ALTERATION OF A WATERCOURSE

Property practitioners are frequently involved with clients buying waterfront property. My remarks are limited to those properties which are residential in nature located on freshwater resources.

DEPARTMENT OF THE ENVIRONMENT

Under our Provincial **Water Act**, S.N.S., 1989, c.500, the definitions contained in **Section 2** state that a:

> "(j) 'watercourse' means the bed and shore of every river, stream, lake, creek, pond, spring, lagoon, swamp, marsh, wetland, ravine, gulch or other natural body of water, and the water therein, including groundwater, within the jurisdiction of the Province, whether it contains water or not."

Section 3 of the **Act** goes on to state:

> "...every watercourse and the sole and exclusive right to use, divert and appropriate any and all water at any time in any watercourse is vested forever in Her Majesty in Right of the Province..."

Having mandated ownership, the **Act** stipulates in **Section 17** that:

> "(17) When any municipality or person
>
> (a) contemplates
>
> (i) a hydroelectric power project;
> (ii) control dam;
> (iii) a river diversion;
> (iv) a drainage diversion, or
> (v) <u>any alteration of a watercourse or the waterflow therein</u>;
>
> or
>
> (b) <u>undertakes any action that results or may result in the alteration of a watercourse or the waterflow therein</u>,
>
> the plans and such information as the Minister may require shall be submitted to the Minister and no such proposal shall be undertaken or

proceeded with until approved by the Minister."

(underlining that of the writer's)

The penalty provisions for non-compliance are contained in **Section 20.** First convictions can result in fines of up to $50,000.00 or on default imprisonment for a term not exceeding one year. The fine and jail term increase with subsequent offenses. In addition, a Court may (and usually does), order the person to comply with orders from the Minister, which is provided for in the **Act.**

Having briefly reviewed that legislative framework, I think there are two situations that appear not infrequently. Both may pose problems for owners or potential purchasers of property; these are illegal infilling and the installation of permanent docks at the shoreline.

When inspecting the statutory provisions cited above, it should be abundantly clear that these activities cannot take place without the consent of the Minister evidenced by a permit from the Department of the Environment.

There is also an ancillary issue. That is the involvement of Federal authorities under our Federal **Fisheries Act.** Any possible deterioration of fish habitat is a matter of Federal jurisdiction and concern.

From a practical point of view if infilling or dock installation is considered, you apply to the Department of the Environment for a permit. That agency refers out to the Department of Fisheries and Oceans for comment but the Nova Scotia Department of the Environment has to grant their approval before you would be issued a permit. This is unlikely to happen, particularly in the case of infilling.

The Department of Fisheries and Oceans has a policy of "no net loss of fish habitat" and invariably will turn down these requests. Even if they do not, the Provincial Department of the Environment has a policy of not allowing infilling for private gain.

Infilling has occasionally taken place illegally within developments in the immediate Halifax/Dartmouth metropolitan area. Infilling also raises the issue of title to that "newly" created piece of land. In some instances I believe deeds have become available through the Department of National Resources.

Similarly, there are a number of local developments around lakes where many shorefront owners have constructed permanent docks; presumably without a permit.

Removal of such structures can be stipulated by Ministerial order and it is not uncommon to find the cost of such removal far

outweighing the cost of the original installation. Not only will you be required to remove all the intruding material you will, in all likelihood, be required to follow, during the removal, protection methods demanded by the Department of the Environment. They can be extremely expensive measures.

It is probably (un)fortunate that limitations of environment staff and money have usually kept legal problems for landowners to a minimum. It is almost analogous to the illegal basement apartment. Municipalities know there are many of them but have not the staff or resources to track them down and usually will only respond upon direct complaint of a neighbour.

DEPARTMENT OF NATURAL RESOURCES

The involvement of the Department of Natural Resources with this issue flows from the **Crown Lands Act**, S.N.S., 1987, c.5, s.1.

Section 2 of that **Act** states:

> "The object and purpose of this Act is to provide for the most effective utilization of Crown lands by...
>
> (c) the integration of wildlife and outdoor recreation considerations in the forest management planning process on Crown lands; and
>
> (d) the more effective administration management of all Crown lands."

The **Act** goes on to say in **Section 5** that:

> "The Minister has supervision, direction and control of
>
> (a) the acquisition, registration, survey and sale or disposition of Crown lands; and
>
> (b) the administration, utilization, protection and management of Crown lands, including
>
> (i) access to and travel on Crown lands,
>
> (ii) habitats for the maintenance and protection of wildlife on Crown lands,
>
> (iii) harvesting and renewal of timber resources on Crown lands,
>
> (iv) forest recreation on Crown lands, and
>
> (v) matters that may be assigned pursuant to this Act and the regulations
>
> but not including land owned or claimed by the Province specifically under the jurisdiction of another member of the Executive Council or a department, branch or agency of the Government other than the Department."

With this legislation and the aforementioned **Water Act**, what we have in place is a **dual** permit system.

The Department of Natural Resources feel that as the bed and shore of water resource areas is vested in the Crown they are consulted as the Department that administers Crown land. In essence their involvement is the same as the Department of the

Environment where infilling and/or permanent wharf or dock structures are being constructed.

Both Departments acknowledge that they issue permits, both acknowledge that each is supposed to tell members of the public that they also require a permit from the other Department and both acknowledge that it is frustrating for the public.

What occasionally happens is that an Applicant is told to apply to the other Department and forgets (conveniently or otherwise). The individual may infill or erect a structure under a permit from the Department of Natural Resources, only to have a Department of Environment Inspector arrive on site wondering where the individual's permit is; a confusing situation.

The Department of Natural Resources works on a policy guideline that was established in conjunction with the Department of Environment and Federal Department of Fisheries & Oceans. If the application fits within those policy guidelines they do not refer out to the other two Departments for comment.

At the present time, the "policy" is that the Department of Natural Resources is the "lead" agency. I think that means they are the Department you should see first! This still does not preclude the necessity of having permits from both Departments.

Nevertheless, in advising waterfront owners you should be fully aware of the involvement of both Departments. In acting for prospective purchasers should we be inquiring as to whether there are any permanent dock fixtures in the water and if so were they done under permit? Chances are they were not.

I would also refer you to the extremely broad definition of watercourse as contained in the **Water Act**. Frequently,

landowners may feel that a low swampy area on their property might be infilled by their own unilateral decision. That may not be the case.

It raises the other interesting question, for property practitioners, that when we see by deed reference, location certificate or otherwise that the property contains a stream running through it, or that it has lake frontage, what advice are we giving to the prospective purchaser as to their limitations with respect to that watercourse. My guess would be that we do very little about it at the present time and the situation may well call for specific restrictions in our certificates of title.