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# The Oshawa Express

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## THE COST OF ETHANOL

*Express Investigation*

By Joel Wittnebel  
The Oshawa Express

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Bad faith, broken promises and a plan up in smoke

## Incinerator disputes settled with Covanta

**\$1.75 million for Durham/York regions**

By Dave Flaherty  
The Oshawa Express

Covanta has agreed to pay \$1.75 million to the regions of Durham and York in order to satisfy 2016 obligations pursuant to the Durham York Energy Centre (DYEC) project agreement.

The two sides spent much of this year negotiating a settlement on disagreements over the DYEC annual reconciliation for 2016.

Regional council gave its final approval of the settlement earlier this month.

As reported earlier in The Oshawa Express, areas of contention within the 2016 reconciliation included losses and increased costs incurred last year due to Covanta's failure to meet performance requirements.

It's still unclear how much of

See **COVANTA** Page 8

## Tax scams on the rise in 2017

By Dave Flaherty  
The Oshawa Express

It's labelled as the most wonderful time of the year, but it is also likely the busiest, and the hustle and bustle of the holiday season can leave some residents more susceptible to becoming a victim of the many scams being perpetrated by criminals in the community.

According to the Durham Regional Police, fraud investigators are once again seeing a rise in the efforts to scam residents out of

money under the guise of the Canadian Revenue Agency (CRA).

Close to home, a Clarington man was recently taken for \$17,000 by such a scheme.

The victim said he was contacted by an individual claiming to represent the CRA who said he owed \$12,000 in back taxes.

After sending that money, he was further instructed to purchase \$4,000 in gift cards to cover the costs of withdrawing his arrest warrant.

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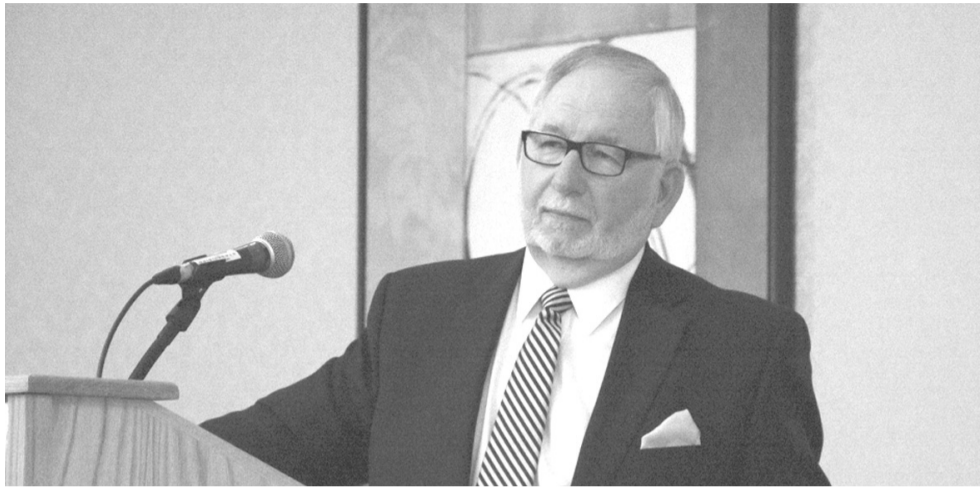
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# and a plan up in smoke



Photos by Joel Wittnebel/The Oshawa Express

Chair of the Oshawa Port Authority board Gary Valcour, above, declined to comment for this story. Resident Larry Ladd, far left, and Councillor Nester Pidwerbecki have been long-time vocal advocates against the ethanol plant.

pay the ground rent of \$10, had failed to deliver monthly wharfage and tonnage totals along with an auditors statement of those totals, and most significantly, had failed to deliver on the proper insurance requirements.

This letter, in a sense, would end up costing the OPA more than \$4 million.

## The OPA's concerns

After receiving the OPA's letter, O'Connor acted fast. Three days later, he met with Valcour to discuss the issues, noting that clearly the first three offences were fairly minor, due to the fact that wharfage totals and auditor statements could not be delivered since the facility had yet to be constructed.

Discussing the issues over coffee, O'Connor asked Valcour if perhaps an exemption could be made on the insurance requirement until the facility was constructed. It was a decision for the board to make, Valcour said.

A meeting was scheduled for Aug. 5 to allow O'Connor to present an update to the OPA Board. Valcour also took the chance to share his concerns about the project and what would be expected by the Board at the meeting.

"Mr. Valcour expressed the Board's frustration that the Project did not appear to be advancing, which was of a particular concern in light of the public attacks on the OPA and Board members," the ruling reads. "Mr. Valcour also stated to Mr. O'Connor that, in his view, Mr. O'Connor needed to assure the Board that not only would the defaults be fixed but that, in the bigger scheme of things, there was real progress in the Project. The Board wanted assurance that this Project was going to happen."

However, come Aug. 5, O'Connor's presentation was met with nothing but crickets.

"It is clear that the board was very disappointed with Mr. O'Connor's report on the status of the project. Indeed, Ms. Taylor admitted in cross examination that if Mr. O'Connor's presentation had been more impressive, then the Board would have likely granted the exemption from insurance until construction and would not have terminated."

It's safe to say the board wasn't convinced. On Aug. 7, 2014 the Notice of Termination was sent to FarmTech.

## Off to arbitration

The path forward following the termination notice was written in the stars. Or rather, it was written into the lease agreement, which noted that should such a disagreement arise that couldn't be settled between the two parties, it would immediately trigger arbitration.

And while the eventual outcome of the

arbitration is already known, with the OPA owing \$4,189,965.25 to FarmTech, it could have been worse for the OPA.

While the arbitrator eventually settled on making the award based on the lost time FarmTech spent in court, it spared the OPA the alternative, which would have been an amount based on the lost potential revenues over the course of the 40-year lease of the ethanol plant, estimated at upwards of \$65 million.

"(FarmTech) sought damages caused by the (OPA's) breaches in an amount up to \$65 million based on a discounted cash flow analysis of the future profits from the ethanol plant," the ruling reads.

Of the four issues raised by the OPA in their initial letter, the insurance issue became the crux of the arbitration.

The OPA argued that without the proper insurance in place, they were liable for anyone getting hurt on the property, a growing concern due to the amount of people starting to protest the proposed development at the time.

However, Judge found that the OPA overstated the importance of this issue, noting that along with the option put forward by FarmTech for a temporary exemption, the OPA also had the choice, under the lease, to acquire their own insurance policy for the land and bill the cost back to FarmTech.

On the other hand, this all seems beside the point as the OPA's own insurance coverage protected them in the event of someone getting hurt on the land.

With that aside, the OPA did not provide due consideration to FarmTech's proposal, which acting under good faith in the lease, they were obligated to do, Judge states.

"Mr. Valcour and Ms. Taylor and the OPA Board dismissed the FarmTech insurance proposal as a non-proposal, a conclusion which was reached in their minds with little or no consideration and was reinforced largest by their assessment of Mr. O'Connor's project update as being completely disappointing and inadequate," Judge writes.

And it is this lack of communication that eventually led to the collapse in any case the OPA had. Following the presentation by O'Connor on Aug. 5, if the OPA board had provided a simple yes or no, O'Connor could have acted accordingly. In fact, despite the termination notice, he had the proper insurance in place on Aug. 8.

"Under the circumstances, any reasonable person would conclude that a timely response would be given by the Board. It is also reasonable to conclude that, in the event of a denial of the request, a short extension would be given to meet the insurance requirement forthwith. Otherwise, it would appear that the OPA was misleading FarmTech over the

OPA's willingness to give due consideration to the proposal and, as a result, that the OPA was intentionally setting up FarmTech to terminate the Lease," Judge writes. "Based on the evidence, this Tribunal has no hesitation in finding that the OPA, acting through its Board, breached its duty of good faith to FarmTech under the Lease when it delivered the Notice of Termination."

## The lost money

The original seed money for the FarmTech project came in large part from the O'Connor family, along with local farmers through a FarmTech Farmers Cooperative set up by O'Connor.

Along with that, FarmTech borrowed extensively, including \$3.2 million from the O'Connor Group, along with hundreds of thousands of dollars from other members of the O'Connor family and other named individuals.

And while almost all of FarmTech's potential debts were included as part of the damage award, one investment was excluded, that being a questionable investment with a Netherlands company called Apple Seed Investments, a group that allegedly provides start-up funds in exchange for an investment.

In total, FarmTech paid \$234,980 in May of 2008, \$494,685 in October 2008, and \$104,002 in November 2009 for a total of \$833,667.

All of this money was never seen again.

"After receiving the funds from FarmTech, Apple Seed apparently provided letters of intent and a memorandum of understanding regarding the project financing. However, no financing was ever obtained from Apple Seed. Invested monies were never returned. Mr. O'Connor confirmed that this money was lost. Unfortunately, none of the documentation and agreements relating to this investment were adduced in evidence in this arbitration," Judge writes. "The absence of documentary evidence about this Apple Seed Investment suggests that this was a risky structure to obtain Project financing at the time the investment was made. It seems highly unusual that such a significant investment into a fund would or should be a pre-requisite to obtaining legitimate project financing."

In addition, a pair of other payments, one for \$169,086 in June of 2009 and another for \$37,436 in July of 2009, both appeared to be in the same manner as the Apple Seed investments, but were not listed as such. However, FarmTech provided no evidence to the contrary.

For that reason, all of these funds, amounting to over \$1 million, was removed from the eventual amount owing by the OPA.

"That loss was not an expenditure by FarmTech incurred in the normal course of searching for and negotiating financing," Judge writes. "Based on the limited evidence made available by FarmTech, this was a highly unusual payment in the nature of a gamble which did not pay off."

## Further troubles

The debt has put the OPA into a bit of financial trouble, one that had the auditor of their 2016 financial statements a little worried, and noting the settlement and associated legal fees "casts significant doubt upon the Port Authority's ability to continue as a going concern."

"Overall, it's distressing in the sense that you don't like to see that sort of number, but at the same time, it's a one-off, one item issue," Valcour previously told The Oshawa Express. "The board is looking at it, we're talking to all of our stakeholders and reviewing what our options are."

One of those potential options was made public during a council meeting in October,

when the City of Oshawa's representative on the OPA board, Bruce McArthur, speaking to council, noted that a propane plant had expressed interest in the land.

With that said, it wasn't being considered as a realistic possibility.

"I think the port authority may have learned its lesson," McArthur said. "It will, in all probability, not go forward."

A potential good thing, as even with the arbitration award settled, it would appear the FarmTech issue is yet to be concluded.

The OPA has yet to pay a dime of the arbitration award to FarmTech, and the lawyers are pushing forward.

"As you know, FarmTech successfully sued the Oshawa Port Authority in 2016 after the Port Authority terminated a Lease Agreement to build a \$200 million state-of-the-art ethanol facility on Port lands. FarmTech expected to create over 300 jobs in Oshawa through the construction and operation of the facility," writes Carole Piovesan, a lawyer with McCarthy Tetrault LLP who is representing FarmTech. "The OPA has not paid any amount of the award, despite repeated requests. Accordingly, FarmTech is seeking to enforce the award before the Superior Court."



“Invested monies were never returned. Mr. O'Connor confirmed that this money was lost. Unfortunately, none of the documentation and agreements relating to this investment were adduced in evidence.”

John Judge  
Arbitrator

# Bad faith, broken promises

*Documents reveal the story of what happened between FarmTech and the Oshawa Port Authority*

By Joel Witnebel  
The Oshawa Express

THE COST OF ETHANOL

The shroud of secrecy at Oshawa's waterfront is starting to lift, and it tells a troubling tale of mismanagement, failed investments and poor decisions that not only led to the end of the proposed ethanol plant, but now has the Oshawa Port Authority staring up at a more than \$4 million debt.

After obtaining a copy of the arbitrator's ruling in the case between FarmTech and the Oshawa Port Authority (OPA), a decision that has been denounced with confusion by the OPA, The Oshawa Express is now able to piece together a portion of what really happened that eventually led to the end of the ethanol project and provide the reasoning for what the port now owes the would-be operators of the defunct plant.

In essence, this story answers one commonly asked question: how did we get here?

This investigation was completed using court documents obtained by The Oshawa Express via confidential sources, past reporting by The Express and comments from OPA board members and FarmTech lawyers.

When approached for comment, Donna Taylor, port of Oshawa president, CEO and harbourmaster, deferred comment to chair of the port authority board Gary Valcour. Valcour did not respond to questions from The Express, noting that as litigation is ongoing, it would be inappropriate for him, or any OPA board member to comment. Several board members contacted by The Express to comment for this story also declined to do so.

"Under the circumstances, I believe it would be inappropriate to comment. That would be true for all my board colleagues," Valcour states in an emailed response.

FarmTech president Dan O'Connor declined The Express' request for an interview, instead choosing to provide a statement through his lawyers.

## The Promised Land

It all started with an idea in 2006.

At that time, O'Connor sold his previous business and began investigating a new venture in the ethanol industry, spurred on by his roots of farming, growing up on the family farm outside of Ajax.

He began considering a number of locations in Southern Ontario for the proposed plant, and in 2007 he set his sights on the Oshawa waterfront, a location with proximity to rail, air transport and highway shipping corridors. That year, he met with Taylor, who appeared quite open to the idea, and took it back to the decision makers, the OPA board, with apparent gusto.

"Indeed, Ms. Taylor promoted the project to the Board due to the significant financial benefits which it could bring, including significant increase in cargo traf-



fic through the Oshawa Port," the arbitration ruling reads. "Ms. Taylor and the (Harbour) Commission were interested in leasing the undeveloped Crown lands to maximize the economic benefits from the property for the Commission and the local community."

And while a lease wasn't officially signed until 2013, well after the project was made public, much to the chagrin of residents and those at city hall, it appears that the ethanol project was almost a go right from 2007.

Documents presented in court show a number of annual option letters signed by the Oshawa Harbour Commission and eventually the OPA that state FarmTech "was given, and continued to enjoy, an option to lease certain port industrial lands for the purpose of constructing a biofuels facility."

"It was understood by the OPA, and in particular Mr. Valcour, that the offers to lease established a legal obligation on the part of the OPA to lease the lands to FarmTech for the project."

This belief could provide some missing context to the signing of the lease with FarmTech despite the strong public backlash that had been ongoing against the ethanol plant, not only from the City of Oshawa, residents and local conservationists, but also other levels of government, who noted the deal was fraught with political cronyism.

O'Connor is the brother of Tim O'Connor, who was a member of the Conservative Riding Association, along with port authority board member Chris Kluczewski and Valcour, who was previously the president of the Conservative Riding Association in Whitby-Oshawa.

Starting in 2007, FarmTech began the work to achieve all the necessary approvals for the project, and the tricky task of acquiring investors to back the project. According to O'Connor's estimations, he anticipated having \$100 million in equity financing, and another \$100 million in debt financing before moving ahead



with the project. The eventual failed search for funding took him across the world, and led to the loss of hundreds of thousands of dollars in overseas investments. However, that's getting ahead of the story.

"It's clear on the evidence that FarmTech and O'Connor did not themselves have the financial wherewithal to finance and build the Project and were looking for investors to provide Project financing, both equity and debt, well before the signing of the Lease," writes arbitrator John Judge. "When the lease was signed, it was also clear that FarmTech did not have its investors and financing in place to be able to start construction."

## Breach

O'Connor notes that due to the 2008 recession, acquiring the proper financing for the ethanol plant was made difficult and while significant efforts were undertaken, including trips to Europe, Hong Kong and China, no financing was secured prior to the signing of the lease in 2013.

O'Connor also blames the transition of the Oshawa Harbour Commission to the Oshawa Port Authority as part of the problem, and also points to the strong local opposition as scaring off potential investors.

However, the legal right to the land did nothing to help their situation. FarmTech and O'Connor continued to have issues acquiring backers for the plan, and a year later, there was still no financing in place to support the project.

According to the court docu-



ments, the OPA was starting to get concerned.

In June of 2014 they obtained a legal opinion, which discovered that FarmTech wasn't in compliance with the terms of the lease. For that reason, on July 18, 2014, the OPA delivered a notice to FarmTech that the lease was at risk of being terminated. However, at that time, the end goal of terminating the deal with FarmTech wasn't really part of the equation.

"It is clear and unequivocal from the cross examination of Ms. Taylor and Mr. Valcour that the purpose of the delivery of the Notice of Default at the time was to 'get the attention' of O'Connor and to encourage him to report some real progress with the project," Judge writes. "The Board felt that Mr. O'Connor was not paying sufficient enough attention to the OPA nor keeping them abreast of the ongoing progress of the Project. Therefore, a formal Notice of Default was used to get his attention, rather than a more informal letter or other communication."

In that Notice of Default, the OPA pointed out four issues. First, that FarmTech had failed to