's claim and the amendments to the Tripartite Agreement.

Thereafter, the TPA sought the agreement of the Minister of Transport to the Minutes of Settlement and the amendments to the Tripartite Agreement. As the result of the discussions that were then held between TPA representatives and Transport Canada, the TPA negotiated a number of amendments to its MOU with RegCo. The modifications to the original MOU were required to ensure that the

arrangement between the TPA and RegCo respected the federal Government National Airport Policy.

On July 14, 2003, the Minister of Transport agreed to the Minutes of Settlement and the amendments to the Tripartite Agreement and asked the TPA to give an undertaking that the CCOA with RegCo would be substantially in compliance with the MOU with RegCo as found acceptable by the Minister.

A revised MOU between the TPA and RegCo was signed on July 30, 2003 but was not converted into a CCOA as a result of the City Council's decision to withdraw its support to the bridge at its meeting of December 3, 2003.

A third MOU between the TPA and RegCo was, however, converted into a CCOA and signed on May 3, 2005, as part of the agreement reached between the TPA and RegCo, which itself was part of the broader settlement that was entered the same day by the TPA and Transport Canada on the one hand and TPA and third party claimants on the other.

There are no specific laws governing the contents of CCOAs entered into by National Airport Authorities in Canada. These are commercial arrangements, the terms of which are dictated by the particular circumstances of each airport and airport authorities. As these are commercial agreements, it goes without saying that general common law principles and legislation such as the *Competition Act,* would generally apply to them.

The TPA and RegCo have determined that the CCOA they entered into on May 3, 2005, is confidential because of the commercial sensitivity of some of the information it contains although it was made available to me for the purposes of my review. It is not, however, contrary to the requirements of my Terms of reference, for me to note that there are provisions in the CCOA that are designed to ensure the financial stability of the TPA. The CCOA does, for example, provide for certain guarantees regarding the use of the airport by RegCo, for a rollout period of time, to assist RegCo to establish itself as a carrier. In return, RegCo agrees to a certain level of use of the airport, failing which deficiency obligations would kick in. RegCo was also required by the TPA to show its commitment to the use of the airport by investing millions of dollars in the infrastructure of the airport.

In June 2003, RegCo would have understood that the total ceiling for large turboprop movements (number of departures and landings) would be 167 in and out of the airport each day. Under the 2006 CCOA with RegCo, the number of movements is far lower than the number contemplated in 2003, as the ceiling for total flights is now 120 movements. Within this 120-slot ceiling, some movements are reserved by the TPA for domestic and cross-border carriers. The overall maximum number of movements in and out of the airport will fall well within the parameters of the Tripartite Agreement.

RegCo and the TPA have separately consulted the Competition Bureau and obtained from the Bureau a ruling that the arrangements contemplated with the TPA, including the exclusivity of certain destinations and guarantees of a minimum of movements were not, in the circumstances, contrary to the provisions of the *Competition Act*.

Considering all the information available, it appears to me that the TPA has respected the requirements of due diligence before entering into and concluding these commercial arrangements with RegCo to ensure the use of the Island Airport and its financial stability.

Questions have been raised with me by Air Canada Jazz about the validity of the CCOA and the authority of the TPA to enter into such an agreement with RegCo in the context of a lawsuit commenced by Jazz in 2005. The Court will have an opportunity, after having heard the parties, to decide whether the TPA had the authority to enter the impugned CCOA with RegCo. Insofar as my review is concerned, I am of the view that the TPA has complied with the requirements of due diligence and principles of good administration.

- **Porter Airlines Inc.**

A few words need to be said about Porter Airlines Inc, a key player in this report.

Mr. Robert Deluce, the President and CEO of Porter, is one of Canada's most experienced airline owners and operators. He has gained his experience over many years with Air Alliance, Air Manitoba, Air Ontario, Canada 3000, to name a few examples. Porter's Chairman of the Board is Mr. Donald J. Carty, a retired Chairman and CEO of American Airlines.

More than $100-million of equity have been committed to Mr. Deluce's project with financial supporting investments from the like of Borealis Infrastructure Management.

Back in June 2001, Mr. Deluce had presented a proposal to the Minister of Transport for the establishment of a regional airline at the Island Airport. After receiving initial indications that Transport Canada would be generally supportive of such a venture, Deluce entered into discussions with the TPA. Eventually, a Memorandum of Understanding was signed between the TPA and RegCo on September 6, 2002, setting out the terms and conditions that form the basis for more formal arrangements between the two parties.

As we have seen, on October 4, 2002, the TPA announced a plan for the future of the Island Airport, including an agreement with a second carrier, which is now known as Porter.

Porter's business plan is to eventually service up to 17 Canadian and US destinations within 500 nautical miles of Toronto. It has a firm order for 10 Bombardier Q400 built in Toronto as well as an option for 10 more.

Porter Airlines' proposed operations fall within the stringent NEF 25 noise limitations imposed by the Tripartite Agreement, limitations that are more stringent than those found at most other Canadian airports.

Porter is confident that it can successfully implement its business plan and help the TPA to achieve financial self-sufficiency. The TPA has concluded, after Board discussions, with the support of the advice of its legal and financial outside experts, that the arrangement with Porter offered a good prospect of bringing to the Island Airport the financial self-sufficiency that had been long sought for.

On September 23, 2005, Toronto City Centre Airlines Inc. (now Porter Airlines) initiated the process to obtain an Air Operator Certificate (AOC) by paying an application fee of $30,000. On September 25, 2006, Transport Canada received a copy of a letter from the Canadian Transportation Agency (CTA) to Porter confirming that, with the exception of the AOC, all conditions were met to issue the Air Carrier Licenses. As part of the approval process for a license to operate commercially, Porter had to pass a financial fitness test. Porter also had to demonstrate a level of Canadian ownership. Having completed its review of the company and satisfied itself that it had met all of the necessary regulatory requirements and standards processes, on the same date, Transport Canada issued an AOC to Porter Airlines.

As part of the AOC process, Porter had to demonstrate that it has an operational and organizational structure that is in accordance with Transport Canada regulations. Transport Canada was required to approve or acknowledge key managerial personnel nominated by the company, including the Director of Flight operations, the Chief Pilot and a Flight Attendant Manager. Transport Canada also approved the applicant's proposed Operations Manual, its Standard Operating Procedure, its Minimum Equipment Lists, and other required documents.

On September 6, 2006, Transport Canada had already issued an Approved Maintenance Organization (AMO) Certificate to Porter. Transport Canada also approved the company's Maintenance Control System and Maintenance Schedule.

The Q400 airplanes purchased by Porter are certified by the Toronto Regional Office of Transport Canada, in accordance with the Civil Aviation Regulations and Standards issued by the Minister of Transport and developed by the Civil Aviation Direction of Transport Canada in consultation with the industry. The certificate allows the Q-400 aircraft to operate in Canada. I was informed that the

Transportation Safety Board is the best source of information regarding its safety record.

The Q400 designation is a trade name used by Bombardier for the DHC-8 400 aircraft. This model is the latest derivative of the original DHC-8 (or Dash 8) aircraft, which is specifically permitted to operate to the Island Airport by the Tripartite Agreement.

I was informed by Transport Canada that their position, after having received advice from Justice Canada, is that the DHC-8 400 aircraft is permitted to use the Toronto Island Airport under the Tripartite Agreement.

PART II

THE AECON BRIDGE CONSTRUCTION CONTRACT

Allegations have been made that the construction contract for the bridge was purposely and inappropriately accelerated so that the bridge would be a “fait accompli” before the municipal election results.

First, I propose to say a few words about the contract itself and then, about the municipal elections.

- **The TPA contract with Aecon**

At its meeting of late November 2002, the Toronto City Council adopted a resolution supporting the expansion of the Toronto City Centre Airport to a maximum cap of aircraft movements as allowed under the NEF-25 Contour and the amendment of the 1983 Tripartite Agreement that would authorize the Toronto Port Authority to construct a fixed link. The amendment to the agreement was subject to a number of conditions set out in the resolution including the settlement of the legal dispute between the City, TEDCO and the TPA.

Having received the approval of the City to amend the 1983 Tripartite Agreement allowing the TPA to construct a fixed link, the TPA proceeded on March 19, 2003, to advertise in local newspapers a request for tenders for the construction of the bridge with a closing date of April 2, 2003. A bidder’s site visit was held on the same day. A first extension of the closing date for bidding to May 7, 2003 was sent out on April 14, 2003. A second extension to May 21, 2003 was announced on May 1, 2003. On the close of the bidding on May 21, 2003, bidding prices were specified to be held for 60 days, i.e., up to Sunday July 20, 2003, with an optional 30 days to August 19, 2003.

Seven tenders were submitted to the TPA by the tender deadline of May 21, 2003. The seven bids were publicly opened immediately subsequent to the tender deadline. The seven bids were reviewed and analyzed by Dillon Consulting and the TPA’s chief of works and engineering. Dillon Consulting had been retained by the TPA to assist in appropriately requesting and analyzing tenders for the construction of the bridge.

The two lowest bidders, including Aecon, were invited to make presentations on their proposals on June 18, 2003. After the presentations, Dillon Consulting recommended to the TPA, on June 26, 2003, that Aecon be retained, subject to the TPA obtaining the necessary approvals and an environmental assessment signed off.

On August 18, 2003, the TPA entered into a conditional construction contract with Aecon. The conditions concerned an amendment to the TPA's Letters Patent increasing its borrowing authority, the approvals required under the *Fisheries Act* and the Navigable *Waters Protection Act* and a satisfactory environmental assessment.

The letter that awarded the contract to Aecon stipulated that the TPA had the right to terminate the contract on or before October 14, 2003. This date was extended to October 31, by letter dated October 14.

After the updating of the environmental assessment was completed, the TPA, during the months of September and October, worked on finalizing the approvals from the Coast Guard and Fisheries and Oceans, as well as finalizing the submission to Treasury Board for amending the Letters Patent of the TPA to increase its borrowing limits. At the same time, the TPA was finalizing the terms of its BMO financing.

As well, the TPA was negotiating the purchase of surplus lands from Public Works and Government Services (PWGS) at the foot of Bathurst Street, which were needed for the construction of the bridge. The Purchase and Sale Agreement with PWGS was signed on October 24, 2003. On October 30, 2003, the TPA was informed that Treasury Board had approved the amendment to the TPA's Letters Patent increasing its borrowing limits. On October 31st, the TPA signed its loan agreements with BMO.

At the end of October, both Coast Guard and Fisheries and Oceans had committed to the issuance of permits and approvals for the construction of the bridge.

It is on the basis of this information indicating that the required approvals and permits would be issued, with formal and official confirmation to follow later that, on October 31, 2003, the TPA entered into a final contract with Aecon.

In fact, the formal Coast Guard permit under the NWPA was initially received by the TPA on December 1, 2003, although it was later revoked and reissued at the same time as the Fisheries permit on January 14, 2004. The amended Letters Patent were received on January 15, 2004.

- **The Toronto Municipal Election Campaign**

Were the construction contract processes purposely and inappropriately accelerated to ensure that the bridge construction project could not be stopped by a new municipal administration after the November 2003 election?

The facts that have come to my attention in the course of my review lead me to conclude that these allegations are grossly exaggerated, for the following reasons:

- When, in November 2002, City Council approved the construction of the bridge and an amendment to the 1983 Tripartite Agreement, it did so after a careful examination of all the questions and issues attending to the operations of the airport. Both the supporters and opponents of the bridge had an opportunity to express their views before the decision was made. This was the third time that the City Council had approved the construction of a bridge to the Island, having done so previously in 1995 and 1998. Council had also approved a bridge in October 1992, but for the use of emergency services only.

- At the time, the financial position of the TPA was tight and the TPA needed to diligently implement its plans (including the construction of the bridge) to ensure its financial stability.

- Both the City and the federal government were very much aware of the financial need for the TPA to generate revenues from the Island Airport as quickly as could be done, preferably starting in the fall of 2004. In fact, the Settlement Agreements were predicated on the TCCA having the bridge in place in September 2004.

- In the circumstances, it is my view that the TPA had the authority, if not the duty, to use its best efforts to ensure that the construction would proceed with diligence. I have not found any evidence that would show that the TPA did anything improper in the management of the construction contract. On the contrary, I am of the view that the TPA acted diligently and appropriately in the discharge of its fiduciary duties.

- Some have argued that the steps leading to the construction of the bridge should not have been undertaken because of the municipal election campaign that began in early 2003, and that in any event, the construction contract should have been terminated when it became clear that the candidate opposing the bridge took the lead in the polls.

- In my view, it would not have been responsible for the TPA to delay the construction of the bridge because of a possible change of the municipal administration, 10 to 12 months later, in December 2003.

- Even if the TPA had considered the municipal political scene, at the beginning of the campaign, there was one candidate, then Councillor Miller, opposing the construction of the bridge to the Island. In April, the National Post reported that 33% of those surveyed would like to see Barbara Hall as Mayor. Just 13% wanted to see David Miller as Mayor. A

Toronto Star poll in early October showed Ms Hall leading with 34% of the decided votes, followed by Mr. Miller at 27% and Mr. Tory at 21%. It is only on October 22 that the National Post and the Toronto Star indicated that Mr. Miller had taken a narrow lead over Ms. Hall, with 31% of the decided voters support Mr. Miller while 29% would cast their vote in favor of Ms Hall, with Mr. John Tory ranking third with 23% of the decided voters.

- When on August 18, 2003, the TPA signed the construction contract with Aecon, there was no sign yet that the candidate proposing to dispense with the bridge might win the election. Former Mayor Hall, according to the polls, seemed at that time to be still in the lead in the intentions of the electors.

- In late October 2003, it appeared that the situation was changing and that the candidate opposed to the bridge might be elected in November, although this was not a certainty. For the TPA, to put all brakes on the processes underway for the construction of the bridge on the basis of such polls would have been extremely problematic if not irresponsible – particularly in consideration of the likely damages that would flow from such a decision.

- In mid-October, the Environment Assessment had been updated and signed-off. DFO and PWGS had informally indicated that permits and approvals would be granted. On October 30th, the TPA had been informed that the amendment to its Letters Patent had been approved.

- I have been informed, in that regard, by external counsel for the TPA that, by mid-October, the TPA could have sought orders directing the federal authorities to issue the required permits and approvals. I was also informed by Transport Canada that their view at the time, after having discussed the matter with Justice Canada, that the federal authorities could well have been ordered by the Court to deliver the required authorizations.

- There was a deep concern, on the part of the TPA, based on external legal advice, that the TPA would expose itself to claim in damages, if it refused to finalize the construction contract with Aecon when all the conditions of the contract had been satisfied.

In the circumstances, I do not see anything improper with the TPA having provided to Aecon, on October 31, 2003, the written authorization to proceed with the construction of the bridge. Indeed, I believe that the TPA was justifiably of the view that if it had not provided the authorization, it would have opened itself up to litigation and costs.

While opponents of the fixed link point to the timing of the decision and its proximity to the November 10 election date as a sign that the TPA was attempting to make the bridge a *fait accompli* prior to the election, I believe that these opponents are under the misapprehension that the contract was signed, as opposed to merely finalized, on October 31. In my review, I have seen nothing to indicate that the October 31 timing and its relation to the municipal election was anything other than the culmination of the RFP process that commenced in March 2003. In particular, I found nothing to suggest anything improper about the timing in relation to the municipal election.

THE ENVIRONMENTAL ASSESSMENTS

Some of the concerns that were raised with me by various people related to the process and substance of the various environmental assessments that were performed by the TPA in furtherance of the fixed link and the new passenger terminal for the new ferry in the period 1996 to 2006. As a result, I have examined these assessments in some depth.

In 1995, the Toronto City Council approved the construction of a bridge to the Toronto City Centre Airport (TCCA) subject to the completion on an environmental assessment (EA).

Under the *Canadian Environmental Assessment Act*, an environmental assessment is required for certain federal undertakings, with specific exemptions. The stated purpose of the *Canadian Environmental Assessment Act* is to *"provide an effective means of integrating environmental factors into the decision making processes in a manner that promotes sustainable development."* In summary, the process requires the responsible authority (or, in the case of the regulations respecting ports, the responsible Canadian Port Authority) to consider the level of review necessary for the project, to define the scope of the project and to retain consulting engineers to conduct an assessment and indicate whether there are environmental impacts resulting from the project and, if so, whether there are "technologically and economically" feasible mitigation measures available to mitigate these impacts.

At that time, the port authority (the Toronto Harbour Commissioners) was not required under law to conduct an EA for such a project, as ports were specifically excluded from the requirements of the *Canadian Environmental Assessment Act* at the time. However, an environmental assessment was required before the necessary approvals required under the *Fisheries Act* and the *Navigable Waters Protection Act* (NWPA) could be issued. The Department of Public Works was also involved because it owned certain property that was proposed to be transferred to the port as part of the project. Each of these departments had the responsibility for ensuring that there was a proper EA completed for the bridge.

This EA was finalized shortly after public consultations were closed on June 3, 1999, and was conducted with the assistance of an independent, experienced and qualified consultant, Dillon Consulting Limited ("Dillon").

Dillon was the same firm retained by the port authority on December 18, 1997 to design the bridge and was retained to conduct final design work once the EA process was complete. I understand that this is a normal practice in construction projects of this size, and I do not believe that this represented any conflict of interest. In any event, Dillon appears to be acknowledged as a well-established and reputable firm, and in my view, any conflict that might have existed would have been offset by its professional responsibilities and interests.

The EA's scope was to conduct an *"evaluation of the Fixed Link form and location",* including the bridge characteristics and the project construction activities. It was broad, in that it consisted of the direct effects of the bridge once it was operating and the construction project prior; it specifically included the cumulative effects – including the environmental impact from the perspective of air quality, water quality, noise, soils, etc. but also from the socio-economic impacts, such as: social environment, transportation, land use, recreational boating, business activity, commercial navigation and cultural that would result from the fixed link, and included the impact that would arise from both the increased automotive and airline traffic which would be expected to flow from the fixed link.

The process was lengthy. The EA was scoped in the period October 1995 to March 1996. After considering alternatives, and having an open house on September 30, 1996 and a public meeting on November 5, 1996 to obtain comments on the scoping, the EA process was continued until June 1997. On June 23, 1997 a further Open House was held and a draft EA report was produced in August, 1997.

Among those consulted was the Municipality of Metropolitan Toronto, and in a letter dated September 30, 1997, the Municipality advised that "*overall, we find that the planning process engaged in the preparation of the EA and the EA document itself to be comprehensive and appropriately focused*."

In the end, Dillon and the THC concluded that the proposed bridge project was "*not likely to cause either direct or cumulative significant adverse environmental effects*."

Over the winter of 1997/1998, the Coast Guard undertook its own consultation activities in relation to the approvals required under the NWPA. The comments received as a result of this process resulted in an Addendum to the 1999 EA that was released on January 26, 1999. The Addendum provided additional information and analysis on traffic, air quality, fish habitat and bird migration. No additional mitigation was identified as being necessary.

Following the finalization of the EA (but prior to the sign-off by the 3 departments), the *Canada Marine Act* was passed into law, the Toronto Port Authority (TPA) was created as a successor to the THC and a new regulation was adopted under the *Canadian Environmental Assessment Act* (the *Canada Port Authority Environmental Assessment Regulations*, S.O.R./99-318). The *Canada Marine Act* received Royal assent on June 11, 1998 (although letters patent creating the TPA were issued on June 5, 1999 meaning that the THC continued until that time; and the regulation was registered on July 28, 1999. This regulation requires a Port Authority to conduct an EA of the environmental effects of a project where one had not been completed before the coming into force of the regulations. The regulation was registered on July 28, 1999, and published in the *Canada Gazette* on August 18, 1999. Although the report itself was finalized shortly after the deadline for public comments closed on June 3, 1999, the EA was formally signed off by the responsible departments on September 10, 1999. The EA had thus been substantively concluded before the port authority EA regulations had come into force, although there is some question as to whether the EA process was "*completed*" as that term is used in s. 29 of the Regulation.

The significance of these dates and the concept that the new *Canada Marine Act* regime might require the TPA to conduct a separate EA was not contemplated until much later. In the late fall, one of the TPA staff attended a seminar where this matter and the new requirements for environmental assessments was discussed. Very shortly after the question was first raised, the TPA retained external legal counsel and put the question to them.

The view of the TPA up until the point when counsel was retained in January 2003 was that the 1999 EA that had been conducted by the TPA on behalf of the three federal departments was valid; and that the project could proceed on this basis.

Even after receiving the advice of counsel, the TPA's view remained the same, i.e. that the TPA could likely rely upon the 1999 EA, although they understood that it was possible that some might suggest that a fresh EA was required. In considering the advice, the TPA management and Board determined that given the public attention that this project would receive and the uncertainty about the impact of the *Canada Marine Act* that the best solution would be to conduct a fresh EA.

Some have suggested to me that the TPA misrepresented the state of their EA approval during an October 8, 2002 City Council committee meeting, where both the CEO and the Board Chair (along with Dillon representatives and City staff) indicated that the EA process was complete. One of the preconditions placed by the City of Toronto on the approval of a fixed link was that a "*clean*" EA be received by the federal authorities. To support this contention that there was some misrepresentation, I have been directed to an April 23, 2003 email from the

Canadian Environmental Assessment Agency that appears to suggest that Dillon was advised in a June 2002 meeting that the TPA would require a fresh EA before proceeding.

My view is that there was no intention to mislead Council. There does not appear to be any reluctance on the part of the TPA to engage in a fresh EA once this situation was brought to their attention; nor any reason to delay this decision until January 2003 other than the fact that the circumstances surrounding the dates and the new regime led to a quite unclear situation.

In saying this, I am assisted by a review of a memo prepared by Dillon and delivered to a number of bodies, including both the CEAA and the TPA, following the June 11 meeting, which seems to suggest a less clear picture. The memo records that the CEAA would "*check with headquarters*" to clarify the position. An email from the CEAA, dated June 14, 2002 indicates that their position was that the TPA would be *"required to undertake a screening."* However, the CEAA goes on to suggest that the "*TPA can use the existing [1999] screening report and check to ensure that the environment conditions … have not changed since 1999. If there are changes, the TPA should update the screening as required and sign off … It should be noted that this does not need to be an onerous task and it is up to the TPA on whether it needs to consult with the public."* In the end, the TPA went much further than seems to be suggested by the CEAA in this June 14, 2002 email.

Moreover, I note that by the time the April 2003 email was written, the TPA was already in the process of undertaking the fresh 2003 EA, and it is not impossible that the April 2003 email was a distillation of all of the advice that had been provided by the Agency to Dillon and the TPA in the period since the June 2002 meeting.

Finally, as the 2003 EA confirmed the results of the 1999 EA and was, in and of itself, a clean EA, I do not find that the October 2002 representations could have provided any advantage to the TPA. The only consequence to the disclosure of the confusing situation about the EA approvals – remembering that there was a valid EA that had been produced – might have been a slight delay in the project, and it certainly does not appear that the TPA was attempting to rush the fixed link project at the time or to mislead Council.

Moreover, this issue does not appear to be of great concern to the City of Toronto itself. To this end, City-staff have indicated to me that once the issue of the separate EA was brought to their attention, they sought clarification of the position of the CEAA in May 2003, who advised that a separate EA was required. This information was relayed to Council in October 2003, i.e., after the 2003 EA was finalized.

Notwithstanding their views on the adequacy of the 1999 EA, there were a number of events that caused the TPA to postpone the construction of the bridge. For example, there were discussions between the TPA, the Toronto City and others concerning Toronto's eventually unsuccessful application for the holding of the 2008 Olympics, with the possibility that they would be held on the Toronto waterfront. At the same time, the TPA was also holding discussions with the City and the federal government with a view to formally amending the Tripartite Agreement to allow for the construction of a bridge to the TCCA. The City, the federal government and the TPA eventually adopted an amendment to the Tripartite Agreement in 2003 lifting the prohibition concerning the construction of a bridge.

The TPA's view that the 1999 EA was valid and that it could have proceeded to proceed with the fixed link in reliance upon it is supported by the fact that the relevant responsible authorities (i.e., the three departments who sponsored the 1999 EA) were prepared to rely on and indeed did rely on the 1999 EA for the purpose of the approvals required for the construction of the bridge. However, and although in its view, it was not required legally to do so, the TPA decided that the most prudent course of action would be to conduct a fresh EA before proceeding with the construction of the bridge. For the purpose of the EA, the TPA (with the approval of its Board) retained the services of Dillon who had conducted the 1999 EA.

This second EA was conducted throughout 2003 and although the applicable legislation did not necessarily require public participation (as confirmed by the June 14, 2002 email from the CEAA), the TPA again conducted extensive public consultations including with the City and members of the public. In the words of counsel advising the TPA, these consultations were "*extraordinary*" for a project of this size. For the purpose of public consultations, both preliminary draft and draft environmental assessment reports were made available for comment. Two public "*Open-Houses*" were organized where representatives of the TPA and Dillon were available to provide information and answer questions.

In early May 2003, the TPA produced a preliminary draft EA Report, which was discussed at an "*Open-House*" on May 24, 2004. In late June, a draft EA report was produced and discussed at a further open house on July 17, 2003. Written questions were accepted and a deadline for the submission of these public comments of September 15, 2003 was set. On September 18, 2003, a Final EA report was produced and was signed off on October 1, 2003 by the TPA.

The scope was similar to that used in the 1999 EA and included both the direct and indirect construction activities required to build the bridge and the operational activities of the bridge once it was constructed.

Although the 2003 EA built on the work done for the 1999 EA, it was done as if it was a fresh review. All of the studies that underlie the 1999 EA were updated

As with the 1999 EA, all of the public comments received at each of the sessions, and those received in writing were summarized along with the responses and made available to the public. I am advised that, aside from the January 26 Addendum, no substantive changes were made as a result of the consultations.

At the same time, during the summer of 2003, representatives of the TPA had discussions with representatives of DFO, Transport Canada, Environment Canada, Public Works and the Canadian Environmental Assessment Agency, with respect to the potential environmental effects of the proposed bridge, the EA and the approvals that were required to be obtained from the federal government.

The DFO itself had sought public input with respect to the approvals it was considering granting with a cut-off date of July 8, 2003. The DFO received and considered approximately 50 submissions, although I understand that no substantive changes were required as a result of this additional consultation.

By a letter dated August 15, 2003 to the TPA, DFO confirmed that the Coast Guard had completed its review of the issues surrounding the proposal to build a bridge and it was their opinion that the majority of the issues raised could be easily addressed through a *"more detailed approach to the traffic control plan".* The letter also indicated that DFO approvals required under the *Fisheries Act* and the *Navigable Waters Protection Act* would be coordinated so that they would be released at the same time. After receiving additional information further to its letter of August 15, 2003 the DFO in its letter of September 19, 2003, confirmed that *"most of the issues appeared to have been addressed by this correspondence"* except for those identified in the letter. On October 19, 2003, the TPA provided additional information and comments regarding outstanding issues raised by DFO.

Later in the same month on October 30, 2003, the TPA was informed by way of email that all substantive issues related to the federal approvals had been addressed. There was no question that the approvals would be issued, and the TPA obtained legal advice throughout the October to January time period that if there was any delay in receiving the approvals, court proceedings could be brought and it was very likely that any such proceedings would be successful. In effect, by the end of October 2003, the TPA was of the view that there was no factual or legal basis that would prevent the approvals from being issued to the TPA, and it received external independent legal advice that the Departments could not legally refuse to issue the required permits and approvals. I understand that the federal government had consulted Justice Canada, and had come to the same conclusion.

Indeed, on December 1, 2003, the Coast Guard sent to the TPA a copy of the *Navigatable Waters Protection Act* (NWPA) approval relating to the bridge project. The same day, however, a Coast Guard representative contacted the TPA to indicate that there had been an error in the document that was sent and that a new document would be issued. Subsequently, on January 14, 2004, both the NWPA and *Fisheries Act* approvals were formally provided to the TPA. The NWPA approval provided to the TPA on December 1st was re-issued to the TPA in exactly the same form and bearing the same date. i.e., December 1st, 2003 and certainly appears to be the precise same document.

The 1999 EA (relied upon by the DFO, the Coast Guard and PWGSC for their approvals) – and the 2003 EA (relied upon by the TPA) were the subject of a judicial review application brought by CommunityAIR in the Federal Court on October 29, 2003. I understand that this proceeding was withdrawn once the bridge could not proceed. I am advised that the legal challenge principally related to the scope of the EA as developed by the federal departments and the TPA. Although an injunction application was filed by CommunityAIR in the context of this proceeding, it was not heard prior to the decision to withdraw the action and there has been no judicial comment on the merits of the challenge.

Following the federal government's action to prohibit the construction of the bridge, the TPA decided to proceed with a new ferry and passenger terminal facilities to improve access to the TCCA. As a result, the TPA was required to conduct an EA.

On June 17, 2005, the TPA again retained Dillon to conduct this new EA pursuant to the *Canada Port Authority Environmental Assessment Regulations*.

This project to construct new passenger terminal facilities and purchase a new ferry was obviously a significantly smaller project than that proposed in constructing a fixed link. As approvals were not required from other federal departments, this EA was conducted exclusively for the TPA.

Dillon was instructed to consider both the direct effects of the new ferry and the related passenger terminal facilities (including the particular impacts during construction) and the cumulative effects resulting from the proposed project. The cumulative effects appear to concern *"other projects or activities that could combine with the potential effects of the proposed project"* and have to be considered *"where there is a reasonable expectation for development."* For this purpose, Dillon appears to have considered increased airport volume, with a "conservative" (which, for the purposes of environmental assessment, means that it is a high) estimate of a 600,000 passenger / year by 2011, including the road and air traffic and related effects (i.e., pollution and noise) that would result from such passenger loads.

A draft report was prepared, posted on the website of the TPA and an "open house" was held on November 22, 2005 to receive public comments. Representatives of both the TPA and Dillon attended this meeting. Again, I am advised that no substantive changes were occasioned as a result of the input received through these consultations.

A final report was issued in January 2006 and concluded that: *"The EA predicts that neither the direct effects nor the cumulative effects of the [ferry passenger terminal facility] project would have a significant impact on the environment."* Certain mitigation measures were recommended in the EA to mitigate potential environmental effects.

This 2006 EA is the subject of a judicial review in the federal court, which was initiated by CommunityAIR on March 1, 2006. I am advised that this proceeding is ongoing; although no injunction was sought by CommunityAIR to halt or prevent construction on the ferry passenger terminal. I understand that this challenge is principally related to the scope of the EA conducted by Dillon at the direction of the TPA and, as the matter is before the Courts, I do not believe it appropriate for me to make any comments in this regard.

I do, however, believe that irrespective of the ultimate correctness of the decision taken by the TPA and its Board on the scope of the 2006 EA review (upon which I make no comment, the matter being before the courts), it appears that the TPA retained and relied upon the appropriate external advisors and acted in accordance with the principles of good governance at each step of the proceedings.

ALLEGATIONS OF MUNICIPAL POLITICAL INVOLVEMENT

The TPA and the future of the TCCA have been political issues for some time in Toronto, and featured prominent roles during the 2003 municipal election. During the election, the issue of the fixed link to the TCCA and the future direction of the airport itself were raised by then mayoral candidate David Miller and others. Opposition to the fixed link to the TCCA was one of several planks on which Mr. Miller based his election platform and upon which he was elected.

During the municipal election, there were three specific occasions on which comments were made by the TPA to the media which have become the subject of criticism from those who opposed the fixed link and the operation of the TCCA. As discussed further, I am of the view that the three specific comments were neither inappropriate in the circumstances nor designed to influence the outcome of the municipal election. In addition, there is one occasion following the election in which comments were made in a letter distributed to councillors. Similarly, my view is that this letter was a sincere attempt by the TPA to explain the consequences that might flow from the cancellation of the fixed link.

The three pre-election comments were:

1. On October 16, 2003, the Port Authority issued a News Release that was critical of then mayoral candidate Miller, stating that he was *"using untruths and distortions to drive the wedge [between himself and the other mayoral candidates.]"*

2. On November 3, 2003, the TPA CEO spoke with media outlets following the October 31, 2003 signature by the federal Minister of Transport on the Tripartite Amending Agreement, with words indicating that only a few small things remained to be completed.

3. On the municipal election day, November 10, 2003, the TPA CEO appeared on the CBC Metro Morning program in Toronto, and gave an interview about the status of the bridge.

To place this in context, at that time, the TPA had already obtained the necessary amendments to the Tripartite Agreement; developed plans for the fixed link; completed the environmental impact assessment; obtained assurances that required *Fisheries Act* and *Navigable Waters Permits Act* permits would be forthcoming; obtained assurances that the supplementary Letters Patent approving the TPA borrowing limits had been approved by Treasury Board; engaged in discussions with a potential carrier; and committed itself to contracts with a construction company.

The TPA's remarks were planned and the subject of deliberations by the TPA. How to relate to the media was discussed with the Board Chair and/or the full Board and a decision was taken to make fact-based comments to correct what was perceived to be a misapprehension on the part of the media and members of the public of precisely what was proposed and the scale of the legal commitments which had been made.

It is clear that the TPA and its Board, relying on the advice of independent lawyers, believed that candidate Miller was misrepresenting the facts surrounding the state of the approvals for the fixed link; the obligations that the TPA had undertaken and the legal liability which would flow from a cancellation of the various contracts and obligations which were in place. I believe that they were justified in this belief, although there is no corresponding reason to believe that Mr. Miller was not sincere in his statements or his belief that they were true.

I agree with those who state that it would be inappropriate for a federal agency such as the TPA to engage in partisan discourse – in the context of municipal, provincial or federal campaigns. However, the line between what one might consider to be political discourse and the proper role of the TPA in ensuring that the media and public are considering the agency and its role in a proper factual

context is a line upon which reasonable people could come to different conclusions on identical facts.

From a governance perspective, it appears that the TPA management correctly identified this as something that required caution, and sought the input and approval of the Board; and this approval was obtained. The comments are, when taken in context, fact-based and appear designed to convey objective, factual information and not to influence the outcome of the municipal elections.

While it would have been preferable in my view that the News Release not make reference to a particular candidate or to speculate on his motivations for making what the TPA and its Board believed were mis-statements about the state of the fixed link and the legal responsibilities which would flow from its cancellation, I have no reason to believe that the TPA was motivated by anything other than a desire to place the facts before the public and that it attempted to do so in as neutral a manner as was possible in the circumstances.

While I might disagree with the benefit of hindsight on the conclusions that they reached, I do not find that I am able to criticize the process that led to the comments that were made and neither have I discovered any evidence that the motives were other than that represented to me by the TPA.

Following the November 10 election, on November 25, 2003, the TPA wrote to all members of the newly constituted City Council indicating that there would be significant adverse consequences and costs to a decision by the City to unilaterally reject the 2003 amendments to the Tripartite Agreement. This letter was delivered in advance of the December 3, 2003 meeting of Council called by David Miller to discuss the fixed link and discussed elsewhere in this report.

This letter was drafted with the input of legal counsel, and the Board of Directors reviewed the letter before it was sent. Although clearly intended to influence Council, the letter is factual in tone and was intended to ensure that the councillors understood the position that the TPA would be taking in the event that a decision was taken to stop the bridge. Given the nature of the comments made by the newly elected Mayor leading up to this December meeting, it is understandable that the TPA would be concerned and I find their action in writing this letter to be a reasonable means of expressing their concern.

In the end, as discussed elsewhere in this report, the City chose not to act unilaterally at the December 3 meeting – and councillors were not asked to do so. I do not believe that there is any basis to believe that this letter was in any way inappropriate.

Although there were a number of other allegations made in regard to the TPA inappropriately involving itself with municipal election, I do not believe that there were any other steps taken by the TPA or the Board that could be characterized

as being directed by a desire to become inappropriately involved in the municipal elections process.

RESPONSE TO THE COMMENTS OF THE INCOMING PRIME MINISTER

As discussed above, on November 12, 2003, some 2 days after the Toronto municipal election, Paul Martin, who was about to be elected leader of the Liberal Party and on his way to becoming Prime Minister, made comments in a press conference indicating that, on the issue of the fixed link to the TCCA, the federal government would "*take its cue*" from the City of Toronto and its newly elected Mayor, David Miller, who had campaigned on a platform that, in part, focused on the cancellation of the agreement to construct the fixed link.

Opponents of the fixed link quickly seized on this comment as evidence that the federal government was in agreement with Mayor Miller and his stated desire to terminate the fixed link to the TCCA. While Mr. Martin crafted his words somewhat carefully, it is clear that this was a signal that his government was considering a significant shift in the position away from the signals that had been sent to the TPA up until this point.

In response, the TPA, through its CEO Lisa Raitt, responded to media inquiries by indicating that *"we have an agreement that says we can go ahead and build a bridge, and that's the state of play right now."*

This comment was carefully chosen, and I believe quite appropriate in the circumstances. At this moment, the TPA was faced with a situation where it had been proceeding for some time in accordance with its agreement with the City and the federal government and had incurred significant obligations in furtherance of the fixed link project. The TPA knew that if there was to be a breach of these legal obligations, significant financial obligations would follow and, in addition, the TPA had to be concerned with the ongoing viability of the TCCA.

Unfortunately, in a follow-up interview, it was reported in the *Globe and Mail* on November 27, 2003 that TPA CEO, Ms. Raitt, had gone further and said that Mr. Martin had made his comments *"at a press conference. He doesn't know the facts. He hasn't been briefed."*

In response, a spokesman for Mr. Martin indicated that *"It's probably best [for the Port Authority] to adopt a more conciliatory posture at this point and work with people to see what the community will choose and decide.* [Paul Martin] *is fully equated with the facts. He has indicated he will take his cue from the elected council which debated and went to the people very recently, and in no small measure, on this issue."*

Ms. Raitt quite candidly admitted to me in the course of our discussions that her comment to the media was a mistake and that she regretted making the comment. Although she did not seek to excuse her comments on this basis, she advised me that her comments were made in a telephone conversation with an individual reporter in an attempt to clarify comments which had been misattributed to Ms. Raitt in a prior story, and in a discussion that Ms. Raitt had assumed was off the record.

The Board appears to have taken the issue raised by the CEO's comments seriously. The Board Chairman immediately raised his concern with the CEO and I am advised that the matter was subsequently discussed at a Board meeting.

Moreover, the next day, Ms. Raitt wrote to Mr. Martin, apologizing for the comments attributed to her in the report, providing some context to the comments and indicating that the TPA understood Mr. Martin's comments that the federal government would '*take its cue' from the city'*, and noting that "*we are in the process of doing our best to inform all members of council of the consequences of any attempt to overturn the agreements that are in place."*

I agree with Ms. Raitt that her comments reported on November 27 were inappropriate. Dealing with the media can be difficult, even for people with considerable experience in such matters. As discussed further below, the circumstances were challenging and her misunderstandings of the nature of the interview all constitute mitigating factors.

Mr. Martin's comment clearly came as a shock to the TPA, who had not been consulted by Mr. Martin or the federal government in advance of these comments. The federal government had, to the contrary, been quite clear, by its provision of the necessary documentation and approvals that it intended to go forward with the fixed link.

The legal and business implications of the cancellation were obvious to the TPA. The TPA was faced with a difficult position where the City, one of the three signatories to the Tripartite Agreement was indicating that it wished to make unilateral demands without any indication that it was willing to accept the financial consequences that flowed from this decision. Mr. Martin's comments, which foreshadowed a potential shift in the federal direction, and the timing of these comments, were surely distressing to the TPA and its Board in light of these circumstances.

Finally, I note that Ms. Raitt's words appear to have been borne out to some extent. As discussed earlier, once Mr. Martin became Prime Minister on December 12, 2003, his Ministers appear to have taken a much more careful and nuanced position on the cancellation of the fixed link vis-à-vis the City of Toronto.

In particular I would refer to the May 21, 2004 letter from GTA Minister Volpe referred to above.

At the end of the day, I believe that while the comments were unfortunate, the Board clearly considered and determined how the issue would be dealt with and how the TPA would deal with the media on this issue in the future. It is my view that after the unfortunate comments had been made by the CEO, both the Board and the Chairman, and the CEO acted appropriately in the circumstances.

PART III

This Part deals with issues that have been raised with me that are not specifically referred to in my Terms of reference but I considered significant enough to be discussed in my Report.

THE NOISE FACTOR

Situated just off the shore from the downtown core, the TCCA is not alone as a noise producer in the Toronto harbourfront. It coexists with traffic noise from the busy Lakeshore Boulevard and Gardner Expressways and the general background noise that forms part of any big city.

The 1983 Tripartite Agreement set noise limitation parameters. In this field, the accepted unit of measure is the NEF or Noise Exposure Forecast. The Agreement set out the parameters surrounding the airport in which the NEF 25 (with the 25 being representative of the permitted level) parameter would be met. In their December 2001 report, Sypher:Muller conducted a survey of the actual noise produced by operations at the TCCA, and concluded that the Island Airport was being operated "*well within"* the NEF 25 parameters.

In conducting the 1999, 2003 and 2006 environmental assessments discussed at greater length elsewhere in this Report, specialized consultants were retained to model the noise impact of the potential air traffic increase (and related effects) to ensure that the TPA would continue to remain in compliance with the NEF 25 restrictions and to examine whether mitigation measures to deal with any increased noise were required. In each case, the conclusion was that the TCCA would continue to be within the NEF 25 parameters; and that no mitigation was required. In addition, the consultants considered whether population growth on the lakeshore mandated any changes in the NEF 25 contours, and the determination was that no changes were necessary.

In addition to the NEF 25 contours, the TPA also has policies in place to minimize noise disturbance. For example, the TPA has created Noise Abatement Procedures, which form part of the standard departure protocol, requiring aircraft to depart over water until certain altitudes are reaches or, in the case of runway 08, prohibits southern turns until the aircraft is beyond the homes on the Toronto Islands. In addition, residential portions of the lakefront are also designated 'Noise Sensitive Areas' and pilots are discouraged from overflying these areas. Neither of these initiatives are mandatory, but both are examples of the TPA working to minimize the inconvenience resulting from excessive noise.

These nose abatement procedures stem from the 2003 Settlement Agreement, in which the TPA agreed to develop and implement a noise abatement plan.

Finally, the TPA has a process in place to deal with noise complaints; and an extensive system of monitoring to ensure compliance. When a complaint is received, all available information is obtained from the complainant, the control tower logs and monitoring equipment is used to determine what was occurring at the time. To the extent possible, this information is used to determine what aircraft was the source of the complaint, and the pilot / company are contacted to discuss what measures could be taken to ensure compliance with the formal rules and informal policies which are in place. The TPA advised me that the complainant is always contacted and advised of the results of the investigation.

PAYMENT IN LIEU OF TAXES (PILTs)

Historically, the Toronto Harbour Commissioners did not pay municipal property taxes. With the passage of the *Canada Marine Act* in 1998, and the creation of the TPA, the TPA became subject to the *Payments in Lieu of Taxes Act* (PILTs Act). This legislation recognizes that while the federal government is exempt from the paying taxes levied by provincial or municipal governments (see s. 125 of the *Constitution Act, 1867*), the federal government is nonetheless a user of the services offered by municipalities and that some compensation should still be paid.

The *PILTs Act* does not require the TPA to pay municipal property taxes, but rather provides for a regime whereby the TPA may make payments *in lieu of such taxes*, provides guidance for how these payments may be calculated and places limitations on the amounts of payments that shall be paid in any given year. While the *PILTs Act* creates no obligation to make such payments, it is a sign of a clear intention that the federal government, including arms-length agencies such as the TPA will make these payments except in unusual circumstances.

In Ontario, the provincial government has created the Municipal Property Assessment Corporation (MPAC) to assess property values for the purposes of municipal property tax, and I understand that the MPAC uses the current value assessment technique in order to derive a property value. In the case of the Toronto Port Authority, the assessment is substantial, given its land and waterlot holdings on the Toronto waterfront and on the Toronto Island.

The MPAC figures are set out below and I note that these amounts exceed the gross revenues of the TPA.

The TPA believes that this assessment fails to take into account the unique nature of the port property and the use that is made of the property, which limits its value and the appropriate valuation to arrive at an appropriate figure. The TPA has asked that Public Works and Government Services Canada (PWGSC) conduct an assessment of the amount of PILTs payable and the result of their

work has created a set of values, constituting yet another view of what the appropriate amount is that should be paid. These are set out below.

In making its determination of the appropriate level of PILTs payable, the TPA started with the PWGSC review, and made specific adjustments where it disagreed with the assumptions or determinations made by PWGSC.

Year	Gross Revenue	TPA Payment	PWCSC Assessment	MPAC Assessment
1999	$7,000,000	$88,255	$106,183	$1,811,183
2000	$12,300,000	$228,061	$321,280	$3,660,651
2001	$11,200,000	$320,420	$764,692	$6,486,672
2002	$11,300,000	$417,674	$997,409	$9,647,055
2003	$9,400,000	$402,700	$892,054	$10,129,408
2004	$10,100,000	$435,445	$965,354	$10,635,608
2005	$9,700,000	*	*	*

* information not yet available

The City of Toronto's view is that the MPAC assessment is substantially correct and that the TPA has failed to make the appropriate payments under the *PILTs Act*. On December 16, 2005, the City of Toronto resolved that the TPA should be making payments in accordance with the determination of the MPAC authority – i.e. $32,552,943.00; and resolved to withhold payments that would otherwise be due and payable under the 2003 Settlement Agreement between the TPA and the City of Toronto.

As a result of this dispute, the City of Toronto has availed itself of the provisions in the *PILTs Act* which allow it to 'appeal' the assessment of the TPA to an Advisory Panel. The Panel is empowered under the Act to consider complaints from taxing authorities and to make recommendations on what the appropriate level of PILTs payment should be. As this matter is proceeding in front of the Panel, and notwithstanding the fact that any finding of the panel would not be binding on the TPA, I do not believe it would be appropriate for me to come to any conclusions on the merits of either position.

For the purposes of this review, I simply conclude that the TPA appears to have taken appropriate advice and come to reasoned conclusions about the appropriate payments that should be made. While the ultimate merits will be considered by the PILTs' panel, I can find no obvious error in the manner in which the TPA has conducted itself in this matter.

I conclude this section in noting that there is an active effort on the part of some Ontario port authorities, including the TPA, to convince the provincial government to adopt measures which would produce "viable" results in the property assessment process for ports, in consideration of the nature of port property,

which is located on waterfront, and the restrictive uses that port property can be put to. It is my understanding that no Ontario port authority (including Hamilton, Thunder Bay, Windsor and Toronto) has ever made PILTs payments in accordance with the MPAC assessment, and that each has adopted its own method of calculating the appropriate payment to be made.

The Ontario ports have made the point that other Canadian jurisdictions, including Quebec, British Columbia and New Brunswick have all made specific exemptions for port properties in their assessment schemes, and have requested similar exemptions be included in the Ontario assessment system.

THE TPA'S BOARD OF DIRECTORS

With the creation of the TPA in 1999, the *Canada Marine Act* and the Letters Patent issued to the TPA introduced a new Board structure with a clear intent to break from the past tradition of direct control by the City of Toronto and a break from direct political involvement through provisions that provide that no federal, provincial or municipal politician or civil servant would be eligible to sit as a member of the Board of Directors.

Under its Letters Patent, the TPA has seven directors. The City of Toronto and the Province of Ontario each have one director; and the federal government appoints the balance, one of which is entirely discretionary and four of which are appointed by the minister in consultation with four different user groups defined in Schedule D to the TPA Letters Patent: (i) Port Related Activities / Operators; (ii) Airport Users; (iii) Commercial Users; (iv) Recreational Users.

Although there were some restrictions on the length of the initial appointments, the terms of all members of the Board appointed thereafter was intended to be to 3-year terms, with each member eligible to be reappointed once for a total of two terms. The original intention of the initial length resulted in the staggering of expiry dates, which ensured that there was some continuity on the Board.

The Board is now operating with 6 of its 7 members as a result of the five recent federal appointments announced by the Minister of Transport on August 25, 2006. However, at the time of my appointment, these five federal positions and the City of Toronto position were vacant, and there was only one director, appointed by the Provincial Government, serving on and, indeed, constituting the Board. The *Canada Marine Act* and Article 4.4 of the TPA Letters Patent, define the quorum of the Board as being the *"majority of the number of directors … appointed to the Board at [the] time"* resulting in the unusual situation where one director constituted the entire Board and had the ability to operate with full authority.

Attached is a summary of the appointments to the Board since its creation (Attachment 4), which set out the names of the persons appointed and the periods of vacancy. As will be seen, until April 2004, the Board was operating with at least 5 members. However, in April 2004, the City appointee resigned and the City took no steps to reappoint and the federal government, over time, allowed its 5 appointments to lapse with only 1 appointment. The result was a diminishing number of Directors to the point where in May 2005, the Board was down to 3 directors, including 2 federal appointees. In November 2005, the Board was reduced to 2 members and, in June 2006 until August 2006, there was only 1 provincially-appointed director.

This situation is a cause for concern from a corporate governance perspective. Although I have every reason to believe that the directors are competent, dedicated and focused on the proper issues, the very reason for the existence of a Board is to have a group of people with a variety of backgrounds and interests who can provide strategic vision and guidance to management. By definition, a one or two-person Board operates at a disadvantage in this regard.

The TPA has recognized this problem, and has sought to deal with it in three ways: first, it has written to the City of Toronto and the Minister of Transport on a variety of occasions when appointments were expiring or had expired to advocate for the appointment of further directors; second, it has retained retiring directors as advisors to the Board for fixed periods of time to retain their knowledge and capacity around the Board table; finally, it has retained external advisors to consult with the Board on important issues and wherever there was some choice as to the route to be taken, the management and the Board defaulted to the conservative option.

My view is that the TPA has acted reasonably in attempting to encourage the City and the Government of Canada to fill the vacant positions, and that the TPA and its Board did everything possible to ensure that proper processes were followed to mitigate any potential consequences from not having a full 7-person Board. I found no evidence that the diminished size of the Board in any way affected the decisions that were taken and which are part of my mandate.

That being said, I can not discount the possibility that additional members might have played some role in assisting to perform some of the necessary consultative function that is an important part of every public board, and that this might have diminished the concerns and the miscommunication that appear to underlie many of the difficulties that the TPA has faced in its relations with some members of the community and the City of Toronto.

- **Director Qualifications**

The TPA has provided me with the *curriculum vitae* of the Board members that have served on the TPA Board of Directors. From my review of these documents, it appears that there is a good mix of corporate, government, board and legal experience in the members and that, on the whole, the appointees appear to be well suited to the responsibilities of a board member.

Although some of the documents indicate experience with the operation of ports and airports, most do not. While I do not believe that this should be a prerequisite for serving on the TPA, having some Board members with this background would be of benefit to the TPA Board and management.

In addition to the requirement that the Minister consult the various users of the port, consideration should, in my view, be given to the experience of Board members in operating marine facilities and airports, both of which are specialized businesses. I believe that this should apply not only to the Minister of Transport, but also to the City of Toronto and the Province in making their appointments.

- **Director Compensation**

The *Canada Marine Act* (s. 14(5)) provides that directors of Canadian port authorities are required to set the remuneration for themselves as directors, the chair of the Board and the CEO of the port.

The TPA Board has complied with this requirement and its Compensation Committee has set these salaries, with advice from outside advisors, including legal counsel.

Although some have raised concerns about the quantum of the salaries paid, the amounts are not, in my view, excessive; and the process followed by the TPA to set these amounts appears to be reasonable and in accordance with the principles of good governance.

- **General Observations**

The City of Toronto has allowed its member to remain vacant since April 26, 2004 and has shown no inclination to appoint anyone to this position. I would recommend that the Minister consult with the City of Toronto and encourage them to appoint someone to fill the vacant City position on the Board. If the City does not intend to make such an appointment, the Letters Patent should be amended to delete the City appointee and provide for an additional federal appointee to be made following consultation with Toronto residents.

The Province of Ontario has diligently made its appointments and the Provincial Government should be encouraged to continue to do so.

As discussed above, the federal government, starting in mid-2003 began to allow positions to fall vacant without proceeding to appoint or re-appoint members to fill these vacant positions. It did this despite numerous entreaties from the TPA and its Chair to make these appointments and to undertake consultations with the various user groups to recommend names to the Minister. This ultimately led to the situation where in June 2006, the last remaining federal member's appointment expired, leaving the Board with no federal appointees and five vacancies.

I recommend that consideration be given to proposing an amendment to the *Canada Marine Act* to provide that the appointment of all members continue after the expiry of their term until another person is appointed in replacement of the departing member. This would ensure that vacancies on the Board would be avoided by changes of government administration after an election, for example. This additional term should be limited to one additional year.

PART IV

This Part of the Report discusses three fundamental issues of concern to many persons I met and many of my correspondents:

i) Does the Toronto Harbour qualify as a National Port?
ii) Is the TPA compatible with the Waterfront?
iii) The TPA Accountability and Community Relations

DOES THE TORONTO HARBOUR QUALIFY AS A NATIONAL PORT?

Some critics of the current arrangements for the management of the Toronto harbour argue that the types and volumes of its activities do not qualify it in the category of harbours of national importance; that the Port of Toronto belongs to the category of regional/local harbours. Consequently, the Port of Toronto should be removed from the *Canadian Marine Act* (*CMA*) Schedule and responsibility for its management and operation should be transferred to the local authorities.

It is also argued that the TPA does not meet the criteria of financial self-sufficiency and that the *CMA* should not be made applicable to the Port of Toronto. I will address this question first.

- **Does the Toronto Harbour meet the test of financial self-sufficiency under the *Canada Marine Act* Schedule?**

The *CMA* provides that the Minister may issue letters patent of incorporation for the purpose of operating a particular port if the Minister is satisfied that four criteria are met, that is, (1) the port is, and is likely to remain, financially self-sufficient; (2) the port is of strategic significance to Canada's trade; (3) the port is linked to a major rail line or a major highway infrastructure; and (4) the port has diversified traffic. Earlier in this report, I have discussed at some length the circumstances under which Parliament itself determined that the Port of Toronto should be covered by the *CMA*. But critics argue that, if the Toronto Harbour met the criteria at the time, which in their opinion was doubtful, the Port does not now meet the test of financial self-sufficiency, and, in any event, is not a port of national importance, but is only a regional/local port.

In 1997/1998, Parliament itself determined that the TPA was a port of national importance and that it met the test of financial self-sufficiency.

Beginning in the late 1980's and mid 1990's, the financial condition of the THC began to deteriorate. At that time, large pieces of land were transferred to the City and its economic development authority, TEDCO, thus depriving the THC from substantial rental revenues. These transfers were drawn to the attention of

the Senate Standing Committee on Transport by witnesses for the THC, when Bills C-44 and C-9 were before the Committee in 1997 and 1998. The possibility of court proceedings against the City was then raised to get the City to return the transferred land or accept a new arrangement to allow the THC to survive financially. Discussions were held with the City, but to no avail.

Proceedings were launched by the TPA against the City in the summer of 2001 to obtain the return of the lands or the payment of damages. Eventually these proceedings were settled by the conclusion of an agreement between the TPA and the City. These court proceedings and their ensuing settlement are discussed at some length elsewhere in this Report. The point to note here is that the 2003 agreement was meant to re-establish the TPA on a sound financial self-sufficient basis. It provided satisfaction to the TPA for the previous actions of the City, which deprived the TPA's predecessor (the THC) from its just claims against the City, and allowed the TPA to operate the airport on a new basis. Indeed, a new deal between the City and the TPA, endorsed by the federal government, which included an amendment to the 1983 Tripartite Agreement permitting the building of a fixed link, announced a brighter future for the Island Airport and the TPA.

This was to be a short-lived promise of amelioration. The election of a new mayor of Toronto in November 2003 brought cold water on the project for the Island Airport's new beginning. The bridge was eventually cancelled and alternatives to the bridge were sought. A settlement of all the claims resulting from the cancellation was eventually concluded after many months of negotiations, which included a commercial agreement between the TPA and a new regional airline to be based in Toronto, with private investment of more than $100-million. Again, the agreement provided a basis for thinking that the TPA would be able to achieve long-term financial self-sufficiency, the airport being its only money losing activity; the port itself, the Outer Marina and its other activities being generally self-supporting. The terms of the commercial agreement between TPA and Porter are discussed elsewhere in this report.

In July 2003, at the time of the settlement with the City, Transport Canada retained PWC to provide its opinion on the question of the long-term financial self-sufficiency of the TPA on an on-going basis. In its report, PWC was positive about the prospects of the TPA achieving financial self-sufficiency and viability after the conclusion of the contemplated settlement of the lawsuit between the TPA and the City. PWC also provided its advice to Transport Canada regarding the TPA's debt capacity. The advice provided by PWC led to the issuance of Supplementary Letters Patent increasing the debt capacity of the TPA from $2-million to $27-million on January 14, 2004.

In December 2004, Transport Canada again retained PWC to provide its opinion in connection with the financial impact on the TPA of a scenario where a bridge to the Island Airport was not built.

On December 17, 2004, PWC informed Transport Canada that it did not believe that, under a scenario where a fixed link is not built, the TPA would have the capacity to borrow money, either to finance an enhanced ferry service or for any other purpose.

Later, that is in late December 2004, the PWC's retainer was expanded to provide its advice in regard to the financial impact of the agreement that was contemplated between Transport Canada and the TPA. Transport Canada came to the view, on the basis of the advice received, that the TPA would be financially viable should the settlement be implemented. The Minister of Transport Canada eventually recommended to the federal government that the proposed settlement be agreed to.

Commercial agreements, such as the one between the TPA and RegCo, rarely provide absolute guarantee of success. It is important to recall that RegCo's business plan has received the support of financial investors who, presumably, had confidence in the business viability of the plan. There are no reasons why their judgement should not be trusted. Regarding the TPA, the commercial arrangement with RegCo guarantees a minimum of financial protection against the impact of RegCo not meeting fully its performance objectives. In the circumstances, there would be no basis, in my view, to conclusively determine that the TPA is not financially self-sufficient at this point and that steps be taken to delete the Toronto Port from the *CMA* Schedule.

- **Is the Port of Toronto a National Port?**

Some have argued that, irrespective of whether the TPA is financially self-sufficient or not, the real question is whether the Port of Toronto is a port of national importance or merely a regional/local port. I have already mentioned that the Minister may issue letters patent of incorporation if the Minister is satisfied that a particular port meets four criteria. Obviously, these criteria are not to be applied as a mathematical formula. A determination whether a port qualifies or not under the *CMA* requires the application of a good measure of judgment. Looking at the list of ports on the Schedule to the *Act*, it becomes obvious that there are few ports that compare with, for example, Vancouver, Halifax or Montreal. These three ports are hardly comparable with one another. Each port has its own particular characteristics, a unique geographic location, different types of activities, different volumes of tonnage, deals with goods and products of varying value and has different inter-modal connections.

Obviously, the goods and products transiting through the Port of Toronto cannot, for example, be compared to those of Vancouver, Montreal or Halifax.

Sugar, cement, salt, aggregates and stone are, in tonnage, the most important goods and products transiting in the Port of Toronto. The total tonnage transiting in the Port of Toronto in 2004 was 2,638,000 metric tonnes.

In 2004, in Vancouver, the total tonnage was 73,574,000, (including 24,701,000 of coal), in Montreal, the total tonnage was 23,636,763, and in Halifax, 13,816,000. St-John's had a total tonnage of 1,617,000 and Saguenay, 387,000. All these ports come under the provisions of the *CMA.*

The lower tonnage of goods and products transiting through the port of Toronto does not, by itself, diminish the importance of Toronto as a national port. Factors other than tonnage must be taken into account in deciding whether a port is of national importance.

Another possible point of reference is the volume of revenues. In 2004, Vancouver collected gross revenues totalling more than $100.8-million, Montréal, more than $70.8-million and Halifax, $26.9-million. Toronto, on the other hand, collected, $10.1-million compared to $1.28-million for Saguenay and $4.1-million for St-John's.

Again, the revenues collected by a port cannot, in my view, by themselves, provide a conclusive determinant of national importance.

The Southern Ontario region is a critical engine for both the Province of Ontario and Canada as it accounts for 68% of Ontario GDP and 27% of Canada's total economic output. Transportation facilities include road, rail, marine, aviation and public transit systems and recent studies show that short sea shipping (the movement of cargo and passengers by water over relatively short distances) has emerged as a new opportunity to assist in the movement of goods and passengers particularly in the Southern Ontario Gateway. European policy makers have in recent years put in force several policy initiatives to promote the use of water in transport. A number of measures are required to bring short sea shipping to fruition; in particular, inter-modal facilities need to be built to facilitate the streamlined movement of containers and trailers between ships and road/rail infrastructure on land. The TPA has already built this infrastructure and has actively worked recently to increase inter-modal movement at the Port.

The Port of Toronto maintains an important position within the Great Lake systems. The Port yard provides convenient access to railroads as well as major highways. Industry is provided with three miles of deep-water wharf space for the loading and unloading of bulk products.

Recent studies estimate that TPA commodity group traffic will grow from 2.27 million metric tonnes in 2004 to 3.77 million metric tonnes in 2020. The short sea traffic is forecasted to grow to 1.92 million metric tonnes 2020, from 1.35 million metric tonnes in 2005.

On the other hand, RegCo's business plan for the Island Airport includes not only liaison within Ontario, but also inter-provincial and international liaisons. The Island Airport is not just engaged in a local activity, it will be involved in inter-

provincial and international airline activities serving not only local but a wider range of needs and demands.

Overall, it is my conclusion that a determination whether the Toronto Harbour is of national importance requires the application of judgment aided by the four criteria listed in the *CMA*. I believe that this was exactly the judgment that Parliament made in 1997-1998 and I see no reason why the same conclusion would not apply now. If anything, it would be my view that recent developments regarding both the port and the airport would provide additional support to the conclusion reached by Parliament in 1997-1998. The Port of Toronto is the port of the capital city of Ontario, the business capital and largest city of Canada. Its port performs a critical role in contributing to its business, commercial, touristic and cultural vitality and vibrancy. It is not just a local/regional port.

One last point. The activities carried out in the Harbour of Toronto clearly concern domains of interest that come within the responsibility of the federal government. They include harbours, navigation and shipping, airlines, inter-provincial and international trade. The activities carried out in the Harbour and on the Waterfront are not just regional/local activities. Obviously the federal and local interests need to be harmonized and reconciled. It does not follow, however, that, because the activities are taking place within a municipality, and have local aspects, the City would be better positioned to arbitrate between the purely local and the federal or national interests. The challenge of harmonizing and reconciling local and federal interests will be best met by the local authorities working cooperatively with the federal authorities, as was done at the time of the 1983 Tripartite Agreement and the development and adoption of the TPA Letters Patent in June 1999.

THE TPA, THE ISLAND AIRPORT AND THE TORONTO WATERFRONT

Many critics of the TPA and the Island Airport have argued for many years that the industrial activities carried out at the Toronto Harbour, including the Island Airport, are incompatible with the vision and revitalization of the Toronto Waterfront.

Many opponents of the current arrangements for the use of the Island Airport, like CommunityAir, many community waterfront groups, many Toronto Island residents, environmentalists, music and green space lovers, have told me that the Island Airport commercial flights should stop. In other words, no commercial airlines should be allowed to use the Island Airport, including of course, Porter Airline.

Such views have been expressed for some years now. There are many who believe that industrial activities should be banished from the Harbour and that the Toronto Island Airport should be limited to non-commercial flights.

Obviously, there are many others, who see the great potential for the Harbour and Island Airport to serve the commercial, business and touristic interests of the City. In other words, they view the Harbour and the Island Airport as constituting great assets for the City of Toronto and its residents.

Back in the early 1980s, the Government of Canada, the City and the Harbour Commissioners, struggled with the challenge of reconciling the different interests of stakeholders in the Toronto Waterfront.

They determined, in concluding the 1983 Tripartite Agreement, that the restrictions under which aircrafts should be allowed to use the Island Airport would have to respect inasmuch as possible the interests of other stakeholders, to ensure that the Island Airport would not come to dominate all activities in the Toronto Waterfront to the detriment of other interests.

These questions were raised again in the following years, indeed every time the suggestion was made that a fixed link should be constructed between the City mainland and the Island Airport. The debates that were held at City Hall, in 1992, 1995, 1998 and 2002, when City Council endorsed the building of a fixed link clearly show that there was no unanimity as to the course that should be adopted.

Each time the matter came up before Council, there were lengthy debates, following careful review of all relevant questions and concerns by Council committees, with the assistance of City-staff and, more often than not, after interested parties and stakeholders have had an opportunity to express their opinions. Each time, City Council endorsed a balanced approach that would reconcile as much as possible the interests of all stakeholders. Each time, the City, following on the precedent of the 1983 Tripartite Agreement, avail itself of the opportunity to influence Transport Canada and the federal government to adopt stringent conditions under which the Toronto Island Airport would operate.

This dramatically changed in 2003, after the election of Mr. Miller as Mayor of the City of Toronto. Indeed, as we know, in early December 2003, City Council decide to withdraw its support to the construction of a bridge to the Island Airport that had been endorsed by the City Council in late 2002.

As discussed elsewhere in this report, the Government of Canada eventually adopted a regulation under the CMA that prohibited the TPA from constructing a bridge between the City of Toronto mainland and the Island Airport and a settlement of all the claims for the damages caused by the cancellation of the bridge was agreed to. Commercial arrangements were entered into between the TPA to bring in a new airline based on the Toronto Island.

To deconstruct the arrangements that are now in place would, in my view, have dire financial and economic consequences. The costs of deconstruction of

current arrangements would be in the millions of dollars. Who would be ready to assume these costs? The City of Toronto, which supports the closing of the Island Airport would not likely readily accept the financial consequences that would follow from the closing of the airport. The other parties to the 1983 Tripartite Agreement, the federal government and the TPA, are committed to the continued operation of the Island Airport and have reasons to believe that at long last, after many unsuccessful attempts, the future of the Toronto Island Airport is brighter than it has ever been.

Most importantly, the plans for the new airport based airline activities are constrained by the 1983 Tripartite Agreement and the conditions that have been agreed to at the time of the 2002 City endorsement of a fixed link, all of which pursue a balanced approach to reconciling the different stakeholders' interests.

In addition, except for the very existence of the Island Airport, which for some is incompatible with the Toronto Waterfront revitalization, I have not come across any evidence that the TPA plans or activities constitute an impediment to the efforts to revitalize the Toronto Waterfront. Quite the contrary, I have been informed that the TPA is closely cooperating with the Toronto Waterfront Revitalization Corporation.

While in the 1990s, the THC held large pieces of land on the Toronto Waterfront, the developments of which might at the time conflict with the development plans of other Toronto City land owners on the Waterfront, the situation is quite different today because of the small amount of land still in the hands of the TPA on the Waterfront. A map which sets out the THC land holdings prior to the 1991 transfer is attached to my report (Attachment 5). As well, a map of the current holdings that, with small exceptions, is identical to the holdings following the 1994 transfer is also attached. (Attachment 6) Note that this map does not set out the waterlot holdings of the TPA.

Some have argued that the responsibility for the Toronto Harbour and the Island Airport should be transferred to the City of Toronto. This question is discussed in the previous section of this report.

TPA ACCOUNTABILITY & COMMUNITY RELATIONS

Concerns were raised with me about the accountability and transparency of the TPA, particularly in its dealings with the residents of the areas in proximity to the port and the TCCA, including residents of the island and along the harbourfront. Questions of accountability and transparency, and community relations are closely related. They will be discussed in that order.

- **Accountability and Transparency**

I would first make some general comments about the nature of accountability in public institutions. Accountability can and does take many forms. There is the traditional department – with ministerial line of responsibility – where a Minister is accountable to Parliament for decisions and actions taken by the department for whom the Minister is accountable. This is, however, not the only means by which accountability can be achieved.

Indeed, in our modern system of governance, it is acknowledged that this manner of accountability is not always the most efficient means of ensuring that the public good is done. The federal and other governments have created single-purpose agencies, which operate at arms-length from the government and the traditional political process of accountability. In these agencies, accountability is achieved in a two distinct ways: first, the mandate of the agency is set out in the enabling legislation and related documents and the agency can be held to this mandate. Second, these agencies are required to operate in a transparent manner, with full public disclosure (at a macro level) of their financial operations for scrutiny by both the government and, usually, the public at large.

The 1999 passage of the *Canada Marine Act* fundamentally changed the nature of the accountability structure of the port authorities. Indeed, one of the purposes of the Act was to focus the interest of the federal government on strategically significant ports, and to transition these ports to a more business-like operation, one step removed from direct political involvement.

As explained previously, from 1911 to 1999, the THC was governed by a Board of Directors established by the *Toronto Harbour Commissioners Ac, 1911*. This legislation provided that three of the five directors would be appointed by the City, resulting, as time went by, in *de facto* control by City Council – through either the direct appointment of councillors or City Staff who were instructed by Council. The THC legislation, an act of the Parliament of Canada, made no requirement of financial accountability other than a right of access to the books and records (upon which no audit was required) to the Audit Department of the City of Toronto (s.18), and a requirement of an annual report to the City Council (s.18).

In creating the TPA, a new system of accountability was put in place that is primarily set out in the *Canada Marine Act* and the Letters Patent which were issued pursuant to that Act.

The *CMA* (s. 16) specifically prohibits politicians, including MPs and City Councillors, as well as officials from the various levels of government from sitting as members of the Board of Directors, and sets out requirements for directors.

The *CMA* (ss. 34, 35) also requires all Canadian port authorities to hold an annual meeting, where the financial statements are to be presented; and where the CEO and Directors are available to answer questions from the public about the port's operations or financial statements.

The books and records required to be kept by the port authority are set out in the *CMA*, as is the requirement to have the financial statements audited, a right of public access and the requirement that the audited financial statements (along with other information, including a 5 year business plan) be provided to the Minister of Transport annually (ss. 37-40) as well as a land-use plan (s. 48).

The *CMA* provides that a Special Examination or more detailed audit must occur every 5 years, and at such other times as the Minister deems appropriate. I have reviewed the 2004 Special Examination which provided the TPA with a "clean" review, and understand that the next such examination of the TPA will occur in 2009 unless the Minister decides otherwise.

The TPA has experienced difficulties over the years in complying with the provisions of the *CMA* that require Port Authorities to prepare and submit a 5-year business plan and a land-use plan.

The preparation of these plans proved challenging right from the very beginning of the TPA in June 1999. The TPA had begun preparation of the land-use plan in early October 1999 and a plan was drafted for a public consultation held in October 2002. After considering the results of the public consultation, the TPA decided to defer the adoption of a land-use plan until the airport plan was dealt with.

The preparation of the land-use plan indeed proved almost impossible because of the land dispute with the City, which greatly affected the land holdings of the TPA. This dispute was settled only in 2003. Also, the potential use of TPA lands for the Toronto's Olympic bid for 2008, created uncertainty as to the future use of TPA lands.

After the land dispute with the City was resolved in 2003, the TPA became absorbed with the preparation for the construction of the bridge. This was to be followed up by the City's withdrawal of its support for a fixed link which itself was resolved only in mid-2005.

The difficult circumstances faced by the TPA regarding its land holdings as well as continued controversies about the very existence of the TPA and the Island Airport may explain why the land-use plan has not yet been formulated. More recently the numerous vacancies on the TPA Board of Directors is another factor that explains this delay. The land-use plan is an important planning tool and I would suggest that the TPA give priority to the preparation and publication of a plan now that most of the previous uncertainty has been removed.

The TPA has also experienced insuperable challenges in the preparation of its business plans as required by the CMA, for the same reasons that plagued the preparation of the land-use plan. Here again, I would suggest that there are now no reasons why the preparation of a business plan should not be proceeded with as a priority, and as required by legislation.

Finally, the TPA is required to submit annual reports to the City of Toronto pursuant to the Tripartite Agreement. Although the TPA advised me that they are now up-to-date in these reports, I understand that there have been some considerable delays in providing them to the City. As with the land-use plan and the business plans, there are reasons for this, but the TPA must make timely compliance with these obligations a priority.

The 2003 Tripartite Amending Agreement provided for the establishment of a Community Advisory Committee including representatives of key community stakeholders and three City councillors. The purpose of the Committee was to facilitate effective community input into the TCCA's impact on the surrounding community. The TPA agreed to meet with the Committee not less than twice a year. The Committee reports to City Council on matters of concern to the Committee, including noise abatement, traffic management, public safety, parking, transit, urban design and environmental impacts.

The Advisory Committee is an important mechanism to ensure good communication between the surrounding community, the TPA and the City. The disputes and controversies of recent years between the City, the TPA and some community groups have not facilitated good communications and reasonable discussions, and the Advisory Committee seems to have fallen short of expectations.

The TPA Letters Patent, issued on June 8, 1999, set out: the legal requirements for Board members and their appointment (repeating the requirement that no director shall be either a politician or official serving for the various levels of government and specifying the user-group involvement, as discussed elsewhere herein); the activities which the TPA was entitled to carry out, both in terms of the physical operations and restrictions on the ability to borrow money, acquire or divest itself of real property, restrictions on its ability to lease or license property, and contains a Code of Conduct guiding the ethical conduct of TPA Directors.

My view is that the regime imposed on the TPA is quite comprehensive and is in keeping with the best practices of transparency and financial oversight of government special purpose bodies as I understand them. Certainly, it cannot be said that the introduction of the CMA in any way reduced the accountability or transparency of the TPA. In Part V, however, I make a number of recommendations designed to improve the quality of accountability and transparency of the TPA.

- **Community Relations**

Notwithstanding its compliance with the formal accountability requirements, the TPA also recognizes that it is a public body and that there must be some public input into its operations. At every step that I have had the opportunity to review, the TPA has gone above and beyond the technical requirements imposed upon it – yet at the same time it has failed to live up to the expectations of those residents who oppose the ongoing operations of the TPA and the TCCA.

An excellent example of this is the process undertaken by the TPA in the course of its environmental assessments in support of the fixed link and, later, the improved ferry terminal buildings. At each stage, the TPA management and board determined that they would take the cautious approach – and consulted far in excess of the requirements of the environmental assessment legislation. These consultations are designed to elicit and identify environmental concerns, and to ensure that the assessment and the mitigation plan address them. At each consultative step, along with specific concerns on environmental issues, concerns were raised by citizens who were profoundly opposed to the project – and whose comments were directly aimed at their goal of closing the airport as opposed to addressing environmental concerns. The final EA report set out these comments and, as a response, simply noted that the TPA and their consultants “noted” the concerns raised.

The questions raised and comments made at these consultations clearly, and understandably, exasperated the TPA and its consultants, as the process was never designed to address the larger concerns about the existence and operation of the TCCA; and the responses were clearly, and understandably unsatisfactory to the concerned citizens, as they were left to feel that they had no outlet in which their concerns could be addressed.

Similarly, I have been provided with examples of exchanges at the annual meetings held by the TPA to discuss their annual financial statements and operations, between community members and TPA management, where the comments were clearly not designed to elicit answers, but rather to make political arguments. The responses were likely to leave any truly concerned citizen who might actually be seeking answers entirely unsatisfied.

These “consultations” became a downward spiral. Faced with a small, but vocal effort to undermine its very existence, TPA management became more guarded in their responses to questions raised in these forums. As those with legitimate questions became confronted with guarded responses, they became more concerned about the operations of the TPA as a whole.

I decline to find any fault on either side for this downward spiral. The *status quo*, however, is not acceptable.

The question of how the TPA should or could meaningfully consult with residents who are clearly opposed to its very existence is a challenging one. Moreover, there is a further question – lost in the process of this noise back and forth between certain very vocal residents and TPA management are the vast majority of Toronto residents who likely have questions about the operations of the port and the TCCA; and whose voices deserve to be heard as well.

To that end, my view is that the TPA must take a more proactive and progressive approach to its community consultations. It must reach out to the organizations that have raised concerns about its operations and build closer relationships, wherever relationships can be built and reasonable discussions enjoined. The TPA must also reach out to the broader Toronto community to engender an understanding of its operations, and to develop an understanding of what measures can be taken to further integrate the port and the TCCA into a revitalized city and waterfront.

PART V

GENERAL OBSERVATIONS AND RECOMMENDATIONS

While the review has brought me to conclude that the Toronto Port Authority has, on the whole, respected requirements of due diligence and has governed itself in accordance with generally accepted principles of good governance, there are, in my view, a number of areas where transparency and accountability could and should be improved. I have particularly identified for consideration four such areas:

1. Transparency and Accountability

As discussed in the Report, the principal corporate entity under the *CMA* is the Port Authority. The corporate and financial elements of the authority are organized around and for the port or harbour activities. The Island Airport is but one of the activities of the Port Authority. The Island Airport does not have a corporate existence of its own, with the result that its financial, operational, reporting activities are all sub-set of the principal entity, the Port Authority. Neither the *CMA* nor its LP require that there be separate reports for the TCCA finances, operations, plans or performance. The information concerning the Island Airport is subsumed under the Port information. In the result, the information concerning the Island Airport is more difficult to obtain and the Airport performance more challenging to evaluate.

In any event, the TPA is not required by the *CMA* or its Letters Patent to prepare and publish an Annual Report of its activities and operations. The practice for the TPA has been to make its Financial Statements available to its Annual Meetings and to respond to questions from participants. Meaningful and comprehensive annual reports would contribute to better-informed and more reasonable discussions.

In my view, not only should annual reports be prepared, but separate annual reports should be prepared for the Port itself and the TCCA. These Reports should be meaningful and comprehensive. Regarding the airport, a good model would be section 184 of Bill C-20, the *Canada Airport Act,* (currently before Parliament) which sets out the information that Annual Reports of Canada's largest airports should contain. The Act when it is adopted will apply only to the largest Canadian airports and it may be that some of the information required in their case would not be applicable to the Island Airport.

Recommendation I

Consideration should be given to adopting changes to the corporate arrangements concerning the TPA to ensure that the TCCA's affairs be governed as a subsidiary - as a distinct and separate entity from the Port Authority, so as to

provide a better management focus and ensure greater transparency and accountability. This, in my view, could be done without modifications to the *CMA*, or the 1983 Tripartite Agreement, through amendments to the Letters Patent or simply through the adoption of TPA's best practices.

Similarly, the TPA should be publishing an Annual Report of it operations and a separate Report of the TCCA's operations should be published to provide stakeholders, interested parties and the public, with meaningful and comprehensive information about the activities, plans and performance of both.

The TPA should also ensure that its reporting obligations under the Tripartite Agreement (reports to the City) as well as the *CMA* (the Land-Use Plan and Business Plan) are fulfilled in a timely manner.

2. Community Relations

While I am of the view that the TPA has generally complied with the requirements imposed by the *CMA*, its Letters Patent and the Tripartite Agreement, particular attention should be devoted to improving the quality of its community consultations to reach the vast majority of Toronto residents who likely have questions about the operations of the Port and the Island Airport.

Recommendation II

A determined effort should be made by the TPA to take a more proactive approach to community consultations. It would be important for the TPA to reach out to organizations and groups who have raised concerns about its operations to build relationships and stimulate reasonable discussions and to, at the same time, begin a dialogue with those who have not been actively involved in the discussion about the TPA to-date.

3. Appointment of Directors

In light of recent years difficulties in the timely replacement of directors whose term had expired, consideration should be given to ensure that directors' vacancies be filled in the best of time to avoid that directors' positions remain vacant over a too long period of time.

Recommendation III

Consideration should be given to proposing an amendment to the *CMA*, at the next opportunity, to provide that the appointment of all members of the Board of a Port Authority continue after the expiring of their term until another person is appointed in replacement of a departing member. This additional term should be limited to one additional year.

4. The federal interests in the Toronto Port and the TCCA

In discussions I had with many stakeholders, the suggestion was made that the federal government should leave it to the City of Toronto to manage the Port of Toronto and the Island Airport and that their assets should be transferred to the City, effectively removing the Port Authority from the application of the *CMA*.

I have found that the role of the federal government, as I explained in the part of the Report that deals with the question whether the Port of Toronto is a port of national importance, is not very well understood or simply not accepted. Many do not see why the federal government refuses to leave it to the local authorities to manage the Port of Toronto, including the Island Airport, and refuses to leave it to the City to decide the fate of those federal institutions as they see fit. My Report, in that regard, has shown that, in recent years, federal elected officials have more than once taken ambiguous positions on the future particularly of the Island Airport, which no doubt has contributed to reinforce the view of many opponents that they would eventually persuade the authorities to close the airport.

Recommendation IV

It would seem to me be that federal government officials, particularly those who have been elected, have a responsibility to take an active role in debates and discussions on the future of the Port and the Island Airport, to explain the federal interests in these institutions, as well the reasons why the federal government needs to be involved, underlining at the same time the importance of a collaborative approach between the City and the federal government in arbitrating national and local interests.

TPA REVIEW

Partial list of Meetings and Interviews

Toronto Port Authority

Michèle McCarthy, Chair

Lisa Raitt, President & CEO

Alan Paul, VP, Chief Financial Officer

Leonard J. Griffiths, Counsel
Bennett Jones LLP – formerly Torys LLP

Henry Pankratz, former President & CEO

Transport Canada

Emile Di Sanza
Director General, Marine Policy

Janet Kavanagh
A/Director – Port Policy

Debra Taylor, Regional Director

Justice Canada

Barrie LePitre
General Counsel

Jacques Pigeon
General Counsel

Carla Lyon
Associate Deputy Regional Director
Ontario Regional Office

City of Toronto

Mayor David Miller

Leslie Woo
Senior Advisor

Councillor Case Ootes
Councillor Norm Kelly
Councillor Denzil Minnan-Wong
Councillor Frances Nunziata
Councillor Karen Stintz

Elaine Baxter-Trahair
Director, Waterfront Project Secretariat

Diana Dimmer
Director, Legal Services
City Manager's Office

Paul Bedford
Former City of Toronto Chief Planner

Others

David Crombie
Former Royal Commissioner
on the Future of the Toronto Waterfront

Roger D. Wilson
Lawyer – Fasken Martineau

Olivia Chow, MP

Jack Layton, MP

Joseph D. Randell
President and CEO
Air Canada Jazz

Scott Tapson,
VP-Customer Experience (Air Canada Jazz)

Robert Deluce
President and CEO
Porter Airlines Inc.

Victor Pappalardo & Antoine Pappalardo
President
Trans Capital Air

Dennis Mills
Former Toronto MP

John Campbell
President & CEO
Toronto Waterfront Revitalization Corp.

Representing CommunityAir
Marc Brien
Bill Freeman
Brian Iler
Bob Kotyk

Waterfront Community Representatives
Cindy Wilkey, lawyer – West Don Lands Committee

Dennis Glasgow – St. Lawrence Neighbourhood Association

Laura Bowman – Lake Ontario Waterkeeper

Margaret Samuel – Central Waterfront Neighbourhood Association

Pam Mazza – Toronto Island Community Association

Dennis Findlay – Waterfront Action/Portlands Action Committee
Toronto City Centre Airport Community Advisory Committee

Ulla Colgrass – Chair, York Quay Neighbourhood Association

Ane Christensen, President – Harbourfront Community Association

Julie Beddoes – Gooderham & Worts Neighbourhood Association

Ian Goodwin, President – Bathurst Quay Neighbourhood Association

Rebecca Quigley - Bathurst Quay Neighbourhood Association

Tamara Bernstein, Artistic Director
Toronto Music Garden's free Summer Concerts

Submissions

From Lake Ontario Waterkeeper – Mark Mattson

From CommunityAir

From Roger Wilson

Emails/correspondence

Note: I have also received a large number of emails and letters from various stakeholders including: Mitch Gold of First Nations Indigenous Trust, Duncan Dee, Senior VP, Corporate Affairs, ACE Aviation Inc., Michael Deluce, Executive VP, Porter Airlines Inc., Robert Kajioka, Alan M. Baker, Tara Donovan, Rod Duncan, Tania Ilieva, Vincenza Jugovic, Ronald B. Sigman, RBS Investment Group, Terence C. Wilkins, Enza Barbieri, etc.

REVIEW OF THE TORONTO PORT AUTHORITY

TERMS OF REFERENCE

OBJECTIVE

To satisfy the Minister of Transport, Infrastructure and Communities (Minister) and Government of Canada that principles of good governance have been upheld in respect of the Toronto Port Authority.

To this end, the Minister requires that an external advisor undertake a review and submit a report to the Minister in respect of questions relating to the Toronto Port Authority, substantially as set out below.

The report of the advisor is to be submitted to the Minister no later than September 1, 2006.

SCOPE

1 - Review

The external advisor is to examine the governance of the Toronto Port Authority and undertake a review of the decisions, actions and associated transactions of the Toronto Port Authority respecting the issue of a fixed link (from the mainland to Toronto City Centre Airport) in the context of the following:

- The Tripartite Agreement, signed in 1983 by the City of Toronto, the Toronto Harbour Commissioners (now the Toronto Port Authority) and the Minister of Transport on behalf of the federal government and amended by these parties in 2003, including the roles of the parties and their rights and obligations under the Tripartite Agreement, as amended; and

- The mandate of the Toronto Port Authority, its inclusion as an initial Canada Port Authority under Schedule 1 of the *Canada Marine Act*, and its operation within the governance framework established by the *Canada Marine Act*, its Letters Patent, the Port Authorities Management Regulations and the Port Authorities Operations Regulations, including the accountability and transparency measures and reporting requirements set out within this framework.

.../2

2 - Report

The external advisor is to provide a report to the Minister that is to specifically address, but not necessarily be limited to, the following questions:

Role of the Toronto Port Authority

- Can the inclusion of Toronto as a CPA under the CMA be justified in the context of the Port's business and traffic levels and does its inclusion differ markedly from the treatment of other Port Authorities?

- What steps has the Board of the TPA taken to meet its due diligence requirements?

Timing of Decision to Build a Fixed Link

- What sequence of events led to the signing of contracts by the TPA for the construction of the fixed link?

- What were the events and circumstances leading to the amendments of the tripartite agreement in 2003?

- What were the events and circumstances respecting the TPA's decision to construct a fixed link from mainland Toronto to the Toronto City Centre Airport?

- What was the timing of contracts in relation to 2003 municipal elections and the confirmation of the various federal and City approvals?

Consequences Associated with Decision to Cancel Fixed Link

- Is there a basis to conclude that grounds for a settlement existed and that the settlement amount of $35 million was reasonable?

- On what basis was a decision taken to replace the current ferry and acquire a new vessel?

3 – Interim Briefings

The external advisor shall provide interim briefings to the Minister as deemed warranted by the advisor, or as requested by the Minister.

.../3

4 – Further Work

As part of the contract, the external advisor is to identify and scope out, by May 13, 2006, work that will require the services of an accounting expert in order to complete the review. Such accounting expert, to be engaged by the Department, will conduct the work in support of the mandate of the advisor. The advisor is to have regard to the work of the accounting expert and will take account of the findings of the accounting expert in his report to the Minister [referenced in #2 above].

5 – Confidentiality

In undertaking this review and preparing his report, the external advisor is required to respect and protect the confidentiality of any information that is made available to him and that is, by its nature, confidential or protected by privilege.

CONTRACT

The Terms of Reference herein are subject to contract.

BDO Dunwoody LLP
Financial Advisory Services

Investigative and Forensic
Accountants

60 Columbia Way
Suite 400
Markham Ontario Canada L3R 0C9
Telephone: (905) 946-1066
Fax: (905) 946-9524

www.bdo.ca

October 12, 2006

Mr. Roger Tassé, O.C., Q.C.
Gowling Lafleur Henderson LLP
Barristers & Solicitors
160 Elgin Street, Suite 2600
Ottawa ON K1P 1C3

and

Mr. Emile Di Sanza
Director General Marine Policy
Transport Canada
Place de Ville, Tower "C"
25th Floor
Ottawa, ON K1A 0N5

Dear Messrs. Tassé and Di Sanza:

TORONTO PORT AUTHORITY

Enclosed herewith is a two volume report that sets out our findings in connection with the review commissioned by Transport Canada of the Toronto Port Authority ("TPA") and our engagement to perform supporting forensic accounting services.

Volume 1 of our report is an Executive Summary. Volume 1 discloses no confidential information.

Volume 2 of our report sets out in detail our findings. Volume 2 discloses information that has been made available to us on a confidential basis.

Yours very truly,

BDO Dunwoody LLP

Jeffrey C. Smith, CA, CA•IFA
Partner

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Toronto Port Authority
Forensic Accounting Review

Executive Summary

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EXECUTIVE SUMMARY

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EXECUTIVE SUMMARY

OUR MANDATE

We have been engaged to undertake a forensic accounting review of five matters relating to the operations of the TPA. Specifically, we have been asked to:

1. assess the adequacy and completeness of the TPA's financial records relating to the tendering of contracts and actual transactions relating to the formerly proposed fixed link to the Toronto City Centre Airport ("TCCA"), and ascertain if:

   (a) the records are adequate to determine if there was appropriate adherence to the specified tender process,

   (b) contracts appear to have been awarded in accordance with the specified tender process, and

   (c) the records document damage payments consistent with those contemplated in the May 2005 Settlement Agreement between the Crown and the TPA and the negotiated settlements between the TPA and third parties;

2. assess whether the figures for damages, including lost profits and lost business opportunities related to all parties, that were presented by the TPA to the federal government in the course of negotiating a settlement, were reasonable;

3. assess the TPA's allocation of the $35 million in damage funds that it received under the Settlement Agreement to the various parties that sustained, or that are alleged to have sustained, damages in connection with the cancellation of the construction of a fixed link to the TCCA;

4. review both the business plan developed by the TPA and the Minutes of Settlement (2003) between the federal government, the TPA and The City of Toronto ("the City") and assess the financial impact upon the TPA's business plan if the City does not respect its financial obligations set out in the Minutes of Settlement (2003); and

5. review the information provided to the Board of Directors of the TPA in connection with:

   (a) the construction of the formerly proposed fixed link to the TCCA, notably the tendering of contracts; and

   (b) the acquisition of a new ferry and the construction of related support facilities,

   and ascertain if the quality, accuracy and completeness of the information used for decisions was appropriate.

Our mandate relates to the period January 1, 2003 onward.

SCOPE OF WORK PERFORMED

In completing this assignment, we met with Messrs. Roger Tassé and Derek A. Vanstone, of Gowling Lafleur Henderson LLP; Mr. Emile Di Sanza, Director General Marine Policy – Transport Canada; Ms. Lisa Raitt, President and Chief Executive Officer of the TPA; Mr. Allan J. Paul, Vice President and Chief Financial Officer of the TPA; Mr. Henry J. Pankratz, former Chairperson of the TPA; Mr. Leonard J. Griffiths, currently of Bennet Jones LLP and formerly of Torys LLP, Mr. Robert Deluce, President and Chief Executive Officer of Porter Aviation Holdings Inc. (formerly Regco Holdings Inc.); Mr. Michael Deluce, Executive Vice President of Porter Aviation Holdings Inc.; and Mr. Jacques Demers of Ogilvy Renault LLP. We also had discussions with Mr. Kenneth Lundy, Chief of Operations and Engineering of the TPA; Mr. J. Mark Richardson, of Lang Michener LLP; Mr. Stephen Stewart of Deloitte & Touche LLP; Ms. Michele McCarthy, Chairperson of the TPA; Mr. John R. Barnett, former director of the TPA; Mr. Steven T. Mirkopolous, former director of the TPA; Mr. Jim Ginou, former director of the TPA; Mr. Rahul Bhardwaj, former director of the TPA; Ms. Margo Brousseau, former director of the TPA; Ms. Michelle DiEmanuele, former director of the TPA; Mr. Paul Hayes, former director of the TPA; and Mr. Murray Chusid, former director of the TPA.

We have reviewed various information made available to us on a confidential basis.

Set out hereinafter are our findings.

SUMMARY OF FINDINGS

1. **Tendering of Contracts and Damage Payments Relating to the Fixed Link**

(a) Adequacy of Records Relating to Fixed Link Tender Process

The TPA has adequate records relating to the actual tender process that resulted in the awarding of a contract to build a bridge link to the TCCA. The records demonstrate that the tender process was public and professionally managed.

It would appear that the TPA's costs and commitments related to the fixed link have been appropriately recognized in the TPA's financial records. The TPA's annual financial statements for each year since its formation have been audited by Deloitte & Touche LLP. For each of the years, Deloitte & Touche LLP has expressed what is known as an "unqualified" or "clean" opinion on the TPA's financial statements. They have stated that in their opinion the financial statements have presented fairly, in all material respects, the financial position, results of operations and cash flows of the TPA.

The TPA's financial statements have been finalized and made available to the public annually within the time period prescribed by the Canada Marine Act. The TPA makes its annual financial statements public, in their entirety, by posting them on its website. We understand that it has done this since 2003 – when it posted its 2002 financial statements.

(b) Award of Bridge Contract

The TPA appears to have appropriately awarded the contract for the construction of a bridge link to the TCCA in accordance with its specified tender process. Aecon, the company to which the bridge construction contract was granted, submitted the lowest

priced bid and its bid was reviewed by the TPA's professional consultants and found to be sound and appropriate.

(c) Actual Damage Payments

Based on a review of relevant records, we have determined that the TPA has made damage payments to third parties consistent with those contemplated in the May 2005 Settlement Agreement between it and the Crown.

2. Reasonableness of Damage Amounts

Based upon a review of the available records, discussions with Ms. Lisa Raitt and Messrs. Leonard Griffiths and J. Mark Richardson, and consideration of relevant issues, we have determined that the damage calculations that the TPA presented to the federal government in the Terms Sheets that underlie the May 2005 Settlement Agreement were reasonable.

The damage calculations that the TPA presented to the federal government were reviewed for the federal government, prior to any final settlements being entered into, by PricewaterhouseCoopers Corporate Finance Inc. ("PWC Inc."). PWC Inc. found all of the damage amounts to be reasonable.

3. Allocation of Damage Funds

We find no basis to conclude the $35,000,000 in damage funds paid out as a result of the May 2005 Settlement Agreement between the Crown and the TPA was not appropriately allocated by the TPA.

4. Impact on Business Plan if City of Toronto Defaults on its Obligations

Since its formation, the TPA has faced very significant external challenges that have severely impacted upon its financial performance and its ability to establish and adhere to a long-term strategic plan. The challenges have been so significant and

have had such a material impact upon the financial results of the TPA that its past financial performance is not a reasonable indicator of either the adequacy and effectiveness of its governance or its ability to be self-sufficient.

The City of Toronto has various financial obligations to the TPA under Minutes of Settlement (2003). It is presently defaulting on all of its obligations, except those for which Toronto Economic Development Corporation ("TEDCO") is jointly and severally liable.

TEDCO is making the payments to the TPA for which it and The City of Toronto are liable. The City of Toronto is, however, the sole shareholder of TEDCO and we understand that it has the ability to issue a Shareholder's Directive to TEDCO that would require it to cease making payments to the TPA.

The impact upon the TPA's operations of defaults by The City of Toronto will depend upon:

(i) the breadth of future defaults (i.e. whether the payments for which the City and TEDCO are jointly and severally liable are suspended); and

(ii) the reaction of the Bank of Montreal ("BMO"), which has provided infrastructure financing to the TPA, to the City of Toronto's defaults.

Provided that TEDCO continues to make the payments to the TPA for which it and The City of Toronto are jointly and severally liable, it appears the TPA will be able to successfully continue to carry on its operations.

Total default by The City of Toronto, including it directing TEDCO to default on its obligations, would have dire consequences for the TPA. Without even considering the likely adverse consequences on the TPA's bank financing, the TPA would run out of operating funds by 2008 unless it disposes of land assets. Any such dispositions would require the approval of the federal government.

5. Adequacy of Information Provided to Board of Directors

We have reviewed the Minutes of the TPA's Board of Directors' meetings from 2003 onward to assess the adequacy of the information being made available to the TPA's Directors to assist them in their decision making and fulfillment of their governance responsibilities. We have also spoken with all individuals who have served as Directors of the TPA at any time between January 1, 2003 and June 30, 2006.

It appears very clear that the TPA's Directors have received reasonable and appropriate information, on a timely basis, to assist them in their decision making and fulfillment of their governance responsibilities. None of the Directors had any concerns with the information that was made available to them nor any concern about the TPA's management ever having acted without having appropriate authority. A number of the Directors were outspoken about their high regard for the TPA's management.

(a) Fixed Link Project

The Board of Directors received regular status and other reports from senior TPA management and technical experts on matters related to the financing and construction of the fixed link. Further, the Directors received reports and advice from independent engineering, financial and legal experts to guide them in their decision making.

We have no concerns with the information made available to the TPA's Directors to assist them in making timely and appropriate decisions on the fixed link project and fulfilling their governance responsibilities in connection with it.

(b) Acquisition of Ferry and Construction of Related Support Facilities

Significant decisions related to the acquisition of a passenger ferry and the construction of related support facilities were made when the TPA was operating with an extremely small Board of Directors. The Directors did, however, receive regular

and appropriate information from management and independent experts to assist them in making informed decisions and fulfilling their governance responsibilities.

We have no concerns regarding the information made available to the TPA's Directors to assist them in making timely and appropriate decisions on the acquisition of a passenger ferry and the construction of related support facilities.

Toronto Port Authority : Composition of the Board of Directors

	City of Toronto 1 Appointee	Province of Ontario 1 Appointee	Government of Canada Minister's Appt	Government of Canada User Gp 1	Government of Canada User Gp 2	Government of Canada User Gp 3	Government of Canada User Gp 4	Total # of Directors
1999 June	**M. Chusid** (2 terms)	**J. Ginou** (2 terms)	**R. Wright** (1 term)	**H. Pankratz** (2 terms)	**H. Wilton-Siegel** (2 terms)	**J. Barnett** (2 terms)	**J. Whitelaw** (1 term)	7
1999 July								7
1999 Aug.								7
1999 Sept.								7
1999 Oct.								6
1999 Nov.								6
1999 Dec.								6
2000 Jan.								6
2000 Feb.								6
2000 Mar.								6
2000 Apr.								6
2000 May.								6
2000 June							**M. Brousseau** (2 terms)	7
2000 July								7
2000 Aug.								7
2000 Sept.								7
2000 Oct.								7
2000 Nov.								7
2000 Dec.								7
2001 Jan.								7
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2001 Mar.								7
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2001 May.								7
2001 June								7
2001 July								7
2001 Aug.								7
2001 Sept.								7
2001 Oct.								7
2001 Nov.								7
2001 Dec.								7
2002 Jan.								7
2002 Feb.								7
2002 Mar.								7
2002 Apr.								7
2002 May.								7
2002 June								6
2002 July								5
2002 Aug.								5
2002 Sept.								5
2002 Oct.			**M. DiEmanuele** (1 term)					6
2002 Nov.								6
2002 Dec.								6
2003 Jan.								6
2003 Feb.								5
2003 Mar.								5
2003 Apr.								5
2003 May.	**R. Bardwai** (1 term)							6
2003 June					**P. Hayes** (1 term)			6
2003 July								6
2003 Aug.								6
2003 Sept.								6
2003 Oct.								6
2003 Nov.								6
2003 Dec.								6
2004 Jan.								5
2004 Feb.								5
2004 Mar.								5
2004 Apr.								5
2004 May.								4
2004 June								2
2004 July		**M. McCarthy** (first term, current)						3
2004 Aug.								3
2004 Sept.								3
2004 Oct.			**S. Mirkopoulos** (1 term)					4
2004 Nov.								4
2004 Dec.								4
2005 Jan.								4
2005 Feb.								4
2005 Mar.								4
2005 Apr.								4
2005 May.								4
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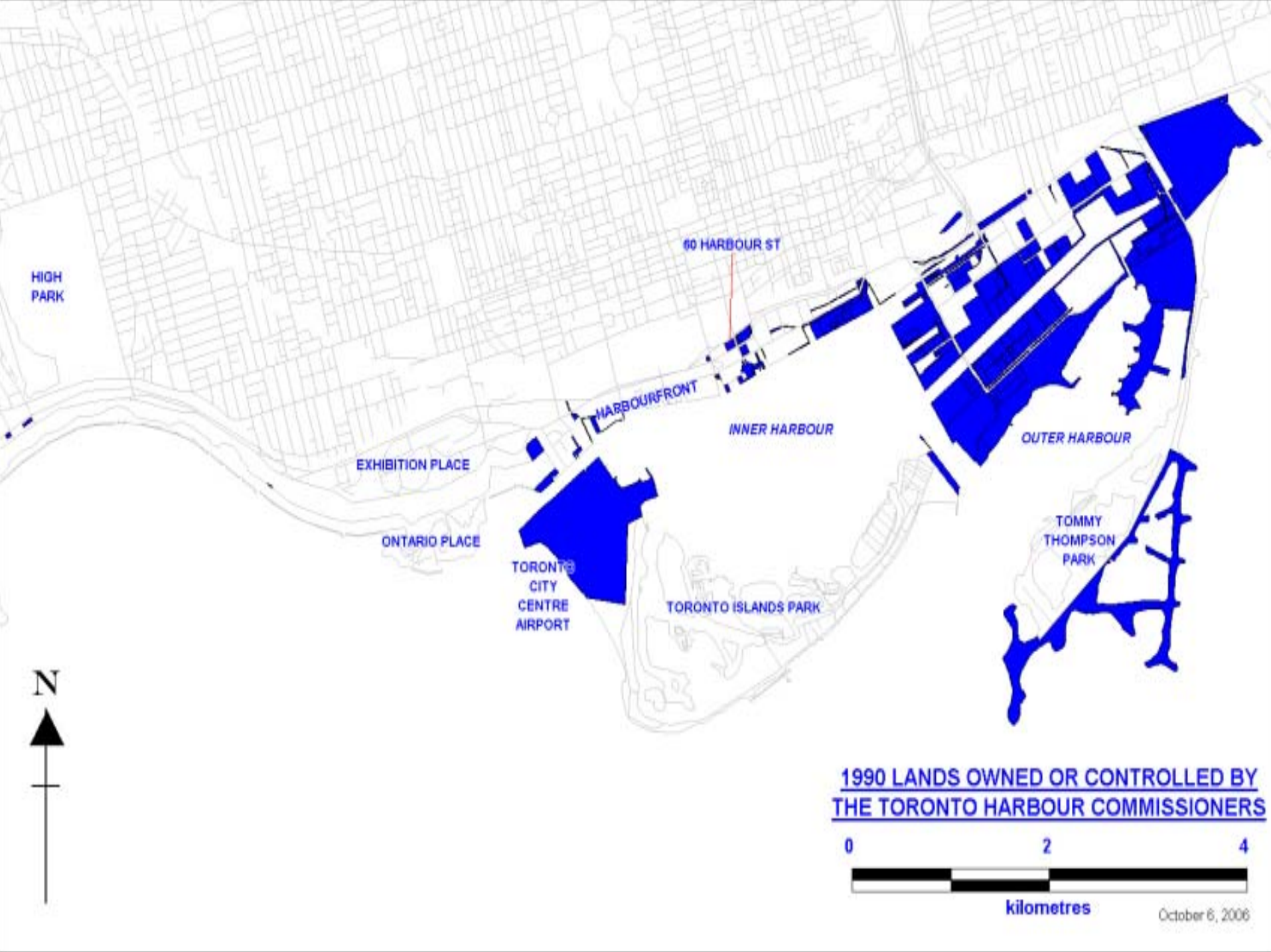
2005 Nov.								3
2005 Dec.								2
2006 Jan.								2
2006 Feb.								2
2006 Mar.								2
2006 Apr.								2
2006 May.								2
2006 June								1
2006 July								1
2006 Aug.			**K. Scaldwell** (first term, current)	**C. Henley** (first term, current)	**D. Reid** (first term, current)	**C. Turner** (first term, current)	**C. Watson** (first term, current)	6
2006 Sept.								6

Legend:

- **Member**
- **Chair**
- **Vacant**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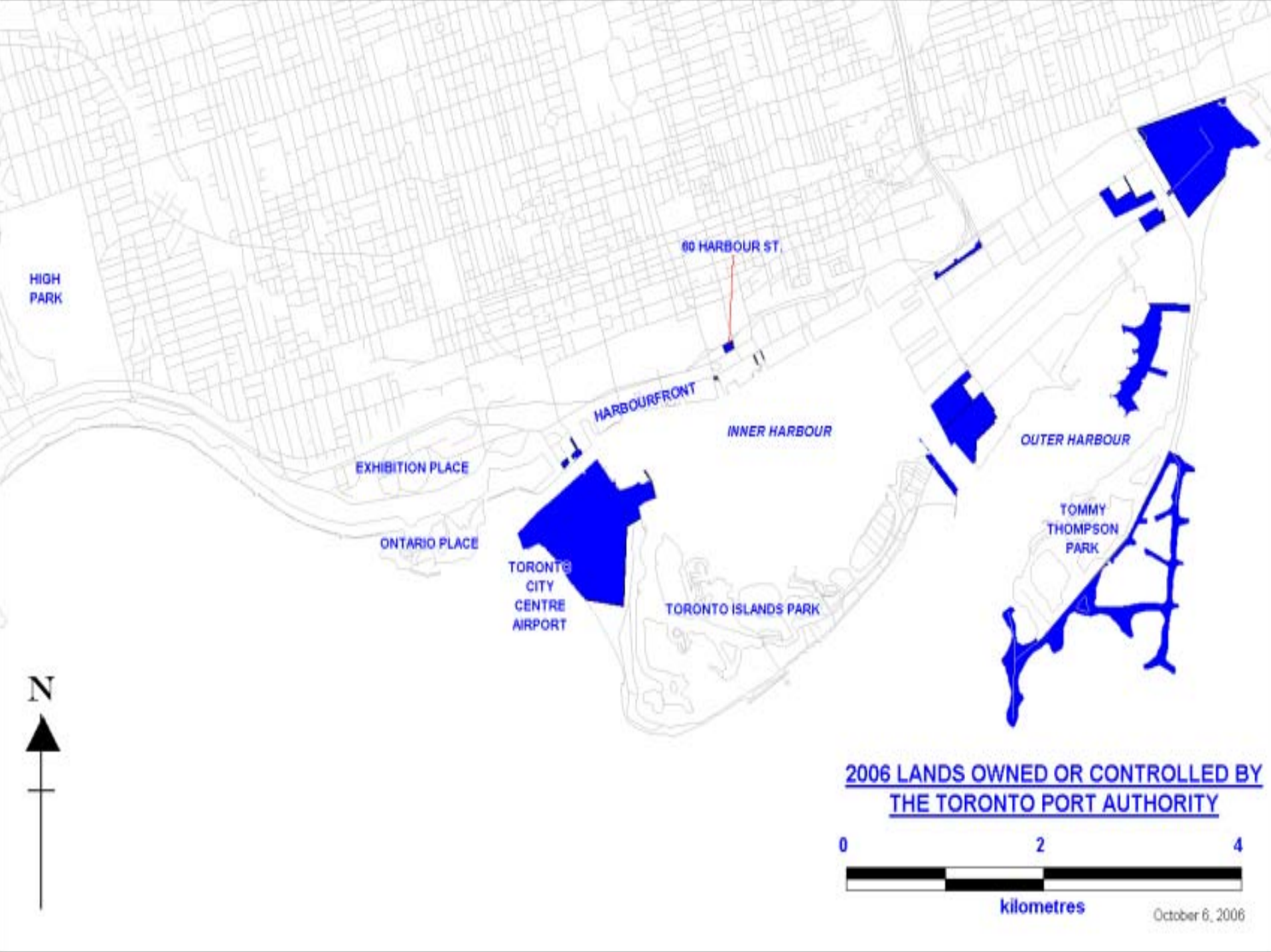
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October 6, 2006