

ONTARIO COURT OF JUSTICE
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E X H I B I T S

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WEDNESDAY, NOVEMBER 14, 2012

5 **THE COURT:** All right. I guess we should just begin by everyone giving names, et cetera, just for the record.

MR. KOEHL: Yes, Albert Koehl, K-O-E-H-L. Represent the prosecution in this matter.

THE COURT: Thank you.

10 **MR. DRYER:** Alan Dryer, D-R-Y-E-R, lawyer for the defendants.

THE COURT: Thank you.

MR. DRYER: Thank you.

15 **THE COURT:** I want to thank everyone for coming this morning. I want to acknowledge the witnesses that have attended previously. Some of these witnesses have attended from a great distance, taking time out of their day and their busy schedules to attend these hearings. I also want to acknowledge the volunteers from the FLAP
20 organization for their efforts and dedication. Obviously it's taken quite a length of time to be able to render a judgment in this case. Earlier dates were not available, either due to lack of
25 courtroom availability, or the prosecution or counsel's schedule or, indeed, my schedule.

R E A S O N S F O R J U D G M E N T

30 **TURTLE, J.P. (Orally):**

The court, in the meantime, has had an opportunity to review the transcripts, consider the case law and books of authorities as submitted by the

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5 prosecution and counsel. While there are no case law regarding the points - sorry. While there is no case law that deals exactly with the points of the case before the court, certainly I've given the appropriate weight to the cases as presented by both the prosecution and counsel, and taken guidance as it applies to the circumstances involved in the Menkes case.

10 Migratory birds play a very important role in the ecosystem. It has been said by some that birds can exist without man, but man cannot exist without birds. Birds help in the dispersal of seeds, helping agriculture, and regeneration of our
15 forests. Scavenging species of birds help in the recycling of nutrients in nature. The normal food of birds consists certainly of insects, some of which may be harmful to man and its agriculture. Their value is sometimes overlooked as each of us
20 go on our daily way. We all have experienced the calming effect and the joy of their songs on a hot summer day, and watched in amazement at their vibrant colours and the beauty of these creatures.

25 Now, dealing with the case that's before the court, there are a number of issues that must be considered and must be answered. One, is the reflected sunlight radiation? Two, if so, is the radiation a contaminant as intended under the
30 *Environment Protection Act*? Three, can the reflection of light from a mirrored window or any window be interpreted as the emission or discharge

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5 of radiation within the meaning of the Act? Four, are the defendants causing or permitting this discharge or emission? Five, the issue regarding due diligence. Six, and lastly, is Menkes' actions or lack thereof causing cruelty to these birds?

10 In the very beginning in this case, we've heard from Dr. Klem, an expert in the field of ornithology, as he described the hazards that face migratory birds as they undertake their journey each year between their summer and winter homes, these migratory birds usually travelling between the hours of 6:00 p.m. and 6:00 a.m. During their trek, we have heard that they are subject to all forms of weather conditions and all other such natural hazards, such as predators, pesticides, along with transmission towers, motor vehicles, wind turbines and, in particular, the issue that brings us here today, namely the hazard caused by mirrored windows and non-reflective windows in general, as the court's heard, mirrored windows being identified as the most deadly of these groups. All these hazards and conditions certainly take a great toll. These migratory birds would appear to be dying at an alarming rate each season, not to mention the injured birds that suffer and, in most cases, succumb to these injuries.

30 Certainly there's no dispute that the migratory birds are being killed and injured in bird strikes in each of the properties named on the informations. Menkes themselves has never

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attempted to deny this issue. One organization that came to the front as a voice or advocate for these migratory birds is FLAP, which stands obviously for Fatal Light Awareness Program, a non-profit organization staffed by caring and dedicated group of concerned members of the public. These concerned members make themselves available on a daily basis in all types of weather. These individuals attend at various office towers in the GTA 365 days a year in all forms of weather and conditions, collecting and tagging dead birds and, if and when possible, rescuing and treating the injured birds and returning them to nature, certainly an unenviable task to collect these dead birds and meticulously note and tag their lifeless bodies to compile data that will be later transcribed into a database so that FLAP can be properly informed of the problem areas throughout the GTA and the type of bird that are affected and the most hazardous times these strikes may occur. These deaths and strikes, as we've heard, are happening throughout the GTA and, indeed, all over the world; specifically, in this case, in the case before the court, the Menkes group of companies in the Consillium Place complex, which includes Menkes Consillium 100 Holdings, Menkes Consillium 200 Holdings, Menkes Consillium 300 Holdings, Menkes Development Limited, Menkes Properties Management Services Limited, and Menkes Consillium Inc. These are pre-existing buildings that Menkes has taken over in the fall of 2006. The court's learned from FLAP's records, and records kept, that 100 and 200

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Consillium Place have been in the unenviable position of being ranked number one and two as the most deadly buildings in all of the GTA, with 300 Consillium Place also in the top ten. It's estimated through FLAP that there are over 900 dead or injured birds were collected between the years 2008-2009. These deaths involved, as the court's observed through exhibits and heard through witnesses' testimony, birds breaking their necks, suffering brain trauma, broken beaks, spinal fractures. We've heard evidence from witnesses that these bird strikes will sometimes be heard in their office buildings as sickening thuds as the bodies of these birds crash into the windows, and these strikes may occur at any time or, in some cases, as a wave, one after another, at alarming rates, causing the deaths of these birds or serious injury.

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Michael Measure, of FLAP, has given very compelling and sometimes emotional evidence facing his frustration at his attempts to get any action on the issue of bird strikes from Menkes Corporation, his efforts resulting in varied degrees of success and with different outcomes and solutions, such as netting, window film, sonic emitters. These attempts have had varying degrees of success and, in some cases, total failure.

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City councilors, Glenn de Baeremaeker and Joe Mihevic, aware of the problems involved, tried to get Toronto council to adopt measures to reduce

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5 these strikes throughout the city. The councilor was eventually successful and able to put together the Bird Friendly Guidelines, which were published in 2007. These guidelines, as we heard, focus not only in the window problems but also on the problems of lights, turning out unnecessary lights at night, closing blinds, et cetera, plus guidelines in regards to creating visual noise on windows to further alert birds of the danger.

10 As previously stated by the court, a great deal of the prosecution's case is not in dispute. Counsel for Menkes Group concedes that these migratory birds are dying. It is not in dispute that these deaths and injuries occur from the birds striking the Menkes building. What is in question here is really what is the intent of the legislation and how should the court interpret the wording of the legislation. The court's had an opportunity to hear a number of expert witnesses. Some, again, have come from the United States, all of whom have impeccable credentials and pertain to their respective expertise.

25 In dealing with the first question before the court that must be answered, is sunlight radiation, in that regard I am satisfied that reflected sunlight, mainly the sun's rays, are indeed, in the broadest interpretation, a form of radiation by definition. But the court is satisfied that the legislation -
30 sorry, the intention of the legislation would be only to include harmful radiation. It would be

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certainly unrealistic, in the court's opinion, to
rule otherwise. As we are all aware, energy from
the sun forms the very heart of our existence in
the solar system. Without the sun's rays,
certainly our planet would cease to exist as we
know it. So I am satisfied the intention of the
Environment Protection Act, RSO 1990, Ch. E19, was
in this case to be interpreted as harmful
radiation, and not just sun's radiation.

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The next question, can the sun's radiation be
considered a pollutant or contaminant? Under the
Environment Protection Act, "contaminant" means
15 "any solid, liquid, gas, odor, heat, sound,
vibration, radiation, or combination of any of
them, resulting directly or indirectly from human
activities that causes or may cause an adverse
affect." Counsel submitted for Menkes and pointed
out that light had been omitted from the list of
20 what constitutes a contaminant. On that point,
this court rules that the sun's rays, nor the sun's
radiation, in no way can be interpreted as a
pollutant or contaminant. Certainly the whole
thrust of the *Environment Protection Act* is to
25 protect the environment by keeping our lakes clean,
the air that we breathe clean, and the protection
of the environment and human health. If the court
were to define the sun's radiation as a
contaminant, it would suggest our planet would be
30 better off without it and, yet, without sunlight
our planet would not exist as we know it. It would
become barren and lifeless, obviously diametrically

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opposed to goals of the *Environment Protection Act*.

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The next question for this court to answer, can the reflection of sunlight from a mirrored window or, in fact, any non-reflective window, be interpreted as discharging or causing or permitting the discharge of a contaminant, namely radiation, by Menkes? I find as a fact that Menkes is not discharging or causing permitting - sorry, is not discharging or causing or permitting the discharge of a contaminant. The source of the radiation is the sun, not the Menkes windows. Dr. Sinervo indicated quite clearly that every object on the planet Earth that comes into contact with sunlight emits the sunlight. Every object above absolute zero in temperature will always be emitting some form of radiation. Our sun emits the life-giving radiation through space, where it enters the atmosphere, then onto the surface of the Earth, giving life to our planet. This is an everyday occurrence that has been in existence from the very beginning of time. The sun's rays reflect off mountains, lakes, pavement, et cetera, indeed, every surface of our planet, with varying degrees of absorption. Menkes' windows merely reflects the sunlight off the glass.

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Counsel for Menkes has given the court a good analogy, I felt. Counsel spoke of a farmer who used excessive fertilizer on his land, which eventually became a contaminant that seeped through the farm soil into an abutting land and then into a

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5 lake. The owner of the intervening property would have no knowledge of this contaminant because the contaminant entered the natural environment of that farm and the owner of the in-between lands could not be said to be the source of the contaminant. Counsel further suggested, and the court agrees, that if the court were to rule that Menkes was guilty of discharging or causing or permitting the discharge of a contaminant merely because the sun was reflecting from their windows, then certainly every household would be technically open to be charged under this section, which would leave every human structure containing a pane of glass, whether it be reflective or non-reflective, be technically open to the same fate.

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20 In regards to the offence of due diligence, regarding the question of due diligence, the court feels that the defence of due diligence really does not need to be put forward, as Menkes has broken no law. They have not breached building codes. There were no industry standards to be met and no government regulations breached. The court can assume that the pre-existing buildings were built to Code, that studies were submitted and permits granted. It is also to be remembered that the Bird Friendly Guidelines were merely voluntary at the time these charges were to have occurred. They did not become mandatory until 2010, and then selective in the structures it relates to, with exceptions for existing buildings.

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Yet, taking all that into account, Menkes did work with and assist FLAP in attempting to rectify the problem. Signs were posted, those being Lights Out Toronto signs in the lobbies, in the underground parking lots, and in the washrooms. There were bird action stations set up to assist FLAP volunteers in their collection and recording of dead birds and injured birds. There is also a special area set aside for all injured birds that were collected and Menkes even attended - sorry, attained a Canadian wildlife salvage permit for those dead birds collected. Also, there were different projects tried, for example, window film, netting, and sonic emitter, some of which were certainly dismal failures, and others moderately successful at best. But attempts were being made to make these buildings safer for the migrating birds and, in fact, number of bird deaths in 2008, 2009, decreased compared to that of 2007. Certainly while there is no solution available - sorry, while there was no solution available at the time, Menkes and FLAP, especially in the very beginning, were working together to do their best to make the best of an unfortunate situation.

For all those noted reasons and rulings, each of the charges under the *Environment Protection Act* are dismissed.

Now dealing with the offences charging the defendant under the *Ontario Society for the Prevention of Cruelty to Animals*, RSO 1990, the

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court would find that cruelty, by definition, would be a deliberate act of inflicting pain or injury, or by neglect causing an animal to suffer or to be in distress. Menkes in no way is deliberately causing suffering to these birds. They are merely the owners of a commercial vehicle - sorry, commercial building. There is no activity, no special action being taken other than owning these buildings. These buildings are stationary, as are all similar structures in the province, which would be commercial or residential buildings. Again, for each of those reasons, the charges - each of the charges under the *Ontario Society of Prevention of Cruelty to Animals* are all also dismissed.

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Again, I appreciate that members of FLAP would no doubt be discouraged with this ruling. I want to again put forward the court's appreciation in their efforts regarding these birds. Hopefully this case will bring to the public the problem that does exist and, God willing, eventually we'll find a solution to it. And I want to thank counsel, and counsel for the prosecution, for their time and efforts. It was a great benefit to me. And thank you, everyone.

MR. KOEHL: Thank you.

MR. DRYER: Thank you, Your Honour.

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FORM 2

Certificate of Transcript

Evidence Act, S.S. 5(2)

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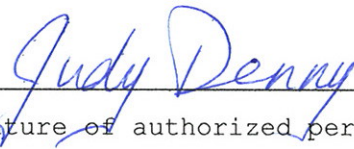
I, Judy Denny, certify that this document is a true and accurate transcript of the recording of Her Majesty the Queen v. Menkes Consillium et al, in the Ontario Court of Justice, Provincial Offences Court, held at 1530 Markham Road, TORONTO, Ontario, taken from Recording No. E8-20121114-0900, dated November 14, 2012 which has been certified in Form 1.

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January 31, 2013

(Date)



(Signature of authorized person)

On behalf of Durham Reporting & Mediation Services

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