



December 7, 2007

Ms. Robin Crombie  
128 Hepbourne Street  
Toronto, ON M6H 1K7

**Re: Oshawa Harbour**

Dear Robin,

Following is Lake Ontario Waterkeeper's recommendation regarding the revitalization and protection of the Oshawa Harbour. We trust that you already have a thorough understanding of the issues, concerns and stakeholders involved in the Harbour's issues; for this reason, we have not provided any background information. If you need elaboration or clarification on any of the issues below, please do not hesitate to contact us at an time.

Drawing on Lake Ontario Waterkeeper's involvement in Harbour issues from 2003-2007, expertise on Great Lakes issues, knowledge of governance and Port Authority systems, and grassroots networks in other jurisdictions, we respectfully identify the following needs and reasons for action:

## **PART I: GOVERNING THE OSHAWA HARBOUR**

Oshawa Harbour needs a new governance structure, one with the authority and the resources to protect and develop the Harbour for the public interest well into the future. An effective, responsive governance structure should include the following elements:

### **1. Guaranteed minimum protections**

Today, because of overlapping jurisdictions, federally-related activities do not respect provincial or municipal standards. The Province of Ontario is not an active defender of the Harbour. The City of Oshawa can rarely negotiate from a position of strength. This results in a lack of accountability, conflict between parties, and uncertainty. Unless there is clarity surrounding the issue of jurisdiction and a commitment to a vision of basic protection for

the Oshawa Harbour, there can be no resolution of jurisdictional conflict and no guarantee that parties will not engage in a "race to the bottom"<sup>1</sup>.

Regardless of who owns, operates, or monitors the state of the Oshawa Harbour, the community needs a set of clearly defined baseline standards. These standards are not planning objectives or negotiated land uses. Rather, they describe what principles guide every decision and what rights cannot be traded away or sacrificed at any time.

One way to create guaranteed minimum protections is to enshrine them in an Accord between the Government of Canada, the Government of Ontario, the Region of Durham, and the City of Oshawa. Such an Accord would commit all parties to the protection and sustainability of the Oshawa Harbour. It would not describe land uses, ownership structures, development priorities or any other changeable matters of policy.

The Accord would simply guarantee the protection of the Harbour's fundamental assets, such as:

- public access to navigation
- protection of fish and fish habitat
- protection of migratory birds and bird habitat
- water quality in the harbour and its feeder rivers
- sediment quality.

An Accord should also commit each party to the effective enforcement and applicability of the environmental and planning legislation and regulations of all levels of government - regardless of "jurisdictional" considerations. An Accord should also bind parties to fair and transparent decision-making processes and the principles of natural justice.

## **2. A governance structure with a public interest mandate**

Private ownership of harbours has been regarded as a violation of the public trust doctrine for well over a century. While the outright sale of the Oshawa Harbour is not being proposed, control over the Harbour by an arms-length agency such as a Port Authority is only a modest improvement.

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<sup>1</sup> See, for example, the 2003 Transport Canada Guidance Document indicating that, "An advantage afforded to CPAs through agent status is greater protection from the application of municipal taxation and zoning, provincial environmental laws and other non-federal regimes." Available online at <http://www.tc.gc.ca/pol/en/acf/tp13937/tp13937e.pdf>

There are a number of unique characteristics of the Port Authority structure that prohibit a Port Authority from operating in the public interest. In particular, the definition of the term “user” found in s. 5 of the *Canada Marine Act*: “... a person that makes commercial use of, or provides services at, the port”. This limited definition of user is problematic because it envisions harbours only as transportation hubs, primarily for shipping and railways. This vision ignores completely and absolutely recreational and environmental importance of harbours to local residents by excluding these interests from the mandate of port authorities. This definition appears to remain unchanged in Bill C-23, *An Act to Amend the Canada Marine Act, the Canada Transportation Act, the Pilotage Act, and other Acts in consequence*.

For this reason, a new governance structure with an unequivocal public interest mandate is required.

### **3. A governance structure with expertise and resources**

Wise management of the Oshawa Harbour requires a wide variety of skill sets, including:

- land use planning
- security
- environmental protection
- environmental remediation
- public consultation
- local, national, and international communications
- transportation planning

There is no one level of government that excels in all of these areas.

### **4. A multi-stakeholder governance structure**

There is no one level of government that is an ideal owner/operator for the Oshawa Harbour:

- The City, while most closely connected to the interests of the community, lacks the resources to develop, manage, remediate, and protect the Harbour indefinitely.
- The Province of Ontario has little expertise in the area of harbour management and has shown little interest in assuming control of the Oshawa Harbour.

- The Government of Canada is not being held accountable through the parliamentary process, because the issues affecting Oshawa Harbour are too local and too chronic to dominate a federal election.

Only a blend of governments can secure the expertise, resources, and accountability described above.

## **5. A governance structure with accountability**

As noted above, the Government of Canada (and most likely the Government of Ontario), is too far removed from the local community to be held accountable for its actions through the political process. It is neither likely nor desirable that the Oshawa community resort to national political advocacy campaigns in order to address what are often local issues.

In one alternative, federally, provincially, and municipally appointed Trustees could be blended with an equal number of directly elected Trustees to create a governance committee for the Oshawa Harbour. Appointed Trustees contribute expertise and secure government support while directly elected Trustees ensure public support and direct community connection. If all Trustees are elected, it is not guaranteed that all the necessary skill sets will be represented and it is possible that staff (should there be staff) may dominate the policy-making process. If all Trustees are appointed, there is no guarantee of accountability to the community and local concerns may once again be overshadowed by provincial and federal priorities.

## **6. A governance structure with powers**

In order to function effectively, the new governance structure must have the authority it needs, including the power to:

- retain experts
- hold hearings
- commission studies
- enforce environmental laws
- enforce municipal planning rules

## **7. A governance structure with obligations**

In order to satisfy the public interest, the new governance structure must have certain obligations consistent with the principles of natural justice, including:

- keeping minutes of meetings
- holding meetings publicly
- providing notice and meaningful consultation during decision-making
- issuing written decisions
- issuing regular reports to the public

## **8. Guaranteed funding**

None of the elements of a governance structure described above can be implemented effectively without secure, long-term funding for the Oshawa Harbour. Funding cannot be tied solely to business development and it cannot be supplied by one level of government alone. Every level of government has a unique role to play in the protection and revitalization of the Oshawa Harbour, requiring some funding commitments from each party. Furthermore, control of funds by one level of government may undermine other accountability mechanisms and weaken this unprecedented partnership.

That said, the federal government has controlled the Oshawa Harbour for decades. It has benefited from development projects and cost-externalization behaviours. Furthermore, it expects to continue to benefit from shipping, rail and industrial activities in the future. The Government of Canada should not, therefore, expect the province and the city to shoulder an equal financial burden. Rather, the federal government should contribute significantly to the new governance structure. A more detailed funding arrangement needs to be determined once a governance model is defined.

## **PART II: ACT NOW**

We are currently at the end of an era. Prior to European colonization, the Great Lakes were some of the most vital, naturally abundant waterways on the planet. Over the last three centuries, the lakes and the land around them have been stripped of natural resources: trees, soil, minerals, fish, fowl and more. In the last century, the Great Lakes saw rapid

industrialization that replaced the lakes' natural assets with man-made problems such as persistent toxins in water, sediment, and wildlife.

Lake Ontario, perhaps more than any other Great Lake, is in peril. From Durham to Hamilton, nearly all coastal wetlands are gone. Stocking programs keep fish in the lake because natural reproductive cycles are failing. Water quality problems worsen year after year resulting in drinking water advisories, beach postings, and new infrastructure pressures.

Navigation and fishing - two of the oldest rights known to humans - are both threatened in the Oshawa Harbour. For centuries, every person has had a right to travel via the water. In 2003, that right was taken away from the people of Oshawa. Similarly, every person has had a right to take fish from the waters and feed his or her family. Without access to the shoreline, moorings for fishing vessels, clean water, or fish habitat, the age-old right to fish has been lost.

Lake Ontario has so few wild places and so little of its wealth left. If government does not choose to protect and restore the Oshawa Harbour, it will choose to condemn forever an entire bay, the mouths of two rivers, centuries of history, and one rare, remaining haven.

Though it seems as though conflict is at a peak, competition for this scarce resource will only increase in the coming years. Here are just a few of the factors that will competition over the Harbour in the foreseeable future:

### **1. Pressures from the shipping industry**

Around 2004, the St. Lawrence Seaway Management Corporation, launched the "Highway H<sub>2</sub>O" campaign. This branding exercise is designed to promote the St. Lawrence Seaway system as an environmentally friendly, commercially viable transportation mode. Shipping, however, has had a devastating impact on the Great Lakes. The "Highway H<sub>2</sub>O" campaign notwithstanding, the Great Lakes have a limited capacity to support shipping.

Some examples of shipping impacts on the Great Lakes include:

- 170 invasive species on the Great Lakes, 43 of which were introduced after the opening of the Seaway and 73% of which can be attributed to ballast water discharges from ships. Invasive species from ship's ballast have destroyed native fish populations, create problems for industry, and changed the natural balance of various ecosystems. Experts

estimate the costs of existing invasive species on the Great Lakes at a minimum of US \$200-500 million per year <sup>2</sup>.

- A practice known as “cargo-sweeping”, in which ships dump extra cargo or debris overboard, introduces thousands of tons of pollutants into the Great Lakes each year:  
*Canadian and US shipping companies pump an estimated 2,500 tons of cargo residue into the lakes each year during 11,000 ship transits, according to a 1999 report by the US National Oceanic and Atmospheric Administration. Data from a study commissioned by the US Coast Guard in 2003 suggests that 80 percent of the dumping takes place in shipping lanes that pass through sensitive-species habitats. Its numbers imply that 45,000 to 64,000 tons of cargo—the equivalent of 6,000 to 9,000 garbage-truck loads—has been dumped into the lakes since the practice started. And nearly all the discharges qualify as pollutants under guidelines of the Ontario government, according to a 1993 study commissioned by the Canadian Coast Guard<sup>3</sup>.*
- Shipping can cause shoreline erosion, premature ice break up, scouring, and the destruction of precious coastal wetlands.
- Dredging of the Seaway to accommodate ships creates tons of contaminated sediment. In order to minimize disposal costs, Canadian Port Authorities and Harbour Commissions tend to amass the contaminated sediments on land or in water within their jurisdiction. Such “confined disposal facilities” contain pollutants such as PCBs, PAHs and metals that can be consumed by birds, fish, and other wildlife.

## 2. Population growth, sprawl and the demand for land

Durham Region is expected to grow dramatically over the next two decades. The 407 highway extension and energy development proposals such as the new Darlington Nuclear Power plant and adjacent energy-from-waste facility are expected to fuel a population growth rate that already exceeds the national norm. As the Region grows, two things will change for the Oshawa Harbour. First, demand for the harbour lands will increase. Second, opportunities for alternative development concepts and revenue streams will emerge.

In the face of change, it appears as though more and more important policy decisions are being made behind closed doors. Many of the monied interests with a stake in the issues described above have already launched lobbying campaigns. A few examples include:

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<sup>2</sup> Taylor, Dr. John C. and James L. Roach. *Ocean Shipping in the Great Lakes: Transportation Cost Increases That Would Result from a Cessation of Ocean Vessel Shipping*. August, 2005.

<sup>3</sup> Roslin, Alex. “Sweeping it Under”, *THIS Magazine*. September - October 2005.

- The Oshawa Port Users Group has hired Crestview Public Affairs, Inc to lobby a number of government departments. The Group's members include McAsphalt Industries, CCL Steel, International Longshoremen's Association Local 1997, and The Miller Group<sup>4</sup>.
- The Association of Canadian Port Authorities is represented by Oshawa Harbour Commission CEO Donna Taylor. The Association is currently lobbying a wide variety of federal government agencies regarding shipping and environmental matters<sup>5</sup>.
- The Shipping Federation of Canada is also registered to lobby the Government of Canada on a variety of environmental, health and safety matters<sup>6</sup>.

By contrast, few or none of the public interest stakeholders who would have an interest in the issues described above have any private access to decision-makers. They are not well-financed, yet they represent vital and legitimate harbour "users": boaters, neighbours, fishers, wildlife, etc.

### **3. Improved knowledge today, loss of knowledge tomorrow**

We know and appreciate more about the environmental and socio-economic value of clean waterfronts today than in recent years. Particularly with regard to the need for increased conservation, the desire tax revenues associated with real estate development, and a desire to eliminate toxins. In many ways, this knowledge contributes to a kind of "waterfront renaissance" taking place in several Lake Ontario communities (indeed, several communities around the globe).

At the same time, with each day that passes, there are fewer individuals and fewer organizations left who remember the Great Lakes as they once were: clean, plentiful. One of the greatest threats to Great Lakes restoration is the loss of memory, a kind of acceptance of a status quo that includes contaminated sediments, polluted beaches, fish consumption advisories and so on. If the next generation is not taught what "clean" is, contaminated areas like the Oshawa Harbour will never recover. And contaminated

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<sup>4</sup> See Lobbyist Registration System:  
[https://strategis.ic.gc.ca/app/secure/ec/lrrs/registrationSummary.do;jsessionid=00006jFChmSnFnD0PIRqUV-D\\_HC:12edujrta?browse=1&language=eng&regId=101610](https://strategis.ic.gc.ca/app/secure/ec/lrrs/registrationSummary.do;jsessionid=00006jFChmSnFnD0PIRqUV-D_HC:12edujrta?browse=1&language=eng&regId=101610)

<sup>5</sup> See Lobbyist Registration System:  
[https://strategis.ic.gc.ca/app/secure/ec/lrrs/registrationSummary.do;jsessionid=00006jFChmSnFnD0PIRqUV-D\\_HC:12edujrta?browse=1&language=eng&regId=95358](https://strategis.ic.gc.ca/app/secure/ec/lrrs/registrationSummary.do;jsessionid=00006jFChmSnFnD0PIRqUV-D_HC:12edujrta?browse=1&language=eng&regId=95358)

<sup>6</sup> See Lobbyist Registration System:  
[https://strategis.ic.gc.ca/app/secure/ec/lrrs/registrationSummary.do;jsessionid=00006jFChmSnFnD0PIRqUV-D\\_HC:12edujrta?browse=1&language=eng&regId=88827](https://strategis.ic.gc.ca/app/secure/ec/lrrs/registrationSummary.do;jsessionid=00006jFChmSnFnD0PIRqUV-D_HC:12edujrta?browse=1&language=eng&regId=88827)

communities like the Oshawa community will receive fewer protections than other Canadians.

## **CONCLUSION**

In light of Lake Ontario's vulnerabilities, the new and emerging threats, the potential for increased conflict, and Canadians' expectation of good governance, Waterkeeper recommends that a new governance structure be found - one that has the authority and the resources to protect and develop the Harbour in the public interest well into the future.

Thank you for your consideration.

**SUBMITTED IN TORONTO, ONTARIO THIS 7th DAY OF DECEMBER, 2007.**

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Mark Mattson  
Waterkeeper & President  
Lake Ontario Waterkeeper

### **Encl:**

- Submission by Lake Ontario Waterkeeper to Mr. Roger Tasse, regarding his review of the Toronto Port Authority. August 18, 2006.
- Alex Roslin, "Sweeping it Under", *THIS Magazine*. September - October 2005.

### **Governance Resources:**

- California Code of Regulations:  
[http://www.dfg.ca.gov/ospr/law/misc\\_regs\\_laws/governing\\_regs.swf](http://www.dfg.ca.gov/ospr/law/misc_regs_laws/governing_regs.swf)
- Los Angeles/Long Beach Harbor Safety Committee:  
<http://www.mxsocial.org/pdffiles/By-Laws%20for%20LA-LB%20HSC%20-%20Rev%20Feb%201%202006.pdf>
- Puget Sound Harbor Safety Committee:  
<http://www.pshsc.org/>
- San Francisco Harbour Safety Committee:  
<http://www.sfmhsc.org/>