

April 15, 2021

VIA EMAIL

Our File No.: 161299

Brent Larmer
Municipal Clerk
Manager of Legislative Services
Town of Cobourg
55 King Street West
Cobourg ON
K9A 2M2

Dear Mr. Larmer:

Re: Cobourg Harbour Opinion

We have been asked to provide a comprehensive legal opinion to The Corporation of the Town of Cobourg (the “Town”) with respect to the powers and authority of the Town to regulate and control activities in or upon waters within its municipally-owned harbour.

Executive Summary

The Town has multiple sources of authority to regulate and control activities in or upon waters within its municipally-owned harbour.

It may regulate the subject harbour water area as an owner of the subject property rights that were transferred to the Town from the Crown pursuant to a grant agreement in 2002.

In addition, it may regulate the subject harbour water area pursuant to statutory authority granted by applicable municipal legislation read in conjunction with the legislation related to the territorial limits of municipal jurisdiction.

Owners of land adjacent to the harbour waters have riparian rights, which include a right to access the water for the purpose of navigation. However, those rights are subject to regulatory authority which the municipality may exercise which would have a limit on the extent of said rights.

Background

The Town is situated on Lake Ontario, one of the five Great Lakes and a navigable body of water. The Town owns a harbour on Lake Ontario known as the Cobourg Harbour (the “Harbour”). Once an important industrial port, the Harbour has more recently been used for leisure craft and recreational activities.

The Harbour was formerly owned by the Crown in Right of Canada. Ownership was transferred to the Town pursuant to a federal program for the divestiture of small craft harbours. In 2002, the Federal Government, represented by the Ministry of Fisheries and Oceans, entered into an agreement with the Town (the "Grant Agreement") whereby the Crown in Right of Canada would transfer ownership of the Harbour to the Town in exchange for a nominal fee, and a covenant to make the Harbour publicly-accessible for a period of 5 years.

On October 7, 2003, title to the Harbour was transferred to the Town. The Town's landholdings in respect of the Harbour comprise not only its physical elements, such as the docks, pier and breakwater, but also a considerable portion of lands covered by water (i.e. water lots forming the bed of Lake Ontario).

A copy of the reference plan describing these water lots and accompanying the transfer, being Reference Plan 39R9776, is attached to our opinion as **Appendix "A"**.

The Town currently operates and maintains the Harbour, including a municipal marina.

There are a number of non-municipal property owners adjacent to the subject harbour waters.

We understand that there has been some questions as to what authority the Town has to regulate certain activities on the water and in the Harbour.

At its meeting on July 27, 2020, Council passed the following resolution:

Moved by Councillor Emily Chorley,

THAT Council receive the recommendation from the Parks and Recreation Advisory Committee for information purposes;

AND FURTHER THAT a definitive legal opinion from an independent legal counsel with expertise in riparian rights be obtained regarding the municipality's ability, if any, to regulate on-water activities in the harbour;

AND FURTHER THAT the legal opinion be obtained before any further attempt to regulate on-water activities;

AND FURTHER THAT the 2015 legal opinion on this matter be made available to the public.

Carried

Our firm was subsequently retained to provide a comprehensive legal opinion pursuant to Council's direction. The Council resolution refers to only to "riparian rights". However, we understand that Council's concern involves the extent of the Town's authority to regulate on-water activities in the Harbour, including a consideration of riparian rights.

Materials Review

In order to provide our legal opinion, we have reviewed the following materials:

- the Grant Agreement, dated March 5, 2002
- relevant parcel abstract, title documents, and plans of survey for the Harbour
- the Memo from the Secretary of the Parks and Recreation Advisory Committee, titled “regarding a recommendation surrounding the Aquatic Safety Audit referred to the Committee at the May 11, 2020 Council Meeting - Request for Legal Opinion”

We have also reviewed the *Municipal Act, 2001*, other relevant statutes, relevant case law, and such secondary sources that we believed to be pertinent to the questions to be addressed in this opinion.

Issues

Our opinion will respond to the following questions/issues:

- 1. The Regulation of uses and activities in the lake harbour area by a municipality under the *Municipal Act, 2001* and the *Planning Act***
 - a. Territorial limits under the *Municipal Act, 2001***
 - b. Regulation of uses by a municipality and conflict of laws/division of powers**
 - c. The spheres of jurisdiction and form of regulation**
- 2. The Regulation of the Harbour pursuant to the Harbour Agreement with the federal government**
- 3. The Riparian Rights of adjacent owners are subject to the above noted regulatory authority**

Analysis

Issue 1 A. – Territorial Limits of a Municipality

A municipality has territorial limits to its jurisdiction. Subsection 19(1) of the *Municipal Act, 2001*¹ provides that the by-laws and resolutions of a municipality apply only within its geographic boundaries, subject to a few enumerated exceptions. Anything outside of the municipality’s territorial boundaries are therefore not subject to regulation by that municipality.

The boundary between two municipalities is generally easy to ascertain: a public highway, a watercourse, or legal description of lands on a survey. However, the *Municipal Act, 2001* does not speak to whether and how far a municipality’s boundary extends into the Great Lakes.

The geographic boundaries of a municipality are generally enumerated in the statute incorporating the municipal corporation. Based on our research, the statute that first incorporated the Town of

¹ *Municipal Act, 2001*, S.O. 2001, c. 25.

Cobourg was passed by the Parliament of Upper Canada in the year 1837. It provides the following territorial description of the Town:

That the said Town of Cobourg shall be comprised within the following limits or boundaries, that is to say, commencing on the Lake Shore, at the South East Angle of Lot number Fourteen, in Concession B; thence North, sixteen degrees West, to the centre of the First Concession; thence South, seventy-four degrees West, to the centre of Lot number Twenty-one, in said Concession; thence South, sixteen degrees East, to the Lake Shore; thence along the Water's edge, to the place of beginning.² [emphasis added]

The 1837 Act appears to indicate that the territorial limit of the Town terminates at the water's edge. However, we believe that modern legislation in the intervening period has since altered this boundary.

Various iterations of the *Territorial Division Act* have divided the province into various geographic sub-units for municipal and judicial purposes. The present *Territorial Division Act, 2002*³ simply provides authority for the province to be divided into geographical areas by regulations, but also provides that the boundaries of any municipality are not effected by the repeal of any previous version of that statute.⁴

The now-repealed *Territorial Division Act*⁵ sets out certain rules related to the boundaries of municipalities fronting on certain bodies of water. Section 5, as applicable to the Town, provided as follows:

Limits of townships bounded by certain lakes and rivers

5 (1) Except as provided in subsections (2) and (3), the limits of all the townships lying on...Lake Ontario...extend to the boundary of the Province of Ontario in such lake...; in prolongation of the outlines of each township respectively; and unless otherwise provided herein, such townships also include all the islands the whole or the greater part of which are comprised within the said outlines so prolonged.

The effect of this provision is that the Town's territorial jurisdiction extends beyond the water's edge and into Lake Ontario to the international water boundary with the United States.

² *An Act to establish a Police in the Town of Cobourg, and to define the limits of the said Town*, Passed 4th March 1837, Prov UC, 1983 (7 Will IV), c. 42, s. II (the "1837 Act"); available online: <https://bnald.lib.unb.ca/legislation/act-establish-police-town-cobourg-and-define-limits-said-town-passed-4th-march-1837>

³ *Territorial Division Act, 2002*, S.O. 2002, c. 17, Sched. E.

⁴ *Ibid*, s. 1(2).

⁵ *Territorial Division Act*, R.S.O. 1990, c. T.5; repealed January 1, 2003 and replaced by the *Territorial Division Act, 2002*.

This effect of this provision of the *Territorial Division Act* has been illustrated and confirmed in case law. In *Moore (Township) v. Hamilton*,⁶ the Ontario Supreme Court relied on a substantially similar provision of the predecessor *Territorial Division Act* to find that the Township of Moore, fronting on the St. Clair River (which forms the international boundary between Ontario and the State of Michigan), could enforce its zoning by-law against structures in that river.

This operation of the *Territorial Division Act* was similarly noted by the Ontario Supreme Court in *Toronto Transit Commission v. Aqua Taxi Ltd.*,⁷ finding that the limits of the former Metropolitan Toronto extended to include Toronto Bay and the Toronto Islands, with the effect that water taxis were subject to regulation by the municipal authorities.

As such, we are of the view that the Town's territorial limit does extend into Lake Ontario. However, we wish to point out that any exercise of authority must be done for a proper municipal purpose, and subject to the jurisdiction of other levels of government. There may be a municipal purpose in regulating those activities immediately off shore. To the contrary, an attempt to regulate the passage of cargo ship in the middle of Lake Ontario would be tenuous and not bare a municipal purpose.

Issue 1B – Federalism, Division of Powers over Bodies of Water, and Municipal Authority

A response to the issues set out in this opinion requires a consideration of the constitutional division of powers in Canada. Sections 91 and 92 of the *Constitution Act, 1982*⁸ divide and enumerate the powers of the federal government and the provinces. Relevant to this opinion, the federal government has been assigned jurisdiction over, among other things, federally-owned property, which includes public harbours at the time of confederation,⁹ and navigation and shipping.¹⁰ The provinces have exclusive jurisdiction to make laws in relation to municipal institutions, property and civil rights, and matters of a merely local or private nature.¹¹

Interjurisdictional Immunity and Federal Paramountcy

Although jurisdiction is ostensibly assigned to one level of government or the other, these powers are not 'watertight compartments'. For instance, many contemporary subject matters have an inherent "dual aspect", meaning that both federal and provincial laws may simultaneously apply. Constitutional law has developed doctrines that recognize some overlap is necessary for effective government. At the same time however, there are limits to the ability of a lower level of government to intrude on the jurisdiction of a superior level of government.

Two constitutional doctrines help to outline the boundaries between federal and provincial jurisdiction: (i) interjurisdictional immunity, and (ii) federal paramountcy.

⁶ (1978), 96 D.L.R. (3d) 156 at para. 4 (Ont. Sup. Ct.); rev'd on other grounds (1979), 96 D.L.R. (3d) 159 (Ont. C.A.).

⁷ (1956), 6 D.L.R. (2d) 721 at para. 50 (Ont. Sup. Ct.).

⁸ *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c. 11.

⁹ *Ibid*, s. 108, Schedule 3, s. 1.

¹⁰ *Ibid*, s. 91 1A, 10.

¹¹ *Ibid*, ss. 92 (8) (13), (16).

Interjurisdictional immunity provides that an otherwise valid provincial law will be inoperative if it “impairs the core” or the “basic minimum and unassailable content” of federal jurisdiction.¹² Federal paramountcy provides that in the event of a conflict between a federal law and an otherwise valid, operative provincial law, the federal law will prevail to the extent of the conflict. This is a high threshold, requiring either that one law permits what the other prohibits, or that the provincial law frustrates the purpose of the federal law.¹³

It is also important to recognize the position of municipalities within the structure of federalism in Canada. A municipal corporation does not exist as an independent level of government in the constitutional framework. Rather, a municipality is a creature of statute, and may exercise only those powers which are explicitly conferred upon them by provincial statute.¹⁴ As a municipality derives its lawmaking authority from the province, its regulations and actions are also subject to these constitutional doctrines.

Concurrent Jurisdiction to Regulate in Respect of Lands Cover by Water

The jurisprudence recognizes that there is concurrent jurisdiction in relation to the regulation of bodies of water. A province, vis-à-vis its municipalities, has the power to regulate matters on lands covered by water, provided it does not do so in a manner that interferes with federal jurisdiction over navigation.¹⁵

In *Hamilton Harbour Commissioners v. Hamilton (City)*, the Harbour Commissioners brought an action against the City of Hamilton for a declaration that its zoning by-laws and an official plan amendment were *ultra vires*, and that it had exclusive jurisdiction to regulate and develop the lands comprising the harbour. The Court of Appeal held that the courts will recognize “overlapping” or “concurrent” fields of jurisdiction such that both authorities are permitted to legislate in a particular field. Houlden J.A. held as follows:

In my opinion, land-use control within a harbour has both provincial and federal aspects. I conclude that the City pursuant to s. 35 of the Planning Act may validly pass a zoning by-law affecting land use within the harbour so long as it does not explicitly attempt to prohibit or regulate the use of land for purposes related to navigation and shipping. Similarly, the Commissioners, pursuant to s. 15 of the Commissioners' Act, 1912, may validly pass by-laws to regulate and control the use and development of land within the harbour for purposes related to navigation and shipping. Only if conflict arises with respect to the use of a parcel of land within

¹² See e.g. *Canadian Western Bank v. Alberta*, 2007 SCC 22 (S.C.C.) at paras. 28-31.

¹³ See e.g. *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53 (S.C.C.) at paras. 51-27.

¹⁴ *R. v. Greenbaum*, [1993] 1 S.C.R. 674 at p. 687, 14 M.P.L.R. (2d) 1 (S.C.C.).

¹⁵ *Galway & Cavendish (United Townships) v. Windover* (1995), 30 M.P.L.R. (2d) 109, at para. 10. (Ont. Gen. Div.); see also *Glaspell v. Ontario (Minister of Municipal Affairs and Housing)*, 2015 ONSC 3965, at para. 48.

the limits of the harbour, will the paramountcy of the federal power cause the operation of the by-law of the City to be suspended.¹⁶

The Court of Appeal considered a similar issue in the decision of *Moore (Township) v. Hamilton*.¹⁷ The trial judge had dismissed an application by the Township for an injunction to prevent the respondent from using a commercial gravel dock on the basis that it was in violation of a by-law. The trial judge had referred to *Hamilton Harbour Commissioners*, but found the by-law ineffective to prevent the use of the land for purposes related to navigation and shipping. On the basis of federal paramountcy, the inferior municipal by-law was held inoperative.

The Court of Appeal overturned the decision and granted the requested injunction. The federal *Navigable Waters Protection Act*,¹⁸ pursuant to which the respondent had received permission to build the dock, did not provide for the control of land use in connection with an approved work and the municipal by-law did not purport to regulate matters relating to navigation and shipping. Though the federal enabling legislation gave permission to build a structure, that permission in and of itself, did not prevent a municipality, acting under valid provincial legislation, from regulating the use of that structure.

Abstracting the principles from these cases, a municipality may validly regulate certain aspects of harbours, docks, and, more broadly, lands covered by water. However, to the extent that the municipal regulation interferes with, conflicts with, or purports to directly regulate a matter of navigation and shipping, it will be *ultra vires* and unenforceable.

A clear problematic example would be a municipal by-law that prohibited lighthouses. Whether grounded in zoning powers or powers to control public nuisance, the municipality passes a by-law prohibiting the erection of any lighthouse along the shore of a large lake. Lighthouses however serve an essential function in navigation in and around inland waterways. To the extent that the municipal by-law interferes with the federal navigation power, it is inoperative. Similarly, if the by-law regulated the luminous intensity (i.e. brightness) of the lighthouse to keep the night sky dark, whereas a federal regulation required a very high luminous intensity, there may be a conflict in which the federal regulation prevails.

Conflict Doctrine and Municipal By-laws

The paramountcy doctrine is also reflected in the *Municipal Act, 2001*:

Conflict between by-law and statutes, etc.

- 14** (1) A by-law is without effect to the extent of any conflict with,
- (a) a provincial or federal Act or a regulation made under such an Act; or
 - (b) an instrument of a legislative nature, including an order, licence or approval, made or issued under a provincial or federal Act or regulation.

Same

¹⁶ *Hamilton Harbour Commissioners v. Hamilton (City)* (1978), 6 M.P.L.R. 183 (Ont. C.A.).

¹⁷ *Moore (Township)*, *supra* note 6.

¹⁸ *Navigable Waters Protection Act*, R.S.C. 1970, c. N-19.

(2) Without restricting the generality of subsection (1), there is a conflict between a by-law of a municipality and an Act, regulation or instrument described in that subsection if the by-law frustrates the purpose of the Act, regulation or instrument.

Given this section, it is also possible that municipal jurisdiction to regulate lands covered by water can be defeated by valid provincial legislation occupying the regulatory field.

This was considered in *Galway & Cavendish (United Townships) v. Windover*,¹⁹ where a zoning by-law regulating the placement of docks and boathouses on a lake was upheld as a valid exercise of municipal powers. In addition to finding that the municipality could regulate the use of land covered by water despite federal jurisdiction over navigation, the court also considered whether the application of the zoning by-law was hampered by provincial legislation.

As the lakebed was owned by the Crown in Right of Ontario, the landowner argued that the provisions of the *Public Lands Act* ousted municipal jurisdiction. The *Public Lands Act* gave the Ministry of Natural Resources authority to issue permits for a dock or boathouse on the lake, which the landowner did not apply for. However, the statutory authority to issue such a permit explicitly recognized the planning authority of the municipality. As such, the province had not “occupied the field,” and the zoning by-law worked to enhance the provincial law rather than conflict with it.

This was also the court’s conclusion in *Glaspell v. Ontario (Minister of Municipal Affairs and Housing)*,²⁰ where a municipality refused to enforce its zoning by-law and the *Building Code Act, 1992* against a large dock in a lake. The municipality did so on the mistaken belief that it lacked jurisdiction to enforce the law against lands owned by the Crown in Right of Ontario (i.e. the lake bed). The plaintiff applied for a declaration that the Township could enforce the by-law and the *Building Code Act, 1992* against the province.

The Ontario Superior Court found that the municipality was empowered to enact by-laws that regulated the use of land covered by water, and enforce those by-laws despite ownership of the land by the Crown in Right of Ontario and the Ministry of Natural Resources’ “Free Use Policy” that allowed the dock.

In summary, our review of the applicable case law indicates that a municipality will have a fair amount of authority to regulate and deal with matters relating to lands covered by water. However, where there is some federal or provincial law that occupies the field in the sense that it comprehensively regulates the matter, a municipal by-law is inferior and of no effect.

¹⁹ *Galway & Cavendish (United Townships) v. Windover* (1995), 30 M.P.L.R. (2d) 109, at para. 10. (Ont. Gen. Div.).

²⁰ *Glaspell v. Ontario (Minister of Municipal Affairs and Housing)*, 2015 ONSC 3965.

Issue 1C. – Specific Statutory Authority

As a creature of statute, a municipality may exercise only those power which are explicitly conferred upon it by provincial statute.²¹ Unless competent enabling legislation of the province authorizes an action, the action is said to be *ultra vires* the municipality.²²

The *Municipal Act, 2001* is the primary statute delegating legislative powers to a municipality. Relevant to this opinion are the following powers:

Interpretation

1 (1) In this Act,

“transportation system” includes harbours, ports and transportation terminals;

...

By-laws

11 (2) A lower-tier municipality and an upper-tier municipality may pass by-laws, subject to the rules set out in subsection (4), respecting the following matters:

...

6. Health, safety and well-being of persons.

By-laws re: matters within spheres of jurisdiction

(3) A lower-tier municipality and an upper-tier municipality may pass by-laws, subject to the rules set out in subsection (4), respecting matters within the following spheres of jurisdiction:

...

2. Transportation systems, other than highways.

The *Municipal Act, 2001* expressly provides a municipality authority to regulate in respect of harbours. This statutory power has been interpreted as giving a municipality jurisdiction to pass by-laws regulating the public’s use of municipally-owned docks and harbours.

In *Adams Bay Residents Assn. v. Muskoka Lakes (Township)*,²³ the Ontario Superior Court considered paragraph 11(3) 2 as providing a basis for municipal regulation of a publicly accessible dock.

In that case, the Township owned an 80-foot section of land along the lakeshore of a large lake. The Township maintained a dock on the property. The property was used for many decades as public access to the lake for local cottage owners, nearby islanders, and also commercial barge

²¹ *R. v. Greenbaum*, supra note 14 at p. 687.

²² Ian MacF. Rogers, *The Law of Canadian Municipal Corporations, 2nd ed.* (Toronto, Thomson Reuters: 2019) (loose-leaf update 2020-10) (online), ch VIII, § 63.11.

²³ *Adams Bay Residents Assn. v. Muskoka Lakes (Township)*, 2010 ONSC 5780.

operators. As the pace of local development increased, use of the property by commercial contractors intensified. Local residents and cottagers brought their concerns to the Township.

The Township passed several iterations of a by-law to regulate public access to the property. The version of the by-law challenged in the case, among other things, restricted the hours and days which the docks could be used by commercial operators, provided for licensing of such commercial operators, regulated parking and berthing at the docks, and provided for signage.²⁴

A residents' group brought an application to quash the by-law and argued that it was *ultra vires* the Township's powers. One argument advanced by the applicant was that the by-law in essence regulated land use and was not enacted pursuant to the *Planning Act* process. In dismissing this argument, Justice Wood found that the type of regulation in the by-laws was a valid exercise of the Township's general regulatory authority under the *Municipal Act, 2001*. Justice Wood reasoned as follows:

47 Thirdly the township is given authority under *Municipal Act, 2001* c.25 to pass regulatory by-laws such as 2003-29 and its amendments. Sections 8(1) & (2) of the present *Act* require the court to give a "broad interpretation" to powers conferred upon a municipality "to enable it to govern its affairs as it considers appropriate", and to include powers held by the municipality under previous legislation.

48 Section 11(3) of the present *Act* authorizes a township to make by-laws respecting transportation systems other than highways, culture, parks, recreation, heritage, and structures, and in connection therewith to pass provisions "regulating or prohibiting activities, requiring certain acts, and requiring licences".

49 Under the *Act's* predecessor *R.S.O. 1990* M.45 a municipality was specifically authorized to make by-laws:

For making improving and maintaining public wharves, docks and slips and for preserving shores, bays, harbours, rivers, or waters and the banks thereof. (Sec 207)

50 I am satisfied that general power to regulate transportation systems in the present *Act* encompasses specific authority to regulate wharves docks, slips, and harbours and as such confers a clear authority upon the township to make regulations governing the commercial use of township water access sites.

51 I find therefore, that the provisions of By-law 2003-29 as amended dealing with commercial activity at the Adams Bay site are a valid regulation of activities carried on legally at a publicly owned site being used for a legitimate public purpose. As such they were appropriately passed pursuant to the provisions of *The Municipal Act* rather than *The Planning Act*.

²⁴ See Township of Muskoka Lakes, Consolidated By-law #2003-29, *Dock By-law*, online: <https://www.muskokalakes.ca/en/resourcesGeneral/Documents/PublicWorks/Use-of-Public-Docks-and-Ramps-2003-29.pdf>

The court found that the by-law was a valid exercise of the Township's *Municipal Act, 2001* powers, though it was ultimately quashed as being passed in bad faith.

Issue 2 – Regulation of Harbour pursuant to the Grant Agreement

In addition to and complimentary to its statutory authority, the Town may also “regulate” the use of the Harbour by virtue of its ownership through the Grant Agreement.

Legal Effect of Grant Agreement

The summary legal effect of the Grant Agreement was to transfer ownership of the Harbour from the federal government to the Town. The transfer included the “dry” components of the Harbour on the land, such as the dry docks and parking, and the “wet” components, such as the breakwater, pier and concrete dock. A significant portion of the transfer also included water lots, meaning that the Town owns the lands covered by Lake Ontario in and around the Harbour.

This is best observed by reference to Reference Plan 39R9776, attached to our opinion as **Appendix “A”**.

“Regulation” of the Harbour as Town-owned Property

As an incidence of property ownership, the Town has the right to exclude or to permit under conditions others from using its property. This right includes the “dry” components of the Harbour, but also extends to the waters of the Harbour itself.²⁵ As the “occupier” of the Harbour, the Town has rights under the *Trespass to Property Act* to exclude or conditionally permit members of the public to enter its “premises”, which is defined to specifically include water.²⁶

Examples of activities that may be restricted by virtue of ownership of the Harbour are similar to many other pieces of municipal property. When coupled with general municipal powers in the *Municipal Act, 2001*, this could include following topics:

- Requiring individuals to pay a fee, obtain permission, or enter into a contract to moor a vessel in the Harbour, and directing conditions under which individuals must moor their vessel (e.g. location, duration).
- Prohibiting activities that constitute a nuisance or obstruction to other users of the Harbour. This can include parking, placing, storing or abandoning vessels, vehicle, or personal items that interfere with the Harbour’s entrance channel, basin, or turning circle, the boat launch, or docks.
- Prohibiting or restricting noises (other than those necessary for navigations of vessels such as air horns) in the same manner as a municipal noise by-law. This might include

²⁵ See *Durham (Regional Municipality) v. Todd*, 2010 ONCJ 122, at para. 44.

²⁶ *Trespass to Property Act*, R.S.O. 1990, c. T.21, s. 1(1).

music or nuisance engine mufflers, but would not include fog or air horns used in navigation.

- Regulating the discharge of fireworks, except certain pyrotechnics necessary as navigation implements such as flares or signalling devices.
- Prohibiting certain activities within the waters of the Harbour, which could include, but is not limited to, swimming, diving off piers, trolling for fish or boat races or regattas within certain areas of the Harbour.
- Prohibiting fishing from shore within certain locations of the Harbour. We observe that the *Fish and Wildlife Conservation Act, 1997* and the *Trespass to Property Act* work in tandem to prohibit trespass for purposes related to fishing, including entering into a premises with a fishing rod.²⁷ However, we also wish to note that this would not permit the Town to regulate matters such as season, species or catch limit. Those remain matters of provincial jurisdiction over fish and wildlife.
- Managing the schedule of permitted uses, such as dragon boat, lake kayaking, canoeing, stand up paddle boarding, kite surfing and other uses in the interest of public safety.

Beyond the legal boundaries of the water lots that comprise the Harbour, the Town would not be able to exercise these ownership rights, and any municipal regulation would require clear statutory authority and a proper municipal purpose.

Moreover, we strongly recommend, as a best practice, any regulation or control of the use of the Harbour be in the form of a municipal regulatory by-law pursuant to section 5 of the *Municipal Act, 2001* and not as broad delegated authority pursuant to section 23.1. Section 5 provides as follows:

Powers exercised by council

5 (1) The powers of a municipality shall be exercised by its council.

...

Powers exercised by by-law

(3) A municipal power, including a municipality's capacity, rights, powers and privileges under section 9, shall be exercised by by-law unless the municipality is specifically authorized to do otherwise.

Scope

(4) Subsections (1) to (3) apply to all municipal powers, whether conferred by this Act or otherwise.

Should Council deem it appropriate to regulate the use of the Harbour, it should do so through passage of a general regulatory by-law and in accordance with its Procedure By-law. A general

²⁷ See *Fish and Wildlife Conservation Act, 1997*, S.O. 1997, c. 41, s. 10(1).

regulatory by-law would also serve as notice to individuals and allow for established penalties for non-compliance.

Issue 3: The Riparian Rights of Adjacent Owners are Subject to the above-noted Regulatory Authority

Riparian rights do not arise from ownership of the bed of a body of water. Rather, these rights depend upon ownership of lands adjacent to a body of water.

The following describes some of the rights incidental to ownership of lands adjacent to water:

- a grant of land adjacent to a body of water includes the right of access to and from the water from any point on those lands;
- the rights of a riparian owner are subject to the public's right of navigation over those waters;
- a riparian owner has a right to exclusive possession to particular lands on the shore, but does not have a right to exclude the public from traversing those waters;
- a riparian owner has the right to the natural flow and quality of water, subject to the same rights as his or her riparian neighbours; and
- a riparian owner is entitled to an accretion of land, but also subject to erosion of land.²⁸

Ownership of riparian lands give the owner a right to access those waters, and by extension, permission to allow others to access the water. However, riparian rights do not necessarily entail the ability to exclude others from the water. Being comprised of multiple water lots, meaning land that is covered by water, ownership of the Harbour therefore gives the Town a greater “bundle of rights” than the riparian rights described above.

Owners of lands adjacent to the water's edge with riparian rights would be subject to municipal regulatory authority under general regulatory authority or under the authority founded in the Harbour ownership. Therefore, while an owner with riparian rights has a right of access to the subject waters, that right is subject to overall regulatory authority and regulation founded either in federal, provincial, municipal or harbour ownership regulation of the subject waters and water lots.

Case Law Involving Whitby Harbour

A case that neatly illustrates the principles discussed in this opinion is *Durham (Regional Municipality) v. Todd*,²⁹ a prosecution of various offences relating to the anchoring of a vessel in

²⁸ *Glaspell v. Ontario (Minister of Municipal Affairs and Housing)*, *supra* note 20, at para. 41; citing *Snow v. Toronto (City)* (1924), 56 O.L.R. 100 (Ont. C.A.); and *Canada (Attorney General) v. Higbie*, [1945] S.C.R. 385 (S.C.C.).

²⁹ *Durham (Regional Municipality) v. Todd*, 2010 ONCJ 122; *aff'd* 2011 ONCJ 449.

a municipal harbour. The setting of this case was the Whitby Harbour, a harbour situated on Lake Ontario.

In this case, the federal government and the Town of Whitby entered into an agreement pursuant to the *Fishing and Recreational Harbours Act*³⁰ in relation to Whitby Harbour. In contrast to the Grant Agreement for the Harbour, the agreement for Whitby Harbour did not entail the full transfer of title. At the time of the case, Whitby Harbour was a designated harbour pursuant to the federal statutory scheme, meaning that its management could exercise specific regulatory rights enumerated under federal laws.

The agreement described the parcels of land and land covered by water comprising Whitby Harbour, and provided Whitby with the right to use and occupy it. In exchange, Whitby paid an annual fee and a percentage of revenue from its operations and covenanted to allow the public to use the Whitby Harbour.

The defendant brought his vessel into the waters of Whitby Harbour and anchored it there for several days. He did not obtain permission or pay the fees as required by the municipal by-law regulating Whitby Harbour. The defendant did not leave the water of Whitby Harbour when instructed to by the harbour master. When he finally did leave, he left behind articles of personal property.

The defendant was charged with several offences under the municipal by-law regulating Whitby Harbour, the provincial *Trespass to Property Act*, and regulations under the *Canada Shipping Act*.

Much of the defendant's argument against the charges was grounded in constitutional challenges. He argued that given the federal government's exclusive jurisdiction over shipping and navigation, neither the province nor Whitby could interfere with or legislate over matters concerning the Whitby Harbour.

The court rejected these arguments, finding that neither interjurisdictional immunity nor federal paramountcy applied in the circumstances. First, by granting rights to Whitby through the agreement, the federal government effectively allowed for municipal regulation over a matter assigned to federal jurisdiction. This did not intrude into the core of the federal navigation power and did not trigger the application of the doctrine of interjurisdictional immunity. Second, no evidence was present to demonstrate a legal conflict between a federal and provincial and/or municipal law, or that the municipal by-law thwarted the purpose of the federal laws.

After finding that the municipal and provincial laws were valid and applicable, the court went on to consider the elements of the offences. As it related to the charge of trespass to property, the court noted in accordance with the agreement with the federal government, Whitby was the "occupier" of the Whitby Harbour. The "premises" at issue included not just the land and buildings, but also the waters of Whitby Harbour. The defendant's right of access over the navigable waters of Whitby Harbour was not absolute, and Whitby was entitled to direct members of the public to designated mooring areas, to collect a fee or toll, and to exclude therefrom those persons who did not pay a fee or toll.

³⁰ *Fishing and Recreational Harbours Act*, R.S.C. 1985, c. F-24.

As it related to the charges under the municipal by-laws, the court was satisfied that Whitby had ample authority under the *Municipal Act, 2001* to enact by-laws respecting the use of public lands owned, leased, or under its control. Furthermore, the municipal by-laws were drafted in recognition of the agreement and federal regulations and drafted to avoid conflicts with the superior legislation. The defendant was convicted on all charges, and these findings were upheld on appeal.

Conclusions

Based on the foregoing, it is our view that the Town has broad authority to regulate the Harbour founded in its ownership rights and sphere of jurisdiction. Provided that the proposed regulation of uses on the subject waters is founded in a municipal purpose, the Town has broad authority to regulate issues in the interest of public health and safety.

Should you have any questions, please do not hesitate to contact the undersigned.

Yours truly,
AIRD & BERLIS LLP

A handwritten signature in blue ink, appearing to be 'Ajay Gajaria', with a long horizontal flourish extending to the right.

Ajay Gajaria

AG/JGP:tp

Appendix "A" – Reference Plan 39R9776

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