

## Toronto ferry deal raises legal issue

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(February 5, 2006) — The Toronto Port Authority has always considered Rochester to be the financial safety net for the now-dead ferry operation, according to a Port Authority official.

That stance, if upheld by courts, could leave the city on the hook for any outstanding debts under a 14-year lease agreement between the Port Authority and the Rochester Ferry Co., the entity established to own and operate the ferry.

"As we were doing (the contract), they wanted to set up the Rochester Ferry Co. and we wanted something behind the agreement," said Ken Lundy, the engineering and

### ***What's at stake***

Rochester taxpayers could be obligated to pay nearly \$3 million to the Toronto Port Authority if the city is responsible for remaining years on the 14-year lease. If the issue goes to Canadian courts, the losing side probably would have to pay all legal costs, too.

operations chief for the Toronto Port Authority.

The 2005 lease agreement, which set the costs and terms for the ferry service to use a recently built terminal in Toronto, says nothing about obligations on Rochester's part.

That fact has created a somewhat ambiguous legal question for current city officials, who are trying to determine whether the city is responsible for lease payments once the ferry company disappears.

Former Rochester officials involved in the contract negotiations contended that the city wouldn't be responsible should the Rochester Ferry Co., or RFC, be dissolved, records show.

"The city of Rochester, notwithstanding the expressed desires of the (Port Authority), is not guaranteeing the RFC's obligations, and bears no obligations in the event of a default by RFC," according to minutes from a June 2005 Rochester Ferry Co. board meeting.

Former corporation counsel Linda Kingsley said that, as the minutes indicate, Port Authority officials wanted the city to be a guarantor under the lease, but the Rochester Ferry Co. refused. In turn, she said, the city has no financial risk under the deal, which required the ferry company to pay \$250,000 (Canadian) a year to

the Port Authority for docking and terminal use. That could add up to almost \$3 million (American) for city taxpayers.

The contract also stipulates charges for the number of passengers and cars using the terminal but, without the ferry service, those costs would cease.

Mayor Robert Duffy announced in January his decision to pull the plug on the ferry service, saying the costs and risks were too great.

The Rochester Ferry Co. will continue to exist until the ferry is sold, after which it likely will be dissolved. And then city officials will have to determine whether the city is responsible for the millions that could be owed if the Port Authority wants payment for the remaining 13 years on the lease.

"We do believe that the city of Rochester backs that agreement," Lundy said.

Corporation counsel Thomas Richards said in a recent interview that the city hasn't ruled out that it might have to make payments to the Port Authority.

"There is a potential obligation in terms of the Toronto lease," he said.

### **Protection from liability?**

For now, the contractual issues are largely hypothetical because the Rochester Ferry Co. still exists and its payments are current. Plus, City Council recently approved legislation from the Duffy administration to set aside more than \$9 million for outstanding ferry-related costs, including costs that may be owed to the Port Authority and Bay Ferries Great Lakes LLC, which was contracted to operate the ferry. Last week the city pulled \$3.2 million from that fund to reimburse Bay Ferries for debts it built up with the ferry operation.

City officials are trying to determine their obligations under the lease, said communications director Gary Walker.

Operating under New York laws, the city created the Rochester Ferry Co. as a limited liability company, or LLC. Common in the private sector, an LLC provides the city with a level of protection from liability.

The lease agreement, if ultimately the center of a legal imbroglio, could test just how much protection there is.

City taxpayers served as guarantors for agreements between Bay Ferries and the Rochester Ferry Co., as well as for the \$40 million loan the ferry company secured from the Export Finance and Insurance Corp., an arm of the Australian government, to buy the ferry.

But no such guarantee was etched into the Toronto terminal lease agreement.

The deal did establish mediation to resolve any disputes. Should those attempts fail, outstanding legal issues would be resolved in Canadian courts, according to the agreement.

That fact could give city officials pause. In Canada, the losing side of a civil case typically pays all legal bills for both sides, said James Harbell, a Toronto-based lawyer who specializes in municipal law.

### **'Piercing the veil'**

The fact that the lease contract does not state that the city guarantees unpaid costs is not, by itself, a legal safeguard, according to lawyers in both Canada and the United States.

In corporate law, there is a term known as "piercing the corporate veil," which means a successful legal attempt to show that a legally established entity is, in essence, no different from its creator.

The same concept carries over to municipal law, both in Canada and the United States.

If it could be proven that the Rochester Ferry Co. was nothing more than an arm of City Hall, then a case could be made that the city is responsible for debts, lawyers say.

In New York or Canada, however, it's not difficult to create a stand-alone LLC immune from liability, the lawyers say.

"It really doesn't take much to maintain enough difference between the two to avoid the 'piercing of the veil,'" said William Moehle, a local lawyer who serves as town attorney for Brighton.

The Rochester Ferry Co., for instance, maintained its own financial and banking records and operated at the behest of its board. Those steps could be enough to shield the city, said lawyer Charles Valenza, who served in the 1980s as Monroe County attorney.

Of course, city officials hope the legal issues stay academic. And officials with the Port Authority and the city appear inclined to try to resolve any issues amicably.

But should the issue make its way to the courts, the fight could provide fireworks — arcane legal fireworks.

"It's one of those things that's almost like a law school exam problem," said Jeff Wilker, a Toronto-based lawyer who specializes in municipal law.

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