

THE EBB AND FLOW OF WATER LAW IN NOVA SCOTIA

In addition to its considerable inland surface waters, Nova Scotia is almost completely surrounded by water. From ancient riparian rights to modern environmental regulation, Nova Scotia's extensive body of water law, derived from common law doctrines as well as provincial and federal legislation, defines our rights to access and make use of our water resources.

This paper is not intended to exhaustively address all issues in relation to water law in Nova Scotia. However, it is hoped that it will bring to light some issues that frequently arise, and to which counsel will, no doubt, be required to turn their minds from time to time. The introduction of Nova Scotia's new land registry system will require careful consideration of some of the principles of water law in Nova Scotia when migrating property to the new system. As the ownership of waterfront properties becomes a desirable pursuit for many individuals, the rights and obligations of such owners may be called into question and require clarification more frequently than in the past.

PUBLIC HARBOURS

Public harbours fall within the legislative powers of the Federal Crown pursuant to Section 108 of the *Constitution Act, 1867*:

108. The Public Works and Property of each Province, enumerated in the Third Schedule to this Act, shall be the Property of Canada.

The Third Schedule setting out the provincial public works and property to be the property of Canada includes "Public Harbours".

What is meant by “public harbour” in the context of the *Constitution* has been the subject of much judicial consideration.

Section 108 first came for interpretation before the Supreme Court of Canada in 1881 in the case of ***Holman v. Green*** [1881] 6 S.C.R. 707, wherein the status of the Summerside, P.E.I., wharf was in issue. The wharf had been granted to the owner from the province and was located between the high and low water mark in Summerside Harbour. The Supreme Court held that upon the province becoming part of Canada, it ceased to have any property in or legislative power over ungranted lands between the high and low water mark in public harbours, and that not only control over the harbour, but also ownership of the soil became vested in Canada. Justice Strong at 717 states:

...next arise the questions does the description Public Harbours include the bed or soil of the harbour ? and, if so, is the foreshore also included in it? I am of the opinion that there is even less doubt on this head than on the first point. By the attribution of harbours to the Dominion, it never could have meant to transfer a mere franchise to the Dominion Government – this is to the Crown in right of the Dominion – leaving the property in the soil vested in the Crown in the right of the Province. Such a construction would be so arbitrary, unnatural and improbable as to be wholly inadmissible.

However, later, in ***Attorney General for the Dominion of Canada v. Attorney General for the Provinces of Ontario, Quebec and Nova Scotia*** [1898] A.C. 700 (P.C.) the Privy Council declined to define the term “public harbour” but stated:

With regard to public harbours, their Lordships entertain no doubt that whatever is properly comprised in this term became vested in the Dominion of Canada. The words of the enactment in the Third Schedule are precise. It was contended on behalf of the provinces that only those parts of what might ordinarily fall within the term “harbour” on which public works had been executed became vested in the Dominion, and that no part of the bed of the sea did so. Their Lordships are unable to adopt this view. The Supreme Court, in arriving that the same conclusion, founded their opinion on a previous decision in the same court in the case of *Holman v. Green* when it was held that the foreshore between the high

and low water mark on the margin of the harbour became the property of the Dominion as part of the harbour. Their Lordships are of the opinion that it does not follow that, because the foreshore on the margin of a harbour is Crown property, it necessarily forms part of the harbour. It may or may not do so according to circumstances. If, for example, it had actually been used for harbour purposes, such as anchoring ships or landing goods, it would no doubt form part of the harbour; but there are other cases in which, in their Lordships' opinion, it would be equally clear that it did not form part of it.

The Privy Council confirmed the reasoning of the Supreme Court in *Holman* (supra) with the exception of its opinion as it relates to the foreshore.

In ***Dominion Coal Co. v. Cape Breton (County)***, 1962 CarswellINS 23; 48 M.P.R. 174, 40 D.L.R. (2d) 593, the Court considered the authority of the County of Cape Breton to levy taxes on works of the Dominion Coal Company which lay under the bed of Spanish Bay Patterson J. stated:

208 I think it is clear that whether or not any body of water was or was not a "public harbour" within the meaning of the Third Schedule of the British North America Act is a pure question of fact. (*R. v. Attorney-General of Ontario et al.*, [1934] S.C.R. 133; *Jalbert and the Attorney-General for Quebec v. R.*, [1937] S.C.R. 51). I mention these cases as it is evident from the reading of the decisions that on the trial a vast amount of evidence was produced to establish as a fact that not only the harbour involved but the relevant part of it was on July 1st, 1867, a "public harbour". That is, in this present appeal before this Court could even enter into a consideration of what legal consequence might ensue if the waters over the assessed properties formed part of a "public harbour", it would first have to be established that these waters were in fact part of a "public harbour". In simple words, this Court cannot take judicial notice of what harbour or what part of a harbour was a "public harbour" on July 1st, 1867, or in fact, at any time since, assuming that there are other pertinent times.

...

220 I think it is true that the words "harbour" and "bay" are often loosely applied and the same body of water is sometimes called a "harbour" and sometimes a "bay". But cartographers generally apply the word "harbour" to a body of water wherein there is shelter. In Fowler's "Modern English Usage" it is said to be a place "offering accommodation (used or not) in which ships may remain in safety for any purpose". "A harbour, in its ordinary sense, is a place to shelter ships from the violence of the sea, and where ships are brought for commercial purposes to load and unload goods." Esher M.R., in *R. v. Hannam*, 2 T.L.R. 234. It seems to me that before a body of water can properly be considered a "harbour", it must have the essential element of shelter or safety. Apart altogether from its use to designate a body of water, the word carries the meaning of a place of safety.

221 Generally speaking, the word "bay" connotes a larger body of water with an inward curve something like a saucer and which affords relatively no protection from the sea. A harbour, because it must have the essential element of safety, (often afforded by its projecting headlands) is to some extent an enclosure.

There is no precise definition of a public harbour and each case will turn on its own facts. Factors such as commercial use of the harbour by the public and the government, for example in loading and unloading commercial cargo, or fishermen wintering their vessels, as of the date of Confederation are important considerations. Once a harbour is found to be a public harbour within the definition of the *Constitution*, then it clearly falls within the legislative power of the federal Crown. This power extends to the bed of the harbour and the boundary between the Crown ownership and private ownership is the high water mark as of July 1, 1867. However, in some instances the boundary may, depending upon the circumstances, extend to include the foreshore¹ where its use was material to the operation of the harbour at the time of Confederation².

¹ The term foreshore is applicable only to tidal waters. It is equivalent to the term "beach" and is the land lying between the lines of high water and low water over which the tides flow and ebb. No right of property in a foreshore which was vested in a province before Confederation has been taken away by the *Constitution Act, 1867* except insofar as transferred by express enactment,

Notwithstanding the *Constitution Act*, the federal government has exercised some legislative jurisdiction over public harbours by enacting the *Canada Marine Act*, S.C. 1998, c. 10, intended to govern the operation of “public ports”.

Pursuant to 65 of the Act, the Governor-in-Council may by regulation designate as a public port “any navigable waters within the jurisdiction of Parliament, including any foreshore”. The Act also provides that every port and port facility to which the *Public Harbours and Port Facilities Act* applied is deemed to have been designated a public port. Pursuant to *Public Ports and Public Port Facilities Regulations*, SOR/2001-154, the following ports were designated as public ports in Nova Scotia:

Bridgewater	Pictou
Digby	Port Hastings
Hantsport	Port Hawkesbury
Liverpool	Pugwash
Louisbourg	Shelburne
Lunenburg	Sydney
Mulgrave	Yarmouth
North Sydney	

The *Canada Marine Act* also replaced *Canada Ports Corporation Act*, under which a number of public ports had been established as separate autonomous corporations. These ports were continued under the *Canada Marine Act*. There are 19 such ports in Canada, including the Port of Halifax in Nova Scotia.

Small craft harbours also fall within the jurisdiction of the Federal Government. These are usually smaller fishing harbours and ports.

such as in certain harbour areas. (See MacIntosh, *Nova Scotia Real Property Practice Manual* at 15-9)

² See, for example, *Montreal v. Montreal Harbour Commissioners* [1926] A.C. 299

The legislation affecting public harbours must be consulted carefully to ascertain the status of a particular public port to ensure that the Federal Crown has not divested or deproclaimed the port.

Given the constitutional nature of “public harbours”, whether a port is a “public harbour” within the meaning of the *Constitution Act* will always be a matter of interpretation. Lists of designated or deemed “public ports” pursuant to the *Canada Marine Act* is not determinative or exhaustive as to whether, pursuant to the *Constitution Act*, a harbour is a “public harbour”.

Lots bounded by Public Harbours and Water Lots

The validity of Crown grants in harbours is an important consideration when a solicitor is certifying title to lands surrounding same, as well as in water lots. The Nova Scotia Court of Appeal first considered the issue in 1904 in the case of ***Kennelly v. Dominion Coal Company***, 1904 CarswellNS 10; 36 N.S.R. 495. At issue was a grant of land around Sydney Harbour. The court held that by virtue of the *British North America Act*, title to the land in the public harbour covered with water, and title to the foreshore, vested in the federal Crown. Accordingly, the provincial grant purporting to grant the lands did not convey valid title to the grantee.

Similarly, in ***Nickerson v. Attorney General of Canada*** (2000), 185 N.S.R. (2d) 36, 2000 CanLII 2117, the Nova Scotia Supreme Court considered the status of a water lot situate in Sydney Harbour. In this case, the Province of Nova Scotia objected to the title to the water lot in pursuing the possible purchase of the property from Nickerson. The lot had been granted to Nickerson’s predecessor in title by the provincial Crown in 1901. Clearly, the grant was not valid because it was granted post-confederation after the Federal Crown assumed ownership of public harbours. However, the plaintiff pursued an action for possessory title against the federal Crown on the basis that the water lot had been occupied by the predecessor in title for the requisite 60 years prior to 1950.

In order to establish adverse possession against the federal Crown, a plaintiff must demonstrate open, actual, exclusive, continuous and notorious possession for 60 years prior to 1950. By virtue of the Public Lands Grants Act, S.C. 1950, Ch. 19, which was enacted June 1, 1950, there was no longer any right to dispossess the Federal Crown of lands by prescription. Section 5 of the Act provided as follows:

5. No right, title or interest in Public lands shall be acquired by any person by prescription.

It therefore followed that the only claim to possessory title of property against the Crown which could succeed was one in which the full 60 years of adverse possession had been accomplished such that the lands had been vested in the claimant prior to the 1st day of June, 1950³.

The Public Lands Grants Act has now been replaced by the Federal Real Property and Federal Immovables Act, S.C. 1991, c. 50, and the prohibition against prescription is found in s. 14 of the Act:

14. No person acquires any federal real property or federal immovable by prescription.

The quality of possession is contextual and must be judged in the peculiar circumstances of the property under considered. In this particular instance, the quality of evidence of possession of the foreshore was determined to be somewhat different than in establishing title to regular real property. The Court in *Nickerson* cited ***Tweedie v. R.*** (1915) 52 S.C.R. 197, where Anglin J. said at p. 214:

In order to establish title by possession to a portion of the foreshore, it is not necessary to prove the same exclusive possession of it, which would be requisite in a case of uplands. A grantee of foreshore holds it subject to the *jus publicum* of navigation and fishing, and a similarly restricted title to it by possession may be established by proof of such beneficial enjoyment as a grantee holding subject to this *jus publicum* might have exercised...

³ The Queen v. Smith (1981) 1 F.C. 346 (C.A.)

In *Nickerson* (supra) the evidence showed that the predecessors in title had used the lot for anchoring and mooring boats in front of their home and that guests were carried to and from the home in rowboats, it was used as a base for the Canadian Navy during WW I, commercial wharf facilities were constructed and used as a private shipping and loading site, a warehouse was constructed on the site that served several purposes over the years. The Court concluded on the basis of the evidence as to the use and occupation of the property for the 60 year period prior to 1950, that Nickerson established title to the water lot in question.

When dealing with lands on water, the original grant should be examined carefully. Prior to the adoption of the *Marketable Titles Act*, title searches would usually contain a copy of the grant. However, since the inception of the *Marketable Titles Act* and the requirement to only go back 40 years, there may be a tendency to have confirmation only that the lands were granted by referencing a grant sheet and not examining the validity of the grant. When certifying title under the new Land Registry System, the grant of what might be a federal water lot, following the date of Confederation, from the Provincial Crown should be noted as a textual qualification and the lawyer may wish to consider the acquisition of title insurance.

WHERE TO DRAW THE LINE: THE HIGH WATER MARK

The location of the high water mark is important. It is the boundary between Crown ownership and private ownership.

In ***Canada (A.G.) v. Kennings, 1988 CarswellNat 828, 23 F.T.R. 51, 40 L.C.R. 253***, the Federal Court of Canada stated:

30 Where land is granted bordering upon tidal waters the water boundary is limited by the line of high water mark, which is interpreted to mean the medium high tide line between spring and neap, unless expressly stated to the contrary in the grant or conveyance thereof. The title to the foreshore or beach between high water and low water mark and the bed of the same under the waters of the sea is

in the Crown in right of the province: *Turnbull v. Saunders* (1921), 48 N.B.R. 502, 60 D.L.R. 666 (C.A.); *Esquimalt & Nanaimo Ry Co. v. Treat* (1919), 48 D.L.R. 139 (P.C.) aff'g (1918), 43 D.L.R. 653 (B.C.C.A.); and *A.-G. B.C. v. Neilson*, *supra*.

The precise location of the high water mark is a matter of fact and evidence. In Nova Scotia, the high water mark is defined in the Land Surveyors Regulations⁴ made pursuant to the *Land Surveyors Act*, R.S.N.S. 1989, c. 249. Part II, s. 7 of the regulations state:

"ordinary high water mark" means the limit or edge of a body of water where the land has been covered by water so long as to wrest it from vegetation or as to mark a distinct character upon the vegetation where it extends into the water or upon the soil itself.

In the case of public harbours, as note above, federal Crown ownership may extend to include the foreshore where the use of the foreshore was integral to the operation of the public harbour.

Whether or not a "foreshore" is owned by the Provincial Crown, or the adjacent landowner, is complicated by legislation such as the *Beaches Act*, R.S.N.S. 1985, c. 32, which states that the beaches of Nova Scotia are dedicated in perpetuity for the benefit, education and enjoyment of present and future generations of Nova Scotians. The Act defines "beach" as:

3(a)...that area of land on the coastline lying to the seaward of the mean high watermark and that area of land to landward immediately adjacent thereto to the distance determined by the Governor in Council, and includes any lakeshore area declared by the Governor in Council to be a beach;

And further, in the *Beaches and Foreshores Act*, R.S.N.S. 1985, c. 33, s. 1.

⁴ O.I.C. 88-908 (Sept. 13, 1988), N.S. Reg. 188/88 as amended up to & including O.I.C. 1999-569 (Nov 25, 1999), N.S. Reg. 127/99

2 (1) The Governor in Council may, upon application therefor in writing to the Minister of Lands and Forests,

(a) give a grant from the Crown to any person of any ungranted flat, beach or foreshore upon the coast of the Province; or

(b) enter into a lease with any person of any such flat, beach or foreshore.

(2) Every such grant when issued shall vest absolutely the fee simple of the land conveyed thereby in the person receiving the same, subject to any control vested in the Parliament of Canada in respect to the navigation of any lands covered with water embraced in such grant.

OWNERSHIP OF LAKES, RIVERS, PONDS AND OTHER WATERCOURSES

The ownership of “watercourses” in the Province of Nova Scotia rests in the Provincial Crown. Nova Scotia’s first Water Act was enacted in 1919⁵ with the effect of vesting all watercourse, whether previously granted or otherwise, in the Province of Nova Scotia as of May 16, 1919:

Notwithstanding any law of Nova Scotia, whether statutory or otherwise, or by a grant, deed or transfer heretofore made, whether by the Crown or otherwise, or any possession, occupation, use or obstruction of any water course, or any use of any water by any person for any time whatever, **every water course and the sole and exclusive right to use, divert and appropriate any and all water at any time in any water course, is declared to be vested forever in the Crown in right of the Province of Nova Scotia.**

“Water course” was defined in the 1919 statute to include:

2 (b) ... every water course and the bed thereof, and every source of water supply, whether the same usually contains water or not, and every stream, river,

⁵ Water Act, S.N.S. 1919, c. 5, s. 3

lake, pond, creek, spring, ravine and gulch; but shall not include small rivulets or brooks unsuitable for milling, mechanical or power purposes

As indicated by the above noted definition of “water course” the initial purpose of the Water Act was grounded in industrial development. In **Corkum v. Nash** (1990), 71 D.L.R. (4th) 390 (N.S.S.C.) Justice Davison summarized its intention at para. 33:

The intention of the legislature was to permit the Province to take control of watercourses in order that watercourses and the water are preserved for the benefit of the public for a number of uses included fresh water supply irrigation and industrial and recreational purposes...

The effect of the Water Act has been considered on a number of occasions by our Courts since its inception in 1919. In **Desbarres v. The Polarus Shipping Co.** (1925), 58 N.S.R. 237, an appeal from the decision of the trial judge was dismissed. In *Desbarres* the plaintiff sought compensation for damage to his land resulting from the defendant’s damming of a river. The dam was constructed under licence issued by the Governor-in-Council pursuant to the Water Act. The defendant pleaded the provisions of the *Water Act* in his defence. At trial, MacKenzie J. stated:

After giving careful consideration to the chapter quoted and fully realizing its far-reaching effect, nevertheless, I am unable to believe that the legislation or chapter pleaded has the intention, purpose or effect of taking away or destroying private property rights, and ownership, beyond its strict limits.

The definition of water course in the 1919 *Act* was repealed by c. 58, s. 1(k) of the Statutes of 1972 and the following broader definition, removing the exception for small streams and rivulets not suitable for industrial use, substituted therefor:

(k) 'water course' 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 ground water, within the jurisdiction of the Province, whether it contains water or not;

Environmental concerns became more prevalent and the Water Act evolved as a means of environmental protection. In 1995, it was rolled into the Environment Act, S.N.S. 1994-95, c. 1. In **Acheson & DeWolfe v. R.** [2006] NSSC 211, Justice Stewart expressed the dual purpose of the vesting provision at para. 27:

...to permit the Province to take control of watercourses in order that watercourses and the water are preserved for the benefit of the public, inclusive of using a suitable waterway for power purposes in a manner protective of the environment and have safe ecological systems and habitat.

This vesting provision is now s. 103 of the Environment Act and reads:

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 a 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.

Pursuant to 3(be) of the Environment Act, “watercourse” means:

- (i) the bed and shore of every river, stream, lake, creek, pond, spring, lagoon or other natural body of water, and the water therein, within the jurisdiction of the Province, whether it contains water or not, and
- (ii) all ground water;

The ability of any person to make use of, occupy or obstruct any watercourse in the province of Nova Scotia is strictly legislated, and we are all well aware of the environmental regulatory regime in place to protect our water resources.

SUBDIVISION AND LAND REGISTRATION CONSIDERATIONS

The fact that watercourses are vested in the province poses some interesting questions in relation to property use and development in Nova Scotia. Perhaps one of the most interesting is the use of watercourses in the development and subdivision of lands.

In a recent decision of the Supreme Court in ***Silver Sands Realty Ltd. v. Nova Scotia (Attorney General)*** 2007 NSSC 291 a developer attempted to create a subdivision by creating lots that were in excess of 10 hectares, which would have dispensed with the need to obtain subdivision approval. In creating the subdivided lots, the developer included within the description of the lots a lake located on the lands in order to increase the lot size. The lake had apparently formed part of the initial grant to the predecessors in title (prior to the 1919 *Water Act*). The Registrar General declined to register the parcels in the Registry system. In an application for judicial review of the Registrar General's decision, the court found the Registrar acted correctly in declining to allow registration of the lots where the Crown was asserting ownership contrary to the registration.

Pursuant to provincial subdivision regulations⁶ and the *Municipal Government Act, 1998, c. 18, s. 1.* subdivision approval is not required for a subdivision resulting from an acquisition or disposition of land by Her Majesty the Queen in right of the Province or in right of Canada or by an agency of Her Majesty⁷. This exception has its foundation in the remedial *Real Property Transfer Validation Act, R.S.N.S. 1989, c. 386 [as it was at S.N.S. 1977, c. 16].* The need for this remedial legislation arose out of the decision of Jones, J. in ***Reid v. Reid*** (1976), 22 N.S.R. (2d) 361 wherein he found a conveyance, the effect of which is to subdivide land, is illegal and void unless a plan of subdivision, certified with the appropriate municipal approval, was filed with the appropriate Registry

⁶ N.S. Reg. 38/99 (April 1, 1999) as amended by N.S. Reg. 111/2003 (June 3, 2003)

⁷ Municipal Government Act, S.N.S. 1998, c. 18, s. 268(1)(c)

of Deeds. The effect of this decision was to illuminate the fact that previous conveyances in Nova Scotia were void and the legislature, to correct hardships resulting from what would otherwise have been invalid property transactions, enacted the Real Property Transfer Validation Act Section 4 of the 1977 Real Property Transfer Validation Act stated:

4. A devise of real property by a testamentary instruments or an acquisition of real property by the Province or any of its departments, agencies or Crown corporations by any means whatsoever resulting in a division of real property shall not be a subdivision within the meaning of subdivision as defined by the said Chapter 16 nor a subdivision within the meaning of the former Town Planning Act or any local Act or any regulation or by-law made pursuant to any of the said Acts.

The Nova Scotia Supreme Court, in ***Kent Homes Ltd. v. Meadowland Development Company Ltd.*** (1984) CarswellNS 94, 65 N.S.R. (2d) 352, determined that this provision had retrospective effect and further that the excluding provision applied not only to the land expropriated by the Province, but also to the remaining parcels. In *Kent Homes*, the surviving joint tenants conveyed a parcel of land outlined in a plan created by the expropriation of lands for highway construction by the province. The purchaser created a subdivision sought to convey the lots. The vendor, concerned that the lack of subdivision approval for the earlier created lot might invalidate the subsequent deed for the further subdivided lots, made an application pursuant to the Vendors & Purchasers Act seeking a declaration as to the validity of the deed. The Court held the deed to be valid. At paras. 21 et seq with respect to Section 4 of the Real Property Transfer Validation Act as it then was:

21. ...it is difficult not to conclude when the section is read in light of the whole statute that it not only has prospective effect, but retrospective effect as well, to subdivisions created by expropriations before April 30, 1977. The whole purpose of the Act was to validate a host of otherwise invalid real property transactions which were exposed by the Reid v. Reid decision. It would not make sense to exclude from the purview of this remedial Real Property Transfer Validation Act those types of subdivision described in s. 4 of that

Act. Such an interpretation would not fit in the general thrust of the “validation” character of the statute.

...

23. The next question to be determined is whether s. 4, as it applies to the expropriation and the resultant division of property, applies to the land expropriated itself or to the land remaining after the expropriation.

24. It seems clear and obvious to me that s. 4 of the Real Property Transfer Validation Act, when applied to an expropriation by the province, can only mean that the newly created distinct parcels of land do not constitute a subdivision and therefore need not comply with municipal subdivision regulations. Surely common sense says that the provisions of s. 4 would not just apply to the land expropriated by the province. What would be the reason for such a requirement? Why singly out provincially expropriated land to be free from municipal subdivision regulations, particularly when most such expropriations are for highway purposes and the need for subdivision approval would not ordinarily be contemplated in any event?

25. By expropriation, the province forcibly takes land from its citizens. This type of acquisition is clearly contemplated in s. 4 of the Real Property Transfer Validation Act. It would be unfair and macabre even, for the province to say, through this piece of legislation, that the land it expropriated would not require municipal subdivision approval but that the parcels remaining would require such municipal approval...

The Court went on to hold that if s. 4 were held to exclude de facto subdivisions created by provincial expropriation, the result would be “unfair and unreasonable”.

By analogy, if the title to a watercourse vests in the Crown, then it could be argued that there has been a de facto subdivision, and accordingly subdivision approval will not be required where a property is divided by a watercourse. The ultimate consideration will likely be whether a stream, brook, or otherwise, is in fact a watercourse. A watercourse,

in the Municipal Government Act, is defined as “a lake, river, stream, ocean or other body of water”⁸. Prior to 1972, the definition of watercourse excluded small rivulets or brooks unsuitable for milling, mechanical or power purposes. As the definition of watercourse has been expanded in pursuit of environmental protection, even the smallest of streams may be considered a watercourse within the Environment Act.

While we are not aware of any case law at this time which might provide guidance on this issue, attempts to broaden the application of the vesting provision of watercourses to include subdivision of property will be of great importance and concern to planners and mappers within the Province.

The location of a brook or stream on a property that may provide a natural subdivision can be of benefit when one wants to subdivide his or her lands. However, caution should be exercised when migrating title for a piece of property that may contain a watercourse; tread these waters carefully. While it may be tempting to create two separate lots at this opportune time given the existence of the watercourse, the pros and cons of doing so should be carefully weighed. Once a parcel of land has been subdivided on the basis of the existence of a watercourse, the parcels may never be able to be consolidated again, because, in effect, there is an intervening owner; i.e. the provincial Crown. Similarly, if two separate parcels are created, an easement from the Crown may be required in order to access one of the parcels over the watercourse. While at first glance, one might assume it could be argued that an easement by way of prescription or necessity has been established, the vesting provision in the Environment Act, may in fact preclude this.

RIPARIAN RIGHTS

Of most concern to waterfront property owners, whether the body of water is owned by the federal or provincial Crown, are their riparian rights. “Riparian” is derived from “ripa”, meaning the bank of a river. The riparian owner is the person whose land runs to and is

⁸ Municipal Government Act, S.N.S. 1998, c. 18, s. 191

bounded by the water⁹. Riparian owners have advantages other property owners do not enjoy¹⁰.

The right of access to the water

The most basic of the riparian rights is the right of access to the water. The right of access is a property right and the owner may maintain an action or obtain an injunction against anyone, even the owner of the bed, or the Crown, who interferes with that right¹¹.

The right of drainage

The riparian owner can construct drains leading to the water in order to remove water from his property. However, the use must be carried out in reasonable manner to avoid liability for damage or injury to neighbouring lands.

The right to the flow of the water

Owners of land upstream may not impede the natural flow of water to downstream properties. Every riparian owner has the right to have the advantage of the water flow on his property, free and undiminished¹². The various riparian rights relating to the flow can be classified as follows:

- (a) the right to have the water flow in its natural course;
- (b) rights preventing the permanent extraction of water from the stream;
- (c) rights preventing the alteration of the flow to property downstream;
- (d) the right to have the water leave one's land in its accustomed manner.

⁹ Although, the foreshore may be owned by another, for example the Crown. This does not interfere with the riparian owner's rights, however he may be required to come to an agreement with the owner of the foreshore with respect to access.

¹⁰ See McIntosh, *Nova Scotia Real Property Practice Manual* at 15.7; see generally LaForest, G. Water Law in Canada – the Atlantic Provinces, (Ottawa: Department of Regional Economic Expansion, 1972).

¹¹ *Byron v. Stimpson* (1878), 17 N.B.R. 697; *Pickels v. R* (1912), 14 Ex. C.R. 379

¹² *Stanford v. Imperial Oil Co.* (1920), 54 N.S.R. 106, 56 D.L.R. 402, 1920 CarswellNS 38 (C.A.)

The right to quality water

The riparian owner has the right for water to come to his property in its natural state of flow, quantity and quality.¹³ In other words, a riparian owner is entitled to the flow of water in its natural state, unpolluted. Riparian owners can maintain actions for pollution against upper riparian owners when pollution results from industries, sewage systems, etc.

The right to use the water

A riparian owner has a right to take water for his own domestic purpose provided he does not interfere with the rights of owners either above or below him. Ordinary uses are restricted to the use of water for drinking purposes, watering stock and other domestic purposes. A riparian owner may also make use of the water for extraordinary purposes. However, it must be incident to the enjoyment of his property¹⁴.

The right to accretion

The right to accretion is the right to own an area of land added to the property by the gradual retreat of the water or by the washing up of sand to create new land, so long as the addition is caused by natural means and is gradual and imperceptible¹⁵. However, when the land created by the accretion involved a process that was measured and perceptible, the newly created land belongs to the Crown and not the riparian owner¹⁶.

¹³ *Ratte v. Booth* (1886), 11 O.R. 491

¹⁴ *James v. Town of Bridgewater* (1915) 49 N.S.R. 188

¹⁵ It is not uncommon to discover that lands bounded by lakes or rivers described in older descriptions have increased in size due to accretion. The element of gradual formation is important in accretion. New lands created by ice flows and storms lack the element of gradual formation and may not belong to the riparian owner.

¹⁶ *Attorney General v. Reeve* (1885) (Q.B.); see also McIntosh, *Nova Scotia Real Property Practice Manual*, 15.7H

The right to embank against flood

Riparian owners are entitled to protect their lands against flood. However, he should be careful to ensure that he does not cause almost total stoppage of the stream for a considerable portion of time.¹⁷

The fact that lands may be bounded by a public harbour does not affect the riparian owner's rights. In ***Merritt v. Toronto (City)***, 1912 CarswellOnt 402, 22 O.W.R. 710, the Ontario Supreme Court (High Court of Justice) stated:

40 The right of the riparian owner to use the water does not depend upon the ownership of the soil under the water, and whether owned by the Crown, as represented by the Dominion or province, or private person, cannot affect the plaintiff's riparian rights.

The lessee of a *water lot* may not necessarily enjoy riparian rights. In ***F. Kerr Co. v. Seely***, 1911 CarswellNB 70, 44 S.C.R. 629 the plaintiff was the lessee of a water lot in a harbour. The plaintiff sought to restrain the defendants, lessees of the adjoining water lot, from erecting a wharf which would interfere with plaintiff's access to his lot, a right of access not given to him under his lease. The Supreme Court of Canada held he was not a riparian owner, and had no rights other than those given to him under his lease. He could not therefore restrain defendant from constructing its wharf. Davies J., stated

[4] In my judgment the respondent was not a riparian owner at all and possessed none of the special rights of a riparian proprietor as such. He was simply the lessee of a water-lot lying in the harbour of St. John, between high and low-water mark, and had just such rights and those only as were conferred by his lease or necessarily arose out of it.

In *Kerr*, the majority of the Court grounded its decision on the fact that no part of the *riparian* or bank of the shore was included within or touched the boundaries of the water lot

¹⁷ *George v. Floyd and Van Gestel* (1973), 6 N.S.R. (2d) 299 (C.A.)

which was the subject of the lease. All the leased lands were below the high-water mark, and between the land and the bank of the river there intervened other water lots.

STATUTORY OBLIGATIONS AND PROHIBITIONS

Whether a waterfront property or water lot owner has acquired his property by provincial or federal grant, or by possessory title, his ownership is always subject to overriding statutory and common law rights and obligations.

When exercising riparian rights, owners must not only be cautious of injury to their neighbours, they must also be cognizant of the overriding rights and limitations placed upon them by an ever increasing plethora of statutory obligations and prohibitions.

Protection of the environment and habitat, as well as protection of the general public's right to navigation are paramount considerations to those of the riparian owner.

While a riparian owner has a right to access the water, or protect against flood, he should take no steps to do so without obtaining proper approval from appropriate regulatory agencies, which may include the Department of the Environment, the Department of Natural Resources, the Department of Fisheries & Oceans (Canada) and Transport Canada if navigation may be affected.

The following legislation¹⁸ may impact upon a property owner's use and access to its waterfront property, or water lot:

Beaches Act, R.S.N.S. 1985, c. 32

Areas of land both the seaward and landward side of the high water mark can be designated as beaches by the Governor in Council and be therefore subject to the use restrictions applicable to beaches

Special Places Protection Act, R.S.N.S, c. 438

Any area of land in Nova Scotia, *including land covered with water*, can be designated as a special place for heritage, ecological, or

¹⁸ This list is not intended to be exhaustive.

paleontological reasons. Again, such a designation restricts activities which may be carried out on the land.

Water Resources Protection Act, S.N.S. 2000, c. 10

This legislation is intended to protect all of Nova Scotia's water resources from exploitation. It provides that notwithstanding any other enactment, no person shall be granted an approval to and no person shall drill for, divert, extract, take or store water for removal; sell or otherwise dispose of water to a person for removal; convey or transport water for removal; or remove water, from the portion of the Atlantic Drainage Basin that is located within the Province. Water may be removed if it is, or is to be, packaged in the Province in a container of not more than twenty-five litres or such other maximum capacity as is prescribed by the regulations; it is transported in a motor vehicle, vessel or aircraft and is necessary for the operation of the motor vehicle, vessel or aircraft or is intended for the use of animals or persons therein, or the transport of fish or any other product therein; used for a non-commercial purpose, including meeting short-term safety, security, fire-fighting or humanitarian needs; it is included in manufactured, produced or packaged foods or other products (with the exception of potable water); or it is removed under such other circumstances as are prescribed by the regulations.

Water Act, R.S.N.S., c. 500

Extinguishes all the right, title and interest of Her Majesty in right of the Province under the lands described in the Schedule to the Act. The lands described in the Schedule are situate, lying and being at Garden Lots, in the County of Lunenburg.

Ditches and Water Courses Act, R.S.N.S, c. 132

Where a landowner might benefit by making a ditch or drain, or by deepening or widening a ditch or drain already made, in a natural water course, or by making, deepening or widening a ditch or drain for the purpose of taking off surplus water or in order to enable the landowners or occupier to make better use of the land for cultivation or other use, a “just and fair” proportion of the ditch or drain may be opened and made, deepened or widened. The owners and their successors in ownership are responsible for the maintenance of the drain. Activities carried out under this Act must be done under the supervision and with the consent of an engineer.

Other legislation which may affect waterfront landowners are:

Beaches and Foreshores Act, R.S.N.S., c. 33
Wilderness Areas Protection Act, S.N.S. 1998, c. 27,
Provincial Parks Act, R.S.N.S., c. 367
Fisheries and Coastal Resources Act, S.N.S. 1996, c. 25
Endangered Species Act, S.N.S. 1998, c. 11
Wildlife Act, R.S.N.S., c. 504
Environment Act, S.N.S. 1994-95, c. 1
Municipal Government Act, S.N.S. 1998, c. 18,
Fishing and Recreational Harbours Act, R.S.C. 1985, c. F-24
Canada Marine Act, S.C. 1998, c. 10
Canada Shipping Act, S.C. 2001, c. 26
Canadian Environmental Protection Act, S.C. 1999, c. 33
Fisheries Act, R.S.C, 1985, c. F-14
Migratory Birds Convention Act, S.C. 1994, c. 22
Oceans Act, S.C. 1996, c. 31
Navigable Waters Protection Act, R.S.C, 1985, c. N-22

The above noted list is not intended to be exhaustive and simply illustrates the myriad of regulatory statutes which a landowner must turn his mind to whenever he intends to carry out any activity on his property that has an impact on water resources.

From the protection of the environment to the navigation of shipping in both provincial and federal waters, the waterfront property owner in Nova Scotia should always be well informed about any obligations or prohibitions to which he or his property may be subject.

January 11, 2008