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OF WHARVES, WATER LOTS, AND KINGS

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FEDERAL VS. PROVINCIAL JURISDICTION

There are a number of federal and provincial statutes which affect water lot rights in Nova Scotia. The use of beaches and land covered by water is highly regulated. If the water lot lies within an area which was a "public harbour" at the time of Confederation in 1867, the land below the ordinary high water mark is owned by the federal Crown unless there has been a valid Crown grant, subject to rights which may have been acquired by adverse possession. If the water lot is within a harbour under provincial jurisdiction or on a lake or river, the land below the ordinary high water mark is owned by the provincial Crown unless there has been a valid Crown grant, again subject to rights which may have been acquired by adverse possession. The law regarding the ownership of lands beneath inland waters and territorial waters is less settled. Moreover, even where the water lot is owned by the provincial Crown, federal legislation such as the *Navigable Waters Protection Act* may regulate its use.

In many cases, we as property lawyers become involved in analysing water lot rights when our client wants to purchase land serviced by an existing wharf, or wants to construct a wharf, or is acquiring lands comprised in whole or in part of infill.

This paper will provide an overview of the various statutes which are relevant to advising our clients in such circumstances. Although there are other areas such as riparian rights in respect of which legal advice sometimes is sought, an analysis from the point of view of rights and liabilities in respect of wharves is a useful analytical tool for exploring water lot rights in Nova Scotia. The principles applicable to wharves would, in many cases, also apply to infill or other structures on water lots. I have not dealt with riparian rights in this paper, but they may well impact upon your client's use of a water lot since the right of a riparian owner to access the water, for example, cannot be interfered with by the water lot owner. In many cases, the client you are advising would be the riparian owner of the lands abutting the water lot or infill, in any event.

When you are asked to provide advices in respect of an existing or a prospective wharf, or infill, the first thing to determine is whether or not the wharf or infill is or will be situate on lands owned by the federal Crown or the provincial Crown. Crown grants of land to riparian owners, with a very few exceptions, convey title down to the ordinary high water mark. Unless expressly granted, the shore (that is, the land between the ordinary high water mark and ordinary low water mark) remains vested in the Crown. This will usually mean the Crown in right of the Province, except where the land has been vested in the federal Crown as is the case with harbours that were public harbours at the time of Confederation in 1867.

With regard to water lots lying below the ordinary low water mark, there is no question that water lots on lakes and rivers (apart from the portions of rivers which form part of a public harbour under federal jurisdiction, such as Bridgewater) are owned by the provincial Crown, and that water lots in federal public harbours are owned by the federal Crown. However, the situation with regard to water lots on the coast of Nova Scotia is less clear. In order to analyze the ownership of a water lot in a coastal area, the distinction has to be made between inland waters and territorial waters.

INLAND WATERS AND TERRITORIAL WATERS

Gerard V. LaForest, Q.C., in his text *Water Law in Canada – The Atlantic Provinces* (Information Canada, Ottawa, 1973), states at page 464 as follows:

> "In order to discuss the ownership of the seabed it is necessary to distinguish between two categories of offshore waters: inland waters and territorial waters. Inland waters are waters so intimately associated with the territory of a state that, under international law, they are considered as much the territory of a state as dry land. The common law spoke of waters *intra fauces terrae*, but despite the terminological difference it seems to amount to the same thing. The inland waters off the Atlantic Provinces are extensive, and have been from pre-Confederation days. At Confederation they included, under general customary international law, all bays and straits, or parts thereof, capable of being enclosed by lines of six marine miles from shore to shore. Moreover historic claims could be made that all bays in these provinces, including in particular the large bays, Chaleurs, Conception, Fundy and Miramichi, were inland bays.
>
> Territorial waters consist of a belt of water stretching seaward from low water mark or the outer edge of inland waters, and though

> Canada has recently extended the width of the belt, any claim by the province would be limited to the three mile limit existing at Union."

One might have thought that the issue of the ownership of inland and territorial waters would have been well settled by jurisprudence by now. However, this is not the case. Certain inland waters are included in Nova Scotia, by virtue of the definition of the boundary between Nova Scotia and New Brunswick which is drawn across the middle of the Bay of Fundy. Waters expressly falling within the boundaries of Nova Scotia continue to belong to that Province at Confederation by virtue of section 7 of the *British North America Act* (subsequently renamed the *Constitution Act, 1867*, in Stalinist fashion). But apart from the Bay Fundy, there is no provision in the definition of the boundaries of Nova Scotia expressly including other inland waters. However, Nova Scotia exercised jurisdiction over its inland waters for fisheries and certain other purposes, and a fairly strong case can be made that the Province owns the seabed of inland waters, subject to the exception in the case of public harbours which were transferred to the federal Crown by section 108 and the Third Schedule to the *British North America Act*.

With regard to territorial waters, there is some judicial authority supporting the view that the jurisdiction of Nova Scotia extended to the three mile limit. The leading case on the conflicting claims of the federal Crown and provincial Crown to the ownership of the bed of the territorial sea is the reference in Re: *Offshore Mineral Rights of British Columbia* [1967] S.C.R. 792. However, the Supreme Court of Canada in that case was dealing with British Columbia, where there was no historical evidence of any exercise of jurisdiction by the British Columbia government over the territorial water prior to Confederation. The decision of the Supreme Court that the Province of British Columbia ended at low water mark and had no property in or jurisdiction over territorial waters may accordingly not be applicable to Nova Scotia. Nova Scotia began to exercise jurisdiction over its territorial sea as early as 1770, when it passed an act prohibiting the dumping of certain material into the sea within three leagues of the coast. Nova Scotia issued mining leases under the sea off Cape Breton prior to Confederation. Nova Scotia in 1836 passed a "Hovering Act", which authorized the seizure and forfeiture of any ships found fishing within three miles of the coast. All four Atlantic Provinces passed such Acts, some of which were expressly approved by imperial Order-in-Council.

Not surprisingly, in the absence of clear jurisprudence, the federal and provincial governments do not agree which Crown owns what areas of inland and territorial waters. Your client risks being caught in the crossfire.

FEDERAL VS. PROVINCIAL HARBOURS

Whether a specific harbour is a federal public harbour is a factual determination, and the courts have identified certain characteristics which tend to indicate whether a specific harbour was a public harbour transferred in 1867 to the federal Crown, such as:

- There must be factual evidence that the area was used as a harbour by ships at the time of Confederation. (See *A.G. (Canada)* v. *A.G. (Ontario)*, [1898] A.C. 700 (P.C.) ("Fisheries Case") and *A.G. (Canada)* v. *Ritchie Contracting* (1915), 52 S.C.R. 78 at 105).

- In order to be considered a public harbour there generally must be some government presence in the operation of the harbour as opposed to it being a purely private activity (see *R.* v. *Jalbert*, [1938] 1 D.L.R. 721 (P.C.)). However, the Supreme Court of Canada did find a place to be a public harbour even though it only had a private wharf at the time of Confederation (*R.* v. *Ontario and Forrest*, [1934] S.C.R. 133).

- Recognition by a public authority as a commercial harbour at the time of Confederation is a strong indication that the harbour is public.

- Evidence of the expenditure of public funds on the maintenance and improvement of the harbour also indicates that it was a public harbour.

Being aware of the strong tradition of cooperative federal-provincial relations in Canada, what do you do when you are asked to advise with regard to a wharf or infill placed or to be placed on ungranted Crown land in coastal waters? If you are lucky, you will be able to establish that the wharf lies within a public harbour transferred to the federal Crown at Confederation. While there has not been any formal agreement signed by the Province of Nova Scotia and the Dominion (unlike, I believe, the situation in Newfoundland and Labrador), I understand that the provincial Crown and federal Crown have reached an understanding as to which harbours are public harbours under federal jurisdiction (or at least, on which harbours are claimed by the federal Crown). In some cases, the exact extent of the federal public harbour has been fairly precisely defined by survey. This is the case in the public harbour of Halifax, for example, and in the public harbour of Bridgewater. It may be possible to obtain information either from the Provincial Department of Natural Resources or from the Coast Guard as to the extent of the harbour under federal jurisdiction. On the other hand, you may find that this information is jealously guarded from your client.

I have attached to this paper as Schedule "A" a list of Nova Scotia Proclaimed Harbours, and as Schedule "B" a list of what I understand to be the federal public harbours of Nova Scotia, as described in a memorandum of understanding between the provincial Crown and federal Crown which may have no formal legal status or effect. Note that there is some overlap. The memorandum of understanding is treated as confidential by both governments and so one cannot know the details of the understanding or its legal effect. The boundaries of some harbours, like Halifax, have been the subject of and defined by litigation. But in many cases exactly what area constituted a "public harbour" in 1867 can be difficult to establish in 2004.

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- Recognition by a public authority as a commercial harbour at the time of Confederation is a strong indication that the harbour is public.

- Evidence of the expenditure of public funds on the maintenance and improvement of the harbour also indicates that it was a public harbour.

If the wharf or infill lies or will lie in inland or territorial waters in an area which is clearly not a federal public harbour, you may need to deal with the possibility that both the provincial Crown and federal Crown will assert ownership and jurisdiction. The federal Crown has in some cases granted leases of water lots for ten year terms to persons who have constructed a wharf or are operating a marina. You should not necessarily assume that the provincial Crown will not also assert a jurisdiction. Moreover, the provincial Crown always owns the shore below ordinary high water mark (except in federal public harbours) and since any wharf commences on the shore and is attached to it, the province can always exercise an

undisputed jurisdiction over this portion of the wharf. If you are dealing with a client who wants to construct a new wharf, the safest course of action may be to approach both federal and provincial Crowns to obtain the necessary authorisations.

EXISTING WHARVES OR INFILL AND ADVERSE POSSESSION

If you are searching title and considering the status of an existing wharf or existing infill, determining whether the wharf or infill lies on a water lot within federal as opposed to provincial ownership is very significant. This is because, although one can obtain title to provincial Crown water lots in some circumstances, by continuous adverse possession for 40 years or more of a watercourse where the land is no longer covered by water (see section 103(3) of the *Land Registration Act*), it is much more difficult to obtain title to federal Crown land by adverse possession. With characteristic contempt for long established legal principles, the federal government amended the law to make it impossible to acquire title to federal Crown lands by adverse possession after 1 June 1950, unless the rights acquired by adverse possession had vested before that date (*Public Land Grants Act*, S.C. 1950 c. 19). The applicable provision is now found in section 14 of the *Federal Real Property and Federal Immoveables Act* set out below. Prior to that time, it was possible to establish title to federal Crown lands by adverse possession for a period of 60 years or more. Accordingly, in order to establish that a person has good title to a wharf or infill in a federal public harbour, you need to be able to prove that there was a valid Crown grant by Nova Scotia prior to Confederation or by the Dominion after Confederation, or that the wharf or infill has been situate on the federal Crown water lot for a period commencing no later than 1 June 1890.

Such adverse possession can often be difficult to prove, since no one is alive today who could testify as to whether a structure or infill was present on the federal Crown water lot in 1890. However, plans of survey and other evidence may be available in some cases. For cases dealing with adverse possession against the federal Crown, see *Canada (A.G.)* v. *Acadian Forest Products Ltd.* (1987), 41 D.L.R. (4th) 338 and *Nickerson* v. *Canada (A.G.)*, [2000] N.S.J. No. 176. The latter case involved a water lot in Sydney Harbour, and the judge relied on a variety of evidence to find that the federal Crown had lost its rights by virtue of acts of adverse possession by the abutting upland owner prior to 1 June 1950. As it will appear from the *Nickerson* case, the federal Crown is quite prepared to assert its jurisdiction vigorously, even in circumstances where the water lot in question may have been infilled more than 100 years ago. Even if ill founded, such claims by the federal Crown can result in land owners being driven to pay off the Crown. It is often cheaper to give into blackmail than to deal with the expense and delay of litigation.

This issue often arises because much of the infill and many of the wharves in Nova Scotia were put in place long ago, at time when the province was being developed and was

less regulated than today. Accordingly, many fish plants are situate in whole or in part on "illegal" infill and serviced by "illegal" wharves. Often, no Crown grant or lease of a water lot was ever obtained, from either the federal Crown or the provincial Crown, and no wharf authorisations were obtained under either provincial or federal legislation.

STATUTORY PROVISIONS

I have set out some of the applicable statutory provisions below, with which you should be familiar when providing advices in respect of wharves and infill. Read them and weep.

***FEDERAL REAL PROPERTY AND FEDERAL IMMOVEABLES ACT* (CANADA)**

> Section 13: Except as expressly authorized by or under an Act of Parliament, no person acquires any federal real property or federal immovable by or under a provincial Act.
>
> Section 14: No person acquires any federal real property or federal immovable by prescription.

Section 14 is the successor of the provision which first came into effect on 1 June 1950 in the *Public Land Grants Act*.

***CROWN LANDS ACT* (NOVA SCOTIA)**

Section 39(1) of the *Crown Lands Act* provides as follows:

> **39(1)** Where a structure is on Crown lands in respect of which there is not in effect a lease or permit issued pursuant to this Act or a structure is placed on Crown lands by a person who is not the holder of a lease or permit issued pursuant to this Act, the Minister may, by written notice, require the person who erected or occupies or uses the structure to remove it from Crown lands within sixty days after service of the notice upon that person.

Under Section 39(4), a person upon whom a notice pursuant to subsection (1) has been served who fails to remove the structure from Crown lands within sixty days of service is guilty of an offence. Under Section 49 of the Act, the *Summary Proceedings Act* applies to all prosecutions and proceedings under the *Crown Lands Act*.

If we were dealing with governments which were concerned to foster economic development, the absence of a Crown grant, lease, or permit for the infill or wharf would not present major concerns. One would approach the applicable level of government and obtain the necessary grant of rights from the Crown. However, do not make the mistake of assuming that the federal and provincial bureaucracies will necessarily assist you. At present, for example, there is ongoing litigation arising out of the Crown's assertion that the federal Crown had title to a portion of the Halifax waterfront in the 1990's, notwithstanding the fact that there were wharves and/or infill situate on the lands commencing in the mid to late 19th century as evidenced by numerous plans of survey recorded at the Registry of Deeds and various ancient recitals in recorded documents. Prior to Confederation, there had not been a Crown grant in respect of certain lands along the Halifax Waterfront, and after Confederation there was no federal Crown grant although there were, in some cases, ineffective provincial Crown grants. Notwithstanding the transfer of the harbour to the Dominion by virtue of the *British North America Act*, the provincial Crown went on merrily granting water lots in Halifax Harbour for decades, on which many poor subjects relied to their peril.

If you are a solicitor searching title to property which may constitute infill, or to property serviced by a wharf, you should therefore be very careful and satisfy yourself that there is a Crown grant or lease from the Crown that has jurisdiction over the water lot, or in the case of a wharf that there is a permit under the *Crown Lands Act* and the appropriate approval under the *Navigable Waters Protection Act*. If there is not, and you are certifying title based upon adverse possession, you should be satisfied that there is sufficient evidence of adverse possession upon which to base your opinion. As indicated, this can be extremely difficult in the case of the infill or wharves on federal Crown land.

WHARF PERMITS

If you determine that the upland owner does not have title to an existing wharf by virtue of adverse possession, or if your client wishes to construct a new wharf, you need to apply for a wharf permit from the Nova Scotia Department of Natural Resources. Your client may also need to apply for the appropriate approval under the *Navigable Waters Protection Act* from the Coast Guard; more on this below. The Province moved to expand its regulation of this area in the 1980's. Although the *Crown Lands Act* always prohibited structures on Crown Lands without a lease or permit, it does not appear that the Crown was very active in its enforcement activities in the past. Many persons constructed wharves without any permits, often in the form of long solid rock breakwaters. Since the late 1980's, however, new policies require wharves to be constructed of cribs of a certain dimension, separated by at least 10 feet, to ensure that water can circulate and fish habitat is protected.

I acted for a client 15 years ago who owned a property on St. Margaret's Bay and had been constructing a solid rock breakwater wharf, similar to those constructed by several of his neighbours in the 1960's and 1970's. He had not consulted a lawyer and was unaware that what he was doing was illegal. Because he had limited funds, he was constructing the wharf little by little, doing what he could afford each year, and his wharf design did not meet the required standards. The Department of Natural Resources discovered his crime and ordered him to remove the entire wharf. The cost of removing the entire wharf would have exceeded $50,000.00. He was fortunate, however, in that he had photographs showing that the first section of the wharf had been constructed prior to the new requirements for wharves coming into effect in the late 1980's. He was accordingly permitted to leave in place the initial section of the wharf, and only had to remove that portion of the breakwater which had been built after the regulatory regime had changed.

Your client can accordingly incur substantial costs if there is non-compliance with the regulatory regime and you should advise your client in respect of potential liability for non-compliance.

I enclose herewith a copy of information obtained from the Nova Scotia Department of Natural Resources in respect of an Application for a Wharf Permit. I comment as follows:

1. Note that there must be at least 10 feet between each crib, and that the distance from the first crib in the water to the ordinary high water mark must be at least 10 feet.

2. In order to apply for a wharf permit, the applicant is obliged to file a plan of survey or location certificate showing the applicant as the owner of the upland property adjacent to the wharf.

3. In order to obtain a provincial wharf permit, the applicant will have to provide the Department of Natural Resources with a Declaration of Exemption, or an Approval, issued pursuant to the federal *Navigable Waters Protection Act*. See my comments below with regard to the provisions of the *Navigable Water Protection Act*.

For many years, the Coast Guard (which administers the *Navigable Waters Protection Act*) has granted water lot leases to an upland owner who wished to construct a wharf and have some security of tenure and control over the seabed around the wharf. Such leases were granted even in areas involving inland waters which were arguably within provincial jurisdiction. This may have changed, now that the federal and provincial governments have attempted to sort out their respective areas of jurisdiction and have some memorandum of

understanding on what constitute federal public harbours. The Province, on the other hand, has a policy of not granting or leasing Crown water lots to individuals in most circumstances, although it may be possible for the owner of a fish plant or of a marina to obtain a provincial Crown grant or lease. If you are acting for an individual applying for a wharf permit, you should point out to him that the wharf permit typically can be terminated without cause at any time in the discretion of the Minister, typically upon three months' notice. There is no security of tenure. It will cost your client tens of thousands of dollars to build a wharf, and he could be required to remove it at his expense if the wharf permit were revoked. One of these days, we Saxon peasants may rebel against the iron rule of the Norman lords who oppress us in the name of the Crown. The policy may change. But given the lack of constitutional protection for property rights and the ingrained acceptance of authority, I do not anticipate any rebellion or change in the regime in my lifetime.

***FISHERIES ACT* (CANADA)**

It is an offence under the federal *Fisheries Act*, unless the work is authorized under Section 35(2) of the *Fisheries Act*, to carry on any work or undertaking that results in the harmful alteration, disruption, or destruction of fish habitat. Assuming that your client does any construction or repair using appropriate materials and care, this may not be an issue. Note that the materials provided by the Department of Natural Resources contain certain provisions dealing with the type of construction materials which may be used. Your client should ensure that any materials used would not create a danger to fish habitat or contain wood treated with substances which could harm the fish environment.

***ENVIRONMENT ACT* (NOVA SCOTIA)**

The Activities Designation Regulations made under the *Environment Act* may require your client to obtain an approval from the Minister in certain circumstances. Section 5(1) sets out certain activities requiring an approval and reads in part as follows:

> Section 5(1)
>
> The use or alteration of a watercourse or a water resource for one or more of the following purposes:
>
> (g) the construction or maintenance of a wharf; ...
>
> is designated as an activity.

Section 5(2) however goes on to state that an approval is not required for an activity designated in (1) where the activity is the use of seawater, the use of brackish water from an intertidal zone of a river estuary, or a non-recurring use of water from the same watercourse for less than two weeks. It would accordingly appear that your client would not need to obtain an approval under the *Environment Act* for the wharf construction or repair if one of these exceptions applies. Note that the *Environment Act* contains a very broad definition of "watercourse" which reads as follows:

> "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; (emphasis added)

The *Environment Act* also contains a provision, formerly found in the *Water Act*, which vests watercourses in certain circumstances in the provincial Crown. Section 103 of the *Environment Act* provides as follows:

> Notwithstanding any enactment, or any grant, deed or transfer made on or before May 16, 1919, whether by Her Majesty or otherwise, or any possession, occupation, use or obstruction of any watercourse, or any use of any water by any person for any time whatever, but subject to subsection 3(2) of the *Water Act*, 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 and is deemed conclusively to have been so vested since May 16, 1919, and is fully freed, discharged and released of and from every fishery, right to take fish, easement, *profit prendre* and of and from every estate, interest, claim, right and privilege, whether or not of the kind hereinbefore enumerated, and is deemed conclusively to have been so fully freed, discharged and released since May 16, 1919. 1994-95, c. 1, s. 103..

Accordingly, pre-1919 Crown grants which often included lakes and streams were in effect amended and the ownership of the beds of the lakes and streams was clawed back by statute without the inconvenient necessity of paying compensation under the *Expropriation Act*. The original definition of watercourse in the old *Water Act* was narrower and did not contain the words "or other natural body of water... within the jurisdiction of the Province". However,

the breadth of the definition of "watercourse" now raises questions as to whether the provision extends even to inland coastal waters.

There has been one useful decision dealing with the interpretation of the word "watercourse" in the context of section 103 of the *Environment Act*. Davison, J. in *Corkum* v. Nash (1990), 98 N.S.R. (2d) 364 (NSTD), in dealing with the defendants' allegation that a water lot in Glace Bay Harbour had been vested in the provincial Crown by virtue of the foregoing provision, found that a harbour did not come within the definition of "watercourse". Davison J. commented, commencing at paragraph 39, as follows:

> Applying the general rules of construction to which I have made reference, before a harbour would be said to come within the definition of "watercourse" in the Act, it must become within the genus of "other natural body of water" and be within the jurisdiction of the Province of Nova Scotia. The requirements are conjunctive.
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> Dealing with the first requirement, I am of the view, as Egbert, J., was in the *Very* case, that "other natural body of water" is ambiguous and I can refer to the ejusdem generis rule for assistance in interpretation. Driedger gives a succinct explanation of the rule at page 116:
>
> > "A fuller statement of the ejusdem generic doctrine is found in the decisions, namely, that where general words are found, following an enumeration of persons or things all susceptible of being regarded as specimens of a single genus or category, but not exhaustive thereof, their construction should be restricted to things of that class or category, unless it is reasonably clear from the context or the general scope and purview of the Act that Parliament intended that they should be given a broader signification".
>
> The general words "other natural bodies of water" follow the specific words "river, stream, lake, creek, pond, spring, lagoon, swamp, marsh, wetland, ravine, gulch". There is nothing in the Act to suggest these specific words should be given a broad

> interpretation and all the general rules of construction to which I have referred suggest a restricted meaning.
>
> The words river, stream, lake, creek, pond, spring, lagoon, swamp, marsh, wetland, ravine, gulch are interior bodies of water, for the most part non-tidal and nonbrackish, which (except incidentally with respect to some rivers) are not directly connected to the sea. A harbour does not fall into the same genus or category and, in my opinion, does not fall within the definition of watercourse in the *Water Act*.

The Nova Scotia Court of Appeal upheld the trial judge's decision in *Corkum* v. *Nash* (1991), 109 N.S.R. (2d) 331. Based upon the reasoning in the *Corkum* v. *Nash* decision and the history of the statutory provision, one could argue that a water lot on the coast in an area where the provincial Crown has jurisdiction, if properly granted by the Crown prior to 1919, would not have revested in the Crown by virtue of Section 103 of the *Environment Act*. However, the matter is not free from doubt.

Finally, note that Section 108 of the *Environment Act* provides as follows:

> 108 (1) Possession, occupation, use or obstruction of any watercourse, or any use of any water resource by any person for any time whatever on or after May 17, 1919, shall not be deemed to give an estate, right, title or interest therein or thereto or in respect thereof to any person.
>
> Exception
>
> (2) Notwithstanding subsection (1), possession, occupation or use of a watercourse where the land is no longer covered by water, for a period of not less than forty years continuously, may give an interest therein in accordance with the principles of adverse possession or prescription. 1994-95, c. 1, s. 108; 2001, c. 6, s. 103.

Subsection 108(2) is particularly useful in dealing with problems caused by infill, and may also assist where a solid rock breakwater type of wharf has been constructed. It would not appear to assist the same extent where the wharf has been built with wooden pilings which nevertheless permit most of the land under the wharf to remain covered by water.

CANADIAN ENVIRONMENTAL ASSESSMENT ACT

You should review the exclusion list regulations made under the *Canadian Environmental Assessment Act* to determine whether or not some environmental assessment would be required in connection with construction or repair work for a wharf. Section 3 of the regulations provides that the projects and classes of projects that are set out in Schedule 1 and carried out in places other than a national park, national park reserve, national historic site or historical canal are prescribed projects and classes of projects for which an environmental assessment is not required. Schedule 1 lists a number of projects in respect of which no environmental assessment is required, the first of which is the proposed maintenance or repair of an existing physical work. It would accordingly appear that the *Canadian Environmental Assessment Act* may not require your client to do anything in connection with the repair of an existing wharf structure.

However, it would appear that the *Canadian Environmental Assessment Act* would require your client to obtain an environmental assessment in respect of a new wharf being constructed in a federal public harbour.

***NAVIGABLE WATERS PROTECTION ACT* (CANADA)**

Because the federal government has jurisdiction over navigation, the federal government plays a role in permitting the construction of wharves in federal and even in provincial harbours, or on islands and in coastal areas. I have attached to this paper information obtained from Transportation Canada in respect of the *Navigable Waters Protection Act*. According to the Application Guide, the Act applies to all bodies of water which are capable of being "navigated by floating vessels of any description for the purpose of transportation, recreation, or commerce". This appears to be an administrative definition only and is not found in the statutes or regulations. I understand that the federal government considers the Shubenacadie Canal to fall within the definition of navigable waters, for example.

I also attach hereto a copy of the statute for your reference. Please note the following:

1. the definition of "owner" is a broad one and includes a person authorizing the maintenance of any work, as well as the person authorizing the erection of the work;

2. the definition of "work" includes any wharf;

3. under Section 5(1), "no work shall be built or placed in, on, over, under, through or across any navigable water" unless the work and the site and plans have been approved by the Minister and the work is built, placed, and maintained in accordance with the terms and conditions set out in the approval. The prohibition in the introductory wording of Section 5(1) is only in respect of building or placing a work on or in navigable water. It does not speak to repair, and might not catch your client if he only intends to effect repairs to an existing structure. Moreover, by virtue of Section 5(2), the Section does not apply to any work that "in the opinion of the Minister" does not interfere substantially with navigation. Although there is nothing in the printed materials or statute to this effect, I believe that the Coast Guard (now Transport Canada) would normally issue a certificate of exemption for most structures extending less than 50 feet from the ordinary high water mark. It accordingly appears necessary to obtain the Minister's opinion that a proposed wharf does not interfere substantially with navigation, and an exemption certificate, in order to construct a short fifty foot wharf;

4. under Section 6, where a work is built without having been approved by the Minister, or is not maintained in accordance with the approved plans and the regulations, the Minister may order the owner of the work to remove or alter the work;

5. under Section 10(1), any "lawful work" may be rebuilt or repaired if, "in the opinion of the Minister", interference with navigation is not increased by the rebuilding or repairing. There is no prohibition here; the language is permissive and any prohibition must be found elsewhere, in Section 5 or 6. "Lawful Work" is defined as any work "not contrary to the law in force at the place of construction of the work at the time of its construction." If, when it was first built, a wharf was an illegal structure on provincial or federal Crown land, the wharf would likely not qualify as a "lawful work". It would be necessary to satisfy yourself that the predecessor in title of your client obtained an NWPA approval or exemption certificate at the time of its construction to make the wharf "lawful". It is difficult to see how certain repair work to an existing structure could increase interference with navigation, if the structure were not being altered. But it would appear technically necessary to obtain the federal Minister's opinion on this to bring your client within the express permission.

   Apart from this provision, I have not found in the NWPA an express prohibition on repairing an otherwise lawful work. Assuming that a certificate of exemption was issued under the *Navigable Waters Protection Act* for the wharf at the time it

was constructed, the NWPA does not appear to prohibit by Section 10 any repair work. Section 10 merely contains a positive statement that a lawful work may be repaired if, in the opinion of the Minister, interference with navigation is not increased by the repair. The NWPA is accordingly somewhat ambiguous in whether or not a landowner must formally apply for approval to repair a wharf. Section 10 does not appear to go this far. Section 5 prohibits building or placing a wharf, not repairing an existing structure.

***BEACHES ACT* (NOVA SCOTIA)**

There are provisions in the Nova Scotia *Beaches Act* and regulations made thereunder which have a bearing on the issue of the repair or construction of a wharf. I have attached copies of the Act and Regulations for ease of reference.

Note that Section 8(1)(g) provides that no person shall, while on a beach, engage in any activity prohibited by regulation. Under the Beaches Regulations, Section 6 provides that no person shall "develop" a beach without the written authorisation and approval of the Minister. "Develop" is defined by Section 2(c) as meaning the erection or placement on a beach of a structure. "Structure" is defined by Section 2(g) as including a wharf.

Accordingly, the Crown may argue that an upland property owner would be in breach of Section 6 of the *Beaches Act* if he erected a wharf on a beach without the Minister's prior written authorisation and approval. It is not clear whether the prohibition in Section 6 would extend to the repair of an existing wharf.

I have not researched the issue of whether the fact that an upland owner may have acquired title to the portion of a beach occupied by a wharf by virtue of more than 40 years adverse possession would take that portion of the beach out of the operation of the *Beaches Act*. However, I doubt that adverse possession would oust the provisions of the *Beaches Act*. Note that the definition of "beach" in Section 3(a) of the *Beaches Act* is a broad one which would arguably include lands on a beach granted by the Crown or acquired by adverse possession. There was a recent case involving the beach at Kingsburg in Lunenburg County, in which the Minister designated privately owned lands lying to the landward of the mean high watermark as a deemed "beach" under the *Beaches Act* and then used his designation to prevent residential development on the privately owned land. The designation had the effect of preventing any significant use of the land except for a walk along the shore, and really constituted de facto expropriation without compensation. This exercise of ministerial authority was upheld by the Nova Scotia Court of Appeal. I would refer you to the decision of the Nova Scotia's Court of Appeal in *Mariner Real Estate Ltd.* v *Nova Scotia (Attorney General)*, (1999), 90 A.C.W.S. (3d) 589 (NSCA), which overruled the decision of Tidman J. reported in *Mariner*

Real Estate Ltd. v. *Nova Scotia (Attorney General)*, (1998) 83 A.C.W.S. (3d) 614 (NSSC). The case makes depressing reading. It appears that the provincial Crown had been planning to establish a provincial park at Kingsburg, but found it easier and cheaper to simply designate private lands as a "beach" under the *Beaches Act* rather than expropriate the lands for a park and pay compensation. The Court noted that, unlike the situation in Australia and the United States of America, property rights are not protected under the *Charter of Rights and Freedoms*. I believe that the Republic of China has recently amended its constitution to protect property rights. Do not expect this to occur in Nova Scotia or in Canada.

Notwithstanding the wording of the *Beaches Act*, I doubt whether owners of upland lands and water lots usually apply expressly under the *Beaches Act* for permits to construct wharves. I imagine that, ordinarily, the Minister of Natural Resources would simply issue a wharf permit under the *Crown Lands Act*. But technically the *Beaches Act* regulations are so broadly drafted as to require an approval from the Minister of Natural Resources under the *Beaches Act* as well.

My Name is Ozymandius, King of Kings

When the first Acadian and British settlers arrived in this Province, they came to a very different Nova Scotia. If they needed to construct wharves or place infill to fish and trade, they did so and government was happy to see them flourish and the economy develop. Outside of major public harbours like Halifax, Sydney, Lunenburg, Liverpool, and Yarmouth, Nova Scotians simply did what they had to do to make a living and did not worry over much about getting a permit from the distant bureaucracy. They had in fact in many cases left Europe desperate to escape an over-regulated society. Today, times have changed and the tide of regulation rises higher every year. Moreover, with the ever-burgeoning federal and provincial civil services, there is a much greater likelihood today that the regulatory regime will be expanded and enforced than 50 or 100 years ago. C. Northcote Parkinson, in his study of the mushroom – like growth of the civil service in Malaya, formulated his now famous Parkinson's Law: Work expands to fill the time available for its completion. Create a bureaucracy and it will continually work to expand the regulatory regime and hence the size and power of the bureaucracy.

In summary, if your client wishes to purchase a property created by infill or serviced by a wharf, or wishes to construct a new wharf, lead him carefully through the thicket of statutes and regulations and instil in him a healthy paranoia. And like Dirty Harry, tell him that what he has to ask himself is, does he feel lucky.